ARBITRAL TRIBUNALS AND NATIONAL COURTS - CONSTANT BATTLE OR EFFICIENT CO-OPERATION?

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Oikeustieteiden tiedekunta
Kansainvälinen yksityisoikeus ja oikeusvertailu

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Summary

Arbitration is a private method of dispute resolution used mostly in commercial relationships. It provides the parties an efficient way to finally resolve their disputes outside national courts. This study presents the basic principles of international arbitration focusing on the interaction between arbitral tribunals and national courts. It is not always clear which one has the jurisdiction on certain issues and in some cases the parties may face the risk of being involved in parallel proceedings.

The basis for international arbitration is the arbitration agreement, from which the jurisdiction of the tribunal is derived. Without an agreement there cannot be any jurisdiction on the arbitrators to decide the issue. The most controversial situations are when the other party contests the validity or existence of the arbitration agreement and therefore the jurisdiction of the tribunal. The principle of separability of the arbitration agreement from the main contract helps to define jurisdiction in these situations.

The study is structured to present some distinct features of arbitration as the basic rules related to arbitration agreement and the general principles governing the recognition and enforcement of arbitral awards under the New York Convention. An award would have no significance if it could not be enforced where needed. Through the widely accepted New York Convention arbitral awards are presumed to be enforceable, and the enforcement can be denied only on specified grounds. Enforcement is the main task of national courts concerning international arbitration.

Tribunals and courts both have certain jurisdiction in arbitration based on international principles and national legislation. The tribunal may rule on its own jurisdiction; this principle of competence-competence helps to define jurisdictional questions in unclear situations together with the principle of separability. A request may also be made to a national court concerning the jurisdiction of the tribunal, in which case the court must determine whether it decides the issue and in which extent, or whether it refers the parties to arbitration. National courts always have the final word on jurisdictional issues.

Interests of the parties may need protection before the tribunal is constituted, which can be done by applying for interim measures of protection. Interim measures may be ordered by the tribunal or a court depending on what kind of measures are needed and when. From a special emergency arbitrator parties may apply for protective measures before the constitution of the tribunal, this is otherwise possible only from national courts. Option to use emergency arbitrator may diminish the collision of jurisdictions in case of interim measures.

Avainsanat: international arbitration, jurisdiction, enforcement, interim measures

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Brussels I Regulation 2001	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
EC Treaty	the Treaty establishing the European Community, consolidated version (2002/C 325/01)
English Arbitration Act	Arbitration Act 1996 chapter 23
FAA	United States Federal Arbitration Act, 9 U.S.C. Sec.1 et seq., July 30, 1947
Finnish Arbitration Act	Laki välimiesmenettelystä (23.10.1992/967)
Geneva Convention	the Convention on the Execution of Foreign Arbitral Awards signed at Geneva on 26 September 1927
HE 202/1991	Hallituksen esitys Eduskunnalle laiksi välimiesmenettelystä sekä eräiksi siihen liittyviksi laeiksi
ICC RULES	International Chamber of Commerce Arbitration Rules 2012 (latest revision)
LaVL 1/2011 vp	Lakivaliokunnan lausunto liittyen Valtioneuvoston kirjelmään Eduskunnalle ehdotuksesta Euroopan parlamentin ja neuvoston asetukseksi tuomioistuimen toimivallasta sekä tuomioiden tunnustamisesta ja täytäntöönpanosta siviili- ja kauppaoikeuden alalla (uudelleen laadittu toisinto Bryssel I asetuksesta)
LaVM 4/1992	Lakivaliokunnan mietintö koskien välimiesmenettelylain uudistamista
Model Law	the UNCITRAL Model Law on International Commercial Arbitration

New York Convention	the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
SIAC Rules	the Arbitration Rules of the Singapore International Arbitration Centre 2010
SCC Rules	the Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce 2010
Treaty of Lisbon	the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01)
U 65/2010 vp	Valtioneuvoston kirjelmä Eduskunnalle ehdotuksesta Euroopan parlamentin ja neuvoston asetukseksi tuomioistuimen toimivallasta sekä tuomioiden tunnustamisesta ja täytäntöönpanosta siviili- ja kauppaoikeuden alalla (uudelleen laadittu toisinto Bryssel I asetuksesta)
ZPO	Zivilprozessordnung - German Code of Civil Procedure

V. Abbreviations

AAA = the American Arbitration Association

Art. = Article

CIETAC = the China International Economic and Trade Arbitration Commission

CISG = the United Nations Convention on International Sales of Goods

ECJ = the European Court of Justice

EU = the European Union

HKIAC = the Hong Kong International Arbitration Centre

ICC = the International Chamber of Commerce

ICDR = the International Centre of Dispute Resolution

LCIA= the London Court of International Arbitration

SCC = the Arbitration Institute of Stockholm Chamber of Commerce

SIAC = the Singapore International Arbitration Centre

UNCITRAL = the United Nations Commission on International Trade Law

US or U.S. = the United States of America

1. Preface

1.1 International arbitration as a part of the everyday life

Arbitration is a private method of dispute resolution used worldwide to settle disputes between companies or states. It provides a private, confidential and speedy way to resolve disputes outside the court rooms, with the possibility to choose arbitrators with expertise of the certain area in question. Nowadays, most contracts in everyday business include arbitration clauses, especially between companies originating from different states. Arbitration brings security for the parties in case of dispute; they both know where, how and by whom the issue will be settled.

The use of international arbitration has increased during the past decades. For example, in 1999 with the International Chamber of Commerce (ICC) Court alone 529 requests for arbitration were filed, in 2009 the number was 817 and in 2011 796. Awards rendered were 269 in 1999 and 608 in 2011. It should also be noted that other respected arbitration institutes have strengthened their position in the field of arbitration, especially in the East; in 2008 American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) had 621 arbitrations, Hong Kong International Arbitration Centre (HKIAC) had 448 and China International Economic and Trade Arbitration Commission (CIETAC) 429 arbitrations[1]. This combined with the fact that according to a study 73 % of in-house counsels at leading corporations around the world preferred to use international arbitration as dispute resolution method makes arbitration a very strong element in the international field of commercial counteractions. Also in Finland the number of cases appointed by the Arbitration Institute of the Finland Chamber of Commerce has increased significantly in the 1990s and 2000s, being approximately 50-70 cases a year[2].

Arbitration is both national and international dispute resolution method, but it is more commonly connected to international disputes. For example, in 2010 ICC Arbitration as the leading institutional arbitration in the world took place in 53 countries in 98 different places, involved 1.331 arbitrators of 73 different nationalities, with 2.145

[1] International Arbitration Study 2008 and International Arbitration Study 2006. These studies were performed by School of International Arbitration, Queen Mary University of London together with White & Case LLP (in 2010) and PriceWaterHouseCoopers LLP (in 2006). School of International Arbitration has carried out studies since 2006, and the newest one is to be done in 2013. The subjects of the studies vary yearly.

[2] Paloranta: 100 Years of Institutional Arbitration in Helsinki.

parties from 140 different countries, among 793 cases registered and 479 awards rendered[3].

Parties from different states have found a more simple and efficient way to solve complex disputes through arbitration with experts as tribunal members. Most commonly arbitration is used in commercial disputes between international companies, but it can also be used between different states or for example in sports law. There are multiple cases concerning disputes between states where using arbitration seems natural; neither of the parties would accept to submit itself to the jurisdiction of the courts of the other party, hence arbitration presents a neutral mean to settle disputes outside court rooms. As my interest is mostly on the commercial side of the story, this study focuses on international commercial arbitrations and disputes between companies more than states. It should be noted however that the principles of arbitration as such still remain the same.

All arbitrations are based on an agreement between the parties. Without an agreement the arbitral tribunal is lacking jurisdiction. The procedure relies on the arbitration agreement, and therefore some unilateral principles have been accepted to cover arbitration agreements, no matter where those have been formed and which law is applicable to the agreement. The connection between different legislations and even legal systems is interesting, and it is also intriguing to see how such principles and model legislations have been accepted worldwide.

In addition, the question of jurisdiction based on the arbitration agreement cannot be ignored when talking about international arbitrations. Jurisdictional issues are usually the most controversial ones, and also causing a lot of court cases when determining who actually has the jurisdiction. Arbitral tribunals are in a way stepping in the area of national courts, and drawing the line between these two is a difficult task. The complicated relationship between national courts and arbitral tribunals is the leading idea of this study, as the confrontation is in my opinion very interesting in all aspects; is it necessarily a constant battle or can it be in fact efficient co-operation, beneficial to both?

[3] Statistics can be found from http://www.iccwbo.org. ICC Arbitration which was established in 1919 is known and enormously respected worldwide by businesses, governments, judges, lawyers and academics.

1.2 The scope and the structure of the study

This study is aiming at presenting some of the most founding principles which one comes across when dealing with international arbitration, with the leading idea being the interaction between arbitral tribunals and national courts. As international arbitration as a private procedure is often seen as a "creature" separate from the national legal systems, it might be forgotten that there are several situations where national courts and tribunal will encounter. Even international arbitration cannot function in a world totally detached from the national legal regime. In the various situations where both national courts and tribunals meet on the same playground, it is not always clear who will rule on certain issues, who has the jurisdiction and who has the "final word" so to say. The focus of this study is to try to find answers to these questions, if there are any, in the relevant context of each chapter.

This study begins with a short introduction to the main characters of arbitration as a procedure and to the legislation concerning international arbitration to become familiar with the outlines (Chapter 2). As all arbitrations are based on an agreement between the parties, the arbitration agreement is one of the most significant features to be discussed. Some most distinct features solely related to arbitration agreement will be presented (Chapter 3). Chapter will present the formal requirements of arbitration agreements and the leading principle of separability. In addition, the question of jurisdiction based on the arbitration agreement is discussed, as it has tight connections also to the relationship between tribunals and courts. Recognition and enforcement of arbitral awards is the key factor in arbitration, giving it the final touch and making it an effective dispute resolution method, and will be presented mostly based on the New York Convention[4] (Chapter 4).

The relationship between the tribunals and national courts concerning jurisdiction in more detail will be handled in Chapter 5, presenting for example another well-known international principle, the principle of competence-competence. The chapters before are essential in the sense of understanding the whole process of arbitration, and also in order to understand the complex relationships between tribunals and national state courts. Chapter 5 is also related to the two following chapters introducing two procedures related to securing of interests before the actual arbitral proceedings,

[4] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10 June 1958. The Convention is presented in more detail later on.

meaning interim measures (Chapter 6) and emergency arbitrator procedure (Chapter 7). Especially interim measures are an area where the courts and tribunals can and sometimes will act concurrently.

With arbitration I usually refer to international arbitration, if not otherwise mentioned. National arbitrations do not have such conflicts as international ones do, and more importantly, international arbitration is the most significant form of arbitration. Therefore also this study will focus on the international arbitration. In addition, choice of law questions as such, as interesting and complex as those are, have been consciously left outside the scope of this study to narrow it down.

1.3 Remarks on the effect of the EU law

When talking about modern international relations, the effect of the European Union (EU) cannot be forgotten. The aim of the EU law in general is to uniform regulations in the EU states, for example concerning jurisdictional issues and judgments given in another states. I have outlined my study so that the EU aspect has not been separately taken into account; instead I have tried to see the international arbitration as a truly global procedure and therefore not limiting it inside the Europe[5]. However, some major points of the EU law concerning arbitration should be mentioned to understand that the principles presented later in this study do cover also arbitrations in which both parties originate from EU states. Arbitration is in this sense somewhat different from many other fields of law in the EU region.

In the EU, Brussels I Regulation[6] lays down the rules governing the jurisdiction of courts in civil and commercial matters and the principles of recognition of judgments. According to the Regulation jurisdiction is on the courts of that EU state where the defendant is domiciled, and a judgment given in another EU state is to be recognized without special proceedings, unless the recognition is contested. However, arbitration is one of the exceptions of this regulation mentioned in Article 1.2. Therefore, the jurisdictional issues as well as recognition and enforcement of arbitral awards will follow the international principles concerning arbitration supplemented by national legislation also when happening inside the EU. It is clearly mentioned in the recitals of

[5] As the focus of international arbitration is more and more shifting to the East, and as the U.S. has always been a major influence in this area, one should not be too focused on the EU and forget that major part of the arbitrations are in fact happening outside EU states and effect of EU regulations.

[6] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

the Regulation that it does not apply to arbitration and that the New York Convention takes precedence over the Regulation. This so called arbitration exception has been seen to guarantee the autonomy of international arbitration in relation to national courts in the EU and to have formed an explicit prohibition for national courts to interfere to arbitration[7]. The principles of arbitration have been accepted worldwide and are developed through international co-operation; therefore it is only reasonable that EU follows these international principles and does not create differing processes for example for recognition of arbitral awards, which would endanger the position of EU states in the field of international arbitration.

However, another essential regulation can have effects also in arbitration, meaning the Rome I Regulation[8] concerning the law applicable to contractual obligations, giving outlines for the choice of law. If the parties have not agreed on the applicable law concerning the merits of the case, the tribunal has to make the decision, and when making the decision they have a wide discretion. The award cannot be set aside because of a wrong choice of law. If the parties both originate from EU states, the Rome I Regulation can give directions to the choice of law question, but only on the substantial law.[9] The procedural issues and the choice of procedural law governing the arbitral proceedings follow the international principles distinct for international arbitration. The Rome I Regulation is clearly stated not to apply to the obligations related to arbitration and choice of court[10], and therefore also the choice of law governing the arbitration agreement as such is seen to be outside the scope of the regulation.

Differing from the national courts a tribunal is not a court of a member state in the meaning required in the Article 267 of the Treaty of Lisbon[11], even though it might be situated in a member state, and therefore the European Court of Justice (ECJ) has no

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[7] Knuts: Skiljeförfarandeundantaget i Brysselförordning – Quo Vadis? See also Knuts: West Tankers – ett bakslag för internationellt skiljeförfarande I Europa?

[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[9] Erkki Havansi: Välimiesmenettely. It should be made clear though that the regulation only covers the choice of law concerning the merits of the case – meaning the law under which the tribunal should decide the material side of the dispute.

[10] http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/jl0006_en.htm

[11] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 and entered into force on 1st of December 2009. This corresponding article in the "old" EC Treaty (the Treaty establishing the European Community) used before was Art.234.

jurisdiction to give a ruling on questions referred to it by arbitrators or tribunal[12]. Therefore, arbitrators cannot ask for preliminary rulings although in some cases they have to apply EU law, as it has become part of the legislation of EU states. The effects of EU law have to be taken into consideration as any other legislation when determining the material issues but also when determining some procedural aspects. For example, the view of ECJ has been that the award given by a tribunal could and should be annulled if it is not compliant with the competition regulations of EU. The regulations concerning competition law have been seen so crucial that non-compliance with those regulations is seen to be against the high-order public policy concerns of EU.[13]

1.4 On the sources

The main sources for information on arbitration are international commentaries, focusing mainly on arbitration in general. Mostly commentaries present the main principles and attitudes internationally, a few being comparative analysis of different legislations. Largely my views and comments are based on a few well-known basic works on international arbitration. With the authorities used I have tried to focus on the common principles found, presenting some individual features of certain legislations mainly just as an example of differing views.

From Finnish authors Koulu has provided leading, sometimes sharper opinions about arbitration also with the international view. A general overview of arbitration in Finland with some international aspects taken into account has been presented by Ovaska. During the recent years a new institution named COMI – University of Helsinki Conflict Management Institute[14] has provided new research in the area of dispute resolution, in which also Koulu has participated. The institute provides information about arbitration by publishing books, informing lawyers about possibilities of different kinds of dispute resolution methods as well as organizing post-graduate training. The support association of the institute also offers institutionalized arbitration. COMI has

[12] Ovaska: Välimiesmenettely, p. 39-42. In order for a tribunal to have competence to ask for a preliminary ruling the arbitration has to be mandatory (parties having an obligation to refer the dispute to arbitration), or the authorities of a state have to be involved in the decision to opt for arbitration or would have to be called upon to intervene automatically to the arbitration proceedings. See also case *Nordsee Deutsche Hochseefischerei (Case 102/81)*.
[13] Ovaska: Välimiesmenettely p. 43-45, referring to the case *Ecoswiss (C-126-97)*. See also Kurkela: Competition Laws in International Arbitration.
[14] http://www.comi.fi/english/

published books including various articles from well-known Finnish scholars which have also been useful material for this study.

As especially common law countries base their legislation strongly on cases, the most important rules of law in arbitration can be found from case-law. Some of the cases referred here are the most basic cases establishing these rules, one could also say "corner-stone cases" concerning international arbitration, the earliest decided in the 1960's. Also articles of law journals have provided a wide source of detailed information on certain issues, providing scholar opinions on some of the controversial questions. As a new source of information electronic materials, for example different kind of professional blogs of people in various positions dealing with arbitration, have created a way to achieve instant opinions on recent developments or recently brought up issues. These are also referred in some instances, mainly when discussing about the newly presented procedure of emergency arbitrator, which has understandably not been addressed by the main authors because of its recent development.

2. Arbitration – what it is?

2.1 Arbitration as a procedure

Arbitration is, as defined for example in the Oxford Law Dictionary, the determination of a dispute by one or more independent third parties called arbitrators rather than by a court. It is dispute resolution method used more and more commonly for example in international commercial transactions between companies. Parties often want to save themselves from the possibility to get caught in time-consuming court proceedings, and arbitration gives an effective option in case of disputes. Although arbitration can be more expensive than national court proceedings, it however gives the parties more freedom concerning for example the procedures to be used and the law governing the dispute. The freedom of choice, and the fact that the final decision can be obtained faster than in national courts, are the usual reasons that favor arbitration, not to mention confidentiality of the proceedings.

The judgment of an arbitrator is called his award. This award is final and binding on the parties. Therefore, different to national court rulings, it cannot usually be appealed from. The parties can seek for enforcement of the arbitral award in their own countries, or any countries necessary, based on the New York Convention. An award is presumed to be enforceable in other countries if the country is a party to the New York Convention and

if the award fills the requirements set in the Convention. Therefore, compared to national court judgments, awards are in principal easier and faster to enforce, and thus help the parties to achieve the final closure for their dispute.

The most common reasons for choosing arbitration can be outlined in five points: neutrality, enforceability, confidentiality, speed/efficiency and expertise. Neutrality means that the parties may choose freely a neutral place of arbitration, neutral set of rules and neutral arbitrators. Therefore they do not have to fear that they will not receive fair treatment if disputes are resolved in other party's national courts. Secondly, the New York Convention provides for relatively simple and predictable enforcement of arbitration awards in any of the Convention's member states. Neutrality of the arbitral forum and international enforceability together form the single most important factor favoring arbitration in international business relationships. Confidentiality, especially in case of disputes, is also having an increasing significance for the business parties – in the modern world bad news and bad publicity travel even faster than before thanks to modern means of communication. Arbitration as a private procedure is significantly more confidential compared to court proceedings which are typically presumed to be public. Fourth factor favoring arbitration is its speed and efficiency; for parties to a commercial agreement it is almost always preferable to find means to solve their disputes quickly and efficiently so they can get back to business. Fifth factor is expertise: in many national court systems, judges can come up with all kind of legal disputes, and it may sometimes be unreasonable to expect a high degree of expertise from a judge in any particular area, much less any exact field of business or certain goods or services. The arbitrators may however be chosen precisely based on their expertise of the relevant legal or factual expertise. Arbitration therefore offers far greater opportunities to choose a decision maker possessing a high degree of expertise related to the particular sort of dispute at issue.[15]

Naturally there are also commonly presented factors against arbitration. For example, inability to join additional parties or claims has been mentioned. As arbitration is based entirely on the consent of the parties, this limits the potential for joining parties and

[15] Morrissey – Graves: International Sales Law and Arbitration, p. 312-315. It should he noted however, that for example the degree of confidentiality as well as the degree of speed and efficiency varies depending on the parties agreement, including the choice of arbitration rules. Confidentiality may also be jeopardized if the parties end up seeking annulment or other measures from national courts. On confidentiality of arbitration with Finnish perspective see Liljeström: Confidentiality in Arbitration.

claims absent consent. Secondly, there is always a potential need for court involvement. Although the ideal situation would be that parties to an arbitration agreement would never need to set foot in a national court, usually this case will not become reality. An action may be brought in court irrespective of the agreement to arbitrate, or either of the parties may need a specific relief or preservation of evidence or assets before the tribunal is formed, in which case resort to a court may be necessary. Thirdly, the opposite effect of quick progress to a final and binding conclusion of arbitration process is that the award is non-appealable. A disappointed party will typically be stuck with the tribunal's decision, even where that decision is clearly wrong on the law, the facts, or both.[16] These negative factors have however been noticed, and in some level addressed for example in the newly revised ICC Rules, making it easier to join additional parties to arbitration or to limit court intervention for example by using emergency arbitrator , which procedure is discussed in more detailed in chapter 7 of this study.

2.2 Arbitration in Finland

In Finland arbitration is governed by its own law, Finnish Arbitration Act (laki välimiesmenettelystä) which came into force on 1992. It largely follows the international trends and adopts many principles of the UNCITRAL Model Law (defined in more detail later on)[17]. The Finnish system differentiates Finnish and foreign arbitration; the main parts (1-50 §) of the Arbitration Act only regulate the former, and any foreign arbitration taking place in another state is outside the application of those parts of the Arbitration Act. The domestic elements of the law apply to any arbitration which is conducted in Finland, regardless of the nationality of the parties or whether it governs international relationships. On the opposite, the Finnish Arbitration Act will not be applicable to the arbitral proceedings performed outside Finland (unless it has been explicitly chosen by the parties to govern the procedure) even though the parties would be Finnish, the procedures would be conducted in Finnish language and the law applicable to the material issues of the dispute would be Finnish law. Arbitration would

[16] Morrissey – Graves: International Sales Law and Arbitration, p. 315-317. As an exception to the general rule of "non-appealability" the United States Supreme Court has added a judicially created doctrine under the Federal Arbitration Act (FAA) allowing for vacation of a tribunal's decision "in manifest disregard of the law". Morrissey – Graves points out as an interesting detail that this exception has been seen far more negatively than positively by the international arbitration community. On the obstacles relating to multi-party arbitration, see for example Poudret – Besson: Comparative Law on International Arbitration, p. 898, on disadvantages of arbitration see Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 28-32.

[17] Lakivaliokunnan mietintö koskien välimiesmenettelylain uudistamista, LaVM 4/1992 - HE 202/1991. This report is a part of the preparatory work for drafting the new Finnish Arbitration Act.

be seen as foreign because of the place where it was conducted. The only relevant factor in this sense is the place of arbitration. This is an international principle also followed in other legislations. However, the Finnish Arbitration Act has provisions concerning international arbitration (51-55 §) focusing on recognition and enforcement, following the principles of the New York Convention.[18]

For example the enforcement of a Finnish award, meaning an award of proceedings held in Finland, will be made according to the regulations of Finnish Arbitration Act. Enforcement of an international award in Finland, meaning an arbitral award made in some other country even when the parties are Finnish, the subject of the dispute is closely related to Finland etc. will be made according only to the provisions in Finnish Arbitration Act 51-55 §.

Institutional arbitration has already quite long traditions in Finland, the steps towards establishing a Finnish arbitration institute were taken quite early even viewed from an international perspective. An institute called "The Helsinki Arbitration Board of Commerce, Industry and Shipping" started operations in 1911 with rules adopted the previous year. The institution started working under the auspices of the Central Chamber of Commerce of Finland soon after its establishment in 1918, and nowadays it is called the Arbitration Institute of the Finland Chamber of Commerce. The number of cases was as high as 20 to 30 in the beginning of 1920s, but decreased and stayed low until 1980s, after which it has increased significantly.[19] The number of applications for arbitration made in 2012 was 69, of which 26 % had international aspects.[20]

2.3 International arbitration

Arbitration has its most significant effects in international business relationships, although arbitration can be, and is, also used in national cases. It is, as mentioned above, a way to avoid long court proceedings and appeals after the judgments and a way to

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[18] Ovaska: Välimiesmenettely, p. 27-29, 271. According to Ovaska the globalization has made it more common to be involved in international arbitrations also for Finnish parties, and it is also not in any way restricted that Finnish parties could not agree to have their proceedings in another country, governed by the procedural arbitration law of that country. The differences between the material and procedural rules of law in different states may seem great but that is not necessarily the case, thanks to long-term international co-operation in the field of arbitration with the aim to enable the use of arbitration in the commercial disputes.

[19] Paloranta: 100 years of Institutional Arbitration in Helsinki. The decision to establish the institute was made in Vaasa, but the place of the institute was decided to be Helsinki, one of the reasons being that goods suppliers from other countries would specifically accept it.

[20] Statistics of the Arbitration Institute can be found from http://arbitration.fi/en/statistics/. 72 % of the cases were governed by the Rules of the Arbitration Institute.

receive final determination for the dispute in a one set of proceedings. It gives the parties the chance to choose the procedure to be used, the law to be applied and the methods of evidence. For multi-national companies having business all around the world it is impossible to know the details of every jurisdiction they are connected to. By choosing arbitration according to certain institutional rules and governed by a familiar law in every single contract or business transaction they make, a company can limit the risks it may otherwise become exposed to. In addition, the arbitral proceedings are not public, as opposite to national courts. This may also be essential to companies acting in international business; they would like to protect their trade secrets or important technical information from becoming public knowledge, not to mention the possible bad publicity a dispute may cause to the company.

Arbitral institutions play a major role in developing the practice of international arbitration. In Europe International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the Arbitration Institute of Stockholm Chamber Of Commerce (SCC) are some of the most well-known ones, in Asia for example Singapore International Arbitration Center (SIAC) and China International Economic and Trade Arbitration Commission (CIETAC) and in the U.S. American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR). There are also many other institutions which have defined their own rules for arbitration which parties can agree to govern their dispute. The most widely used and respected institution is ICC, followed by AAA/ICDR and LCIA[21]. Institutions usually set the arbitral process in motion by constituting an arbitral tribunal, sometimes from an exclusive list of arbitrators or giving the parties some freedom in selecting the members of the tribunal. Once the tribunal has been constituted, it is typical that the institution fades into the background and the arbitrators proceed as they wish rendering an award completely unrestricted by the institution. The institution may also have supervisory capacity within the institution, as does the ICC, to reduce the supervisory role of national courts.[22]

[21] According to 2010 International Arbitration Survey, the most preferred institutions were ICC (50%), LCIA (14%) AAA/ICDR (9%) and SIAC (5%). Institutions used most frequently over past 5 years were ICC (56%), AA/ICDR (10%), LCIA (10%) and the German Institution for Arbitration (DIS) (6%).

[22] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 40-42. Supervisory role in the ICC means that awards are issued by the Secretariat of the Court, not arbitrators themselves, and only upon the ICC Court of Arbitration's approval. Therefore there is a presumption of legitimacy of the awards when they are issued by the ICC, compared to the situation if an award is issued by three arbitrators alone.

If the arbitration is not determined to be conducted under the auspices or supervision of an institution, it is called an *ad hoc* arbitration. The parties simply agree to arbitrate, and usually also choose an arbitrator or arbitrators to resolve the dispute. They may also choose some procedural rules to govern the *ad hoc* arbitration, commonly used ones are UNCITRAL Rules.[23] In this case the Rules and national law govern the procedures together, supplementing each other. The differences of *ad* hoc arbitrations are not the main focus of this study and therefore are not presented separately, but one should not forget they exist.

As already briefly mentioned, arbitral awards are enforceable based on the New York Convention all around the world. There are only limited possibilities for national courts to deny the enforcement. Parties are therefore both protected and bound by the award and the presumed enforceability – they have the possibility for enforcement in other countries and on the other side, they have no change to appeal from the award without special conditions[24]. One of the major advantages of arbitration as a method of resolving international commercial disputes is that it is generally much easier to obtain recognition and enforcement of an international arbitral award than of a foreign court judgment[25]. The recognition and enforcement will be discussed in more detail below in chapter 4.

2.4 Most important legislation concerning international arbitration

As arbitration is primarily international measure of dispute settlement, there have been worldwide attempts to achieve unilateral legislation concerning arbitration in different countries. As from a general point of view the most valuable and meaningful achievements have been the UNCITRAL Model Law and the New York Convention, providing central rules for the proceedings as such and for the recognition and enforcement of awards.

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[23] Born: International Commercial Arbitration, p.12. In an *ad hoc* arbitration parties simply agree to arbitrate without designating any institution to administer their arbitration. UNCITRAL Rules are commonly used for international commercial disputes.

[24] In general an appeal is only possible concerning the fees of the arbitrators; see Tulokas: Välimiesmenettely ja tuomioistuimet, p. 96.

[25] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 519. According to Redfern and Hunter the reason for this is that the network of international and regional treaties providing for recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments.

On 1958 UNCITRAL finished drafting its Model Law on International Commercial Arbitration (the Model Law). The Model Law is a leading example of legislation that is supportive of the international arbitration process[26]. It "reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states of all regions and the different legal or economic systems of the world". The Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. The Model Law covers all stages of arbitration process from arbitration agreement to recognition and enforcement of the award.[27] The articles concerning enforcement are similar to the ones in the New York Convention, thus strengthening the connection between these two legislative measures. Through the Model Law countries have had the chance to create uniform legislation, which also helps tribunals when they have to apply laws of other countries than their own. By presenting some basic principles for arbitration which have become accepted worldwide it has had a huge impact on national legislations even when it has not been implemented directly, as for example in Finland or the United States.

Even greater value than the Model Law has had to international commercial arbitration should be admitted to New York Convention. This convention on recognition and enforcement of foreign arbitral awards, presenting the principle of presumed enforceability of arbitral awards, has enabled the use of international arbitration as a true dispute resolution method. The principal aim of the New York Convention is that foreign and non-domestic arbitral awards will not be discriminated against, and it obliges the states to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the New York Convention is to require courts of states party to the convention to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[28]

With unilateral rules on recognition and enforcement there is only a minor risk that the arbitral award will be useless. So far 146 states have become parties to the convention,

[26] Born: International Commercial Arbitration, p.30, presenting the nature of the Model Law in brief.
[27] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html
[28] http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html

some with either of the two possible reservations mentioned in the Convention[29]. Reciprocity is the more commonly used reservation, enabling the state to apply the New York Convention only to awards made in the territory of another contracting state[30]. The other reservation, applying the New York Convention only on commercial relationships, is less used but might however have significance since it might cause interpretation problems in different jurisdictions[31].

Together the Model Law and New York Convention have formed international principles concerning arbitration worldwide. As the Model Law has been used as drafting base for numeral national arbitration laws, and almost all remarkable countries are parties to New York Convention, parties can almost always rely on the fact that certain principles apply to their arbitration. However, parties must keep in mind that some states may have made reservations or amendments to the Model Law or the New York Convention.

3. Arbitration agreement is the basis for international arbitration

As a private dispute resolution method performed outside the national courts, arbitration is based solely on the will of the parties. Therefore, parties who wish to settle their possible disputes in arbitration have to have an agreement to arbitrate, reflecting the intention to use this kind of dispute resolution method. The arbitration agreement has some significant features which make it distinct from other agreements, for example the principle that it is autonomous from the main agreement in which it is inserted.

3.1 The agreement to arbitrate

Arbitration is a private procedure, which is based on the will of the parties to use such procedure instead of court proceedings. In order to have a basis for the arbitration procedure, the parties must have an agreement to arbitrate. This agreement is the ground without which the arbitration tribunal cannot be constituted. Although freedom of

[29] An up-to-date list of the states being party to the convention can be found from the website of UNCITRAL, with remarks of the which states have made either of the two possible reservations http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html

[30] New York Convention Art.I(3); Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 524. Reciprocity reservation has the effect of narrowing the scope of application of the New York Convention. Choosing a state that has adopted the Convention improves the changes of securing recognition and enforcement of the award in another Convention states.

[31] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p.525. The fact that each contracting state may determine for itself what relationships it considers "commercial" has created problems in the application of the Convention.

choice is a distinctive factor in arbitration procedures, an arbitration agreement must take into consideration the requirements defined internationally and developed in practice of arbitral institutions; otherwise there is a risk that the award may not be enforceable.

Let's think of two companies from different countries, company Black Ltd and White Ltd, where Black Ltd wants to buy certain goods from White Ltd. The companies enter into an agreement including a standard clause, formed for example like this:

> "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[32]. The proceedings shall take place in Helsinki, Finland and shall be governed by the Finnish law."

What have the parties agreed then, by adding such a minor, innocent looking clause in to their commercial, possibly 10-20 pages long contract with tens of clauses related to the actual sale of goods?

3.1.1 Significant features of arbitration agreement

There are two types of arbitration agreements: it can be a separate, so called submission agreement, which is usually used to submit already existing disputes to arbitration, or it can be an arbitration clause as in our example case. The latter one, inserting an arbitration clause covering future disputes to the main agreement governing the relationship between the parties, is the much more commonly used one.[33] Submission agreement is also traditionally called a *compromise* and the one formulated by an arbitration clause a *clause compromissoire*[34].

In effect, an arbitration agreement is usually a conditional contract because the parties' contractual obligations are not typically triggered until a dispute arises[35], an exception being a situation of submission agreement where the arbitration agreement is actually

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[32] Standard arbitration clause of the ICC.
[33] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 155. An arbitration clause looks to the future, whereas a submission agreement looks to the past.
[34] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 85. The term "arbitration agreement" is currently used to refer either or both of these forms. As an agreement to arbitrate is easier to reach when lawsuits are a not-too-likely theoretical possibility, *clause compromissoire* is more commonly used. See also Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 37.
[35] Morrissey – Graves: International Sales Law and Arbitration, p. 347. Once a dispute does arise, the parties' performance obligations come due, as in any other conditional contract in which the condition of performance is satisfied. See also Koulu: Välityssopimus välimiesmenettelyn perustana, p. 79.

signed after the dispute has arisen. Arbitration agreement is defined as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship"[36]. When parties enter into arbitration agreement, they commit to submit certain matters to the arbitrators' decision rather than have them resolved by courts[37]. The obligation to submit disputes covered by the arbitration agreement to arbitration results from the application of probably the most recognized rule of international contract law, *pacta sunt servanda*, stating that parties are bound by their contracts[38].

Thus, by forming an arbitration agreement the parties a) waive their right to have their disputes resolved by a court, and b) grant jurisdiction powers to private individuals, the arbitrators[39]. The effect of the arbitration agreement can be divided also to positive and negative; negative meaning that the courts are prohibited from hearing such disputes and positive obliging the parties to submit disputes to arbitration and providing the jurisdiction for the arbitral tribunal[40]. Arbitration agreement is therefore not only obliging the parties but affects also national courts; they have the obligation to refer the parties to arbitration if there is a valid arbitration agreement.

Negative effect means that once the parties have agreed that a dispute shall be settled in arbitration, this precludes a national court from resolving that same dispute. The lack of jurisdiction is not automatic or cannot be declared *ex officio*, but requires that the defendant raises the issue not later than when filing the answer to the complaint. Defendant must therefore claim that the issue shall be settled in arbitration and therefore the court has no jurisdiction. After the issue has been raised, the court should refer the

[36] UNCITRAL Model Law, Art. 7.1.
[37] UN Dispute Settlement, p. 3. This course module has been prepared by Mr. R. Caivano at the request of the United Nations Conference on Trade and Development (UNCTAD) as a part of a Course on Dispute Settlement in International Trade, Investment and Intellectual Property. The module is an overview of arbitration agreement for purposes of teaching and study. See also Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 186 emphasizing that this intent should be made clear when drafting the arbitration clause.
[38] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 382. The principle that arbitration agreements are binding has been readily accepted as a substantive rule of international commercial arbitration. For example, French courts would refuse to apply to an arbitration agreement a law which fails to recognize binding nature of arbitration agreements.
[39] UN Dispute Settlement, p. 4 and Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 381.
[40] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 381, 402. See also Poudret – Besson: Comparative Law of International Arbitration, p. 314-315.

parties to arbitration to settle their dispute as they have agreed.[41] It should also be noted, that the negative effect is not only limited to prohibiting the national court from deciding the issue but also prevents latter arbitration procedures concerning the same dispute[42].

The positive effect of the arbitration agreement means that a party to an arbitration agreement is obliged to contribute to the arbitration procedures, commencing it as well as to the ability of the tribunal to give an award which will be enforceable.[43] Positive effect is derived from two main principles: the arbitration agreement obliges the parties to submit disputes to arbitration, and it also provides for the basis for the jurisdiction of the arbitral tribunal[44]. By agreeing to arbitrate parties grant jurisdiction powers to arbitrators, which is one of the features of positive effect of the arbitration agreement. This is the basic principle of arbitration, freedom of the parties to submit disputes to arbitration and an agreement which establishes the jurisdiction of the tribunal. Positive effect means that by decision of the parties these individuals forming the tribunal have been granted jurisdiction to resolve the issue, jurisdiction which is based on the agreement of the parties instead of for example legislation. Compared to national court judges, the arbitrators get their jurisdiction only from the agreement of the parties, not having any jurisdiction on any issues outside that agreement.

3.1.2 Formal requirements defined for arbitration agreement

Formal validity of the arbitration agreement is officially governed by *lex arbitri* (the law of the place of arbitration) and the law of the place of enforcement. Substantive validity issues, including for example questions of capacity and other related issues, will be subject to the law of the place of arbitration, unless the parties provide otherwise or

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[41] Ovaska: Välimiesmenettely, p. 85. It is also essential that the claim brought before the court addresses exactly that same relationship of the parties which is governed by the arbitration agreement. See also Redfern – Hunter: Law and Practice of International Commercial Arbitration p. 162-163, Koulu: Välityssopimus välimiesmenettelyn perustana, p. 81 and UN Dispute Settlement p. 4-.

[42] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 80. This would actualize in a situation where the parties have, knowingly or by mistake, formed two differing arbitration agreements.

[43] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 83. Any explicit provision stating this obligation cannot be found, but the obligation to contribute to the arbitration proceedings can be derived for example from the provisions concerning the obligation of a party respond within the set time limit.

[44] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 381, 384. This obligation is capable of specific performance. It would be extremely difficult to assess the monetary loss resulting from a court accepting the jurisdiction to hear a case covered by an arbitration agreement; often the party unable to bring its claim before an arbitral tribunal will suffer real damage. The value of the loss is usually impossible to quantify, and the party may be stuck with a decision of a court which is much more difficult to enforce than an equivalent award by a tribunal.

absent specific provision of the *lex arbitri* addressing these issues in the context of an arbitration agreement.[45]

However, when defining the validity of the arbitration agreement, as a separate agreement as will be explained in more detail below, certain formal requirements have been universally accepted.

The most typical formal validity requirement of arbitration agreements is the writing requirement found in most national arbitration laws and in the New York Convention[46]. As the New York Convention has been described to be "the single most important pillar on which the edifice of international arbitration rests"[47], it should be seen as the starting point when defining the requirements of arbitration agreement, bearing in mind that these requirements are related to the recognition and enforcement of the final award made by the tribunal, therefore connected to the essential usefulness of the final award sought from the tribunal. Under Art.II(1) of New York Convention each contracting state undertakes to recognize and give effect to an arbitration agreement when the following requirements are fulfilled: (a) the agreement is in writing, (b) it deals with existing or future disputes, (c) these disputes arise in respect of a defined legal relationship whether contractual or not, and, (d) they concern a subject matter capable of settlement by arbitration[48].

Although some states have not included the requirement of written form in their national legislations, in order for an arbitration agreement to be capable of being recognized and enforced based on the New York Convention it must be made in writing[49]. For example, Swedish legislation does not require the arbitration agreement to

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[45] Morrissey – Graves: International Sales Law and Arbitration, p. 393. In general, the validity may implicate the law of the place of arbitration, the law of the place of enforcement and/or any law the parties have subjected it. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration p.365-367. Choice of law issues going beyond brief mention would basically need a study of their own, therefore I will not address those in more detail.

[46] Morrissey – Graves: International Sales Law and Arbitration, p. 393. However, the Model Law has also an Option 2 which would eliminate the writing requirement to the extent adopted. This is moving toward an approach more consistent with CISG Article 11.

[47] Redfern – Hunter: Law and Practice of International Commercial Arbitration p. 158, referring to a well-known quote by Wetter on "The present status of the international court of arbitration of the ICC: An Appraisal" (published in 1 American Review of International Arbitration 91 at 93 (1990)).

[48] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 158, presenting the four positive requirements of a valid arbitration agreement laid down in Art.II of the New York Convention.

[49] New York Convention Art. II. The definition of "in writing" has of course changed since the early days of arbitration. The new methods of communication, e-mails and other developed technology create new obstacles of interpretation of the writing requirement.

be made in writing, but this kind of agreement could face problems when seeking for enforcement based on the New York Convention in other countries. There are opinions that an agreement lacking the written form does not fulfill the requirements of the New York Convention and therefore may not be enforced based on it.[50] For example the Austrian Supreme Court has ruled that the formal requirements for an arbitration agreement are not controlled by national law but exclusively by the New York Convention Article II(2)[51]. On the other hand it has also been seen that the failure to meet these formal requirements need not to be fatal[52]. However, it should be noted that enforcing awards based on oral agreements are exceptional cases that derive from individual legislations of certain states (for example German and Holland which both allow oral agreements). These cases represent more the "pro-arbitration" view of national courts and the enforcements are made based on other grounds than the New York Convention.

Additional requirements for arbitration agreement are stated in the New York Convention Art V(1)(a) and Model Law Art.34(2) and 36(1)(a)(i): parties must have the capacity to make such an agreement and the arbitration agreement must also be valid under the law to which the parties have subjected it, or failing any indication thereof, under the law of the country where the award was made. These are not written as direct requirements for validity of an arbitration agreement, but the articles clearly state that the enforcement of an award may be refused if either of these conditions is not fulfilled. Therefore the additional requirements are meaningful, as the ultimate goal of arbitration

[50] Ovaska: Välimiesmenettely, p. 49. It is a bit odd that Swedish legislation does not require written from. Ovaska's view is that both parties have to in some form confirm the agreement in writing, not necessarily at the same time or in the same document, but in some way that the content of the arbitration agreement is unambiguous.

[51] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 93, referring to case *Oberster Gerichtshof, Decision of November 17, 1971* (reported in English in 1 Yearbook of Commercial Arbitration n.183 (1976)).

[52] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 59, referring to the view of German Supreme Court that the Convention itself does not preclude enforcement of foreign awards under more lenient national requirements of form. Craig – Park – Paulsson refers also to a decision of the *Obelandesgericht* of Düsseldorf of 8 November 1971, enforcing an award rendered in Holland against a German party, holding that although the Convention was inapplicable in the absence of a written agreement to arbitrate, the award could be enforced under German Code of Civil Procedure (ZPO) on the ground that the award was operative under the law applicable to the arbitral proceedings. Dutch law acknowledges arbitration agreements made orally or by failure to protest reference to arbitration, and German law allows also oral arbitration agreements between merchants. The Bundesgerichtshof in Germany has held that if resorting to arbitration is a trade usage within a particular branch of trade, a signed arbitration agreement may not be necessary (as cited in Várady – Barceló – von Mehren: International Commercial Arbitration, p.93).

is to achieve an enforceable award; otherwise the whole proceedings could be meaningless.

Of course, already based on standard laws of contract, the parties to a contract must have legal capacity to enter into that contract, and this is no different if the contract in question is an arbitration agreement. Whether the parties have the capacity to agree to arbitration depends on their own national law; rules governing the capacity vary from state to state. According to the provisions of New York Convention Art.V(1)(a) and Model Law parties must have a capacity to enter into agreement "under the law applicable to them".[53] Hence, New York Convention ties some of the requirements to national laws, either to the law of the state where the award was made or the law of the state where the enforcement is sought. This might cause interpretation problems, if the principles governing the capacity vary significantly in these states.

3.2 Arbitration agreement as an autonomous agreement

3.2.1 The principle of separability

To use companies Black Ltd and White Ltd as an example again, let's picture a situation where the parties have signed the contract. However, later on company Black states that the contract is not valid for some reason, for example because it was signed by unauthorized person. White Ltd is in the view that a contract has been formed and insists on delivering the goods, Black Ltd states the contract is invalid and will not accept the delivery and more importantly, will not pay for the goods supplied. When determining the correct procedure to settle the dispute, White Ltd assumes based on the contract that the dispute will be settled by arbitration. In Black Ltd's opinion the contract and the arbitration clause included in it were not validly formed, and therefore it does not accept arbitration but claims the dispute should be settled in a national court. This kind of situation is a classic example of a disagreement of the parties concerning the correct forum for the settlement of their dispute.

[53] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 172-173 and Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 44. Redfern – Hunter points out that with arbitration agreements it is generally necessary to have regard to more than one system of law, as the "law applicable to them" might mean the law of the state of a party's place of domicile and the law of the contract, which might be different. Craig – Park – Paulsson refers to New York Convention, which makes clear that capacity is to be determined not by the law chosen by the parties but by the law applicable to them. Both of these however might be of importance.

As mentioned earlier, it may not be clear what is the effect of a single arbitration clause in a usually lengthy business contract, having tens of clauses and possibly various appendixes. An effect which most people do not realize instantly is that an arbitration clause inserted in another contract is also seen as an agreement, an agreement to arbitrate, although it is "just" one clause. The arbitration agreement is a separate and autonomous agreement, even if included in and related closely to an underlying commercial contract, and it survives for example the termination of the contract[54]. This is universally called the principle or doctrine of separability (or severability) of the arbitration agreement. This principle has been internationally recognized in leading institutional arbitration rules and in national arbitration legislations or judicial decisions[55]. Parties' agreement to arbitrate consists of promises that are distinct and independent from the underlying contract[56]. However, this autonomy is a legal concept, not a factual determination; thus, it does not mean that the acceptance of the arbitration agreement must be separate from that of the main contract[57]. This principle, or doctrine, of separability serves to protect the viability of the arbitration process in the event the agreement containing the arbitration clause is ultimately found to be null and void[58].

The effect of the principle of separability is that the validity of the arbitration clause does not depend on the validity of the contract as a whole[59]. This principle presumes that even if the parties may have signed an invalid contract they nevertheless expressed a separate and valid intent that any dispute arising in connection with the contract

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[54] Born: International Commercial Arbitration, p. 56. The separability doctrine is generally regarded as having highly important consequences for the arbitral process through continued validity of an arbitration clause and by permitting the application of different substantive laws to the parties' arbitration agreement and underlying contract.

[55] Born: International Commercial Arbitration, p. 56 and Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 199-209. The doctrine can be found for example in Model Law clauses 7, 8 and 16(1), English Arbitration Act 1996 6-7 §, Federal Arbitration Act 2-4 §, in institutional arbitration rules ICC rules Art. 6, UNCITRAL Rules Art.21, LCIA Rules Art.23, and is determined by courts for example in cases *Sojuznefteexport v. Joc Oil, Ltd.,* or *Prima Paint Corp. v. Flood & Conklin Manufacturing Co. (U.S. 1967).*

[56] Born: International Commercial Arbitration, p. 56, quoting an U.S. case where it was stated that "[T]he mutual promises to arbitrate [generally] form the *pro quo* of one another and constitute a separable and enforceable part of the agreement" (*Robert Lawrence Co. v. Devonshire Fabrics, Inc..).*

[57] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 209. It does not also mean that the arbitration agreement cannot follow the main contract where the latter is assigned to a third party.

[58] Morrissey – Graves: International Sales Law and Arbitration, p. 368. "Null and void" are the terms used in the Model Law, and are also typical among arbitration statutes. English Arbitration Act however uses words "invalid or did not come into existence or has become ineffective", and FAA does not address separability in the statute itself (principle has been established through case law).

[59] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 299. See for example the UNCITRAL Arbitration Rules, Art. 21, ICC Arbitration Rules Art. 6.4, LCIA Arbitration Rules 23.1 and the Model Law Art.16(1) where this principle has been explicitly stated.

should be resolved by arbitration[60]. Hence, a challenge going only to the underlying main contract allows arbitration agreement to survive and provide the forum for the dispute concerning the main contract[61]. This clearly pro-arbitration view would mean that the dispute in our example between Black Ltd and White Ltd would be resolved by arbitration, since Black Ltd contest the validity of the main agreement, which in fact does not automatically affect the validity of the agreement to arbitrate.

This must be taken into consideration in case a party wants to challenge the award by stating the contract, and therefore the arbitration clause forming the arbitration agreement, is invalid. The doctrine of separability has been originally developed to protect the arbitration agreement from the effects of the invalidity of the main contract[62]. As long as a national court does not consider that there was a case of invalidity going to the arbitration clause itself, the arbitrator's decision as to the validity of the main contract is as conclusive as any other element of his decision on the merits[63]. The doctrine of separability provides that the invalidity of the contract does not invalidate the arbitration agreement, thereby preserving the arbitrators' jurisdiction to render an award, even an award finding the underlying contract invalid[64]. The arbitration agreement can be invalidated only on a ground which related to the arbitration agreement itself and is not merely a consequence of the invalidity of the main contract[65].

Having agreed to submit their claims to arbitration, usually by an arbitration clause, the parties are deemed to have given by separate agreement power to the arbitrators to rule

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[60] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 49. That intent is then viewed as extending to cover the consequences of the invalidity of the contract (assuming the arbitral tribunal in fact finds it to be invalid).

[61] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 89 stating also that this can be seen clearly as an pro-arbitration view, as it usually is easier for a party seeking delay to conjure up invalidating complaints about the contract as a whole than about the arbitration clause specifically.

[62] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 74. The doctrine in a way protects the arbitration agreement from outside incidences.

[63] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 49. The motivating force behind the establishment of the separability of the arbitration clause in international contracts is the plain desire to uphold the validity of the agreement to arbitrate.

[64] Morrissey – Graves: International Sales Law and Arbitration, p. 369. Defenses to the contract validity are often wrapped up in the merits of the parties' dispute. As such, a tribunal may not decide on such defenses until it renders a final award. If the award would state that the agreement is invalid, one might reasonably ask whether the arbitration clause within it is rendered invalid as well. This problem is minimized with the application of the separability doctrine.

[65] *Premium Nafta v. Fili Shipping (UK 2007),* ch. 17. In this case the House of Lords stated that of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. The distinctive factor is that there has to be an attack on the arbitration agreement.

even upon claims of nullity of the contract in which the arbitration clause is found. Accordingly, when a plea of lack of jurisdiction is raised it is first for the arbitrators rule on it.[66] One might suggest that an arbitration agreement within a commercial contract later found invalid has at least a moment of validity. If the duress defense does not directly touch upon the arbitration clause within the commercial contract, then one might perhaps explain that such an already existent and fully autonomous arbitration clause is saved by its separability from the commercial contract, because the defense itself only touches upon the commercial contract.[67]

What are then the consequences of separability doctrine, why is it seen so crucial in international arbitration? At least the following issues have been listed: 1) the invalidity of the parties' underlying contract does not necessarily invalidate their arbitration agreement, 2) the invalidity of the parties' arbitration agreement does not necessarily affect the underlying contract, 3) the separability doctrine implies the arbitrator's power to consider his own jurisdiction, 4) the law governing the arbitration clause may be different from that governing the underlying contract, 5) the arbitration clause may survive termination or expiry of the underlying agreement, and 6) the invalidity of the parties' underlying contract may not deprive an arbitral award of validity[68]. In order for arbitration to be an effective mean of dispute resolution the doctrine of separability is crucial; an award in favor of a defense against the validity of the overall agreement would itself be made invalid at the moment it was issued without separability. The award invalidating the commercial contract would effectively destroy the very basis on which the jurisdiction of the tribunal issuing the award in question was based.[69] When the tribunal would rule that the underlying contract was invalid, it would create an absurd situation where it would at the same time deny its own jurisdiction to set such a ruling. The whole process, the efforts, and necessarily money, the parties would have contributed into the dispute would have been wasted. Therefore, the doctrine of

[66] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 162.This is also connected to competence-competence principle, the power of the tribunal to rule on its own jurisdiction, presented later on.
[67] Morrissey – Graves: International Sales Law and Arbitration, p. 369. This theoretical justification becomes much more difficult to maintain when moving from voidable contracts to void contract, and from void contracts to questions of whether a contract ever came into existence in the first instance.
[68] Born: International Commercial Arbitration, p. 67-68 where each of these consequences are explained in more detail.
[69] Morrissey – Graves: International Sales Law and Arbitration, p.369. This kind of situation would undermine the very basis of arbitration as an effective means of dispute resolution.

separability is a fundamental necessity of any effective arbitration regime[70]. The autonomy or severability of the arbitration clause is a conceptual cornerstone of international arbitration[71] and is so widely recognized that it has become one of the general principles of arbitration upon which international arbitrators rely, irrespective of their seat and of the law governing the proceedings[72].

There has also been criticism on the separability doctrine. For example some recent Scandinavian studies have critized the doctrine and held it as vague and ambiguous concerning its content[73]. Usually parties do not easily recognize the idea that they have signed two separate agreements, especially if the arbitration clause has been inserted as a part of standard terms and conditions used frequently in everyday business. For example, if in our example the contract was drafted by company White Ltd, first 15 pages of commercial terms, including provisions related solely to the nature of the goods in question, transportation, money transfer etc. Then, company White Ltd may have included a separate "Standard Terms and Conditions", 25 articles of which article 24 is the arbitration clause. Is it clear to company Black Ltd what it has agreed, especially if arbitration is only mentioned in the appendix as standard terms and conditions? Of course, parties acting in international business should be aware of the practice and may have to carry the risk alone if they have not participated enough in drafting the contract. But human errors happen, for example with tight schedules, and sometimes the other party just does not think what such a separate destiny of an arbitration clause would mean for the company in practice. Especially sales people, the people actually signing the agreements, may not realize the effects. They may just assume that if the contract has no effect for the company "businesswise", meaning the contract does not become reality, it has no effect on any other aspects either.

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[70] Morrissey – Graves: International Sales Law and Arbitration, p. 370. Separability doctrine is a necessary fiction that allows the tribunal to decide all claims and defenses relating to the main contract together and preserves the jurisdiction of the tribunal.

[71] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 48. Terms autonomy and severability/separability are sometimes used in the same context, but may also have different content depending on the situation. The difference between severability and autonomy could be seen for example that severability denotes merely potential or occasional as opposed to invariable distinctness.

[72] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 199. The recognition has actualized through recognition in leading institutional arbitration rules, accepting it almost unanimously in arbitrate statutes and arbitral case law.

[73] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 77. Koulu also mentions that for example the Finnish Arbitration Act does not include any privisions concerning the separability of the arbitration agreement, but the existence has to be drawn from studies concerning arbitration and individual court cases which can be interpreted in various ways.

Almost all would agree that if the signature on the written commercial contract is a forgery, this invalidates the commercial contract as well as the arbitration agreement[74]. A validity defense that specifically addresses the arbitration agreement itself will also invalidate the arbitration agreement[75]. This should be self-evident; if one of the parties never signed or meant to sign the agreement, never had the will or intent to enter into the agreement, there never was the intent to submit disputes related to such agreement to arbitration either. It is impossible to logically state that the parties would have agreed to solve their disputes in arbitration, especially concerning the elementary question of the existence of the main contract, when there allegedly never was such an agreement[76]. Therefore, there cannot be an arbitration agreement.

In our example company Black Ltd would possibly have to participate in an arbitration of a dispute based on a contract which in its opinion is not binding on it, unless it can provide that there never existed an agreement at all. On the other hand, it cannot avoid arbitration simply by stating that the person signing the contract was not authorized to do so, defect which may be a result of a pure mistake inside its own organization and which would not automatically affect the original intent to arbitrate.

The doctrine of separability is usually connected to the principle of competence-competence; through the doctrine of separability the jurisdiction of the arbitrators is derived from a different source – the meaning of the parties to submit the disputes to arbitration[77]. However, these two rules overlap only slightly and should be carefully distinguished[78]. Nevertheless, both principles have influence on the relationship between arbitral tribunals and national courts, and could be seen to strengthen the position of tribunals. The principle of separability is an efficient tool to secure that a dispute is not resolved in a national court merely because of a claim that the contract

[74] Morrissey – Graves: International Sales Law and Arbitration, p. 370. This approach is also dictated by the requirement of a signed writing for any arbitration agreement under the New York Convention. See also the reasoning in *Premium Nafta v. Fili Shipping (UK 2007)*.
[75] Morrissey – Graves: International Sales Law and Arbitration, p. 370. A finding of a forgery, or for example duress or improper threat involving the arbitration clause, would require the arbitrators to decline jurisdiction without any formal award. Any award made by the tribunal would be rendered invalid based on a finding invalidating the arbitration clause itself.
[76] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 79. In Koulu's opinion the doctrine of separability is not justified and has no value as an argumentation in this kind of situation, although the Model Law could be seen as forcing the recognize the doctrine of separability also in this case.
[77] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 72, 77. Koulu brings up the metaphor of the doctrine of separability being the "step-brother" of the principle of competence-competence, which is very close to the theoretical truth of the connection between these two.
[78] Fouchard – Gaillard – Goldman: On International Commercial Arbitgration, p. 399. See also chapter 5 presenting the competence-competence principle in detail.

between the parties is invalid. The dispute is directed primarily to arbitration and it is for the tribunal to determine whether it has jurisdiction to decide the issue.

3.2.2 Controversial distinction between invalidity and non-existence

As another example, let's think of a situation where Black Ltd again wants to buy goods from White Ltd. Salesmen agree in e-mail correspondence on sales, the other sends their contract draft with standard terms and conditions including an arbitration clause which the other approves, but there is no actual signing of any papers. And then, something happens. Due to bad publicity on the latest newspapers concerning the products of White Ltd, Black Ltd retrieves from the sales and states there actually has been no agreement at all. White Ltd insists that the contract has been made and therefore, Black Ltd has to take the delivery and act according to the contract. Who will then decide the issue? Black Ltd thinks there is no contract at all, nothing to decide and especially, no arbitration agreement. White Ltd has the opposite opinion. So, should it be the national court, and of which state, or the arbitral tribunal? Has there been intent to arbitrate forming an arbitration agreement? This kind of problem ties together the separability of the arbitration agreement and the general questions of contract formation.

The situation pictured above brings us to the most problematic situations with the doctrine of separability, situations where one of the parties denies the very existence of the underlying contract; this happens frequently[79]. A commonly used counterclaim for separability has been that "[i]f an agreement contains an obligation to arbitrate disputes arising under it, but the agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part. If the agreement was never entered into at all, its arbitration clause never came into force. If the agreement was not validly entered into, then, *prima facie*, it is invalid as a whole, as must be all of its parts, including the arbitration clause."[80] It could be seen that the doctrine of separability also requires that there is something from which the arbitration agreement can be separate. In

[79] Born: International Commercial Arbitration, p. 70. For example, a party denies that it executed or otherwise agreed to the underlying contract, or claims there simply never was an underlying contract. This kind of challenge could be seen to apply necessarily to the arbitration clause contained in the contract. See also Koulu: Välityssopimus välimiesmenettelyn perustana, p. 75.

[80] Schwebel: International Arbitration: Three Salient Problems, p.1. This is one of the most cited comments on separability and questions of non-existence, written as early as in the 1980's. This also indicates that regardless of the constant development of arbitration and the wide acceptance of the separability doctrine, there are still issues which could not have been resolved without contradiction.

this sense the arbitration agreement shares the destiny of the main contract: if the main contract never existed, there is no valid arbitration agreement.[81]

The question is do words "null and void" used in connection with regulations governing arbitration agreements include "non-existent", and does the doctrine of separability extend to non-existence? If the words "null and void" are interpreted to be limited to invalidity, this would cause a situation where tribunal has jurisdiction to determine the existence of the commercial contract between the parties, but may not issue an award if it determines there never was an agreement. The tribunal would have to simply decline jurisdiction. If the words "null and void" are however interpreted broadly to include non-existence as well as invalidity, the tribunal could have the powers to issue an award where it would determine that the parties never formed an agreement. As the questions of formation of contract (offer, acceptance, withdrawal, revocation) are often inseparately blended with the merits of the parties dispute, it would seem reasonable and more efficient to extend separability to such questions of formation. Although such an extension could be seen as going too far beyond the party consent upon which arbitration is based, the trend is more in the direction of extending the doctrine of separability than the opposite.[82] This seems reasonable also in the practical sense as it usually is in the interest of the parties to reach a final decision on the dispute rather than simply a statement declining jurisdiction.

In a case *Sojuznefteexport v. Joc Oil, Ltd* it was found that a breach of certain provisions concerning signatures was not a case of a non-existent contract but one of invalidity[83]. The invalidity of the contract itself does not mean the invalidity of the arbitration agreement, if the invalidity is caused by some error in the signatories; the arbitration agreement is protected by the principle of separability. As for our examples, the one

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[81] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 75. The doctrine of separability is however very useful when arguing whether a condition in the main agreement has been fulfilled or whether certain time limits have been met in the contract.

[82] Morrissey – Graves: International Sales Law and Arbitration, p. 371. According to Morrissey – Graves the issues is particularly important in arbitration clauses expressly including contract "formation" within the scope of issues to be arbitrated, for example JAMS International Arbitration Rules and WIPO Arbitration Rules. Unless separability extends to the formation, the tribunal could not decide in an award that the parties had failed to form a contract without eliminating the source of its jurisdiction in the process.

[83] Case *Sojuznefteexport v. Joc Oil, Ltd*, where Joc Oil Ltd. stated that arbitral tribunal lacked competence to adjudicate the dispute because the arbitration clause was void, and SNE claimed that the sales agreement was not void and that, even if it were, the arbitration clause was separable and the law applicable to that agreement did not require two signatures to be valid. For *Premium Nafta*, see footnote 65 above.

mentioned in the previous chapter 3.2.1 could be seen to be covered by the example stated in *Sojuznefteexport v. Joc Oil, Ltd*, as it presented a situation where the agreement was not signed by an authorized person. Drawing the line between invalidity and non-existence is however tricky, and can vary from state to state, as can be seen for example comparing cases *Sojuznefteexport v. Joc Oil, Ltd* and *Premium Nafta v. Fili Shipping (UK 2007)* (stating that in some cases the reasons invalidating the main agreement are identical concerning the main agreement).

In the U.S. the case *Prima Paint* is often cited as the most authoritative statement of the separability doctrine in the American approach. If the challenge to arbitration alleges that the main contract never came into existence, as opposing to alleging that an existing contract is invalid, the *Prima Paint* rule (meaning the same as the principle of separability) is still basically applicable. The chief difference is that a defect in the formation of the main contract, for example the absence of a proper offer or acceptance, would, if true, generally undermine the separate arbitration clause just as much as it would the main contract. Hence, American court will generally decide such existence questions for itself before referring the parties to arbitration.[84]

The orthodox view in English law has been that if the contract in which the arbitration clause is contained is void *ab initio*, and therefore nothing, so also must be the arbitration clause in the contract. That is the proposition that nothing can come of nothing, *ex nihil nil fit*.[85] However, to reject the separability of the arbitration agreement on the ground that one of the parties has claimed the main contract never came into existence would be to run the risk of facilitating the delaying tactics which the principle of separability aims to prevent. The distinction between a contract which is void and one that never came to existence is difficult, hence the mere allegation that a main contract never existed should not suffice for an arbitrator's jurisdiction to be denied.[86]

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[84] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 90, representing case *Sandvik AB v. Advent International Corp.* where "party seeking a stay of court action in favor of arbitration claimed the main contract did not come into existence because its purported signatory did not have authority It nevertheless sought to rely on the arbitration clause in the main contract. The Third Circuit Court Appeals refused to apply the separability concept and ruled that a court decision on the existence of the contract was prerequisite to sending the parties to arbitration."

[85] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 138, referring to case *Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd*. This has also been called the argument of logic.

[86] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 211. If the arbitrators examine and decide that the main contract never existed, then they must apply the consequences of that finding to the merits of the dispute.

This distinction has also been discussed in the context of the tribunal having jurisdiction to rule on its own jurisdiction in chapter 5.1.

Thus, the doctrine of separability almost uniformly allows the tribunal to decide at least one jurisdictional issue – the validity of the agreement containing the arbitration clause – and has also been extended under some arbitration laws to issues involving the existence of the commercial contract.[87] This also helps the parties to save some time and money in the process; without the principle of separability the arbitrators would be obliged to investigate not only the arbitration agreement but also the merits of the dispute in order to be able to determine whether they have the jurisdiction in the dispute. The doctrine clearly has its purpose in the international arbitration because of the functional needs of the arbitration procedures as such; the dispute resolution clauses have to have their in some ways separate, protected status in order for them to fulfill their ultimate goal.[88]

3.3 Jurisdiction of the tribunal is based on the arbitration agreement

The powers of arbitral tribunal are based on the agreement between the parties to subject the dispute to arbitration. Without this agreement, there cannot be any valid basis for the jurisdiction of the tribunal. The arbitration agreement is in a way protected by the principle of separability presented above, having its own independent status as a ground for the jurisdiction of the arbitral tribunal.

The powers, jurisdiction and duties of the arbitrators forming the tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the award may be sought[89]. Arbitration agreement is the basic source of the powers of the arbitral tribunal. The agreement establishes the jurisdiction of the

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[87] Morrissey – Graves: International Sales Law and Arbitration, p. 371. Other issues of jurisdiction may be allocated in a variety of ways between courts and arbitrators; this is a larger "who decides" question.

[88] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 72, 77. The strong status of the doctrine is probably caused by the attempts to strengthen the efficiency of the arbitration agreements and through that favor the use of arbitration as a dispute resolution method. Not only the tribunal has to consider the principle of separability, sometimes also national courts will have to take it into account, mostly when determining the validity of the arbitration award or whether the arbitration agreement prevents the court from deciding the issue at hand.

[89] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 277. This differs from a position of a judge in a national court, whose jurisdiction and the extent to which his decisions related to jurisdiction may be reviewed by an appellate court are clearly established in the law governing the proceedings.

tribunal, and is the only source from which the jurisdiction can come.[90] An agreement records the consent of the parties to submit to arbitration – a consent which is indispensable to any process of dispute resolution outside national courts[91].

The basic principle stated in the Model Law Article 8(1) and in the New York Convention Article II(3) is that if there is a written arbitration agreement, every national court should refuse to hear proceedings covered by that agreement. This is, as mentioned above in chapter 3.1.1, the negative effect of the arbitration agreement and has been confirmed in various cases internationally[92]. For example, according to New York Convention Article II(3) the courts must refer the parties to arbitration when the case is subject to a written arbitration agreement that is not null and void, inoperative or incapable of being performed. Therefore, the jurisdiction of the tribunal to decide the issue based on the agreement is also recognized in this sense, by preventing the courts from deciding the same dispute.

An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine[93]. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit[94]. If the parties have for example not agreed to submit the question of arbitrability to arbitration, the court should decide that question just as it would decide any other question that the parties did not agree to submit to arbitration, namely independently[95]. Usually parties use an arbitration clause drafted by some international arbitration institution, which usually states that all disputes arising out of the contract, including questions relating to formation of the contract, will be submitted to arbitration. If the

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[90] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 10. Compared to ordinary legal processes where the jurisdiction of a relevant court may come from several sources, arbitral process is a private method of resolving disputes and the jurisdiction is derived simply and solely from the agreement of the parties. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 29.

[91] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 155. Any process outside of national courts depend for their very existence upon the agreement of the parties.

[92] For example, *Samsung Telecommunications America v. Bancomer (Mexico 2001), MitsubishiMotors Co. v. Soler Chrysler-Plymouth, Inc.. Bundesgerichtshof Germany 2000 (CLOUT Case 561)* where the court affirmed that even an arbitration agreement transferred to a legal successor results in the refusal to hear the case.; *High Commercial Court of Croatia Pz-6756/04-3 (CLOUT Case 1071), Marlex Ltd. v. European Industrial Engineering (Chile 2008, CLOUT Case 1095).*

[93] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 295. The competence of the tribunal comes from the agreement of the parties, which also enhances the voluntary nature of arbitration. See Also Kurkela: Competition Laws in International Arbitration, p. 610.

[94] As stated by the U.S. Supreme Court in *United Steelworkers of America v. Warrior and Gulf Navigation Company (U.S. 1960)*.

[95] Case *First Options of Chicago, Inc. v. Kaplan, et ux. and MK Investments, Inc.*.

question which has been raised is expressly mentioned in the arbitration clause to be resolved by an arbitral tribunal, the use of the exact word in the arbitration clause of course suggests that the tribunal must determine the issue[96]. However, the jurisdiction of the tribunal to decide certain issues may also be founded by the conduct of the parties; if the party does not contest the jurisdiction of the tribunal to determine for example the question of arbitrability but lets the proceedings continue and the tribunal to determine the arbitrability, that party by conduct evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute but also the question of arbitrability[97]. Anyhow, the competence and jurisdiction of the parties is voluntarily given, and should be limited within the boundaries the parties have decided to give to it, compared to jurisdiction of courts founded in law.

In order for an arbitral tribunal to have jurisdiction to decide certain issues, there has to be a contract between the parties in which this jurisdiction is acknowledged. Arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority)[98]. Exceeding the jurisdiction may cause the award to be denied enforcement at another state based on the New York Convention Art.V(1)(c). This does not, however, limit the powers of arbitrators to rule on their own jurisdiction: having agreed to submit their claims to arbitration, the parties are deemed to have given by separate agreement power to the arbitrators to rule even upon claims of nullity or invalidity of the contract in which the arbitration clause is found[99]. This is known as the rule or principle of competence-competence and will be explained in more detailed below in chapter 5. The consequence of this principle is that arbitration does not need to be stopped when one party objects to the jurisdiction of arbitrators; when one party states that the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge[100] . Generally the arbitral proceedings may be commenced or

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[96] For example in case *Instrumenttitehdas Kytola Oy v. Esko Industries Ltd. (Canada 2004)* the exact use of word "termination" in the arbitration clause suggests that the issue of termination must be determine by arbitral tribunal. See also similar case *Croatia High Commercial Court Pz-8147/04-5 (Clout 1070).*

[97] *George Day Constructions Co. v. United Brotherhood of Carpenters (U.S. 1994).*

[98] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 295-296. This "rule" can also be expressed by saying that a tribunal must conform to the mission entrusted to it, or that it must not exceed its mandate or that it must stay within its terms of reference.

[99] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 162. For example, ICC Rules Art. 6(2) states that " - - the Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Tribunal upholds the validity of the arbitration agreement".

[100] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 512. However, the arbitrators' determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

continued and an award may be made, even notwithstanding an application made for a court concerning the jurisdiction of the tribunal, as stated for example in the Model Law Article 8(2).

Because an arbitrator's jurisdiction is rooted in the agreement of the parties, an arbitrator has no independent source of jurisdiction apart from the consent of the parties, and any power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties[101]. If there is in fact a dispute as to whether an agreement to arbitrate exists, then according to some opinions, that issue must be first determined by a court as a prerequisite to arbitrator's taking jurisdiction[102]. This brings up again the question what is the difference between invalidity and non-existence of an agreement to arbitrate. If there has not been an arbitration agreement and an award has still been made without jurisdiction, the nullity of such award is recognized both in national laws and in the international conventions governing arbitration[103].

Challenges to the jurisdiction generally involve questions of the parties' intent. A challenge will often focus on the questions of whether the parties in fact agreed to arbitrate anything, whether any such agreement is valid, and, if so, whether the dispute in question is within the scope of the agreement. Some disputes may be deemed nonarbitrable as a matter of public policy, based on either nonarbitrability of the subject matter of the dispute or other public policy precluding arbitration of the dispute. If this is the case, the tribunal may be said to lack jurisdiction over the parties' dispute, irrespective of the parties' consent expressed in an arbitration agreement.[104] Although the basic principle is that if there is an arbitration agreement, the tribunal has jurisdiction to decide the dispute, the situation is unfortunately not always that straightforward. The questions of invalidity and non-existence have been discussed for decades and will probably be discussed also in the future. The ideal situation would be

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[101] *George Day Constructions Co. v. United Brotherhood of Carpenters (U.S. 1994), I.S. Joseph Co. v. Michigan Sugar Co. (U.S. 1986), United Steelworkers of America v. Warrior and Gulf Navigation Company (U.S. 1960)*

[102] At least in the United States Court of Appeal 8th Circuit had this opinion in case *I.S. Joseph Co. v. Michigan Sugar Co. (U.S.1986)*.

[103] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 304. This principle is for example recognized in the New York Convention Art.V.1(a) and the Model Law Art.36(1)(iv). It is also one of the limited cases in which it is possible to challenge an international award for example in the French courts.

[104] Morrissey – Graves: International Sales Law and Arbitration, p. 383-384. While the arbitration proceedings need not to be stayed to wait for the possible court review of the jurisdictional decision, the prompt review may still save needless time and expense compared to the situation where the jurisdictional award was given together with the award on the merits.

that the tribunal could decide the dispute without any interference from the national court, but as long as there are unclear agreements or agreement formation situations, this cannot be reality.

4. Recognition and enforcement of arbitral awards

International arbitration would have no real, practical meaning in everyday business life if the awards made by tribunals would not be enforceable. Parties who form the arbitration agreement want their disputes to be finally and bindingly resolved by an arbitral tribunal, it is the basis for the whole process. The ideal situation is of course that both parties perform the award voluntarily. However, this is not always the reality. Fulfillment of awards requires, besides the "promise" of the parties, real legislative basis that the award can be enforced and that also that the party who lost the case has to act according to the award. Arbitral tribunal has no role to play in the enforcement of the award[105]; this has been left to national courts, and can be seen to be the most important job for them in relation to arbitration[106]. The New York Convention, made in 1958, has been the most important international tool to make this happen.

4.1 Recognition *or* enforcement, or recognition *and* enforcement?

The New York Convention was drafted in 1953, and one of its goals was to deliberate the arbitral awards from the burdensome enforcement procedures of the Geneva Convention which was in force since 1927. The Geneva Convention required the "double *exequatur*"-procedure, meaning that the judicial recognition needed to be sought both in the country where the award was made (place of arbitration) and from the enforcement forum[107]. New York Convention was to change this situation.

Although the New York Convention speaks about recognition and enforcement, these two are in fact separate issues which can happen without one another and have different

[105] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 510. Usually, when an award has been made, the tribunal has nothing more to do with the dispute, its work is done and the tribunal is *functus officio*.
[106] Tulokas: Välimiesmenettely ja tuomioistuimet, p. 92. As it is the aim to minimize the interference of a national court to international arbitration, it is the enforcement stage where the courts can have the most influence on the proceedings.
[107] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 679-680. The change was based on report of ICC in 1953 underscoring the commercial community's need for arbitral awards that are transportable from one country to another. Shifting the burden of proof from the party seeking the enforcement to the party resisting the enforcement procedure, and the elimination of "double *exequatur*", were in ICC's opinion ways to streamline the enforcement of awards. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 971.

legal affects. Purpose of recognition is to act as a shield, to block any attempt to raise in fresh proceedings issues that have been decided in the arbitration that gave rise to the award whose recognition is sought. By contrast, enforcement is a sword, and means applying legal sanctions to compel the party against whom the award was made to carry it out.[108]

An award does not generally need to be confirmed in any way in the place of the arbitration before it may be confirmed and enforced in another forum[109], but in some countries it may still be necessary. The trend is to abandon this kind of deposit procedure and as it is not specifically required either by the New York Convention, the Model Law or for example United States and English Arbitration Acts, it is more a minority view in the international arbitration field. The New York Convention does not allow refusal of recognition and enforcement on the ground that some form of confirmation or other scrutiny by the court of origin is absent.[110]

There are also differences as to whether it is necessary to apply for recognition in the place where the enforcement is sough before enforcement itself is possible; for example in France it is necessary to apply for recognition as a preliminary step to enforcement as an opposite to for example England where the award may be enforced directly without any need for deposit or registration[111].

Recognition will usually become an issue when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favor the award was made will object that the dispute has already been determined. To prove this, he will seek to produce an award to the court and ask the court to recognize it as valid and binding upon the parties in respect of the issues with which it dealt. A party seeking simply recognition of an award will generally do so

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[108] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 516-517. Such sanctions may take many forms, including seizure of property or other assets, or in extreme cases imprisonment.

[109] Born: International Commercial Arbitration, p. 705. As discussed above, this was a major change from the previous conduct under the Geneva Convention and made international recognition and enforcement smoother to accomplish. Often an award must however be "confirmed" by a local court in particular forum before it may be coercively enforced in that forum.

[110] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 607-609, 669. Examples of legislations mentioned to require confirmation are Belgian, Dutch, Egypt and Spanish Acts. When drafting the Model Law the deposit procedure was discussed but dismissed, in Swiss law it is optional. This points out how important it is to consider the country in which the award is relied upon.

[111] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 514. It is impossible and impractical to lay down detailed procedural guidelines as it is usually always necessary to obtain competent advice from experienced lawyers in that certain jurisdiction where the enforcement is sought.

because he needs to rely on the award by way of defense or set-off, or in some other way in court proceedings. The party seeking recognition cannot choose the court but has to seek recognition wherever the proceedings against him are brought.[112]

Enforcement on the other hand means asking the court merely to recognize the legal force and effect of an award, but also to ensure that it is carried out, by using such legal sanctions as are available[113]. This will involve commencing legal proceedings, under local law, in which the award provides the basis for coercively appropriating money or imposing other consequences on the other party[114]. Enforcement is usually sought by the successful party in arbitration and the first step is to determine in which county or countries enforcement is to be sought, meaning usually the countries where the losing party has, or is likely to have, assets. Again the international nature plays a major role; usually the place of arbitration has been chosen precisely because it is a place with which either of the parties has no connection at all. Therefore also the award has to be enforced in another state.[115]

4.2 Recognition and enforcement based the New York Convention

4.2.1 General remarks about recognition and enforcement of awards under the New York Convention

The presumption that arbitral awards are enforceable, established by leading national arbitration statutes, is subject to various exceptions as discussed below. Some national arbitration statutes permit more expansive judicial review in actions to enforce foreign arbitral awards than the principles laid down in the New York Convention and the Model Law; in some jurisdictions arbitral awards are subject to the same judicial review as judicial judgments, and in others local courts are authorized to review *de novo* the substantive and procedural aspects of the arbitrators' decisions.[116] The main rule which

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[112] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p.516-517. This emphasizes how important it is that international awards should be accepted as truly "international" in their validity and effect.

[113] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 516. Enforcement therefor goes a step further than recognition and means applying lgal sanctions to compel the party against whom the award was made to carry it out.

[114] Born: International Commercial Arbitration, p. 705.

[115] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 517-518. If assets are likely to be available in more than one place, the party seeking enforcement has a choice either to proceed in one or more places as seems appropriate. Generally the award has to be enforced in a country other than in which it was made, because that forum may have been selected simply because it is a "neutral" forum, especially when dealing with large companies or issues with connections to state interests.

[116] Born: International Commercial Arbitration, p. 796. In general, exceptions in national legislations broadly parallel those of the New York Convention, with significant local variations in some instances.

most national statutes follow is the idea of New York Convention, and the statutes granting full review are exceptions not having a remarkable role. However, these should be acknowledged to exist and be taken into consideration when dealing with parties from other states. If the opposing party originates from a state where the review is done in more detail, the outcome could in rare cases cause surprises at the enforcement stage.

Majority of the arbitral awards are performed voluntarily. If this is not the case, the party on the winning side can firstly try to exert commercial pressure on a party who fails or refuses to perform the award. If a satisfactory result has not been gained through these measures, the party may seek enforcement from a national court.[117] It is essential for the efficiency and functionality of the arbitration as a procedure that the awards granted by tribunals can be enforced without delay regardless of the possible resistance of the parties[118].

Enforcement can be divided into two categories: the enforcement in the state that is the "seat" of the arbitration, and the enforcement of an award which is regarded as a "foreign" or "international" award. The first case is relatively easy process, involving mostly the same processes as required for the enforcement of a domestic arbitral award, but the second one is a more complex matter, on which this chapter also focuses on.[119] Citizenship of the parties is relevant to the New York Convention coverage only indirectly, when the parties' different nationalities add an element indicating an award is "not domestic"[120]. Although the New York Convention bars an enforcing court from

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States mentioned to grant full judicial review are for example Argentine and Iraq, so the issue is not so current to most parties.

[117] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 510-512. As Redfern – Hunter points out, the purpose of arbitration is to arrive at a binding decision on the dispute, unlike mediation and most other methods of alternative dispute resolution. This is emphasized in most of the model arbitration clauses, which underline the commitment of the parties to carry out the award by stating it shall be "final and binding". If the parties in question have a continuing trade relationship it can be in the interests of the loser to perform the award voluntarily in order not to lose future trade possibilities. However, parties should ensure that proper procedures are followed in order for the award to enforceable, if necessary.

[118] Tulokas: Välimiesmenettely ja tuomioistuimet, p. 92. Enforcement of awards can be seen to be the most important job of a national court in relation to arbitration. It should be noted that national laws may have different provisions for national and international awards (as does Finnish Arbitration Act), and as mentioned earlier, the enforcement procedure follows the New York Convention and not the Brussels I Regulation also when happening inside EU.

[119] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 515. See also Poudret – Besson: Comparative Law of International Arbitration, p. 793-, stating that the rules on the recognition and enforcement of domestic and foreign awards are generally different, and presenting those differences in more detail.

[120] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 681. In some countries national legislation implementing the New York Convention however might restrict its application as between citizens of the same country.

imposing any greater burden on enforcement of international than domestic awards[121], the international connection cannot be without meaning, as an award may involve company Black Ltd from France and company White Ltd from the US, and sought to be enforced in Germany.

Imposing a presumptive obligation to recognize international arbitration awards is a common factor to the New York Convention and most developed international arbitration regimes, as they are typically based on or guided by the Convention. Under the New York Convention it is a general obligation on signatory states to recognize arbitral awards made in other countries, subject to procedural requirements no more onerous than those applicable to domestic awards. Most importantly, the New York Convention presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement.[122]

Formalities required for the recognition and enforcement are simple: the party seeking the recognition and enforcement is required to supply (i) the duly authenticated original award or a duly certified copy thereof, and (ii) the original arbitration agreement on which the award is based or a duly certified copy thereof[123]. The party seeking enforcement bears the burden of satisfying the enforcement court on a *prima facie* basis on the existence and validity of the arbitration award, usually done by providing the necessary documents to meet the formal requirements for seeking enforcement under the New York Convention. Once the necessary documents have been supplied, and it is shown that the award is subject to the New York Convention, then a *prima facie* case has been established for recognition, and the burden of proof shifts; it is left for the party resisting the enforcement to supply proof that the award falls within one of the

[121] Morrissey – Graves: International Sales Law and Arbitration, p. 472. In fact, an international award may be enforceable even under circumstances in which a domestic award is not.
[122] Born: International Commercial Arbitration, p. 779-780 and New York Convention Art. III. According to Born, several aspects of the New York Convention give special force to the obligation imposed by Article III and underscore its drafter's goal of facilitating transnational enforcement of awards. The New York Convention does not require either expeditious or efficient procedural mechanisms for enforcing awards, it merely requires signatory states to use procedures no more cumbersome than their domestic enforcement procedures.
[123] New York Convention Art. IV; Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 527. If the award and the arbitration agreement are not in the official language of the country in which the recognition and enforcement is sought, certified translations are needed.

exceptions for recognition listed in New York Convention Article V (as discussed in more detail below).[124]

It is a fundamental principle of arbitration that court cannot refuse the recognition of an arbitral award if there is only a substantial (material) error in the award. Hence, although the court sees that the tribunal has interpreted the evidence wrongly or applied the applicable law faultily, this has no relevance regarding the recognition and enforcement of the award.[125] Either New York Convention or Model Law, as the provisions concerning recognition and enforcement are almost identical, do not explicitly permit any review on the merits of an award[126]. Therefore, the court cannot take any view concerning the substance of the dispute but has to focus on the procedural side of the story.

4.2.2 Grounds for refusal of recognition and enforcement under the New York Convention Article V

The court may refuse recognition and enforcement only on the basis of a limited list of procedural defenses. These are divided into two groups, one relating mainly to procedural defects in the arbitral proceedings and the other permitting courts to decline enforcement of awards that contravene their fundamental notions of public policy. First group which is protecting the loser's interests and safeguards the parties against injustice, is listed in the Article V(1) of the New York Convention and must be raised and proven by the party resisting the recognition and enforcement. Second group in Article V(2) is protecting the forum's own vital interests, and these defenses may be

[124] Born: International Commercial Arbitration, p. 783, and cases *Altain Khuder LLC v. IMC Mining Inc. and IMC Mining Solutions Pty Ltd (Australia 2011)* and *Maxtel International FZE v. Airmech Dubai LLC. (Dubai 2011)* The party seeking enforcement should satisfy the court that an award has been made, the award was made pursuant to an arbitration agreement and both the award creditor and award debtor are parties to the arbitration agreement. Usually these requirements are evidenced by supplying the documents required under the New York Convention article IV. See also *Fertilizer Corp. of India v. IDI Mgt. Inc.*, where a District court of Ohio in U.S. stated that "[t]he primary thrust of the [New York] Convention is to make enforcement of arbitral awards more simple by liberalizing enforcement procedures, limiting defenses, and placing the burden of proof on the party opposing enforcement".

[125] Hemmo: Välimiesmenettely tuomioistuinkäytännössä, p. 1064. Only if the material error would constitute a serious violation of *ordre public* it could be a ground for setting aside an award. This would however mean a serious violation of fundamental rights, basically unknown situation in case of commercial disputes. See also Poudret – Besson: Comparative Law of International Arbitration, p. 891.

[126] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 528. See also Poudret – Besson: Comparative Law of International Arbitration, p. 891, according to which the review is at least limited to the violation of international public policy.

raised by a court on its own motion, without any proof by the party resisting the award.[127]

The fairly-limited substantive grounds provided by the New York Convention and leading national statutes are based on the following ideas: lack of jurisdiction, procedural irregularities, bias or misconduct of the arbitral tribunal, public policy and non-arbitrability[128]. The refusal of enforcement is therefore permitted on the basis that the fundamental fairness of the arbitration was in question or if the award contravenes with the fundamental notions of public policy[129].

The New York Convention Article V(1) sets five separate grounds on which the recognition and enforcement may be refused at the request of the party against whom it has been invoked. These grounds for refusal are exhaustive. It is significant that under both the New York Convention and the Model Law the burden of proof is not upon the party seeking recognition and enforcement. However, even though the grounds for refusal exist, the enforcing court is not *obliged* to refuse the enforcement, it *may* only do so.[130]

First ground for refusal written in the New York Convention Article V(1) is that the parties to the arbitration were under some incapacity or the said agreement is not valid under the law to which parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[131]. This covers the formal requirements for the arbitration agreement as well as restrictions concerning for example the power of a state or of public entities to enter validly into an arbitration

[127] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 684. Traditionally courts have given narrow scope to the New York Convention's "public policy" defense, interpreting policy violations to include only breach of the forum's "most basic notions of morality and justice". On the grounds for refusal see also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 983-998.
[128] Born: International Commercial Arbitration, p .795. See for example New York Convention Article V, the Model Law Art.34 and 35, Swiss Law on Private International Law Art. 190, FAA 10 §, Finnish Arbitration Act 53 §, which all include the same ideas with slightly different wordings.
[129] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 684 and Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 969.
[130] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 528. The language is permissive, not mandatory. This interpretation seems to be generally accepted, both in court decisions and by experienced commentators. Shifting the burden of proof to the party against whom the award has been invoked is a major change from the earlier conduct based on the Geneva Convention of 1927. See also Poudret – Besson: Comparative Law of International Arbitration, p. 829.
[131] New York Convention Art.V(1)(a).

agreement, as well as enables a party to invoke other than a formal irregularity affecting the validity of the arbitration agreement[132].

Second, and according to some opinions the most important, ground in New York Convention Article V is that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case[133]. This clause is directed at ensuring procedural fairness and that the arbitration itself is properly conducted, with proper notice to the parties; requirements of "due process" are observed and parties are given a fair hearing[134]. It permits challenges to awards for grave procedural unfairness in the arbitration proceedings[135], and the party invoking it does not need to establish actual damage suffered by the breach as the breach of due process is considered to be sufficiently important[136]. Although arbitration is a private procedure, it is important that the parties are given fair treatment and ensuring this at least at the enforcement stage is essential, as it may not become an issue at any point earlier in the proceedings.

Third ground relates to jurisdictional issues: grounds for refusal exist "if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to the arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced"[137]. This long and a bit complicated provision covers situations in which the tribunal is alleged to have acted in excess of its authority and to have dealt with a dispute that was not submitted to it. It covers also situations of partial excess of authority, tribunal exceeding its jurisdiction in

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[132] Poudret – Besson: Comparative Law of International Arbitration, p. 830-831. Legal authorities have been divided on the question whether the arbitrability of a dispute can be verified on the basis of this provision, or is the control governed only by Art. V(2)(a).
[133] New York Convention Art.V(1)(b).
[134] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 532. It is essential that the proceedings should be conducted in a manner that is fair, and that is seen to be fair. Arbitrators have the obligation to take care that the proceedings are conducted following the due process requirements.
[135] Born: International Commercial Arbitration, p. 832. From the European perspective, this could also be called denial of procedural fairness, equality of treatment, or natural justice, or from the U.S. lawyers a denial of "due process".
[136] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 987. As the principles of due process are usually considered to reflect the fundamental requirements of procedural justice, they may also form a part of the public policy, and therefore may also be raised by courts on their own motion.
[137] New York Convention Art.V(1)(c).

some respects but not in others. The part of the award concerning matters duly submitted to arbitration may be saved and enforced.[138]

Fourth ground for refusal is that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place[139]. As well as in Article V(1)(a), the law of the place of arbitration is inserted to ensure that the choice of law giving the grounds for the determination will not end up being random and lead to unexpected results in different jurisdictions, in case parties have not agreed on for example certain institutional rules to cover the procedures. However, the focus should be on the fact that a court may but does not have to refuse the enforcement. In some judgments the judges have allowed enforcement on the basis that the party objecting to enforcement had taken part in the arbitration knowing that technically the arbitrators were not selected correctly; having done this they could not seek to profit from this error trying to nullify the whole proceedings afterwards on the grounds that the arbitrators were chosen wrongly[140].

Fifth and the final ground in Article V(1) for refusal is that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made[141]. This ground has given rise to more controversy than any of the previously mentioned grounds, and it has in fact happened that some courts for example in France, Belgium, Austria and the United States have enforced awards that have been set aside by the courts at the seat of the arbitration[142]. The effects of such decisions are discussed in more detail in chapter 4.3 below.

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[138] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 534-535. According to Redfern – Hunter referring to a "leading authority on the Convention" van den Berg, courts almost invariably reject the defense of tribunal acting in excess of its authority. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 988 and Poudret – Besson: Comparative Law of International Arbitration, p. 836-838.

[139] New York Convention, Art.V(1)(d).

[140] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 536. Cases referred to by Redfern – Hunter in this respect are *China Nanhai Oil Joint Service Cpn v Gee Tai Holdings Co Ltd (1995)* and *Tongyan International Trading Group v Uni-Vlan (2001)*. See also Poudret – Besson: Comparative Law of International Arbitration, p. 838-840.

[141] New York Convention Art.V(1)(e).

[142] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 537-539. According to Redfern – Hunter, an award should be seen as "binding" if it is no longer open to an appeal on the merits, either internally or by an application to the court. As the grounds for setting aside an award have

Furthermore, an award may not be enforced under Article V(2), if the subject matter is not capable of settlement by arbitration[143]. This question of arbitrability must be determined based on national laws; each state decides which matters may or may not be resolved by arbitration in accordance with its political, social and economic policy[144]. Among other things, various nations refuse to permit arbitration of disputes concerning labor or employment issues, intellectual property, competition (antitrust) claims, real estate, consumer claims and franchise relations[145]. However, in international context, the effect of domestic legislation should be reduced, if not neutralized, in respect of international transactions to which they were not intended to apply. This should be done in order to avoid respondents from first signing an arbitration agreement and then in case of dispute invoking some alleged legal restrictions on arbitrability. Agreements to arbitrate that would have been illegal under national law have been accepted by national courts for example in France, Italy, Tunisia and the United States in the context of international contracts; thus has evolved a concept of international public order as overriding national laws which are mandatory with respect to internal relations.[146]

Enforcement may also be refused if it is contrary to the public policy of the enforcement state[147] and this may be one of the most significant and controversial basis for refusing to enforce an award[148]. Such refusal is only justified when the award contravenes with principles which are considered as reflecting the fundamental convictions of the state of enforcement or as having an absolute, universal value. Public policy, or "*ordre public*",

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been left to the domestic laws of the country in concern, there have been problems with awards set aside in another country and enforced in the other.

[143] New York Convention Art.V(2)(a).

[144] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 164. In Finland for example questions related to contracts between consumers and companies cannot be resolved in arbitration; some Arab states on the other hand have had regulations that any disputes related to contracts between foreign corporation and local agents can only be resolved by local courts. See also chapter 5. 3 concerning arbitrability in general.

[145] Born: International Arbitration and Forum Selection Agreements, p. 110.

[146] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 62-63, 71. An objection on the arbitrability of a dispute is particularly difficult to accept when the rule of non-arbitrability is allegedly derived from a national law other than the one stipulated as applicable to the substance of the dispute The question is whether national prohibitions, such as preventing parties agreeing to waive their rights to have contractual disputes heard by their national courts, should also apply on international contracts; should those bind international arbitrators, or courts other than those of the country whose law is at issue. If it is true that tribunal should look to the intent of the parties in determining whether a claim is arbitrable, there must be a heavy presumption in favor of the arbitrability.

[147] New York Convention Art.V(2)(b).

[148] Born: International Commercial Arbitration, p. 815. However, the public policy defense has given rise to challenging questions. For instance, the source of public policy standards in international matters is not clear. See also Morrissey – Graves: International Sales Law and Arbitration p. 419, stating that the tribunal will need to consider any applicable public policies that might invalidate the award, whether contained in the law of the place of arbitration or in the law of a likely place of enforcement.

should be given an international and not a domestic dimension[149]. As public policy claims become more common in arbitration, national courts will also increasingly be required to consider whether to enforce an award permitting conduct occurring in a foreign state that is inconsistent with fundamental public policies and laws of that state. Therefore national courts have to consider whether and when foreign public policies will be relevant to their recognition and enforcement of an international arbitral award.[150] A court may also refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum state of its obligations towards other states or international organizations[151]. The public policy exception is unpredictable and expansive, and therefore courts in many developed jurisdictions have taken very restrictive views of public policy[152].

As seen, grounds for refusal can be various and complex, but have their basis in the New York Convention. The idea behind the regulations is of course to prevent enforcing of awards which would be against the general requirements for example of due process or fairness between the parties, or which would have been made clearly without any jurisdiction. It also gives a possibility for states to have some limited control over awards in cases of public policy, and a change to at least consider whether public policy, either the one of that state or of a foreign state, should be taken into account. As the international arbitration as a procedure is deemed to be beyond the control of national courts, enforcement procedures bring it back closer and at least in some matters under the surveillance of national courts and legislations.

The power of courts to control the arbitral awards should however not be exaggerated; on the background there is constantly the idea of New York Convention on presumed

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[149] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 544. This has been recognized by courts, for example the Indian Supreme Court has held that a narrower concept of public policy as applicable in the field of public international law should prevail over the wider public policy view of the municipal law. See more in Storskrubb: *Ordre Public* in EU Civil Justice, p. 687-688, and the definition of "international public policy" in more detail in "ILA recommendations on the application of public policy as a ground for refusing recognition or enforcement of international arbitral awards".

[150] Born: International Commercial Arbitration p. 817. Also the uncertainty surrounding the authority of an arbitrator to consider issues of public policy in arriving at an award has been a question. If an arbitral decision is based on arbitrator's view of the enacted legislation and not on the interpretation of the agreement, the arbitrator has according to the view of U.S. Supreme Court (in 1974) exceeded the scope of its jurisdiction, thus causing the award not to be enforced. This is a traditional view, and inconsistent with contemporary international law and practice, but continues to influence analysis in some quarters.

[151] ILA recommendations on the application of public policy as a ground for refusing recognition or enforcement of international arbitral awards.

[152] Born: International Commercial Arbitration, p. 816. Public policy has been said to be an "unruly horse that carries its rider to unpredictable destinations".

enforceability of arbitral awards, which has been internationally accepted. Enforcement, or setting aside of for that matter, of awards should not become a battlefield of courts and tribunals in determining which one is more powerful, but should strictly obey the limits set in the international principles, the New York Convention and in the national legislation.

4.3 Challenge of the award to set aside or vacate the award

As an alternative for challenging the enforcement of the award at the court where the winning party has presented the award to be enforced, a party may seek for setting aside of the award already at the place of arbitration. There are thus two ways to obtain judicial review of an arbitral award: to attack the award with a claim for setting aside in a country in which the award was made or is considered domestic, or oppose the recognition and enforcement in a country in which the winner chooses to rely on the award[153].

Either party may challenge the arbitrators' decision in an appropriate court in the place of arbitration. This action is called an action to set aside or vacate the award. If the challenge is successful, and the award is set aside, it will no longer have any legal force and effect in the place of arbitration. The legal viability of an arbitration award may be addressed in a court action to set aside or vacate the award in the place of arbitration, or in a court action to enforce the award in the place of enforcement, or both.[154] This might end up in a race between the winner and the loser party, the first one seeking for the enforcement and the latter for the setting aside of the same award.

The difference between enforcement and setting aside is in the proper forum and in the influence they have on courts of other states. Many countries will take jurisdiction to set aside an award only if the award is handed down within their own borders, meaning domestic awards. However, for example in the U.S. even an award rendered within its borders may not be considered domestic if it has various foreign elements. In this case

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[153] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 706. There is no international treaty with respect the grounds for setting aside, or annulment of, an award. However there is a strong trend toward convergence anchored in the Model Law, in which the grounds for setting aside are basically the same as grounds for refusing recognition and enforcement in the New York Convention.

[154] Morrissey – Graves: International Sales Law and Arbitration, p. 461. The award may however continue to have legal force and effect in other jurisdictions outside the place of arbitration. It could also be asked whether the legal standards in these possible forums are the same or different; if they are different, it could make the choice of forum determinative or could lead to inconsistent results in multiple forums. An example of a legislation having different standards for setting aside of an award and enforcement is FAA of United States.

such an award would be "foreign" and hence subject to recognition and enforcement under the New York Convention, in contrast to setting aside under domestic law. A country may also consider an award domestic if the *lex arbitri* of that country governs the arbitration, even though the award was handed down beyond its borders.[155]

Based on the approach of the Model Law and other legislations an opinion has been drawn that the only country in which the arbitration award may be rendered invalid is the place of arbitration. Therefore, *lex arbitri* becomes crucial. When applying for enforcement, any court judgment in the place of enforcement is without legal effect outside of that country. However, a decision to set aside the award may render the award invalid and unenforceable, at least in most of the countries. As such, the reviewing court at the place of arbitration has considerable power over the ultimate enforceability of the award.[156] The actual extent of this power depends of course also on the courts of the other states which might be involved in the same issue, whether they decide to give effect to the setting aside of the award or not.

The setting aside of an award may be accepted and given effect in a member-state of the New York Convention if it was effected in the country in which the award was rendered, or in the country under the law of which the award was rendered. A problem is that this definition is not clear enough; it could be questionable in which country the award was exactly made and to which law the phrase "under the law of which" refers, substantive or procedural law or the law governing the arbitration agreement. The Model Law is more clear in this respect, stating that most provisions of it, including those governing setting aside of awards, apply "only if the place of arbitration is in the territory of this State", meaning the state which has adopted the Model Law. This same approach has been adopted for example by French, Hungarian and German laws, naming it explicitly that the law applies to arbitrations having their place in the named country.[157]

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[155] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 669. The "home country" of an award is not necessarily the country where the tribunal hands down the award, although this would be the most simple way to determine it. In some cases it could be possible that an award has no home country at all, or has two home countries; the country where it was handed down and the other, under whose *lex arbitri* it was rendered.

[156] Morrissey – Graves: International Sales Law and Arbitration,p. 463. Under the Model Law this court is the court designated in Article 6, in which each enacting state specify the court or courts competent to perform the functions referred to.

[157] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 707-708. Using the New York Convention criteria would mean that if setting aside is granted by a court which assures jurisdiction

Hence, the question of proper forum for the setting aside procedures is not even nearly simple. However choosing a wrong forum might have significant effects, as the other party may have the award enforced under the New York Convention notwithstanding the setting aside, if it was not done in a proper forum[158]. The distinction between domestic and foreign awards is not written in stone, and it is not necessarily clear what is the country where the award was made (the place of arbitration proceedings may even be different from the place where the award is actually rendered) and it may even be that the law under which the award was rendered is not the law of the seat of arbitration. This variety of options also enhances the meaning of national courts, again exposing the parties to the risks of national court proceedings they may have originally wanted to avoid when agreeing to arbitrate.

There is no international treaty concerning the grounds for setting aside of awards, but the Model Law presents one approach which has been adopted in many countries. The grounds for setting aside an award are listed in the Model Law Article 34. This list is almost identical to the one for grounds for non-enforcement of award under the New York Convention Article V, having only two significant differences, logical in view of the differing context.[159]

The Model Law provides six sole and exclusive grounds for setting aside an award. It addresses the validity of the arbitration agreement (34(2)(a)(i)), basic notice and due process requirements ((a)(ii)), the scope of the parties' arbitration agreement or any formal submission or agreement as to the issues to be decided ((a)(iii)), constitution of the arbitral panel ((a)(iv)), arbitrability question ((2)(b)(i)) and public policy issues other than arbitrability ((b)(i)). Issues under subsection (2)(a) require the party seeking to set aside the award to furnish proof of the relevant grounds, subsection (2)(b) do not, as matter of pure law and policy.[160] It should be noted that similar to the grounds for

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on another ground (for example the domicile of the defendant) the setting aside judgment would not be relevant in other countries party to the New York Convention.

[158] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 707. The criteria set out in Article v(1)(e) of the New York convention are clearly influential and important, but do not mandate a rule stating which awards can and which cannot be set aside by national courts.

[159] Morrissey – Graves: International Sales Law and Arbitration, p. 473, Várady – Barceló – von Mehren: International Commercial Arbitration, p. 705. The differences are Article V(1)(e) concerning awards set aside which naturally does not include in the Model Law art. 34 and the applicable law in each of the provisions of the Article V(2).

[160] Morrissey – Graves: International Sales Law and Arbitration, p. 464-467, where each of these grounds is explained in more detailed. The Article 34 also sets a quite strict time limit for setting aside, as the application may not be made after three months from the day when the party received the award (34(3))

refusal of enforcement, any of these grounds do not provide any basis for a review on the tribunal's decision on the merits of the case; such a review would be inconsistent with the parties' express agreement for final and binding arbitration. An award should not be set aside simply because it left one of the parties disappointed, as this would effectively make all awards subject to judicial review on the merits.[161] This same principle applies when seeking for enforcement of an award; the court cannot refuse enforcement solely on the basis that there was a substantial error in the award (as mentioned in 4.2.1 above).

The annulment or vacation of an award has been listed as one of the grounds for refusal of enforcement of award in the New York Convention. This has been criticized to weaken the international system of enforcement; although the arbitral tribunal and award would be of high quality, the local, possibly very low standard court could vacate the award based on criteria which is not consistent with the international consensus, for example based on the fact that the arbitrators were not of certain religion or were not all men.[162]

Although annulment at the place of arbitration can impair the award's international currency under the New York Convention, it will not necessarily foreclose enforcement in all jurisdictions[163]. An enforcing court outside of the place of arbitration may choose not to give effect to a court decision setting aside the award to the extent that such decision is inconsistent with international norms of commercial arbitration and is enforceable under applicable national law. This is based on the facts that the New York convention provides only minimum requirements for enforcement, as Article VII(1) expressly leaves open the potential broader enforcement under more favorable national law. It provides that the Convention would not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law … of the country where such award is sought to be relied upon".

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and gives the possibility to suspend the setting aside procedures for a time in order to give the tribunal an opportunity to take any actions as may eliminate any grounds for setting aside the award.

[161] Morrissey – Graves: International Sales Law and Arbitration, p. 468. A party may try to argue that the tribunal's allegedly erroneous decision on the merits amounted to a "decision on matters beyond the scope of the submission to arbitration" but such arguments should be rejected, unless the award has decided issues that are unequivocally beyond the scope of submission to arbitration.

[162] Ovaska: Välimiesmenettely, p. 268; Paulsson: Awards Set Aside at the Place of Arbitration, p. 25. This problem could be resolved by relying on the non-mandatory nature of the New York Convention Art.V.

[163] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 685. Wording "may" instead of "must" of the English version of the New York Convention is thus playing a major role. The equally authorative French version lends itself to a more forceful interpretation.

Article V also makes it clear that a competent court ruling setting aside an award allows an enforcing court to decline enforcement, but does not mandate such a result ("may" instead of "must"). For example, both U.S. and French courts have enforced an award set aside in Egypt in an often sited case *Chromalloy*. The court must decide whether to respect the international arbitration awards or respect the judgment of a competent foreign court.[164]

In *Chromalloy* the U.S. District Court enforced the award which was set aside in Egypt. As Egypt stated that the court should deny the enforcement, Chromalloy argued that Egypt "does not present any serious argument that its court's nullification decision is consistent with the New York Convention or U.S. arbitration law". The court acknowledged that the award was made in Egypt, under the laws of Egypt and had been nullified by the court designated by Egypt to review arbitral awards. Hence, the requirements of Article V(1) and V(1)(e) were fulfilled. However, the court pointed out the non-mandatory wording (*may* be refused) and stated that Article VII *requires* that the provisions of the Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where the enforcement is sought. In Court's opinion, the claimant (Chromalloy) maintains all its rights to enforcement that it would have in the absence of the New York Convention. Accordingly, if the Convention did not exist, the FAA would provide Chromalloy with a legitimate claim to enforcement of the award.[165]

Where a court in the place of arbitration sets aside an international award in a manner that is clearly inconsistent with well-established international norms, there remains at least a possibility that a foreign court will decide to enforce the award – notwithstanding the fact that it has been set aside.[166] Preferably, the court where the enforcement is sought should determine whether the base for annulment of the award at the place of arbitration was consistent with international standards[167]. Such standards would of

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[164] Morrissey – Graves: International Sales Law and Arbitration, p. 469-470, 476, case *Chromalloy Aeroservices Inc. v. the Arab Republic of Egypt*. *Chromalloy* was a case involving military procurement contract between a U.S. corporation and the Air Force of the Arab Republic of Egypt.

[165] Case *Chromalloy Aeroservices Inc. v. the Arab Republic of Egypt*. See also Várady – Barceló – von Mehren: International Commercial Arbitration, p. 862-869.

[166] Morrisey-Graves: International Sales Law and Arbitration, p. 470. It is important to recognize the right of a court in the place of arbitration to set aside an award that is inconsistent with its own public policy, and failing to respect such a decision is arguably contrary to general notions of comity.

[167] Paulsson: Awards Set Aside at the Place of Arbitration, p. 26. According to Paulsson, the annulments can be divided into two categories: International Standard Annulments consistent with said standards which should not be enforced, and Local Standard Annulments which have their basis not recognized in

course not be met in a case where a local court would vacate an award based on for example the fact that all arbitrators were not men, and an enforcing court could enforce such award regardless of the annulment at the place of arbitration. Enforcement of such awards has been justified with the permissive and non-mandatory language of the New York Convention (*may* instead of *must*) and with New York Convention Article VII(1) stating that there may be more favorable provisions in the country where the enforcement is sought, under which an award may be recognized and enforced[168]. A District Court in U.S. has pointed out that Article VII(1) *requires* not to deprive a party of more favorable provisions in the law of the enforcement state, while Article V only gives *discretion* to decline enforcement[169]. Therefore Article VII(1) has mandatory nature compared to Article V.

Naturally it is not an ideal situation that an award has been set aside in its country of origin, then refused enforcement in some countries based on this but enforced in others regardless of the setting aside. This might tempt the parties to so called "forum shopping" trying to find the most suitable forum for their proceedings and enforcement of the award. Luckily courts around the world are still more than likely to decline the enforcement of annulled awards, therefore preventing this kind of behavior[170].

5. Tribunals and courts – rivals or co-workers?

When parties choose arbitration to be their method of dispute resolution they may think that it will rule out national courts entirely, and that courts would have no jurisdiction and no role to play at all concerning any state of the dispute. However, as has already been pointed out in many instances above, there are multiple situations where tribunals and courts get involved concerning the same issues and are in a way challenging each other. Most essentially, national courts are the ones to recognize and enforce the arbitral awards. In addition, there might be challenges concerning the jurisdiction of tribunals also when the arbitration proceedings are still ongoing. Therefore, the aim of totally

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international practice or basis on an intolerable criterion, and which should be disregarded and award enforced.

[168] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 539. The New York Convention recognizes that there might be a local law that is more favorable to the recognition and enforcement of arbitral awards than the Convention, and gives it blessing to any party who wishes to take advantage of this more favorable local law.

[169] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 558; see also *Chromalloy Aeroservices v Arab Republic of Egypt*.

[170] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p .540. Although some known cases have been where awards set aside at the place of arbitration have been enforced, the question still remains controversial.

independent arbitration with no strings attached to national courts has not been, and cannot probably ever be, achieved.

Both arbitrators and courts may decide whether a dispute is arbitrable, in the sense of whether the question should be decided in arbitration or not. Today it is clear that arbitrators have competence to decide upon their own competence, but it is also clear that the conclusion of the arbitrators on this issue can be reviewed by courts in recognition or setting-aside proceedings[171].

5.1 Tribunal may rule on its own jurisdiction based on the principle of competence-competence

The principle of competence-competence (or Kompetenz-Kompetenz) is spelled out in most institutional arbitration rules and modern national laws governing international arbitration, also in the Model Law through which it has been adapted in various national legislations. Competence-competence means that the arbitral tribunal has the jurisdiction to rule on its own jurisdiction; as clearly stated in Model Law Article 16 "[the] arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". This principle has been verified in multiple cases around the world[172]. According to article 16.1 "[f]or that purpose, an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract". Therefore, article 16 determines both the principle of separability and competence-competence. However, as already mentioned above at the end of chapter 3.2, these two should be carefully distinguished rather than combined.[173]

The principle of competence-competence is among the most important and contentious rules of international arbitration. It has also given rise to much controversy and regardless of the worldwide acceptance continues to be the subject of considerable

[171] Várady – Barcheló – von Mehren: International Commercial Arbitration, p .87. Arbitrable is here used both in in the broad and narrow sense.
[172] For example, *D.G. Jewelry Inc. et al. v. Cyberdiam Canada LTd. (Canada 2002), RosInvestCo UK Ltd v. the Russian Federation (Sweden 2010), Ativenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*.
[173] It could be noted that the principle is not mentioned in the New York Convention, not because it only governs the recognition and enforcement of awards but because it only obliges courts to respect the existence of arbitration agreement and does not prescribe how the jurisdiction of an arbitral tribunal should be controlled.

divergence between different legal systems.[174]According to it the tribunal may decide on its own jurisdiction, also when a party argues that there is no arbitration agreement or that the agreement is invalid[175]. This decision, whether decided as a preliminary matter or as a part of the final award is however subject to review by an appropriate court [176] . Therefore the principle of competence-competence in practice gives jurisdiction but also acknowledges that the final determination of the jurisdiction is on the national court.

Competence-competence principle can be seen as having both positive and negative effect. The positive effect establishes that the arbitrators have authority to decide their own jurisdiction, meaning their competence to decide the merits of the dispute, and they are not required to stay the proceedings to seek judicial guidance. Negative effect in its strongest form forbids a court from giving a ruling on the existence or validity of the agreement before the arbitrators have had an opportunity to do so, when an action on the merits of the dispute has been seized despite the arbitration agreement. Hence, the tribunal should be able to decide first, subject to a possible judicial review of its decision. The negative effect of competence-competence varies from legislation to legislation; it has been fully adopted only by French law being somewhat weaker in the US, but it has also recently gained substantial acceptance. If an arbitration tribunal has already been constituted, a French court will refuse jurisdiction and leave validity, existence and scope questions to arbitrators. If the tribunal has not been constituted, then the court will undertake a limited scrutiny of validity and existence questions and will retain jurisdiction only if the arbitration agreement is manifestly null. Thus, if the court finds *prima facie* existence, validity and scope, it will refer the parties to arbitration. The primary policy justification for this approach is to prevent a party from obstructing or delaying arbitration.[177]

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[174] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 395. See also Poudret – Besson: Comparative Law of International Arbitration, p. 878, according to which the principle of competence-competence has a scope that varies from state to state, and p. 886 listing some exceptions of legislations which specifically allow to depart from the principle.

[175] Case *OOO Al'yans-3 v. OOO Leasing Company URALSIB*.

[176] Morrisey-Graves: International Sales Law and Arbitration, p. 372; the Model Law Art. 16(3).

[177] Fouchard – Gaillard – Goldman: On International Commercial Arbitration p. 410-416, Barcheló: Who Decides the Arbitrator's Jurisdiction? p. 1124-1125, Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 90-91 and Poudret – Besson: Comparative Law of International Arbitration, p. 387. See also case *Rio Algom Ltd. v. Sammisteel Co. (Canada 1991)*, where Ontario Court also held that where the arbitrator decides a question of jurisdiction or scope of authority raised in the arbitration, the jurisdiction of the courts is not ousted; once the arbitrator has made a preliminary ruling or a final decision on the merits a party may move to the court to set it aside.

When the tribunal has made a ruling on its jurisdiction, either party may request within 30 days a court (whichever is the right forum under Model Law article 6) to decide the matter, which decision shall be subject to no appeal. While such request is pending, the tribunal may however continue the arbitral proceedings and make an award without being impacted automatically by the actions or challenge procedures aimed at establishing the lack of jurisdiction of the tribunal[178]. The arbitral tribunal's decision on the issue may be overruled subsequently by a competent national court, but this does not prevent the tribunal from making the decision in the first place[179]. This has enabled to prevent using challenges to jurisdiction purely as delaying tactics, but on the other hand may cause the parties to be obliged to participate in two sets of proceedings concerning the same issue at the same time.

The extent of competence-competence depends on the interpretation. It permits at the minimum an arbitrator to continue with the arbitration proceedings notwithstanding a party's claim that the arbitration agreement is invalid; the mere existence of a jurisdictional challenge does not automatically deprive the arbitrator of jurisdiction under the contested arbitration agreement. Furthermore, arbitrators' have the power to consider challenges to their jurisdiction, subject to subsequent judicial review; arbitrators are permitted to consider and make awards on the formation, validity and scope of the arbitration agreement, but either party is free to seek a resolution from a court of the jurisdictional challenge. It depends on how broadly the competence-competence principle is interpreted, whether the powers of arbitrators are exclusive to rule preliminarily on a challenge to arbitration agreement and are the national courts precluded from considering challenges before the arbitral tribunal has made an interim or final award on the issue. For example legislation in Germany allows a party to make an application to the court to determine whether or not arbitration is admissible, before the constitution of the tribunal[180]. This sub-clause has been added to original Article 8 of the Model Law when it was adopted in Germany. However, sub-clause 8(3) of the Model Law has also been sustained, stating that pending the decision of the court the

[178] Poudret – Besson: Comparative Law of International Arbitration, p. 386. This principle is based on the practical reasons, to avoid that a party disputing the jurisdiction of the tribunal prematurely seizes the courts or obstructs the arbitral process. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 401.
[179] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 299. The tribunal must be able to look at the arbitration agreement, the terms of its appointment and any relevant evidence in order to decide whether or not a particular claim comes within its jurisdiction.
[180] Zivilprozessordnung - German Code of Civil Procedure, Tenth Book, Section 1032(2).

arbitral proceedings may be commenced or continued, and therefore the tribunal is not bound or stopped although such a request has been made to the national court. The broadest definition would be that the arbitrators have the exclusive power to decide challenges to the arbitration agreement; this would mean that the judicial review could be possible only after the award has been made, either at an annulment process or at enforcement stage.[181]

The consequences of competence-competence are less clear if the debate takes place before a court. Arbitrators are competent to rule on their own jurisdiction, but so are courts. If one party seeks relief from a court and the other asserts arbitral jurisdiction, two approaches are possible. On one hand, a broad understanding of the competence-competence principle suggests that the court should let the arbitrators first decide whether they have competence. On the other hand, one can argue that the court is obliged first to establish its own competence or incompetence, meaning whether it can decide the issue or not. In the latter case, assuming the court would be competent in the absence of the arbitration agreement the court will only refer the case to arbitration after it establishes that there is a valid and operative arbitration agreement, because only valid and operative arbitration agreement can supersede the jurisdiction of courts.[182]

An interesting detail to be noted is that the Model Law does not provide for a court remedy against a decision by the tribunal declining jurisdiction. Different national approaches exist concerning the finality of such decision; in a number of jurisdictions that have not accepted the Model Law a plea against such decision is not allowed, but in some countries courts may overrule an arbitral decision refusing jurisdiction[183].

The competence of tribunal is seen to be extended to the objections regarding the existence or validity of the arbitration agreement. As stated above in chapter 3, arbitration agreement is the basis for tribunal's jurisdiction. In a logical sense there might be a contradiction: how may the tribunal rule on the existence of the arbitration

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[181] Born: International Commercial Arbitration, p. 86. This would mean that judicial review would be available only on the highly-deferential grounds applicable in many jurisdictions to non-jurisdictional arbitral awards. See also cases *Sojuznefteexport v. Joc Oil, Ltd*, *First Options v. Kaplan*. See also Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 410-.

[182] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 121. French commentators refer to this issue as the "negative competence-competence" question, the issue of whether and under what circumstances a court should restrain its exercise of jurisdiction to decide arbitrability in order to allow positive competence-competence principle to operate.

[183] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 92. The Model Law Art.16(3) only provides for court remedy against arbitral rulings that accept jurisdiction. Jurisdictions explicitly disallowing such a plea are for example Spanish Arbitration Act and Dutch Arbitration Act.

agreement, if its jurisdiction is based on that certain agreement? Without the agreement the tribunal would have no jurisdiction and in fact would not even exist.

This issue has been widely discussed, and the distinction has been made between the nullity of a contract and its non-existence. If the contract does not exist (for example signature of one of the parties was a forgery and therefore the contract has never been formed), it is difficult to see how such a document can give rise to a valid arbitration clause and hence to a valid arbitration. However, where there is a main contract, even if it were always a legal nullity, the arbitration clause that it contains constitutes a genuine juridical "platform" upon which the arbitral tribunal may stand, to judge the validity of the main body of the agreement. "Non-existence" stated in many institutional rules and national laws cannot mean "never existed", but must mean "ceased to exist", when it can be interpreted to have had at least a moment of validity. If the contract never existed at all, then there never was an agreement, and the tribunal can have no valid existence, authority or jurisdiction.[184]

However, although the competence of the tribunal cannot be derived from the arbitration agreement where it is null and void or non-existent, it can come from other sources. According to a view the competence-competence principle does not result from the arbitration agreement, but from the arbitration laws of the country where the arbitration is held and in the laws of the countries liable to recognize an award made by arbitrators concerning their own jurisdiction. The agreement between the parties, including for example institutional rules confirming competence-competence cannot grant the arbitrators more rights than the applicable legal systems allows them to exercise. A tribunal can give an award stating it lacks jurisdiction because there was no valid arbitration agreement, because it is done based not on the non-existence or non-valid arbitration agreement but on the laws of the country where the arbitration took its place.[185] This kind of thinking would resolve the problem concerning competence without having to take the issue to a national court.

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[184] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 303. Although many institutional rules and national laws include separability rules to preserve the validity of arbitration clauses, those also require a contract, at least one that has ceased to exist by the time of arbitration, but cannot be applied to a contract that never existed at all. The distinction between "never existed" and "ceased to exist" and who has the jurisdiction to determine it, is then another issue.

[185] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 400. According to Fouchard – Gaillard – Goldman, without the legal base for competence-competence, one would be immediately confronted with the "vicious circle" argument: how can an arbitrator solely on the basis of

The U.S. courts have adopted a view focusing on whether the party resisting the arbitration targets its complaint on the main contract or to the arbitration clause itself. It is only if the alleged invalidating defect goes specifically to the arbitration clause itself, for example, a claim that the clause was included in the contract by fraudulent misrepresentation or that it is so indeterminate or contradictory that there was no real meeting of the minds on arbitration, that the court would retain jurisdiction to decide the question.[186] It has been stated in the U.S. that notwithstanding the pro-arbitration policy of U.S. legislation and the leading principles of separability and competence-competence, the first principle in arbitration decision of Supreme Court is still that arbitration is strictly a matter of consent. The pro-arbitration policy never overrides the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit. A party that contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate; only a court can make that decision.To require a plaintiff to arbitrate where it denies that it entered into the contract would be inconsistent with the "first principle" of arbitration that a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit, which can never be overridden by the pro-arbitration policy.[187]

Separability of an arbitration agreement is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it is not enough to enable the arbitrators proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement. This ability to proceed is a consequence of the competence-competence principle alone; this principle allows arbitrators to determine that an arbitration agreement is invalid and to make an award stating that they lack jurisdiction without contradicting themselves.[188]

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an arbitration agreement, declare that agreement void. See also Poudret – Besson: Comparative Law of International Arbitration, p. 386-387.

[186] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 89. This relates closely to the separability doctrine explained earlier in chapter 3.2. This kind of view requires separability of the arbitration agreement and the main agreement, otherwise any complaint would be targeted to arbitration agreement as well as to the main agreement.

[187] *Three Valleys v. Hutton (U.S. 1991), AT&T Technologies Inc. v. Communications Workers (U.S. 1986),* and as a more recent case conforming this principle for example *Granite Rock Co. v. International Brotherhood of Teamsters (U.S. 2010)*.

[188] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 400. See also Poudret – Besson, p. 385-386, stating that although principles of separability and competence-competence are frequently assimilated, they are not identical. Competence-competence is derived from an extensive or analogous application of the principle that all tribunals have competence to rule on their own jurisdiction

In case of discrepancies, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. Any arbitration clause should be construed according to this assumption unless it clearly states that certain questions were intended to be excluded from the jurisdiction of the tribunals.[189]

The main challenge with competence-competence principle is to find the right amount and context for court restraint; a legal order needs the right balance between avoiding arbitration-obstructing tactics and protecting parties from being forced to arbitrate without their legitimate and genuine consent[190]. If the parties have agreed to arbitrate, court has to refuse to decide on such matter and should return the issue for tribunal to decide. Competence-competence can be justified by the presumption that the will of the parties is to submit on the arbitrators the power to decide all aspects of their dispute, including jurisdiction, while the court retains the power to control the decision but not to take their place[191]. The efficiency of the arbitration proceedings should however not prevail over the fundamental right of a party to apply to a court.

5.2 Request to the court concerning the jurisdiction of the arbitral tribunal

The governing principle of arbitral procedure is party autonomy, which means that within some boundaries the parties can determine the procedural rules governing the arbitration and there is in principle no court interference with arbitration proceedings[192]. However sometimes courts are involved in the arbitral proceedings before an award has been made, mostly in situations where one party commences the arbitration proceedings and the other turns to the national court regarding the same issue stating the tribunal has no jurisdiction to decide the issue at hand.

The Model Law adopted a system of "concurrent control", which means that a national court may be involved in the question of jurisdiction before the arbitral tribunal has

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or from the presumption that the parties intended to also submit the preliminary question of jurisdiction to the arbitral tribunal.

[189] This principle was adopted by English Courts in case *Premium Nafta v. Fili Shipping 2007*.

[190] Barceló: Who Decides the Arbitrators' Jurisdiction? p. 1124. Whereas separability is universally accepted, competence-competence is controversial and has caused a range of different national responses.

[191] Poudret – Besson: Comparative Law of International Arbitration, p. 386. The role of the court should stay as controlling and assisting one, not taking over the whole process.

[192] Várady – Barcheló – von Mehren: International Commercial Arbitration, p. 452. Courts exercise control over the award, but as a rule they do not interfere with ongoing arbitration proceedings.

issued a final award on the merits[193]. A party may bring an action seeking a court order referring the parties to arbitration before seeking another form of dispute settlement; this is sometimes called an "independent suit" to enforce arbitration agreement. Another form is an "embedded suit", in which the moving party may seek a remedy from a court in spite of an arbitration agreement, and the respondent may contest the jurisdiction of the court and ask for an order sending the parties to arbitration.[194] The concurrent control system is an example of a situation where the co-operation between arbitral tribunals and national courts could resolve issues more rapidly and efficiently, and save parties some money at the same time.

The basic principle stated in the Model Law and New York Convention is that when the parties have an arbitration agreement and the issue under dispute is covered by it, the court should decline jurisdiction and refer the parties to arbitration[195]. This is not however automatic in states which are party to the New York Convention but must be requested by the interested party, since the obligatory nature of the arbitration agreement derives from the parties' will[196]. Some national legislations have taken the view that the referral can be made *ex officio*, hence if the court finds from the documents submitted to it that the parties are bound by an arbitration agreement, it must refer the case to arbitration even without party request[197]. The more common view is however that the parties are free to agree even to waive their obligation to submit disputes to arbitration; therefore the court should not declare *ex officio* that it has no jurisdiction if either of the parties has not challenged the jurisdiction by bringing up the arbitration agreement. If the parties both intend the court is the forum they wish to use to settle their dispute, expressing that intent inter alia by participating in the

[193] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 305. Concurrent control was adopted in the Model Law but was widely debated during the preparation.
[194] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 86. Independent suit may be useful if a party has doubts about the validity of the arbitration agreement. Regardless of either procedure is used, the national court has to refer the parties to arbitration if it finds that a valid arbitration agreement exists.
[195] the Model Law Art.8 and the New York Convention Art. II.3. Morrissey – Graves: International Sales Law and Arbitration, p. 355. The language of the two articles is identical.
[196] UN Dispute Settlement, p. 6, Ovaska: Välimiesmenettely, p. 324. The obligatory nature being related to the parties will means that the parties may agree (even tacitly) to submit their disputes to a court decision even after having previously agreed to enter into arbitration. Therefore the court could not automatically refer the parties to arbitration.
[197] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 86. Hungarian Act of Arbitration is an example of such legislation, however it is a way more rare to go so far as to mandate courts to referral.

proceedings, the court must give effect to those intentions as it would with an agreement in any other form.[198]

According to New York Convention Article II(3) and the Model Law Article 8(1) the court should refer the parties to arbitration at the request of a party unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed". These articles are mandatory in the sense that the court is obliged to refer the dispute to arbitration but only when appropriate conditions are met without contradiction[199]. Although the text of these articles refers only to proceedings which have already been initiated, the same rule should apply simply where an arbitration agreement exists[200]. The request to court to stay or dismiss its proceedings and refer the parties to arbitration must generally be made not later than the party's first statement on the substance of the dispute, or the right to arbitration is deemed waived[201]. It is a common view that when determining whether a dispute should be referred to arbitration a court may not review the merits of the dispute but should limit its scrutiny on whether a valid arbitration agreement exists between the parties. Only if it becomes evident that the agreement is null and void, inoperative or incapable of being performed the courts should be allowed to hear the merits of the dispute.[202]

The basic principle internationally is that the national court will investigate the existence and validity of the arbitration agreement *prima facie*. If it finds that there is a valid arbitration agreement, it will leave the issue to be resolved by arbitration. Because the court only made a *prima facie* determination of the issue the decision does not bind

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[198] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 405. The waiver of obligation to arbitrate may be made expressly or implicitly, and without necessarily waiving the main contract. Filing a defense on the merits of the dispute without challenging the jurisdiction of a court may also imply an intention to waive the arbitration agreement.

[199] UN Dispute Settlement, p. 6. The law governing the judicial proceeding will determine whether an appeal can be made to the court's decision to refer the parties to arbitration.

[200] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 403. This might seem self-evident, but is necessary in order to avoid turning the proceedings into a race to secure or avoid the jurisdiction of the courts.

[201] Morrissey – Graves: International Sales Law and Arbitration, p. 355. This is however not an exact rule, for example FAA contains no such limitation and courts will often refer parties to arbitration after the court proceedings are well underway if a party subsequently realizes it has a right to arbitration.

[202] *Nokia Corporation v. AU Optronics Corporation (U.S. 2011)*, Fouchard – Gaillard – Goldman: On International Commercial Arbitration p. 408-409. A traditional view has been that the determination should be only *prima facie*, but recent statutes are not completely determinative of this issue. See also Poudret – Besson: Comparative Law of International Arbitration p. 417, stating that there is nothing to suggest that the control should be limited to the apparent existence of the arbitration agreement and/or that it should only be made *prima facie*.

the arbitrators. They might end up deciding that there is no valid arbitration agreement – and the issue would probably end up back to the national court.[203]

According to the Model Law arbitral proceedings may be commenced or continued notwithstanding any application before a court regarding the same issue[204]. Arbitration proceedings can be initiated even when an action is pending in a national court[205]. Therefore, the tribunal has no similar obligation to stay the arbitration proceedings as the national courts as stated above. Arbitral tribunal has the possibility to rule on its own jurisdiction and continue the proceedings even if one of the parties has made an application to the national court.

It is recognized in the Model Law (and in most, if not all, national systems of law) that whilst any challenge to the jurisdiction of an arbitral tribunal may be dealt with initially by the tribunal itself, the final decision on jurisdiction rests with the relevant national court, either the court at the seat of arbitration, or the court of the state in which the recognition and enforcement is sought[206]. The tribunal can determine its own jurisdiction, but a national court is not bound by the decision of the tribunal concerning its jurisdiction and the validity of the arbitration agreement[207]. Any decision given by arbitral tribunal as to its jurisdiction is subject to control by the national courts of law, which in this respect have the final word[208].

The system implemented in the Model Law and through that in most national legislations, has advantages, but has also been criticized. The advantages are that it enables the parties to know relatively quickly where they stand, and they will save time

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[203] Koulu: Välityssopimus välimiesmenettelyn perustana, p. 228. In Scandinavian countries, including Finland, this kind of bouncing back and forth between procedures has not been accepted, and a national court will even with the risk of wasting of time investigate thoroughly whether the arbitration agreement will prevent the court proceedings or not. See also Poudret – Besson: Comparative Law of International Arbitration, p. 394.

[204] The Model Law Art. 8(2).

[205] *Samsung Telecommunications America v. Bancomer S.A (Mexico 2001).*

[206] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 393. See also Várady – Barcheló – von Mehren: International Commercial Arbitration, p .87 stating that "the final word on the issue of arbitral competence belongs to the courts". The relevant national court may be the court at the seat of arbitration, or the court of the state/states in which recognition and enforcement of the award is sought. Koulu has an opinion that in fact the idea of arbitrators having a "special competence-competence" is a myth because of this and the fact that all judicial instances have to decide on their jurisdiction before they can start to determine any case brought for them to decide; Koulu: Välityssopimus välimiesmenettelyn perustana, p. 231.

[207] Ovaska: Välimiesmenettely, p. 321.It is clear that the national court may decide the issue otherwise, which has also often happened.

[208] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 304. Relevant procedure and burden of proof varies from state to state. See also Poudret – Besson: Comparative Law of International Arbitration, p. 385.

and money if the arbitration proceedings prove to be groundless. Through judicial rout a final ruling is achieved more rapidly and more economically, at least in jurisdictions where the courts decide within reasonable time. On the other hand, it has been argued that recourse to the courts during the course of arbitral proceedings should not be encouraged, since arbitral proceedings should so far as possible be conducted without outside "interference". Secondly, it is argued that to allow recourse to the courts is likely to encourage delaying tactics on the part of a reluctant respondent.[209] Criticism is understandable; taking into account the international and "business-related" nature of arbitration it is questionable whether courts should be involved in arbitration, which was chosen by the parties especially to avoid court proceedings. It will at least delay the achievement of final conclusion to the issue. Using applications to court as a delaying tactic could also cause further harm to the other party, for example when issues involving delicate information or business secrets must be handled in court.

Parallel proceedings in the same case is usually not the ideal situation for any of the parties. When this happens inside same legal system concerning normal court proceedings, the situation is relatively simple and *lis pendens* -effect will prevent the double proceedings. Also the *res judicata* of a normal court judgment will prevent the same case from being brought up again. But are these principles applicable to arbitration and arbitral awards? The current respectability of international arbitration could allow courts to grant *lis pendends* effects to ongoing arbitral proceedings[210]. This has been confirmed by various cases granting a stay of the court proceedings in favor of arbitration as soon as the court has determined that the parties do in fact have an arbitration agreement. Both the Model Law and the New York Convention provide that the court should refer the parties to arbitration in case they have agreed to submit the dispute to such proceedings, therefore preventing the proceedings concerning the same matter in the national courts. *Res judicata* also in arbitration proceedings is in some countries determined in the law, for example the French Code of Civil Procedure states

[209] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 305 and Poudret – Besson: Comparatice Law of International Arbitration p. 386. Usually the challenge of the jurisdiction is made to the tribunal itself, and the tribunal may then issue an interim award concerning the challenge. In some jurisdictions a reluctant respondent can challenge the tribunal's jurisdiction in the courts before any award has been issued, even an interim award regarding the challenge of jurisdiction (for example English Arbitration Act 1996, section 32).

[210] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 690. The referred respectability is encouraged by international conventions and recent pro-arbitration development in national statutes and case law. The exact moment at which an arbitration causes *lis pendens* varies in different legal systems.

that the award has *res judicata* effect with respect to the dispute it decides from the moment it is rendered[211].

Based on Model Law Article 8 courts usually stay the court proceedings and refer the parties to arbitration. This could be seen also referring to a kind of *lis pendens* -effect of the arbitration agreement and ongoing proceedings. However, it has been seen that there can be exclusions to this principle. In Canada, the British Columbia Court of Appeal determined that, while article 8 of state's legislation (similar to Model Law art. 8) requires the court to grant a stay of court proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court still has some residual jurisdiction to exercise. The court may exercise this jurisdiction and refuse to grant a stay should it conclude that one of the parties named in the proceeding is not a party to the arbitration agreement, the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time. Only when it is clear that one of these situations is at hand, the court should reach any final determination in respect of such matters on an application for a stay of proceedings. Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement, the stay should be granted and those matters left to be determined by the arbitral tribunal.[212]

As can be seen, the relationship between the jurisdiction of a court and of a tribunal is complicated, and varies from state to state regardless of the international principles followed. It is understandable that states do not want to give away all the power to tribunals, but will maintain some control over arbitration proceedings. How the co-operation between tribunals and courts actually functions, and is it practical, is another question. For it to function effectively both have to take into consideration each other in these areas where they might end up being involved in a same dispute.

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[211] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 690. The French approach is according to Várady – Barceló – von Mehren "admirably straightforward". The reasons for judicial deference are even more compelling when the tribunal has issued an award. See also Poudret – Besson: Comparative Law of International Arbitration, p. 394-396, 415-.

[212] *Gulf Canada Resources Ltd. v. Arochem International Ltd. (Canada 1992)*. This case was about a contract for the delivery of crude oil, defendant refusing to deliver the oil after which the plaintiff sued for damages. A stay of the court proceedings was granted pending the arbitration.

5.3 The question of arbitrability – whether a dispute should be settled by arbitration or in the court

Arbitrability in its broadest sense means the question of whether a dispute should be decided by arbitrators instead of courts. This depends on the existence, validity and scope of an arbitration agreement (whether such an agreement has come into existence, whether it is valid and whether the dispute falls within its scope). In its narrower meaning, arbitrability refers to whether mandatory law in given jurisdiction disallows arbitration of disputes dealing with a particular subject matter because that subject matter is infused with high-order public policy concerns.[213] In its broader meaning the concept of arbitrability includes the scope of the arbitration agreement, this is the view adopted for example in the United States[214]. As arbitration is a private proceeding with public consequences, disputes of a certain type are reserved for the national courts, whose proceedings are generally in the public domain[215].

States may insist upon certain categories of dispute remaining within the jurisdiction of national courts. Any national law does not permit private parties to completely exclude the jurisdiction of national legal systems.[216] Countries have traditionally been reluctant to allow arbitration in spheres where there is a strong public interest at stake. Usually areas deemed nonarbitrable in national legislations are those regulated by mandatory rules of law designed to protect important public interests. However, specific universal rules or guidelines on arbitrability cannot be found but public policy varies from one state to the next and indeed changes from time to time.[217] For example the New York Convention, as in fact any other convention, does not attempt to define the concept of nonarbitrability by stipulating that certain disputes are inherently nonarbitrable, but only

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[213] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 86-87. An example of a case concerning high-order policy concerns could be a dispute arising out of or related to a U.N embargo imposed on a renegade state. Both arbitrators and courts may decide whether a dispute is arbitrable, but the final word on the issue of arbitral competence belongs to the courts.

[214] Poudret – Besson: Comparative Law of International Arbitration, p. 282. In the U.S. arbitrability implies that the dispute falls under the provisions of the arbitration agreement and that the law does not forbid the arbitral tribunal from deciding the issue.

[215] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 164. Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy.

[216] Collier – Lowe: The Settlement of Disputes in International Law, p. 202. It would not be possible in any legal system that all issues, even murders in the extreme sense, could be litigated behind closed doors in private hotel suites instead of state courts.

[217] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 217-218; see also Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 164. The legislation concerning what is arbitrable and what is not is often connected to the distinction between claims that are within the free disposition of the parties and those who are not.

acknowledges expressly that nonarbitrability may defeat an arbitration agreement or prevent the enforcement[218]. It is left for the states to determine the boundaries of arbitrability, which may cause major variations between different states and also different legal systems (common law vs. civil law). A worst case scenario could be that the issue is capable of being settled by arbitration under the law of the country where the arbitration took place but nonarbitrable in the state where the award is to be recognized and enforced. A nonarbitrability doctrine (what is not arbitrable) generally reflects distrust in the capacity of arbitrators or the institution of the arbitration to resolve appropriately disputes in these areas[219]. The trend in most legal systems is in the direction of sharply limiting the doctrine, at least with respect to international arbitration and in disputes over enforcement of the arbitration agreement[220]. This is reasonable, since a state extending the coverage of nonarbitrability to more and more issues would endanger its creditability and usefulness as a seat of arbitration.

5.4 Some special questions involving tribunals and national courts

When a court reviews an award made by an arbitral tribunal, in either a set-aside or a recognition and enforcement proceeding, the court must decide how much weight to give the arbitrators' decision upholding arbitral jurisdiction. Even a very pro-arbitration national legal system will draw back from automatically referring all existence, validity, and scope questions to arbitrators when brought up in court. If the legitimacy of arbitration is based on consent, how can a court refer a party to arbitration unless it first determines for itself that the party has entered a valid arbitration agreement? On the other hand, if every existence, validity or scope question is retained for full court scrutiny, opportunities for obstructing the arbitration process will increase, and a party

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[218] Collier – Lowe: The Settlement of Disputes in International Law p. 203. Conventions merely limit their fields of application, for example with particular limitations such as ICSID arbitrations limited only to investment disputes, but more generally by reference to the provisions of national laws concerning arbitrability. See also Várady – Barceló – von Mehren: International Commercial Arbitration, p. 217-219 and Poudret – Besson: Comparative Law of International Arbitration p.283.

[219] Várady – Barceló – von Mehren: International Commercial Arbitration, p.219. Such distrust could be justified on several grounds, for example the fact that arbitrators need not to be trained lawyers, the award cannot be appealed from etc. See also Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 164, pointing out that the legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes.

[220] Várady – Barceló – von Mehren: International Commercial Arbitration, p. 217-219. Although New York Convention Article v(2)(a) stating "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country" clearly presents the principle of strong role given to the national laws, it is understandable that international arbitration as a genuinely useful process is depending on this trend of limiting the nonarbitrability.

wanting to delay or obstruct the process will raise issue after issue for court determination.[221] This will present the problems concerning where to draw the line, is it even possible to determine exact boundaries between which the tribunals and courts should stay?

There are differing attitudes to the situation where the tribunal has made a decision that it does not have jurisdiction on an issue. Can such decision be appealed on a national court? The Model Law does not provide for a court remedy against such decision, and national approaches to the issue have been differing. In a number of jurisdictions that have not accepted the Model Law a plea against such decision by arbitrators is not allowed (for example Spanish and Dutch legislation), but in some countries the courts may overrule an arbitral decision refusing jurisdiction (for example, Swedish and Swiss legislation, and France through precedents in the absence of an explicit rule).[222] In Finland the opinion seems to be that such a decision by the tribunal precludes the same issue to be handled in arbitration again, and a national court cannot force the arbitrators to investigate the issue if they have reached a conclusion that they do not have a jurisdiction on the issue[223]. This brings up again an interesting question concerning the relationship between courts and tribunal; if the tribunal sees it does not have jurisdiction, can a court rule it has and therefore "force" it to proceed with the issue?

And how about a situation of two compelling results in an imaginary case: the other party (White Ltd) seeks from a court in place of arbitration (country X) that the tribunal does not have jurisdiction. The tribunal sees that it has jurisdiction, proceeds with the arbitration, as it may under for example the Model Law, and makes an award. After that, the court proceedings initiated before the award by White Ltd. will end up in conclusion that there was no jurisdiction on the tribunal to decide the issue. However, the opposing party Black Ltd. has already started proceedings in country Y to enforce the award. Now we might end up with a situation that Black Ltd. can enforce an award

[221] Várady-Barcheló-von Mehren: International Commercial Arbitration, p. 88-89. The greater the number of claims required to be fully litigated at the court, the greater the potential for disruption of the arbitration process, or the greater the potential for a obstructing party to frustrate a genuine agreement to arbitrate.

[222] Várady-Barcheló-von Mehren: International Commercial Arbitration, p. 92. In Sweden the possibility was provided by the new Swedish Arbitration Act in 1999. It is interesting that usually very similar legislations of Finland and Sweden are different in this issue. It could however be a consequence of the fact that the Finnish Arbitration Act dates back to 1992 without any major changes since.

[223] Ovaska: Välimiesmenettely, p. 321-322. However, if the arbitrators have not given an exact award on the jurisdiction but merely made a decision to stop the proceedings or the claimant has canceled his application, a new arbitration as well as a court scrutiny concerning the applicability of the arbitration agreement could be possible.

in country Y although a court in country X sees that the tribunal did not have jurisdiction to decide the dispute in the first place.

This is different from the situation of setting aside an award as such, if the proceedings in the court have been initiated before the award has been given. Setting aside proceedings are the ones which will be commenced after the award has been given, in the place of arbitration, to annul the given award. Now we have a party Black Ltd. with an award which is favorable to him wanting to enforce it, and a court decision stating that award was made without jurisdiction. Should the party declining jurisdiction seek for annulment of the award separately or is it automatic? Can the award be enforced? It has been noted internationally that some states enforce awards regardless of annulment in the place of arbitration[224]. Should and would the courts in country Y take into account the decision of a court in country X that there was no jurisdiction, although this is not a decision on setting aside the award as such?

A similar situation could be where a court determines that the tribunal did not have jurisdiction, but the tribunal still proceeds with the issue and gives an award. A tribunal would in this kind of situation act against most international principles and rules. What are the means of the court in this situation? What can a party do, if the other party seeks for enforcement of such award in other country? Clearly the distinction and in some ways tension between national courts and arbitral tribunals exists, even though the atmosphere has been to strengthen the independence of international arbitration.

6. Interim measures in international arbitration

As mentioned above, it is sometimes necessary for a court to intervene in the arbitral proceedings in order to grant provisional or conservatory measures. Such measures can also be called interim measures, and are aimed at protecting the vital interest of a party of the arbitration. The measures can also be sought from the tribunal itself, therefore not harming the autonomy of arbitration.

6.1 What are interim measures?

A final award would not be worth much to the prevailing party if the counterparty has managed to dispose its assets or the object of the dispute while the arbitral proceedings

[224] For example case *Chromalloy Aeroservices Inc. v. the Arab Republic of Egypt* mentioned earlier in chapter 4.3.

are in progress. To prevent this kind of actions, it may be necessary for the arbitral tribunal or national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the *status quo* pending the outcome of the arbitration proceedings. These are called interim measures of operation (in the Model Law and UNCITRAL Rules), or interim or conservatory measures (in the ICC Rules), or provisional or conservatory measures (for example Swiss Law). They are intended to operate as holding orders, pending the outcome of the arbitral proceedings.[225] Usually these expressions are used interchangeably, but it has also been stated that interim or provisional measure are not binding on the court or the arbitrator hearing the merits of the dispute therefore reflecting the nature of the decision made. Protective and conservatory measures on the other refer to the purpose of the decision, preserving party's rights, the *status quo* or evidence.[226]

Interim measures are a type of remedy or relief that is aimed at safeguarding the rights of the parties for the duration of the proceedings, pending the final resolution of the dispute[227]. The main focus when empowering the tribunal to grant interim measures is on allowing the tribunal to proceed with the arbitration in as smooth manner as possible[228]. A party may seek for interim measures from a court or from the tribunal; usually it is done from the court before the tribunal has been constituted and after that from the tribunal itself. Various sources of arbitration law (statute, institutional rules, international conventions and arbitral awards) reveal a growing acceptance of the principle that courts and tribunals have concurrent powers to order provisional or protective measures[229]. However, there are still some jurisdictions which expressly

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[225] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 393-394. In many cases where interim measures are required, the arbitral tribunal has the power to issue them. See also Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 647. According to Savola the interim measures of protection have gained more and more importance in the international arbitration over the past few years.

[226] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 709-710. A protective measure may have fulfilled its purpose by the time the decision on the merits is made; hence it may have been intended from the outset to stand alone. The general nature of expressions "protective measures" and "provisional measures" tends to cloud often essential distinctions between certain of the measures granted.

[227] Poudret – Besson: Comparative Law of International Arbitration, p. 519. See also Tsang: Transnational rules on interim measures in international courts and arbitrations, and Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 647.

[228] Yesilirmark: Provisional Measures in International Arbitration, p. 167. Purpose is to prevent further aggravation of the dispute. Giving the power to seek for interim measures is a matter of party autonomy.

[229] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 710-711. This allows the parties to apply to a court even if the arbitration agreement exists, without waiving any rights. The thinking is that parties to an arbitration agreement should not be deprived of the benefit of emergency measures available from courts.

forbid arbitrator-ordered provisional measures although the majority tendency seems to approve the arbitrator's right to order interim relief[230].

To grant an interim measure there needs to be an instant danger of prejudice to a right of the applicant should the tribunal not take immediate action. Accordingly, two positive requirements arise from the requirement of "necessity": urgency and prejudice. The collective requirements to grant an interim measure are 1) *prima facie* establishment of jurisdiction (existence of *prima facie* jurisdiction is enough), 2) *prima facie* establishment of case (refraining from prejudging the merits of the case), 3) urgency (an essential requirement, if the making of a decision could await the final determination of the parties' case there would be no basis for seeking interim protection), 4) instant danger, serious or substantial prejudice if the measure requested is not granted (risk of irreparable harm), and 5) proportionality (effect of granting any measure on the parties' rights). There are also so called negative requirements, which may lead to the denial of an application for provisional measures: 1) the request should not necessitate examination of merits of the case in question, 2) the tribunal may refrain from granting final relief in the form of a provisional measure, 3) the request may be denied where the moving party does not have clean hands, 4) the request may be denied where such measure is not capable of being carried out, 5) when the measure requested is not capable of preventing the alleged harm, or 6) the request may be denied where it is non-relevant.[231]

Courts and tribunals should carefully assess the circumstances at the time interim measures are requested and shall not grant the application unless certain criteria are satisfied. Usually the party requesting interim measures bases the request on the risk of irreparable damage, a situation where there is a probability that the rights of the parties may be damaged in a way that cannot be made good in a later judgment on merits.[232] If the party fails to demonstrate that its rights would be irreparably harmed in the arbitration, interim measures should not be granted[233]. The applicant should also demonstrate the urgency of the measures sought. Urgency is essential considering the

[230] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 647. As examples of such legislations Savola mentions China, Italy, Greece, Argentine and Chile.
[231] Yesilirmark: Provisional Measures in International Arbitration, p. 174-182. According to Yesilirmark when granting provisional measures, the tribunal should take guidance from arbitral case law, comparative analysis of arbitration rules and scholarly opinions. An interim measure could be ordered where there is mere probability of the relevant facts and rights.
[232] Tsang: Transnational rules on interim measures in international courts and arbitrations.
[233] As decided by an ICSID tribunal in case *Plama Consortium v Bulgaria (2005)*, chapter 24.

nature of interim measures; otherwise the measures could wait the final judgment after a full hearing. Only when there is urgency for the indication of interim measures in order to prevent irreparable damage to the rights of a party should interim measures be indicated.[234]

Certain institutional arbitration rules include provisions which limit the parties' right to seek interim measures from state courts in case where the arbitral tribunal is in a position to act efficiently. This may help to prevent situations with contradictory decisions such as a party seeking interim measures from both arbitrators and judicial authorities, attempting to obtain one in its favor.[235]

Both in case of interim measures requested form the tribunal or a national court, a *prima facie* determination of jurisdiction is a fundamental due process requirement, reflecting the consensual nature of international arbitration and therefore covering also situations where interim measures are needed. Interim measures can be also granted by tribunals formed under the supervision of an institution such as International Court of Justice (ICJ), or International Centre of Settlement of Investment Disputes (ICSID). Both have established through case law the perception that before recommending interim measures a *prima facie* jurisdiction is required. Therefore, both ICJ and ICSID case law have suggested that jurisdiction needs not to be completely established but the institution in question needs to form a provisional view based on the information available as to whether it is at least arguable that it would have jurisdiction over the dispute. ICJ is at the minimum required to be satisfied that it has some prospect of seizing jurisdiction over the merits of the case before the indication of provisional measures, which invariably have significant implications on the positions of the parties.[236] Therefore, at least a preliminary assessment of the merits of the case is to be done at this point, whether the parties want it or not.

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[234] Tsang: Transnational rules on interim measures in international courts and arbitrations. The requirement of urgency seems obvious; if the measure could wait for the final decision, why waste time and money on the application of interim measures either from the court or the tribunal.

[235] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 648. This is possible because few national laws have clear rules on whether the interim measures should be sought from the tribunal or the courts (English and Swiss Arbitration Acts being notable exceptions to this principle clearly spelling out the rules in this respect).

[236] Yesilirmark: Provisional Measures in International Arbitration, p. 175, and Tsang: Transnational rules on interim measures in international courts and arbitrations. The requirement of *prima facie* jurisdiction is not written in the UNCITRAL Rules, it is however fundamental.

As the rules and procedures of international courts and arbitration institutions do not usually specify the criteria for the granting of interim measures, much is left to the discretion of judges and arbitrators based on the practice generally accepted by such courts or tribunals. Nonetheless, there is clear evidence of convergence in the practice of major international courts and arbitral tribunals in relation to the criteria upon which interim measures may be granted. Usually tribunals do not mention and analyze the prerequisites for granting interim awards.[237]

Some commentators argue that a request for interim measures tends to disrupt or delay arbitration proceedings. However, it is a main rule that the arbitral process will continue undisturbed by the request. Furthermore, the request may have positive effect in resolution of the dispute, for example speeding up the whole arbitration process.[238]

Similar to the situation with final awards, interim measures would have no real meaning if a party could not enforce them against the other. This is not a simple question, especially if the parties originate from different countries and legal systems. If a foreign party is obliged to do something based on an interim measure given by a foreign court, that party may question the jurisdiction of the said court to grant any interim measures concerning the given relationship. By entering into a for example a sales contract a party may not realize it also exposes itself to the jurisdiction of foreign courts, jurisdiction which in the form of interim measures may have various effects. Most national legal systems lack a proper enforcement regime for arbitrator-ordered provisional measures, which render them less effective than interim relief granted by state courts[239].

6.2 Interim measures granted by the tribunal

Parties to an international arbitration are often in need of urgent interim measures, and arbitrators are better positioned than state courts to assess whether the preconditions for

[237] Tsang: Transnational rules on interim measures in international courts and arbitrations and Poudret – Besson: Comparative Law of International Arbitration, p. 537.
[238] Yesilirmark: Provisional Measures in International Arbitration, p. 169. It is an experience of Yesilirmark that nearly all requests are handled with a certain speed and generally priority is given to such requests, therefore the statement of delaying is not so easy to accept. It is also relatively easy for an arbitral tribunal to distinguish whether the request is obviously without grounds.
[239] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p.648. It should also be noted that arbitrators naturally cannot issue orders against third parties who are not bound by the arbitration agreement.

awarding the requested measures should be deemed to be fulfilled.[240] Several arbitration laws presume that arbitrators have jurisdiction to order interim measures[241].

The jurisdiction of the tribunal to grant interim measures can be founded on the applicable arbitration laws, the applicable arbitration rules, and/or the arbitration agreement. When considering an application for interim measures the tribunal is bound to take into account the relevant arbitration laws and rules as well as the provisions of the arbitration agreement.[242] Jurisdiction cannot be presumed in the absence of specific basis in the *lex arbitri*, but usually arbitrators have in any event jurisdiction where the parties submit to arbitration under certain rules which grant the said jurisdiction[243]. As arbitration agreement most commonly is actually an arbitration clause in another agreement, it rarely gives any answers to the powers of the arbitrators.

Most of the arbitration laws or rules either do not specifically provide the criteria upon which interim measures may be granted but only state that the "tribunal may order any interim measures it deems appropriate". The tribunal may exercise broad powers and wide discretion in granting interim measures it "deems appropriate". When trying to establish some clarity as to the requirements of granting a provisional measure, the tribunal may in the absence of a party agreement adopt the principles of the applicable procedural law, or rely on the past experience of its individual members, or transnational arbitral procedural rules or customary rules. Guidance can be taken from arbitral case law, comparative analysis of arbitration rules and scholarly opinions.[244] In practice arbitrators have ordered interim measures where they have considered that damages would not be enough to compensate a party for the loss it would suffer during the proceedings, if the other party were allowed to continue its actions. Application for

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[240] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 663. The importance of arbitrator-ordered measures will in Savola's opinion continue to grow. See also Poudret – Besson: Comparative Law of International Arbitration p. 520, stating that while tribunals are more familiar with the merits of the case and the proceedings, they cannot alone ensure an effective protection, notably when measures require powers of coercion or are addressed to third parties and are thus not within the arbitrators' jurisdiction.

[241] Poudret – Besson: Comparative Law of International Arbitration, p. 521. Nowadays most modern legislations and institutional arbitration rules clearly state that arbitrators have power to grant interim measures; this has not always been the case.

[242] Tsang: Transnational rules on interim measures in international courts and arbitrations.

[243] Poudret – Besson: Comparative Law of International Arbitration, p. 522. One should note that exceptions exist, and for example in Italy and Swiss domestic arbitration this does not apply and the law denies arbitrators from granting interim measures.

[244] Yesilirmark: Provisional Measures in International Arbitration, p. 171-173. See also Tsang: Transnational rules on interim measures in international courts and arbitrations referring to the ICC Rules of Arbitration Art.23. As Tsang points out, mostly the rules and laws are silent as to the standards and principles of granting of interim measures, and only state that the tribunal may order such measures.

status quo measures generally necessitates more careful scrutiny by the arbitral tribunal than applications for the protection of evidence of property.[245]

A pleasant exception in this sense is the new revised UNCITRAL Rules, which specify in art. 26(3) the criteria to be applied by an arbitral tribunal when determining whether interim measures should be granted. Said article determines in more detail the prerequisites a party should demonstrate to the satisfaction of the tribunal in order for it to grant an interim measure. Interesting detail is that according to these rules the party should be able to demonstrate that there is a reasonable possibility that it will succeed on the merits of the claim.[246] This possibly leaves the tribunal into a little difficult position, since according to point b) of the said article the "determination of this possibility shall not affect the discretion of the tribunal in making any subsequent determination"; therefore the tribunal should determine whether the party has actually presented reasonably that it will succeed on the merits before actually going into detail on the merits of the case, and then it should "forget" and stay neutral on the merits later on.

It is not a rare case that parties file applications for interim measures that substantially overlap with the final relief claimed in the main proceedings. It is questionable that there is always a tension when the tribunal is asked to grant an interim measure or relief which will result in the same kind of remedy as is sought with the final resolution of the dispute. Tribunal may have to do a *prima facie* establishment of a case, but it should refrain from prejudging the merits of the case. In practice, tribunals have often refrained from granting interim measures which would actually result in the granting of final relief to the applicant before the issue of a final award. [247]

The forms of provisional interim measures available for international arbitration are very broad, subject to mandatory provisions of the law of the seat. They are not limited to those which could be ordered by judicial authorities at the place of arbitration. Orders

[245] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 651.
[246] Tsang: Transnational rules on interim measures in international courts and arbitrations; UNCITRAL Rules Art 26(3).
[247] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 660 and Yesilirmark: Provisional Measures in International Arbitration, p. 178. The tribunal should make an "overall assessment of the merits of the case" without prejudging, but making a *prima facie* establishment without getting too close to the final relief is not always simple.

for the preservation of evidence or property are the most straightforward examples of provisional measures, and are generally granted at the parties' request.[248]

The courts, even those at the seat of arbitration, cannot in principle intervene and control orders for interim measures made by the tribunal, unless they are given or integrated in an award and therefore could be enforceable subject to same court scrutiny as any other award.[249] Therefore by applying for interim measures from the tribunal the parties can again avoid the national courts and gain the advantages resulting for example from the confidentiality.

Of course an interim measure ordered by tribunal is not really effective unless it can be enforced if needed. Interim measures ordered by the tribunal may or may not be enforceable in national courts. The New York Convention is by case law and various opinions seen not to be applicable to interim measures, even though they are ordered in the form of an award, as its application is limited to "final decisions" irrevocably determining the questions it addresses. Orders concerning interim measures do not, by definition, finally resolve any point in dispute and therefore are unlikely to satisfy the requirements of the New York Convention[250]. Therefore, in most jurisdictions interim measures ordered by arbitrators are not enforceable through judicial system. Notable exceptions include England, Germany and Switzerland, where national laws provide a mechanism for the enforcement of arbitral provisional measures. Even when the enforceability is unclear, parties may nonetheless deem it reasonable and wise to comply with the interim measures ordered by the tribunal. Although tribunal lacks coercive powers, it certainly possesses considerable persuasive power *vis-á-vis* the parties, and interim measures are seldom disobeyed by the parties.[251] Choosing not to follow an order made by the tribunal a party takes a clear risk that the question related

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[248] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 650-651. For example a tribunal having its seat in Germany could ordered an English type freezing order, while a German court could not make such an order.

[249] Poudret – Besson: Comparative Law of International Arbitration, p. 533.

[250] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 395-396. See also chapter 7, presenting the new way to deal with such situations through the procedure of emergency arbitrator. For example French and Australian courts have adopted the view that interim measures are not enforceable.

[251] Morrissey – Graves: International Sales Law and Arbitration, p. 432, Poudret – Besson: Comparative Law Of International Arbitration, p. 539-546 and Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 661-662. For example, a party disregarding an order to preserve evidence might find the tribunal deciding to draw all inferences relating to the lost evidence against the party who ignored its preservation order. However, usually sanctioning the disobeyed party only happens if there is a causal link between the failure to comply with the orders and the outcome on the merits.

to the subject of the interim measures, for example preserving evidence, will be then decided against that party based on the disobedience towards the interim measures ordered by the tribunal.

It is for the national law to determine whether interim measures can be given in a form of award and therefore be enforceable. Some legislations provide that arbitrators can order interim measures in the form of an arbitral award, and other have created a particular procedure which allows the applicant to obtain from a court an order confirming the decision or forcing the other party to comply with it. This court support mechanism should not be confused with the power of a court to order interim measures directly; these two systems simply coexist.[252]

Enforcement is explicitly taken into account in the 2006 revised Model Law, stating in article 17H that "an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to provisions of Article 17I". The limited grounds for non-enforcement listed in Article 17I are virtually identical to those found in the New York Convention Article V for non-enforcement of an award, along with a few additional grounds unique to interim measures[253]. This is a clear statement in the direction that interim measures should be treated as enforceable partial awards.

6.3 Interim measures granted by a national court

A common view is that the parties to an arbitration agreement should not be deprived of the benefit of emergency measures available from the courts, although they have agreed to arbitrate their disputes. It is in some opinions considered more effective to apply to courts where emergency measures are needed both because the courts will hear an application as a matter of urgency, and because their decisions will be readily enforceable.[254] The jurisdiction of arbitrators to order interim measures is not exclusive

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[252] Poudret – Besson: Comparative Law of International Arbitration, p. 540-543. For example German, Swiss and English laws certainly allow an efficient intervention by the courts in support of interim measures ordered by the tribunal. In Germany it is the party who benefits from the measure who should apply to the court, in Switzerland it is only tribunal who can do this. English law allows both.

[253] Morrissey – Graves: International Sales Law and Arbitration, p. 436. The conditions set forth in 17I are intended to limit the number of circumstances in which the court may refuse to enforce interim measures. A state could however adopt fewer circumstances in which the enforcement may be refused, as the aim of the harmonization is to achieve the minimum levels applicable.

[254] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 711. It is a consequence of concurrent jurisdiction of courts and tribunal that the parties are entitled to apply to court to obtain

and does not prevent the jurisdiction of courts in the same matter; the parties retain the possibility to apply to the courts for interim measures without a detour via the arbitral tribunal.[255]

Whether a national court can enter orders in aid of arbitration is a matter of local law. Such orders are usually sought in the state where the arbitration is officially held (the seat of the arbitration). However, it is also possible that the courts of one state may be competent to make orders in aid of arbitration in another state, for example at the situs of property attached to secure execution of an award to be obtained in a foreign jurisdiction.[256]

By seeking immediate interim relief in court, a party is able to protect its rights pending a later decision on the issue by the arbitral tribunal. However, a party seeking relief from court might be deemed to have waived its right to arbitrate, absent some sort of provision expressly allowing resort to the courts under these circumstances. That is why most modern arbitration laws and institutional rules include express provisions concerning interim measures, stating the right of a party to seek for such without this being seen as a waiver of right to arbitrate and being incompatible with an arbitration agreement.[257] For example, Model Law Article 9 clearly states that "[i]t is not incompatible with an arbitration agreement for a party to request, before or during the proceedings, from a court an interim measure of protection and for a court to grant such measure.". It would not be appropriate that a party protecting his rights or evidence crucial to the case would be punished in a way of waving his rights to arbitrate the issue.

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provisional measures despite the arbitration agreement. See also Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 486.

[255] Poudret – Besson: Comparative Law of International Arbitration, p. 524-525. The rules like the New York Convention Art. II(3) providing that a court shall refer the parties to arbitration do not apply to provisional measures.

[256] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 473. According to Craig – Park – Paulsson many international arbitration specialists generally favor the choice of a place of arbitration in countries whose courts are reluctant to intervene in the arbitration process, thereby reducing the potential for judicial interference.

[257] Morrissey – Graves: International Sales Law and Arbitration, p. 357. In most cases the effectiveness of the relief sought may be entirely dependent on its promptness. If the tribunal has not yet been constituted, a party has no option except to seek for the interim measures from a court, which would in some states cause waiver of rights to arbitrate. See also Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 398. However, where an application is made to a national court a judge may be reluctant to make a decision that would risk prejudging the outcome of the arbitration. For examples of rules see ICC Rules Article 23(2), UNCITRAL Arbitration Rules Art.26.3, LCIA Rules Art 25.3.

As well as it does not constitute a waiver of a right to arbitrate, a request for and the grant of interim or conservatory measures by nature will not prejudice a decision on the merits of a dispute. Such a decision is the exclusive domain of the arbitral tribunal. However, a requesting party must be careful not to seek final relief or final disposition of a matter as such requests could be found to constitute waiver of the right to arbitration.[258]

Many jurisdictions allow interim measures in the form of conservatory attachments of assets pending arbitral proceedings and prior to an award. It is an appropriate way to provide a remedy to prevent reluctant defendants from frustrating the arbitral process by removing assets from the reach of effective execution following an award. In many jurisdictions in continental Europe conservatory attachments may be granted if the party applying it can demonstrate that there is a reasonable cause to believe that its claim is founded and urgency exists. Upon showing a reasonable cause, attachments are routinely available in most countries.[259] In England the courts have had jurisdiction to issue so called *Mareva* injunctions restraining the defendants from selling, disposing, or otherwise removing assets from the jurisdiction. The powers of courts to provide such injunctions was confirmed in the Arbitration Act 1996 Article 44(2)(e).[260]

The United States stands out from all other contracting states of the New York Convention when having developed case-law to the effect that attachment pending international arbitration is somehow incompatible with the New York Convention. This

[258] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 472. This general principle of not waiving the right to arbitrate is recognized by all national courts. See also Poudret – Besson: Comparative Law of International Arbitration, p. 525-256, and ICC Rules 23(2) and the Geneva Convention Article VI(4).

[259] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 482. Such provisional assessment by a national court of the possibility that the respondent may be indebted to the claimant and that the claim has some likelihood of success does not imply a prejudicial assessment by the court of the merits (as the determination of those is reserved to the arbitrators).

[260] Craig – Park – Paulsson, International Chamber of Commerce Arbitration, p. 483. *Mareva* injunctions were named after the case which established the injunctive device of restraining a party from removing from the jurisdiction or otherwise dealing with assets which could be used to satisfy a judgment or award. Before the case giving name to this type of injunctions there was substantial doubt for many years about the power of courts to grant attachments in support of arbitration except in certain cases. *Mareva* injunctions were first thought only possible if the defendant was not domiciled in England, but this limitation eventually disappeared.

view was adopted in the *McCeary*-case[261] already in the 70's, based on the courts statement that:

> "[the New York] Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional measures should equally apply, is unavailable."

McCeary has been cited by courts, but its proposition has also been rejected. The situation in the U.S. is therefore complex; the question of whether an attachment order can be obtained before the award has been made remains uncertain and depends on the place where the measure is sought. Although the *McCeary* controversy focused on attachment procedures, the same observation applies to the various other protective measures which may be sought in an emergency, despite the existence of arbitration agreement or pending arbitral proceedings.[262]

Applying for an interim measure from a court could also be problematic from the point of view of the court. The court should determine whether it has a power to issue interim measures and, more importantly, whether it should do so in order to preserve the *status quo*. As English judges stated in *Channel Tunnel* case, there is a tension between the need for the court to make an assessment of the merits in order to decide whether the plaintiff's claim is strong enough to be granted protection, and the duty of the court to respect the choice of tribunal which both parties have made and not take out of the hands of the arbitrators a power of decision which the parties have entrusted to them alone. According to the House of Lords, deciding on the injunction could lead to the situation where there would be very little left to decide for the arbitrators and therefore, would seriously interfere with the autonomy of the arbitration proceedings. As Lord Mustill stated when giving the House of Lords judgment on *Channel Tunnel*, "the court should approach the making of such an order [to continue performance of the works]

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[261] *McCeary Tire & Rubber Co. v. CEAT S.pA (U.S. 1974*). The case was about setting aside an attachment granted by a lower court in favor of U.S. distributor in connection with its dispute against an Italian manufacturer. The contract contained an ICC arbitration clause.

[262] Craig – Park – Paulsson: International Chamber of Commerce Arbitration, p. 485-486 and Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 711-712. It is the opinion Craig – Park – Paulsson that the scope of any prohibition of the New York Convention on the granting of interim measures in support of arbitration will continue to be raised before federal courts of appeal in diverse circumstances.

with the utmost caution and should be prepared to act only when the balance of advantage plainly favors the grant of relief".[263]

It has been argued whether the arbitral tribunal is allowed to amend or overrule an interim measure ordered by a state court. There are opinions that the arbitrators cannot interfere in the domain of the courts by revoking or amending reliefs ordered by courts, except in their final award. On the other hand, it has been contested that the arbitrators should have the final word and be allowed to overrule, release or vary interim measures ordered by courts.[264] The latter opinion could seem controversial with the fact that the court has in fact the final word on certain questions even in arbitration, as recognized above for example in relation to the jurisdiction of the tribunal. Parties may wish to contractually preclude a national court from granting provisional measures, but whether they are allowed to do so depends on the law governing the arbitration; this kind of exclusion agreement should be entered cautiously[265].

It is a conflicting situation when a party seeks for interim measures from a national court in order to support the arbitration proceedings. The court must make a decision based on its own evaluation, taking necessarily into account some merits of the case, whether the application is grounded or not and should a measure be granted. Either it grants the interim measures or not, is it possible that the evaluation it has made has some effect on the arbitrators own evaluation of the merits of the case? It could be argued, that if a court sees that an interim measure should be granted, the court will not make this kind of decision lightly but has to have grounds for it. An arbitrator could, either knowingly or unconsciously, be effected by the interpretation of the court of the merits and therefore, the court could in fact affect the final decision of the issue. Also the attitude between tribunal and national court in the given situation or state can have effect on how the tribunal will react on the interim measures ordered by the court.

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[263] Redfern – Hunter: Law and Practice of International Commercial Arbitration p. 407-409, and *Channel Tunnel Group v. Balfour Beatty Construction.* This case has been widely sited and is one of the foundation cases concerning interim measures in arbitration. The contract between these parties included a two-stage provision for resolution of disputes, the latter being arbitration under ICC Rules. The other party applied an English court for an injunction, and the other argued that the English courts had no jurisdiction and so the court should stay the litigation and refer the parties to arbitration.

[264] Poudret – Besson: Comparative Law of International Arbitration, p. 533 and Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 649.

[265] Savola: Arbitrator-Ordered Interim Measures of Protection in International Arbitration, p. 649-650. An exclusion agreement could also be against the parties' interest in cases where the tribunal is not yet constituted or is otherwise unable to act efficiently. At least English Arbitration Act allows parties to exclude the jurisdiction of courts concerning interim measures, in other laws the answer is controversial.

7. Emergency arbitrator

When parties agree to arbitrate possible future disputes, this reflects the intent of them to have all issues relating to the defined relationship to be decided in arbitration and more strongly, the intention to avoid court proceedings in any case. Newly presented provisions concerning the emergency measures and emergency arbitrator provide the parties one more way to avoid the court rooms, by having a possibility to seek for interim measures from the arbitral institution even before the tribunal has been constituted.

7.1 The concept of emergency arbitrator

It has been a traditional view that interim measures can be applied from either national court or the arbitral tribunal. Which one is the correct one to turn to depends on the relevant law and the nature of relief sought; some legislations make it clear that any application should be made first to the tribunal and only then to the court at the seat of the arbitration, some interim reliefs are outside the jurisdiction of the tribunal in some countries. If the rules have not been clearly defined, the situation depends on the circumstances of each case. If the arbitral tribunal is in existence, it is appropriate to apply first to the tribunal for interim measures, unless the tribunal does not have powers to grant such measures. If the tribunal is not yet constituted, and the matter is of urgency, the only possibility is to apply to the relevant court for interim measures.[266] However, parties may be reluctant for applying interim measures from a national court for various reasons, for example because the issue would become public at least on some parts, or if the parties do not trust the courts at the relevant jurisdiction.

Channeling a party to court is also against the party's original intention to refer their disputes to arbitration as it was their intent to have their dispute resolved by a neutral, party-determined authority. To refer parties to a court for interim measures would mean asking them to go back to the forum they have elected to avoid.[267]

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[266] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 400. This is not simply a question of division of labour; although an arbitral tribunal lacks the coercive power of a court and in spite of questions concerning the international enforceability of interim measures the parties should not forget that any order is binding as between them.

[267] Yesilirmark: Provisional Measures in International Arbitration, p. 115. According to Yesilirmark experience demonstrates that this forum would generally be the home court of the requesting party or another forum but certainly not the home court of the non-moving party. Such a request for provisional measures from a home court is an open invitation for abuse.

To avoid this situation the new ICC Rules which came into force on 1 January 2012 present new provisions concerning emergency arbitrator. Same kind of process has already been inserted in the SCC Rules, coming into force on 1 January 2010 and SIAC Rules 4th edition, in force from 1 July 2010. The concept of emergency measures is not totally new; it has been included in American Arbitration Association's (AAA's) Dispute Resolution Rules since 1 May 2006, in the arbitration rules of the Netherlands Arbitration Institute and in a procedure offered by ICC called "Pre-Arbitral Referee"[268].

The difference to earlier situation is that Pre-Arbitral Referee could only be applied if the parties had expressly agreed to use it in their agreement to arbitrate, but as an opposite the new ICC Emergency Arbitrator procedure is automatic and needs to be opted out by explicit agreement of the parties if not wanted to become part of the agreement[269]. Earlier it was the tendency that arbitration institutes did not want to take the emergency rules incorporated automatically as a part of the overall institutional arbitration package. The arbitration institutions did not want to fully commit themselves by adopting the automatic inclusion approach to procedures that had not been tested. Therefore, most provisions concerning emergency measures needed to be specifically referenced either in the arbitration clause or through a special agreement.[270]

In international arbitration proceedings, it can take weeks or months to constitute a tribunal. Therefore the Emergency Arbitrator procedure provides a safeguard option for a party to make sure the *status quo* can be reserved between the parties before the arbitration proceedings can be initiated and hence a fair and rightful decision can be obtained without being compelled to allow national courts to intervene in the proceedings. The need for use of emergency provisional measures may arise in any kind of disputes, however, certain disputes for example disputes concerning trade secrets or intellectual property generally demand speedier and more confidential resolution than other types of disputes.[271]

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[268] Yesilirmark: Provisional Measures in International Arbitration, p. 119-123. See also Slaoui: Emergency Arbitrator. The Pre-Arbitral Referee procedure was inspired by *reféré* procedure of French law, which allows a creditor to apply to a court for an enforceable order to pay all or part of claims the merits of which do not appear to be "seriously contestable". About *reféré* see more on Poudret – Besson: Comparative Law of International Arbitration, p. 526.

[269] HerberSmith Newsletter, December 2011 and D'Agostino: First aid in arbitration.

[270] Yesilirmark: Provisional Measures in International Arbitration, p. 124. Yesilirmark wrote his opinions in 2005 before the newly introduced rules concerning emergency arbitrators.

[271] HerberSmith Newsletter, December 2011 and Yesilirmark: Provisional Measures in International Arbitration, p. 118. As the main alternative has been to apply to national courts, emergency arbitrator

Institutional rules have different deadlines for the application and appointment of an emergency arbitrator. In ICC Rules, the application for emergency arbitrator may be made irrespective of whether the party has already submitted the Request for Arbitration according to those Rules (Art.29.1), as long as it has been made before the constitution of the tribunal (as defined in Art.16). However, the emergency arbitrator proceedings shall be terminated if the Request for Arbitration has not been received within 10 days from the application, unless the emergency arbitrator determined that a longer period of time is necessary[272]. According to SIAC Rules, a party may apply for an emergency relief with or following the notice of arbitration, but before the tribunal is constituted[273]. SCC sets the limit of 24 hours for the appointment from the receipt of the application, which can be made at any stage before the tribunal has been established, and any decision shall be made within 5 days from the date when the application was referred to the emergency arbitrator[274]. The nature of the procedure and the true meaning of "emergency" are strengthened by the strict and short time limits for both the appointment and the decision of emergency arbitrator. Under SIAC Rules, the emergency arbitrator should be appointed within one business day from receiving the application[275]. ICC Rules determine that the appointment should be made "within as short a time as possible, normally within two days" from the receipt of the application[276]. An order shall be made not later than 15 days from the date when the file was transmitted to the emergency arbitrator[277].

Emergency arbitrator cannot be involved in the arbitration proceedings in any other role after he has been appointed. He cannot act as an arbitrator in the any future arbitration relating to the dispute, at all under the ICC Rules, or unless the parties otherwise agree under SCC and SIAC Rules. It could be argued that the emergency arbitrator already has become acquainted with the case and therefore the case could be resolved faster if he would be allowed to be appointed as an arbitrator. However the main rule remains that based on the argument that the proceedings taken, the information obtained and the decision rendered under emergency measures rules should remain confidential and

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procedure provides for a significant option if the parties do not trust the national courts of the relevant jurisdiction.

[272] ICC Rules, Appendix V, Art. 1.6.
[273] Savage, SIAC Rules Schedule 1, Art.1.
[274] SCC Rules, Appendix II, Art.4.1 and Art.8.1.
[275] SIAC Rules, Schedule 1, Art.2.
[276] ICC Rules, Appendix V, Art. 2.1.
[277] ICC Rules, Appendix V, Art.6.4.

should not affect the decision concerning the substance of the case, emergency arbitrators is prevented from acting as a member of the tribunal.[278]

The emergency arbitrator procedures generally give wide discretion to the emergency arbitrators to deal with requests for emergency measures. Naturally it is also clear that a decision of an emergency arbitrator does not aim at pre-judging the substance of the case, but instead is provisional and stands until either an arbitral tribunal or a competent judicial body confirms, modifies or terminates it.[279] It is also evident that the orders or awards of the emergency arbitrator do not bind the subsequently constituted tribunal and that the tribunal is empowered to reconsider, modify, terminate or annul the order or award[280].

The emergency arbitrator shall make the decision in form of an order (ICC and SCC Rules) or an order or award (SIAC Rules). The distinction between orders and awards may therefore play a role if there are problems with the compliance of the order. In principle, the parties are bound by the decision of the emergency arbitrator by contract[281]. The emergency arbitrator cannot naturally make decisions that will bind any third parties outside the arbitration, but the power to bind parties derives from the arbitration agreement. ICC Rules state that "the parties undertake to comply with any order made by the emergency arbitrator", and with a slightly different wording SIAC and SCC Rules provide that by agreeing to arbitrate under those rules the parties undertake to comply with any orders or awards without delay[282]. Therefore, there is no question as to whether the parties are bound by the decision of the emergency arbitrator. In case of a failure to carry out the decision an emergency arbitrator, an arbitral tribunal or the competent court can, where permitted, compensate any damage caused by the failure[283].

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[278] SCC Rules, Appendix II, Art.4.4; ICC Rules, Appendix V, Art.2.6; SIAC Rules, Schedule 1, Art.1.4, and Yesilirmark: Provisional Measures in International Arbitration, p. 135.
[279] Yesilirmark: Provisional Measures in International Arbitration, p. 143, 157. This is confirmed in various rules concerning emergency measures. Usually the decisions are not as such appealable; permission to appeal or any other recourse against a decision of an emergency arbitrator does not go well within the nature of emergency measure proceedings.
[280] D'Agostino: First aid in arbitration.
[281] ICC Rules, Appendix V, Art.6.6; SCC Rules, Appendix II, Art.9.1; SIAC Rules, Schedule 1, Art.9; see also Yesilirmark: Provisional Measures in International Arbitration, p. 144. The compliance with the order may be enhanced where available by adding liquidated damages or other sanctions.
[282] ICC Rules, Art. 29.2, SIAC Rules, Schedule 1, Art.9 and SCC Rules, Appendix II, Art.9.3.
[283] Yesilirmark: Provisional Measures in International Arbitration, p. 144. It should also be noted that where the decision of an emergency arbitrator is proved to be wrong or otherwise caused damages, the tribunal or the competent court may hold the applicant liable for such damage.

Earlier, before the exact provisions on emergency arbitrators, the faith of the decision relied more on the question of whether the emergency arbitrator was considered an arbitrator. Only if the answer was yes, then the decision could be categorized as an order and could be enforced as a decision of an arbitrator. Whether the decision, in the form of an order or an award is enforceable under the New York Convention was then another question, depending for example on whether the decision can be seen as final and binding.[284] The question of enforcement of interim measures ordered has already been discussed above, and the same principles are applicable to interim measures ordered by the emergency arbitrator.

7.2 Emergency arbitrator as introduced in the new ICC Rules

AS the ICC Rules are probably the most commonly used or at least most familiar in international arbitration, it is reasonable to take a closer look at the ICC's newly presented emergency arbitrator regulations. ICC Rules introduce a new clause concerning Emergency Arbitrator, firstly in Article 29 and in more specific in Appendix V – Emergency Arbitrator Rules. Article 29 of the new released Rules being in force since 1 January 2012 states:

> "A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration."

With these new rules it is possible that it becomes a rare case that parties have to seek for interim measures from the court, even if the arbitral tribunal has not been constituted yet. The amount of cases where court has to intervene in the proceedings in some way will diminish, and cases will be more and more focused in the hands of the arbitral tribunals.

The legal nature of the decision of the emergency arbitrator is important as it determines whether or not the decision is enforceable as an award under the New York Convention,

[284] Yesilirmark: Provisional Measures in International Arbitration, p. 145-146. The enforcement regime of the decision could still be improved on both national and international level.

as discussed already above[285]. Emergency arbitrator's decision shall be in a form of an order, not an award. The orders of the Emergency Arbitrator will not bind the arbitral tribunal when it resolves the issue finally. Relative provisions of ICC Rules will only apply to the parties of the arbitration agreement and therefore, Emergency Arbitrator is no different to any other arbitrator in the sense of naturally not having powers concerning any third party.[286]

Earlier there have been differing opinions on whether submission of parties to a set of arbitration rules providing for emergency arbitrator procedure of some kind suffices to exclude court jurisdiction concerning interim measures. It has been stated that a waiver of rights to apply to courts for measures within the jurisdiction of emergency arbitrator is perfectly legitimate and can be inferred from the intention of the parties to resort to an emergency arbitrator or referee for the interim measures[287]. However, it could be seen paradoxical to recognize the necessity of a parallel jurisdiction of the courts and the tribunal even after the latter has been constituted and then to exclude the jurisdiction of the courts for the sole reason that the parties have provided for a pre-arbitral mechanism[288]. The latter view could be emphasized by the fact that for example the new ICC Rules have to be explicitly opted out; therefore it could be unreasonable to assume that the inclusion of pre-arbitral mechanism would mean exclusion of court jurisdiction totally. However, the ICC Rules resolve this question by explicitly determining the jurisdictional questions relating to the Emergency Arbitrator in Article 29.6:

> "The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the

[285] Yesilirmark: Provisional Measures in International Arbitration, p. 141. Generally, if an emergency arbitrator is not considered as an arbitrator under a particular national law his decision cannot be considered as award.
[286] ICC Rules Art. 29.3 and 29.5.
[287] Fouchard – Gaillard – Goldman: On International Commercial Arbitration, p. 719. Fouchard – Gaillard – Goldman, as most authorities, are referring to the system based on the ICC Pre-Arbitral Referee Rules as the exact Emergency Arbitrator Procedure is fairly new, but the opinions can be applied to the new procedures where they are similar.
[288] Poudret – Besson: Comparative Law of International Arbitration, p. 530. As pointed out in Poudret – Besson although the emergency arbitrator mechanism allows the swift intervention prior to constitution of the tribunal, it does not remedy other drawbacks of arbitral jurisdiction, namely the absence of power to grant interim measures against third parties etc.

> arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat."

Therefore, the question has been answered at least when the ICC Rules are used. The same interpretation could be applied to other rules being silent on the issue.

Emergency arbitrator will determine in his order, whether he has jurisdiction to order Emergency Measures[289]. Therefore, he has to make a preliminary determination of the arbitration agreement and the jurisdictional issues. It should be noted however, that the tribunal is not bound by any decision the emergency arbitrator may make, including related to the jurisdictional issues. How much it will affect the decision subconsciously is obviously difficult to say, but persons been selected as arbitrators in international disputes should be experienced enough not to let former opinions affect their independent decision making.

As SCC and SIAC Rules, also ICC Rules include the possibility for the parties to opt out the provisions concerning emergency arbitrator. Hence, if parties wish not to have the possibility to use emergency arbitrators, they may agree so when drafting the arbitration agreement. As this is a change to former practice, it could take time for the parties in fact realize this possibility.

7.3 Effects of the possibility to have an emergency arbitrator

As the rules concerning emergency arbitrator are fairly new, the effects to the practice of international arbitration cannot be seen clearly yet, but some directions can be seen for example from the previously used Pre-Arbitral Referee procedures. It could be anticipated that the possibility to use emergency arbitrator to handle requests for interim measures could be useful especially for parties who strictly want to keep their dealings classified and out from the court rooms. As the parties wish to avoid court proceedings also in order to maintain confidentiality, having the possibility to use emergency arbitrator for interim measures instead of applying those from court could be a suitable solution. Applying for interim measures before the tribunal was constituted was not possible before the emergency arbitrator procedure in any other way than from a national court. As discussed in chapter 6 concerning interim measures, when determining whether it should grant those or not, a court must make a *prima facie* determination of its jurisdiction and possibly of other aspects of the dispute. This could

[289] ICC Rules, Appendix V, Art. 6.2.

expose parties to risks related to confidentiality they are not willing to take. Confidentiality point should not be overlooked, as it might very well be one of the major reasons for adopting the emergency arbitrator provisions.

Also, the emergency arbitrator process may fasten the whole arbitration proceedings, when the tribunal, after it has been conducted, needs not to discuss the issues of interim measures anymore. Especially this would be emphasized when the application to a court for interim measures would not be necessary. The whole process would be more focused and centralized on the arbitration, arbitration rules and possibly arbitration institute. New procedure could also diminish the difficult situations between tribunals and courts at least concerning interim measures and hence create a smoother dispute resolution process.

On the other hand, focusing can be seen as a threat to national legislation and to the power of national courts to "supervise" arbitral proceedings. One could doubt that arbitration as a procedure will become more isolated and somehow disconnected from the national legislations. Large multinational companies will have their issues dealt "behind closed doors" altogether without any interference from national courts. With the confidentiality requirements extended also to the interim measures before the actual arbitral proceedings, companies could hide their issues and problems from the public. States would not be involved in the decisions of provisional measures through the national courts even though it might affect the rights of its citizens or major assets situated in that country. The only stage where national courts would have a role to play would be the recognition and enforcement of the award, especially if the enforcement of the interim measures orders is not possible or needed; therefore the courts would only be given the result of the proceedings, if necessary for the parties to have the award enforced.

As the emergency arbitrator provisions have been implemented into some of the commonly used Rules, it could be predicted that the procedure will be used and accepted increasingly. The importance of interim protection of rights before the

constitution of the tribunal will certainly not diminish.[290] How the procedure and rules function in practice remains to be seen.

8. Concluding remarks

8.1. Recent development in the EU

Although the EU context has not been separately discussed in this study, the recent development of Brussels I Regulation should be noticed. Arbitration and jurisdiction in case of parallel proceedings have had a lot of attention and have been widely discussed also in relation to reformation of the Brussels I Regulation because of a decision of the ECJ in the case *Allianz SpA v. West Tankers*. This case was mostly a case about anti-suit injunctions, relating to question of parallel proceedings in national court and arbitral tribunal as well as the question of jurisdiction of a member state court to prevent another court in another member state from handling a case covered by arbitration agreement[291]. The question was brought before the ECJ by the House of Lords to find out whether it was possible for an English court to give an anti-suit injunction in favor of arbitration without infringing the Brussels I Regulation. The answers was no; ECJ found that it is incompatible with the Brussels I Regulation for a court of a member state to issue anti-suit injunctions preventing proceedings before courts in another member states.[292]

When the Brussels I Regulation was reformed, it was suggested by the European Commission to outline the extent of the exception better by adding new articles to the Regulation[293]. However, for example in Finland the attitude towards including the changes concerning arbitration to the Brussels I Regulation was cautious. According to the preliminary statements the Finnish Government held that the changes would cause the relationship between the Brussels I Regulation and the New York Convention to become vague. The law committee confirmed this in its statement and stated that the suggested changes to the Regulation would have seemed to cause a different outcome

[290] Yesilirmark: Provisional Measures in International Arbitration, p. 157. The need to create a mechanism under with interim protection is proceed for in a flexible and speedy manner has been one of the main reasons why emergency procedures have been developed.
[291] *Allianz SpA v. West Tankers*. An anti-suit injunction is an order made by a court (usually an English court) to restrain a person from commencing or continuing proceedings before the courts of another state on the ground that such proceedings would be contrary to an arbitration agreement.
[292] *Allianz SpA v. West Tankers*, point 34. See also Storskrubb – Knuts: Nytt om Brysselförordningen.
[293] Knuts: Skiljeförfarandeundantaget I Brysselförordningen – Quo Vadis? The article presents in detail the suggestions made for the reformation starting from the so called "Heidelbergreport" until the proposal of the Commission.

than the provisions of the New York Convention. This would have meant that the jurisdiction of a court of a member state concerning the arbitration agreements would be determined differently depending on whether the arbitral tribunal would be located in the EU or not. This would make the common situation more complicated and would not ease the status of the companies mainly using arbitration in their international relationships.[294]

It could be because of the above mentioned effect noticed also in Finland that the new articles were not included as such in the reformed Regulation published in 12.12.2012 (Regulation N:o 1215/2012, shall apply from 10 January 2015). The content of the proposed articles is however included in the recitals before the actual content of the Regulation, therefore including the outlines to the guidance of the Regulation. The possible effect of the new articles to the function of arbitration in the EU area must have had an impact on the reformation process: the New York Convention is one of the leading conventions concerning international arbitration, and even as powerful institution as EU cannot take the risk of having regulations conflicting with it or making its application inconsistent.

The new revised Regulation clarifies that there is an absolute exclusion of arbitration, and arbitration is clarified to include court proceedings surrounding or in support of arbitration. Whether the ruling given by a court regarding the arbitration agreement is a principal issue or an incidental question does not matter, the ruling should not be subject to the provisions of the Regulation. The revised Regulation therefore confirms that a) member state courts retain the right to rule on the validity and scope of the arbitration agreements in accordance with their national law and that such decisions should not be subject to the rules of recognition and enforcement laid down in the Regulation, b) the New York Convention takes precedence over the Regulation and therefore, the member state courts are permitted to recognize and enforce an arbitral award even if it is inconsistent with another member state's judgment, and c) the Regulation does not apply to any action or ancillary proceedings relating to the establishment of the tribunal, the powers of arbitrators, the conduct of the arbitration, nor to any action or judgment

[294] Valtioneuvoston kirjelmä Eduskunnalle ehdotuksesta Euroopan parlamentin ja neuvoston asetukseksi tuomioistuimen toimivallasta sekä tuomioiden tunnustamisesta ja täytäntöönpanosta siviili- ja kauppaoikeuden alalla (uudelleen laadittu toisinto Bryssel I asetuksesta) (U 65/2010 vp), sekä siihen liittyvä Lakivaliokunnan lausunto 1/2011 (LaVL 1/2011 vp.). This is a statement from the Finnish Government to the Parliament about the suggestion for reformations to be made to the Brussels I Regulation.

concerning the annulment, review, appeal, recognition or enforcement of an arbitral award. This is positive development in the right direction, although some issues still need to be resolved.[295] Through the reformation arbitration remained explicitly outside the EU regulations concerning jurisdiction and enforcement of awards, making the situation clearer for both tribunals and national courts.

8.2 Conclusion

In general, it is fundamental for the proper understanding of international arbitration to understand the necessary interchange between arbitral process and national systems of law[296]. As it has been noted, the relationship between arbitral tribunals and national courts is not simple. There is always a risk of conflicting jurisdictions and parallel proceedings. National courts have the final word in some issues, for example concerning jurisdiction. On the other hand, the tribunal is usually the one deciding on the merits and the courts will not be able to review that decision at the annulment or enforcement of the award.

It is essential that courts and tribunals both acknowledge that in some instances it would be in the interests of all parties to develop the co-operation between them. This would possibly save time, money and efforts of everyone involved. The interaction between these two is usually seen more like a battle, as they would be fighting for the power to decide the disputes. Obviously this is not reality, or at least it should not be. The courts should have the power to control the arbitral proceedings within the boundaries given in the national legislation and by international principles, and the tribunals should be able to function without the fear of national courts interfering in the proceedings more than necessary. Therefore the aim should be on the co-operation with the right amount of understanding each other, enabling the use of arbitration as an efficient means of dispute resolution also in the future.

[295] Lightfoot – Davison – Attenborough: Brussels Regulation Reforms – Key changes and their implications. See also Hodges-Kaplan-Godwin: The Revised Brussels Regulation.
[296] Redfern – Hunter: Law and Practice of International Commercial Arbitration, p. 76.