Queen Mary
University of London

International commercial arbitration in Laos, Thailand and Vietnam: comparative perspectives in the light of the UNCITRAL model law, and the reference to the arbitration laws of England and People's Republic of China.

Suvanpanich, Thawatchai

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without the prior written consent of the author

For additional information about this publication click this link.
http://qmro.qmul.ac.uk/jspui/handle/123456789/1608

Information about this research object was correct at the time of download; we occasionally make corrections to records, please therefore check the published record when citing. For more information contact scholarlycommunications@qmul.ac.uk

UNIVERISITY OF LONDON

DOCTOR OF PHILOSOPHY EXAMINATION

INTERNATIONAL COMMERCIAL ARBITRATION IN LAOS, THAILAND AND VIETNAM: COMPARATIVE PERSPECTIVES IN THE LIGHT OF THE UNCITRAL MODEL LAW, AND WITH REFERENCE TO THE ARBITRATION LAWS IN ENGLAND AND THE PEOPLE'S REPUBLIC OF CHINA

January 2001

THAWATCHAI SUVANPANICH

BIBL. LONDIN. UNIV.

ABSTRACT

The development of markets and indeed the 1997 financial crisis in the South East Asia region led to the increase of international disputes and the emergence of international commercial arbitration as the preferred settlement of disputes mechanism. One can observe a "cultural" difference in the way developed and developing countries approach the resolution of disputes: while the state controlled judicial authority is essential in the developing countries, developed countries opt for flexible and non-judicial settlement. Foreign investors have exercise pressure for the launch of international commercial arbitration in the countries where they invest.

This thesis constitutes a survey of the international commercial arbitration regimes in Laos, Thailand and Vietnam in the light of the UNICTRAL Model Law and the arbitration systems of the United Kingdom, the United States, and China. It provides guidance to legislators in their regulatory efforts and intends to assist local courts and judges in their developing an arbitration culture. Further it will be useful to businesspersons with economic activity in South East Asia. The paramount consideration is to bridge the gap between developed and developing arbitration systems.

Chapters One and Two highlight the importance and provide for a definition of party autonomy in international commercial arbitration. The theoretical background and the practice in each jurisdiction in question are discussed and the advantages of arbitration in comparison with litigation are presented.

Chapter Three focuses on arbitration agreement. Three stages regarding the issue of validity of such agreements are distinguished.

Chapter Four looks at the selection of arbitrators and the criteria for such a choice.

Chapter Five deals with arbitral procedure; both ad hoc and institutional arbitration in the jurisdictions in question is discussed.

Chapter Six addresses choice of law issues. Particular attention is paid on choice of substantive law and on lex arbitri.

The thesis finally make critically evaluates the arbitration systems in Laos, Thailand, Vietnam and assesses their compatibility with the Model Law and the international standards set by the UK and the US practices. References are also made to the Chinese multi-jurisdictional arbitration system, but are rather limited.

Acknowledgments

The author wishes to express his sincerest gratitude to the following individuals, whose support, assistance and advice made this project possible. With respect to valuable advice: Hon. Pintip Sucharitkul, President of the Thai Supreme Court (Dika Court), Justice Jaran Pukdithanakul, Justice Kanok Indrambarya, Justice Vichai Ariyanuntaka, Justice Voravuthi Dvadasin -all are Thai Justices- and Lord Dervaird. As to specific support, assistance and advice on this research: Dr. Julian Lew, Dr. Loukas Mistelis (CCLS, Queen Mary and Westfield College, University of London), Henry Uscinski (Herbert Smith, Thailand), Professor Pryles (Minter Ellison Lawyers, Australia), Ms. Ha Thi Ngoc Ha (Legal adviser, Ministry of Foreign Affairs, Vietnam). As to general assistance: Ms.Korawan Chirungsaprasuk (Senior Manager Public Relation Division, National Petrochemical Public Company Limited, Thailand) and Ms.Jinsupang Kosolbhand (Senior Manager, Valvoline, Thailand). In term of personal support and encouragement: his wife, Justice Kornkanya Suvanpanich; his brothers, Manas Jumpeereang. In addition, the author expresses deepest appreciation to members of the CCLS academic and administrative support staff.

Table of Contents

Abstract 2

Acknowledgements 3

Abbreviations 16

Table of Court Cases 17

Introduction 19

Background and Justification 19

Method of research 21

Scope of the study 23

Aims to be achieved 24

Overview of each system 26

China 26

Laos 47

Thailand 48

Vietnam 52

Chapter 1 Definition of Party Autonomy 54

1. Definition of arbitration 54

1.1. Dispute 56

China 63

Laos 64

Thailand 64

Vietnam 66

Model Law 66
1.2. Procedure 67
1.3. Binding decision 71
2. Definition of party autonomy 71
2.1. Contractual theory 73
2.2. Jurisdiction theory 77
2.3. Mixed theory 81
2.4. Autonomy theory 83
3. Party autonomy in practice 85
3.1. Party autonomy in domestic and international arbitration 85
3.2. Definition of international 87
3.2.1. The place of arbitration 90
3.2.2. Identity of parties criterion 93
a) Place-of-business Test 93
b) Place-of-resident Test 94
c) Nationality-of-parties Test 94
3.2.3. Nature of dispute criterion 95
3.2.4. Opt-in criterion 97
England 99
China 99
Laos 102
Thailand 102
Vietnam 104
4. Conclusion 105

Chapter 2 Role of Party Autonomy in Arbitration 107

1. Party autonomy response to business communities need 107
1.1.Domestic court 109
1.2 Arbitration 116
1.2.1. Choice of arbitrator 121

1.2.2. Choice of applicable substantive law 122
1.2.3. Choice of arbitral procedure 122
1.2.4. Place of arbitration 123
2. Party autonomy reduces the court's interference 124
2.1. The assistance of the national court 124
2.2. The control of the national court 127
2.2.1. Judicial review at the place of arbitration 127
2.2.2. Judicial review at the enforcement stage 134
2.2.2.1. Natural justice 134
2.2.2.2. Mistake of law 135
3. Conclusion 141
Chapter 3 Arbitration Agreement 145
1. Definition of arbitration agreement 145
China 148
Laos 150
Thailand 150
Vietnam 151
2. Feature of arbitration agreement 151
2.1. Source of party autonomy 151
2.2. Exclusion of the court's jurisdiction 153
2.3. Source of arbitrator's power 157
3. Legal framework of arbitration agreement 160
3.1.Validity of arbitration agreement 160
3.1.1. Requirements of validity of arbitration agreement 160
3.1.1.1. Requirement as general principle of contract 161
(i) Capacity of parties 161
(ii) Consent of parties 164
3.1.1.2. Requirement as special feature of arbitration 164
(i) The agreement is in writing 165

(ii) There must be dispute 166
(iii) The differences concern a subject-matter capable of settlement by arbitration 166
3.1.2. Legal consequences of invalidity of arbitration agreement 167
3.1.3. Applicable law to an arbitration agreement 169
3.1.3.1. Law applied to the arbitration agreement 169
(i) State court 171
a) At the enforcement of the arbitration agreement stage 171
b) At the setting aside of the award stage 172
c) At the enforcement of the award stage 172
(ii) International arbitrator 174
3.1.3.2. Law applied to the capacity of the parties to arbitrate 175
3.1.3.3. Law applied to the subject matter arbitrability 176
3.2. Separability 176
England 182
China 183
Thailand 183
Vietnam 185
3.3. Competence-competence doctrine 186
England 192
China 192
Thailand 194
Vietnam 195
4. Conclusion 196
Chapter 4 Choice of Arbitrator 197
1. Definition of arbitrator 198

1.1. Person 199
1.2. Capacity of arbitrator 200
2. Appointment of arbitrator 202
2.1. Number of arbitrators 203
2.1.1. Sole arbitrator 204
2.1.2. Two arbitrators 206
2.1.3. Three arbitrators 209
2.2. Methods of appointing arbitrator 211
2.2.1. By arbitration agreement 212
2.2.2. By list system 213
China 214
Laos 215
Thailand 215
TAIMJ 215
TCAI 216
Vietnam 216
2.2.3. By appointing authority 218
2.2.4. By State court 218
China 219
Laos 219
Thailand 220
Vietnam 220
3. Requirement of equality of parties to appoint arbitrator 220
4. Qualifications of arbitrator 225
4.1. Qualification determined by parties 225
4.1.1 Lawyer 226
4.1.2. Judge 228
4.2. Qualification determined by law 229
4.2.1. General 229

4.2.2. Impartiality 231
4.2.3. Independence 233
4.2.4. Nationality of arbitrator 234
4.2.5. Qualification of arbitrator by law in practice 235
4.2.5.1. Impartiality and independence requirement 235
China 237
Laos 238
Thailand 238
Vietnam 239
4.2.5.2. Requirement of nationality of arbitrator 239
China 239
Laos 240
Thailand 240
Vietnam 241
4.3. Mechanism to guarantee qualification of arbitrator 242
4.3.1. Disclosure 242
4.3.1.1. Consequence of non-disclosure 243
4.3.1.2. The extent of fact must be disclosed 244
China 246
Model Law 247
Laos 247
Thailand 247
Vietnam 248
4.3.2. Challenge 248
China 249
Laos 250
Thailand 250
Vietnam 254
5. Conclusion 254

Chapter 5 Choice of Arbitral Procedure 256

1. The recognition of party autonomy to determine the arbitral procedure 257

1.1. International Conventions 258

1.1.1. Geneva of 1923 258

1.1.2. The New York Convention of 1958 258

1.1.3. ICSID 259

1.2. Arbitration laws 260

1.2.1. Model Law 260

1.2.2. China 261

1.2.3. Laos 261

1.2.4. Thailand 261

1.2.5. Vietnam 262

1.3. Institution rules 262

1.3.1. The direct party autonomy 262

1.3.1.1. ICC 262

1.3.1.2. LCIA 262

1.3.1.3. TAIMJ 263

1.3.2. The indirect party autonomy 264

1.3.2.1. UNCITRAL Arbitration Rules 264

1.3.2.2. AAA Rules 264

1.3.2.3. CIETAC Rules 265

1.3.2.4. TCAI 266

1.3.2.5. VIAC 266

2. Basic principles of arbitral procedure 266

3. Factors to make arbitral procedure effective 269

3.1. Forms of arbitration 269

3.1.1. Ad hoc arbitration 270

3.1.2. Institution arbitration 272

3.2. Legal background of arbitrators 275
3.3. The place of arbitration 279
4. Arbitration procedure 280
4.1. Commence of arbitration 280
4.1.1. China 281
4.1.2. Laos 285
4.1.3. Thailand 287
4.1.4 Vietnam 287
4.2. Pre-hearing 290
4.2.1. ICSID 291
4.2.2. UNCITRAL Rules 291
4.2.3. China 293
4.2.4. Laos 293
4.2.5. Thailand 294
4.2.6. Vietnam 294
4.3. Hearing 295
4.3.1. Requirement of hearing 296
4.3.1.1. Advance notice 296
China 296
Laos 297
Thailand 297
Vietnam 297
4.3.1.2. Language 298
China 298
Laos 299
Thailand 300
Vietnam 300
4.3.1.3. Confidentiality 300
China 300

Laos 301
Thailand 301
Vietnam 301
4.3.2. Evidentiary hearing 302
China 303
Laos 303
Thailand 303
Vietnam 304
4.3.3. Presentation of evidence 304
China 304
Laos 307
Thailand 307
Vietnam 309
4.3.4. Settle dispute during procedure 310
China 311
Laos 315
Model Law 316
Thailand 316
Vietnam 317
4.3.5. *Ex parte* procedure 317
China 319
Laos 321
Thailand 321
Vietnam 322
5. Conclusion 322

Chapter 6 Choice of Law 324

Part 1 Choice of *lex mercatoria* 325

1. Scope of *lex mercatoria* 326

2. The application of *lex mercatoria* 327
3. Choice of *lex mercatoria* 329
3.1. Direct choice 329
3.2 Delocalisation 330
3.3. Indirect choice 333
4. Conclusion 334

Part 2 Choice of substantive law 335

1. Express choice 335
1.1. National legal system 337
1.2. Non-national legal system (*lex mercatoria*) 339
1.2.1. Definition 340
1.2.2. Sources 342
1.2.2.1. General principle of law 343
1.2.2.2. International legislation 345
1.2.2.3. Customs and usages 346
1.2.2.4. Arbitral jurisprudence 346
1.2.3. Problems of *lex mercatoria* 348
2. Implied choice 350
3. Conclusion 351

Part 3 Limitation on party autonomy 351

1. Public policy 352
1.1. Meaning of public policy 352
1.2. Roles of public policy 353
1.3. Levels of public policy 355
1.3.1. National public policy 355
1.3.2. International public policy 356
1.4. Public policy in international commercial arbitration 357
2. Mandatory rules 359

China 360
Laos 362
Thailand 362
Vietnam 364
3. Conclusion 364

Conclusion 365

Appendixes

Appendix 1 Arbitration Law of the People's Republic of China 374

Appendix 2 Decree No.106/PM on the Settlement of Economic Dispute.....396

Appendix 3 Thai Arbitration Act B.E. 2530 (1987).....413

Appendix 4 Draft of the Thai Arbitration Act B.E 426

Appendix 5 Statutes of the Vietnam International Arbitration Centre (SVIAC)..447

Appendix 6 Order No. 42-L/CTN of September 27, 1995 (Ordinance on the Recognition and Enforcement of Foreign Arbitral Award in Vietnam 450

Appendix 7 China International Economic And Trade Arbitration Commission Arbitration Rules ("CIEATAC").....463

Appendix 8 Arbitration Rules the Arbitration Institute Ministry of Justice 486

Appendix 9 Thai Commercial Arbitration Rules.....497

Appendix 10 Arbitration Rules of the Vietnam International Arbitration Centre at the Chamber of Commerce and Industry of Vietnam ("VIAC").....512

Appendix 11 Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between the Kingdom of Thailand and the People's Republic of China 524

Appendix 12 Dika (Thai Supreme Court Decision) 5513/2540 533

Appendix 13 Dispute Resolution in Asia (Thailand) 538

Bibliography.....577

Abbreviations

CAA ..... the Chinese Arbitration Association

CAL ..... the China Arbitration Law 1994

CCPL ..... the Chinese Civil Procedure Law

CIETAC.... the China International Economic and Trade Arbitration Commission

CMAC ..... the Arbitration Rules of the China Maritime Arbitration

ICC ..... International Chamber of Commerce

IP&IT Court ..... the Thai Intellectual Property and International Trade Court

IP&IT Court Act ..... the Thai Intellectual Property and International Court Act

LEAO (LAA) ..... the Economic Arbitration Organisation Lao PDR

LCIA ..... the London Court of International Arbitration

LSED ..... the Laos Settlement of Economic Disputes

MRLC ..... the Mekong Region Law Center

OSE ..... the Office for Settlement of Economic Disputes

SVIAC ..... Statute of the Vietnam International Arbitration Centre

TAA ..... the Thai Arbitration Act of 2530 B.E. (1987)

TAIMJ ..... the Thai Arbitration Institute of the Ministry of Justice

TCAI ..... the Thai Commercial Arbitration Institution

TCCC ..... the Thai Commercial and Civil Code

TCPC ..... the Thai Civil Procedure Code

TDAA ..... the draft of Thai Arbitration Act

VCCI ..... the Vietnamese Chamber of Commerce and Industry

VEAB ..... Economic Arbitration Bodies

VEFA ..... the Ordinance on the Recognition and Enforcement of Foreign Arbitral Award in Vietnam

VFTAC ..... the Foreign Trade Arbitration Committee

VIAC ..... the Vietnam International Arbitration Centre

VMAC ..... the Maritime Arbitration Committee

VPSED ..... the Ordinance on Procedure for Settlement of Economic Disputes

VSEAC ..... the State Economic Arbitration Council

Table of Court Cases

Antco Shipping Co. v. Sidermar SpA,
417 F.Supp. 207 (S.D.N.Y. 1976). 62

Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V.
[1983] 2 Lloyd's Rep. 419 156

Aramco Arbitration 17 I.L.M. 3 (1978). 331

Arenson v. Casson Beckman Rutley & Co.
[1976] 1 Lloyd's Rep. 179 199

BP Arbitration, 53 I.L.R. 309. 334

Bureau Wijsmuller v. United States,
1076 A.M.C. 2514 (S.D.N.Y. 1976). 61

Bauer Int'l Corp. v. Etablissements Soules & Cie.,
25 N.Y. 2d 871, 250 N.E. 2d 876, 303 N.Y.S. 2d 884 (1969) 156

Compagnie d' Armement SA v. Compagnie Tunisienne de Navigation SA,
[1971] AC 572. 350

Cooper v. Cooper (1988) 13 App.Cas. 88 at p.108. 175

Corcoran v. Ardra Ins. Co., 566 N.Y.S.2d 575 (1990) 62

Cox v. Fremont Country Pub.Bld.Auth., 415 F.2d 882, 886 (10th Cir.1969). 57

Faberge Int'l. Inc. v. Di Pino, 491 N.Y.S. 2d 345 (App.Div. 1985). 62

Fertilizer Corp. of India v. IDI Management Inc.,
517 F.Supp. 948 (S.D. Ohio 1981). 244

Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 331 A.2d 184
(9175). 181

Hiscox v. Outhwaite [1991] 3 W.L.R. 297 173,228

Hermansson v. AB Asfaltbelggningar, Judgment of March 24, 1976 reported in
Stock Chamber of Commerce, Arbitration in Sweden p.26. 181

India Organic Chemicals, Ltd. v. Chemtex Fibres Inc.
(1978) All India Rep. 106 (High Ct. of Bombay 1977) 59

Island Territory of Curacao v. Solitron Devices, Inc. 416 U.S. 986 (1973). 62

James Miller v. Whitworth Street Estates, [1970] 1 All E.R. 796. 327,336

Meadows Indemnity Co. v. Baccala & Shoop Ins. Service, Inc. 760 F.Supp.
1036 (E.D.N.Y. 1991). 62

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985). 62

Morelite Construction Corp. v. N.Y.C. District Council Carpenters' Benefit
Funds, 748 F.2d 79 (2d Cir. 1984) 231

Naviera Amazonica y Intemacional de Sequos,
[1988] Lloyd's Rep. 116 324

Scherk v. Alberto-Culver Co., 419 U.S. 885 (1974) 359

Shawn v. Kuhnel & Assoc., Inc., 102 N.M. 607, 698 p.2d 880 (1985) 181

Societe Generale e Surveillance v. Raytheon European Management &
Sys.Co., 643 F.2d 863 (1st Cir. 1981) 62

Sojuznefte Export v. JOC Oil Company, 1987 Int'l.Arb.Rep. 420. 180

Sumitomo Corp. v. Parakopi Compania Maritime,
477 F.Supp. 737 (S.D.N.Y. 1979). 62

Texaco Overseas Petroleum Company and California Asiatic Oil Company v.
The Government of the Libyan Arab Republic, January 19, 1977, 4 Yearbook
Commercial Arbitration 177 (1979). 331

Ultrasystems, Inc. v. Islamic Republic of Iran Award No. 27-84-3,
2 Iran-United States C.T.R. 114 (1983). 304

INTRODUCTION

Background and Justification

Since trade emerged in the world, disputes among merchants, like other groups in society, have been inevitable. Although each state has some form of legal framework of justice to deal with disputes this does not necessarily meet the needs of the business community. This problem becomes more complicated when trade extends and crosses international borders. The legal system of justice provided by some of these states maybe unsuitable. In light of this fact various methods of dispute resolution have been created to meet the needs of the international business community.

Arbitration is one method which is considered appropriate, particularly in disputes between parties from developed and developing countries. The main reason for this is that arbitration gives the parties the freedom to tailor the arbitral proceedings in any way they see fit. In this respect, the effectiveness of arbitration depends to a large extent on party autonomy.

The question therefore arises, how can parties express and exercise this freedom? This is a difficult question to answer. The concept has been researched and developed since the emergence of arbitration in the world. And it would seem from the researches done that there are two main factors which may help us answer the question. The first is, what parties "could" do. And the second is, what parties "should" do. The first directly concerns the concept of party autonomy which deals with the scope of the parties' freedom.. The second is that, although the parties may have the freedom to tailor the arbitration to meet their needs there is the matter of how the parties can effectively express this freedom.

What parties can do may also depend on the local legal system, and the attitude of the state court concerning arbitration. This local legal system may be the law where they want to have their dispute settled or the place where enforcement of such settlement may be sought. Therefore, the parties must abide by what the law prohibits, but still have the freedom to choose a location

which is 'permissive'.

In the past, most states were of the mentality that arbitration was a method of dispute resolution which competed with the state court. They therefore attempted to exercise as much control as possible over all arbitrations which took place in their territory. Accordingly the parties' freedom to design the conduct of the arbitral proceedings was restricted. This restriction has relaxed with the adoption of the the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958, which is commonly referred to as "The New York Convention".[1]

The New York Convention provides a universally recognised framework for foreign awards made in international commercial arbitration in that an award rendered in one country may be enforced in another country, if both these countries are parties to the Convention. The aim of the New York Convention attempts to provide compromise for certain conflicts among arbitration laws, by providing a framework which facilitates the enforcement of foreign awards.

Most importantly, the New York Convention gives the parties to arbitration a wider scope to agree. This is further promoted with the emergence of the UNCITRAL Model Law on International Commercial Arbitration[2], adopted by the United Nations Commission on International Trade Law on 21 June 1985, which is similarly significant in the matter of party autonomy. The pre-eminent aim of the Model Law is to respect party autonomy and to restrict the level of court interference in the practice of international commercial arbitration.

The problem of what parties "could" do now seems more relaxed. However, the problem still remains with respect what parties can do in that what maybe permitted in one jurisdiction may not be permitted in another.

---

[1] Hereinafter "New York Convention".

[2] Hereinafter "Model Law".

Another obstacle to party autonomy is the development of arbitration. The practice of arbitration in developed countries such as England, is more advanced whilst in the jurisdictions of developing countries its use has been more recent. The development between these two groups of jurisdictions has created problems.

The second factor which relates to what parties "should" do. This factor is equally as important as what the parties "could" do. What the parties "should do" depends very much if not entirely on the experience of the parties, that is it concerns practical matters. Although the parties are free to do certain things, they should not not always do so.

For example, in appointment an arbitrator the parties may choose a non-lawyer. However, this should not be done if the dispute involves substantive legal issues. This is good practice, simply because such an arbitrator may run the risk of rendering an award which maybe unenforceable in other countries.

In practice, parties from developed countries may have more experience than those from developing countries. This raises the question of whether arbitration is a practice of and for developed countries. This would be an incorrect perception. Arbitration is not of and for any specific group of countries, but it is a method of dispute resolution used worldwide by the business community. Its use demonstrates that the business community has more much in common than any other group in society thus rendering the role of nationality insignificant. Notwithstanding this comment, cultural backgrounds may be of relevance and may affect the way businesses are conducted or disputes are settled. In most cases, however, cultural differences do not contest the importance of arbitration.

Method of research

In order to deal with the questions of what parties "could" and "should" do I propose to undertake a comparative study of some selected jurisdictions. A comparative method is more appropriate because it not only has the

advantage of giving a wide picture but also gives an insight of tendencies. There are two classic books which provide good examples of the success of this approach. The first was published in 1978 by Dr. Julian Lew and is titled "The Applicable Law in International Commercial Arbitration". This work provides a comparative review of ICC awards.

As a result of this noted piece of work, ICC awards are now being published in order to educate those who are involved in the practice and study of international commercial arbitration. These awards have now become a useful source of reference and the tendency is that international awards will be treated as one of the sources of *lex mercatoria.*

Four years later, a similar approach was used by van den Berg in his book titled "The New York Convention of 1958" to compare court decisions applying the New York Convention. The result, the decisions of various courts are now published worldwide. The publication of awards have served to facilitate the unifications of the decisions by the various national courts internationally.

In comparing the different arbitration systems people who are involved in arbitration are given assistance in choosing the most suitable system for their dispute. In other words, they have some knowledge about what each system says in respect to what they "could" and "should" do. They may for example select international rules, to apply to their arbitral procedure, but is this may only be appropriate if the dispute involves a small amount of money? Alternatively, they may select a local system to apply to their arbitration. However, in order to do so, the parties need to know about that particular system, otherwise their selection may give them difficulties later.

The comparative approach in not only useful for parties from developed countries but also for those from developing countries. In practice, it has served a source of information for developing countries thus they avoid the risk of using their own system which may put them at a disadvantage.

To illustrate this point I propose to examine the developing arbitration

systems of the People's Republic of China[3], Laos Thailand and Vietnam. In these countries it has been my observation that (whether court decision, arbitral awards or research) involving international commercial arbitration are rare. The only material available is the body of (black letter) law . Therefore in order to carry out my research on the topic interviews were conducted with those who have authority or those who practice arbitration or those who are authorities on the subject. The research was however further limited by the fact that the author has used material available in English, Laos and Thai. This brings him to say that certainly in explaining the basic principles of arbitration one cannot avoid referring to developed systems such as that of England, the United States, and the Model Law.

Scope of the Study

Although the comparative approach is an effective method, it is not possible to compare all the systems of the world in this paper. Accordingly this research will concentrate on the systems of Laos, Thailand and Vietnam with particular emphasis on the PRC. The usual limitations with regard to accessibility of materials or indeed linguistic bars apply. There are three main reasons for the choice of study of these systems which I will now discuss.

First, arbitration has significantly grown in South East Asia since the cold war. This is as a result of the fact that many of these countries have reformed their economies. In addition, international trade between these countries and developed countries has been increasing dramatically. Thus it is not surprising that a great number of arbitration cases have been taking place in the PRC in recent years.

Although South East Asia experienced economic crisis in 1997, the use of arbitration has not been affected. In fact, this has been the opposite, in that the number of disputes has been on the increase. To address this development, the countries in question have been attempting to improve their arbitration systems in order to accommodate these disputes and to meet the needs of

[3] Hereinafter "PRC".

foreign investors. The, positive spin off of what should have been a crisis seems to be the promotion of arbitration. In effect this has been the start of the golden age of arbitration in South East Asia.

It is worth noting that the South East Asian countries have different political systems. The PRC, Laos and Vietnam apply the socialist system on one hand, while Thailand has a democratic system. This difference, like East/West trade in the last two decades, needs mutual understanding. This is done by each states understanding of each others system. To achieve this the Mekong Region Law Center[4] was established in 1995.

The MRLC is a non-profit association of the legal communities of Cambodia, Lao PDR, Thailand and Vietnam. MRLC membership also extends to the Myanmar and Yunan Province of the PRC. One of its main objectives is to assist and contribute to the process of legal development within the countries of the Region.

Thirdly, the arbitration systems in these four countries are distinct from each other. The PRC, Thailand and Vietnam are parties to the New York Convention. The PRC has very much followed the Model Law, Thailand has not, and Vietnam has no arbitration law. Laos, has an arbitration law, but it has not yet become a party to the New York Convention. China has at least four arbitration systems: the PRC, Hong Kong, Macao and Taiwan. Thus, the legal effects of international commercial arbitration, which takes place in these four countries produce interesting questions. For this reason, one of the MRLC's objectives is to provide the means for improving and promoting the legal and economic knowledge and skills of arbitrators.

Aims to be achieved

The outcome of this research is expected to be two-fold.

The paper aims first to relate the need for party autonomy in the business community in the developing systems studied. In this respect, it can

---

[4] Hereinafter "MRLC".

assist legislators to decide whether they should or should not accept the norm of worldwide practice.

In practice, these legislators have tended to adopt the arbitration model form a developed system without an understanding of it. In most cases a particular system is adopted mainly to please foreign businessmen. The result of this sometimes causes damage to the parties and to arbitration process. This research provide legislators with an opportunity to compare their systems with other systems of the world and to clarify any shortcomings in their own systems

Furthermore, it is also an opportunity for courts to consider their role in dealing with international commercial arbitration. In this respect, both the legislators and the courts should have a say in the answer to the question of what parties "could" do in their territory.

Secondly, the paper aims to remind and educate parties to exercise their freedom with care. Choices in arbitral process are only beneficial to the parties if the procedure is tailored with understanding.

Besides, one of the serious problems of international commercial arbitration today is cost. Many arbitrations take place away from the place where the dispute actually occurs. This may simply be because that country does not provide a legal framework which supports international commercial arbitration. Accordingly, parties have to pay more to have the benefit of a situs with a developed legal system. By examining the systems of the four countries highlighted above this may assist parties to choose one of these countries as location with a suitable legal system as it is expected that trade in these four countries will increase in the near future.

We should bear in mind that if something goes wrong, nobody can be blamed but the two parties. This thesis is geared to help parties who enter arbitration agreements to anticipate problems and ultimately avoid them in their agreements where possible. It should also be of value to those who are assigned the role of arbitrator to better understand the position in these four

countries compared on issues treated dealt with in this thesis.

Overview of each system

PRC

In general there are four methods of dispute resolution used in Asia: negotiation, mediation, arbitration and litigation. The first three methods are private and informal, whilst the fourth is formal. Negotiation and meditation are traditionally, considered as cornerstones in the Asian system of dispute resolution.[5] This is simply because it is the Asian culture to compromise and respect elders. In the PRC, for example, mediation plays a prominent role in the traditional and contemporary society.[6]

Although arbitration has its origins in the Western world, it is well-accepted in Asian countries for two main reasons. First, arbitration, unlike litigation, is a private and informal method to settle disputes. This complies with the Asian culture of dispute settlement, in this respect a losing party in arbitration will not feel that they have lost face. In most cases the parties will settle their disputes because they respect the arbitrator.

Secondly, most Asian countries need foreigners to invest in their countries, so they will do anything to gain the confidence of foreign investors. One matter of major concern to a potential foreign investor, is how a dispute(s) will be resolved should it arise in within the territory of a particular country. Foreign investors tend to be more reluctant to submit their dispute(s) to a state court because they are in unfamiliar surroundings and they may feel a bit intimidated. Thus, most Asian countries promote arbitration as a means to settle disputes to inspire the confidence of foreign investors.

The arbitration system was first established in the PRC in 1950s. In the first two decades there was not much arbitration activity because of the PRC's international isolation, its highly centralised economic system, and internal

---

[5] G Triggs, 'Is There An 'Asian' Style of Dispute Resolution?', 23 *Melb.U.L.Rev.* (1999) 550, at p.552.

[6] Moser, "People's Republic of China" in M Pryles (ed.) *Dispute Resolution in Asia* (Kluwer: 1997) at pp. 79-82.

political and economic turmoil.[7]

However, since the PRC officially opened its doors to international trade in 1979, its economy has witnessed dramatic growth. Consequently, international commercial disputes between Chinese and foreign parties have been increasing.[8] In order to garner the confidence of foreign investors, arbitration has been encouraged as an acceptable and desirable way to settle disputes.[9] Thus, arbitration started to gain popularity in the 1980s,[10] and it has become even more successful in the 1990s.

Previously, arbitration agreements in the PRC traditionally favored European countries as a place of arbitration. One popular location was Sweden under the auspices of the Stockholm Chamber of Commerce.[11] There were two major reasons for this.

First, there was the fact that Stockholm was a neutral country with a long-standing reputation of settling East-West disputes.[12] The Rules of Stockholm Chamber of Commerce were historically viewed as being more politically acceptable to parties from the PRC.[13] Secondly, Swedish law was more flexible to the parties[14] in that, the parties were free to decide on the matters they saw fit to their dispute. This illustrated, for example, with respect to choice of law; the parties were free to nominate the applicable law to govern their dispute.[15] In practice, however, the Chinese usually avoided using

---

[7] Kaplan, Spruce & Moser (eds.), *Hong Kong and China Arbitration Cases and Materials*, (Hong Kong: Butterworths 1994) at 309.

[8] 2/16/98 China Daily via *1998 WL 7594192.*

[9] See Hong-Lin Yu, "Some Thoughts on the Legal Status of A-national Principles in China", 1(6) *Int'l.Arb.L.Rev.* (1998) 185.

[10] Tang Houzhi, "Lecture, Arbitration--A Method Used by China to Settle Foreign Trade and Economic Disputes", 4 *Pace L. Rev.* 519, 520 (1984).

[11] J Cohen and J Lange, "The Chinese Legal System: A Primer for Investors", 17 N.Y.L. Sch. J. Int'l & Comp. L. 345, at p.367.

[12] L Reed, "Drafting Arbitration Clauses", 624 PLI/Lit 563, at p.583.

[13] *Ibid.*

[14] J Nafziger and R Jiafang, "Chinese Method of Resolution International Trade, Investment, and Maritime Dispute", 23 *Willamette L. Rev.* 619, at p.665.

[15] *Ibid.*

Swedish law as the applicable law because they were generally unfamiliar with it and the Swedish language. [16] Consequently, when the CIETAC Rules were reformed, the Rules of Stockholm Chamber of Commerce were used as a guideline.

In the 1990s, a number of laws have been developed, including those on arbitration, to comply with international standards.[17] On 31 August 1994, the Chinese Arbitration Law [18] was adopted by the Ninth Session of Standing Committee of Eighth National People's Congress and took effect on the 1 September 1995. This piece of legislation is of great significance in the history of the development of the Chinese arbitration system.

The Chinese authorities also encourage the use of arbitration as an alternative means to settle disputes, which arise out of international commercial and economic activities.[19] The result is that most contracts between the Chinese and their foreign counterparts now tend to contain arbitration clauses.[20] The result is that many international arbitration cases now take place in the PRC than any other place in the world.

In order to understand the Chinese arbitration system, first it is important to examine current legislation. The second task is to look at the arbitral institutions. Finally, I will explore the practice of arbitration in China.

Sources of Arbitration Law

Multi-jurisdiction

The law of China comprises of four distinct territorial jurisdictions: (1) the laws of the PRC; (2) the laws of Hong Kong Special Administrative Region[21], a former British colony handed back to China in 1997, but which

---

[16] *Ibid.*

[17] Charles J. Conroy, "Recent Chinese Legal Developments", 221(78) *N.Y.L.J.* (1999) S3.

[18] Hereinafter "CAL".

[19] See Hong-Lin Yu, *op.cit.*, footnote 9, at p.186.

[20] Hua Chen, "China and Its Arbitration System in Foreign Trade" 68 *U. Det. L. Rev.* 457 (1991) 460.

[21] Hereinafter "Hong Kong SAR".

still maintains the common law system; (3) the laws of Macao Special Administrative Region[22], a former colony of Portugal, handed back to China in 1999, but which has kept its original legal system; and (4) the laws of Taiwan which remained part of the former Republic of China but which has a developed and distinct legal system from mainland China following the loss of the civil war by the Nationalists to the Communists in 1949. Taiwan independent but it is, however, still not recognised by Mainland China. It should be noted that the term "China law" which is commonly referred to is in fact the laws of Mainland China. Examination of this area is also the aim of this study.

To uphold national unity and territorial integrity, to maintain prosperity and stability and to take account of their history and realities of Hong Kong and Macao, the PRC decided that upon its resumption of exercise of sovereignty over these two countries, a Hong Kong SAR and a Macao SAR was to be established. Under this system, the principle of "one country, two systems" applies. The result is that the socialist system and policies is not be practised in Hong Kong[23] and Macao[24] and that the previous capitalist system and way of life has remained unchanged over the past 50 years.

Arbitration in Hong Kong SAR has two distinct arbitration regimes: domestic and international arbitration.[25] The former regime was based on English law and it continued in this form for the next 50 years. Since 1990 the UNCITRAL Model Law has been applied in international arbitration held in Hong Kong SAR.

Arbitration in Macao SAR is also divided into domestic and international arbitration. Macao SAR promulgated the Decree-Law No. 29/96/M of 11 June on domestic arbitration on 11 June 1996 (effective as of 15

---

[22] Hereinafter "Macao SAR".

[23] The Basic Law of the Hong Kong SAR of the People's Republic of China, Article 5.

[24] The Basic Law of the Macao SAR of the People's Republic of China, Article 5.

[25] Chapter 341 of the Law of Hong Kong.

September 1996). With respect to international arbitration, Macao SAR promulgated the Decree-Law No. 55/98/M on 23 November 1998, to adopt the UNCITRAL Model Law. However, Decree-Law No. 55/98/M has a wider scope than the term 'international' in that it is applied not only to international arbitrations, but also to arbitrations considered external to the Macao SAR.

Taiwan's new Arbitration Act is based on the UNCITRAL Model Law and was given effect on 28 December 1998. The Act, however does not make a clear distinction between domestic and international arbitrations. It is also not limited to commercial matters.

In the PRC, prior to 1995, there were no specific statute enacted to regulate arbitration involving foreign parties. In practice, arbitration was governed by a combination of central government decrees and statutes, which referred to arbitration, regulations enacted by arbitration authorities, and common practices. [26] When the CAL was adopted in 1995, it became the first unified and completed piece of legislation on arbitration in the PRC.[27] The CAL did not adopt the UNCITRAL Model Law[28] but was rather an amalgamation of provisions from international experts and the norms set by the Model Law.[29]

In addition to the legal sources mentioned above, other sources of Chinese laws which deal with arbitration include for example, the Law of the PRC on Civil Procedure, amended 1991[30], Sino-foreign Joint Venture Law of the PRC adopted on 1 July 1979 [31] and Sino-foreign Cooperative Enterprise

---

[26] Ge Liu, Alexander Lourie "International Commercial Arbitration in China: History, New Developments, and Current Practice" 28 *J. Marshall L. Rev.* 540 (1995).

[27] *Ibid.*

[28] Tang Houzhi, "The People's Republic of China", in Sanders and Berg (eds.), *International Handbook on Commercial Arbitration*, (Kluwer, 1996) Vol.1. p.2.

[29] Cheng Dejun, Michael J. Moser and Wang Shengchang, *International Arbitration in the People's Republic of China* (Butterworths, 2nd ed. 2000), p.15.

[30] Hereinafter "CCPL".

[31] Article 14.

Law of the PRC adopted on 13 April 1988 [32].

From the perspective of legal sources, besides those mentioned above, Chinese laws concerning arbitration also include the following:

(1) Judicial interpretation issued by the Supreme People's Court of China[33] on arbitration. [34]

(2) International treaties on arbitration to which the PRC has acceded. [35] For example, New York Convention 1958, which the Chinese government acceded to in December 1986, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States to which the Chinese government acceded in 1990.

The CAL consists of eight Chapters and eighty Articles and it is applies in almost all arbitration cases whether domestic or international. Chapter 7 contains the provisions, which relate to international arbitrations and, is very similar to Chapter 28 of the CCPL. The other provisions of the CAL may also be applied to arbitration matters involving foreigners.

Arbitral Institutions

Similarly, arbitration established under the CAL is classified into two groups that are domestic or foreign-related arbitration institutions. [36] Separate tribunals and procedures are provided for each [37]. Domestic and international arbitration have separate laws, rules and regulations. [38]

Arbitration institutions are correspondingly divided into two types

---

[32] Article 26.

[33] Hereinafter "Chinese Supreme Court".

[34] M Moser, *op.cit.*, footnote 6, at p. 84.

[35] *Ibid.*

[36] Vivienne M Ashman, New York Convention and China's 'One Country, Two Systems,' *N.Y.L.J.*, July 2 (1998).

[37] *Ibid.*

[38] Jun Ge,"Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China", 15 *UCLA Pac. Basin L.J.* (1996) 122, 129.

according to this classification: domestic arbitration institutions and foreign-related arbitration institutions.

Domestic arbitration institutions

Before enactment of the CAL, domestic arbitration institutions were divided and set up according to the subject matter of the arbitration. The major domestic arbitration institutions were:

(1) arbitration institutions for economic contracts disputes. These were established under the government department for the administration of industry and commerce at all levels. They were responsible for arbitration of disputes arising from economic contracts in accordance with Economic Contract Law of China adopted on 13 December 1981 and Regulations for Economic Contract Arbitration issued on 22 August 1983.[39]

(2) arbitration institutions for technology contract disputes. These were established mainly by government departments responsible for the administration of science and technology. They were competent to arbitrate disputes arising from technology, intellectual property and know-how contracts according to the Law of Technology Contracts of People's Republic of China and the Provisional Regulations for the Administration of Technology Contract Arbitration Institutions.[40]

(3) arbitration institutions for labour disputes. These were established jointly by labour administration departments, trade unions and comprehensive administration department for economy at various levels. They arbitrated disputes related to labour contracts in accordance with Labour Law of the People's Republic of China

---

[39] See Zhao Yuhong, "Contract Law", in W Chenguang and Z Xianchu (eds), *Introduction to Chinese Law*, (Hong Kong: Sweet &Maxwell Asia: 1997), 235 at pp.246-247, p.253.

[40] See *Ibid.*, at p.266, pp.269-270.

1994 [41] and Regulations for the Settlement of Enterprise Labour Disputes 1993.[42]

(4) arbitration institutions for real estate disputes. These were set up by the administrative department of the local government and responsible for the arbitration of disputes related to buildings and lands.

It is worth noting that in the past there were at least 3,400 arbitration institutions in the administration departments of industry and commerce. Additionally, there were some 5,000 detached arbitration tribunals in towns and townships.[43]

After the enactment of the CAL, fundamental changes were made to the domestic arbitration institutions. In this respect, certain domestic arbitration institutions were reorganised [44] while some were terminated.[45] The arbitration institutions which dealt with labour disputes and disputes which arose out of agricultural contracts are not eligible for reorganisation or termination.[46]

Further under the CAL, arbitration commissions could be set up directly in the municipalities under the direct control of central government or in cities where the provincial or autonomous regional people's government is seated.[47] It may also be set up in other cities that are divided into districts. There is however, one restriction under the system in that the commission

---

[41] Section 77-84.

[42] See Lin Feng, "Labour Law", in W Chenguang and Z Xianchu (eds), *Introduction to Chinese Law*, (Hong Kong: Sweet &Maxwell Asia: 1997), 457 at p.484.

[43] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *Arbitration Laws of China*, (Hong Kong: Sweet & Maxwell Asia: 1997) at p.45.

[44] CAL, Article 10.

[45] CAL, Article 79.

[46] See CAL, Article 77.

[47] CAL, Article 10 para.1.

cannot be set up at all levels of the administrative divisions.[48] The arbitration commissions can be located in the same place where the arbitration institutions are set up. Effectively all the arbitration institutions were reorganised and those which could not be reorganised were terminated.

When an arbitration commission is set up, it has to be registered with the judicial and administrative departments of the province, autonomous region or the municipalities directly under the central government.[49] The people's government have the authority to organise relevant departments and the chambers of commerce to form the arbitration commission in a unified way.[50]

The CAL regime guarantees that arbitration commissions are independent from administrative organs,[51] not subordinate to administrative organs and prevent any affiliation between the arbitration commissions and the administrative organs.

The CAL[52] requires that the arbitration commission shall have the following qualifications:

(1) its own name, domicile and articles of association;

(2) the required property;

(3) members that make up the commission; and

(4) arbitration officers retained by it.

An arbitration commission generally consists of one director, two to four deputy directors and seven to eleven commission members.[53] The director, deputy directors, and members of the arbitration commission may be held by

---

[48] CAL, Article 10 para. 1.

[49] CAL, Article 10 para. 3.

[50] CAL, Article 10 para. 2.

[51] CAL, Article 14.

[52] CAL, Article 11.

[53] CAL, Article 12 para.1.

legal, economic, trade experts or persons with working experience in one of these fields. Further, legal, economic or trade experts may make up at least two- thirds of the arbitration commission.[54]

Apart from the reorganisation of domestic arbitration institutions, there was another important change to the jurisdiction of domestic arbitration institutions. In recent years, the dual system has triggered question regarding which of the various arbitration institutions are authorised to handle domestic or foreign-related cases. To clarify this matter, the State Council issued a notice on 8 June 1996, [55] which expressly authorised the domestic arbitration commissions to administer foreign-related cases.[56]

Foreign-related arbitration institutions

The second type of arbitration institution is that which deals with foreign-related disputes. There are two foreign-related arbitration institutions, the China International Economic and Trade Arbitration Commission[57] and China Maritime Arbitration Commission.[58]These two institutions are regarded as the pioneers of modern Chinese arbitration institutions. Although these institutions were established before the CAL, the latter does not affect them as main aim of CAL is to set out special provisions for dealing with foreign related arbitrations. There are certain apparent differences between the domestic and foreign-related arbitration commissions. The former is newly established under the CAL, while the latter was established by the China Chamber of International Commerce[59] Furthermore, the CAA was developed to formulate rules on arbitration in accordance with the CAL and the relevant

---

[54] CAL, Article 12 para.2.

[55] Hereinafter "State Council Notice of 1996". See Article 3.

[56] Harpole S, "Following Through on Arbitration", *China Bus.Rev.*, Sept.1, 1998, via *1998 WL 10921747.*

[57] Hereinafter "CIETAC".

[58] Hereinafter "CMAC".

[59] Hereinafter "CCOIC" (also known as the China Council for the Promotion of International Trade or CCPIT).

provisions of the CCPL for domestic arbitration commissions[60], whilst the CCOIC is authorised to do the same task for foreign-related arbitration commissions.

1.1. CIETAC

The Foreign Trade Arbitration Commission[61] was set up in April 1956 within the CCPIT in accordance with the "Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission," adopted by the former Government Administration Council[62] of the Central People's Government on 6 May 1954.

FTAC's jurisdiction was limited solely to disputes with foreign parties and handled a small number of cases. Consequently, in 1980 the Foreign Economic and Trade Arbitration Commission[63] replaced the FTAC. The FETAC's jurisdiction was expanded to include "foreign trade" as well as disputes "arising from contracts between China's economic cooperations and foreign countries such as joint ventures using Chinese and foreign investment, to build factories in China, credits and loans between Chinese and foreign banks."[64] However, this change has been subject to the criticism that it is has more in form than substance. This is evidenced by the fact that even though the commission was given a new name, the rules of arbitration were only slightly modified and remained the same as those of FTAC.[65]

On 21 June 1988, FETAC's name was further changed to the CIETAC. Similarly CIETAC's jurisdiction was broadened to include "disputes arising

---

[60] CAL, Article 15 para.3.

[61] Hereinafter "FTAC".

[62] Now is the State Council.

[63] Hereinafter "FETAC".

[64] See Notice of the State Council Concerning the Renaming of the Foreign Trade Arbitration Commission as the China Foreign Economic and Trade Commission, February 26, 1980.

[65] See Wang Sheng Chang, "A Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission", 9(4) *J. Int'l Arb.* 93, 96-99 (1992).

from international and trade."[66] The CIETAC Rules 1988[67] have been amended three times, in 1994, 1995 and finally in 1998. These amendments were aimed to bring the CIETAC more in line with internationally recognised international arbitration standards. In other words, the new developments in CIETAC have contributed significantly to the "modernisation" of CIETAC rules and procedures.[68] The adoption of the 1995 Arbitration Law does not affect the legal status of CIETAC because the CAL, in setting forth a special chapter which refers to this institution, reaffirms their independent positions in the PRC's dispute resolution system.

The CIETAC has become one of the busiest arbitration centres in the international commercial arbitration community.[69] In 1997, CIETAC accepted 723 cases -the largest number in the world- and which involved about US$ 978 million.[70]

CIETAC is a non-governmental arbitration institution developed to handle contractual or non-contractual economic and trade disputes that are international or has a foreign element. CIETAC may also accept domestic arbitration cases with special authorisation. CIETAC has its headquarters in Beijing. The Shenzhen Sub-Commission and Shanghai Sub-Commission were established in 1989 and 1990 respectively with the view to expand CIETAC'S arbitration activities. The Sub-Commissions are an integral part of CIETAC.[71]

CIETAC is composed of number of members; which consist of one Chairman, several Vice Chairmen, one Secretary General and several Deputy

---

[66] See CIETAC Rules of 1988, Article 1.

[67] Hereinafter "CIETAC Rules".

[68] S Blay, "Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments", 8 *Am.Rev.Int'l.Arb.* 331 (1997).

[69] Stanley Lubman, "Setback for China-Wide Rule of Law", *Far East Economic Review* (Nov.7, 1996) at.p.38.

[70] "CIETAC leads world in international arbitration cases", *China Bus. Info. Network*, (Thursday, Jan. 15, 1998) via 1998 WL 7560224.

[71] See CIETAC Rules, Article 11.

Secretaries General. [72] In addition, the Sub-Commissions each have a Secretariat that is responsible for the routine operations of CIETAC and its Sub-Commissions. [73] CIETAC also maintains a list of approved arbitrators[74] that are used both by CIETAC and the Sub-Commissions.

Chairman

The Chairman carries out a variety of duties with respect to the overall work of CIETAC and the conduct of arbitration proceedings. The Chairman is also charged with the responsibility of appointing the Secretary General and Deputy Secretary Generals of CIETAC and its sub-commissions. The Chairman has also power to authorise a Vice-Chairman to perform any duties on his behalf.

With respect to the conduct of arbitration proceedings, the Chairman may be called upon to carry out any of the following duties: to appoint an arbitrator, a sole and/or a presiding arbitrator[75]; to decide whether an arbitrator should withdrawal from office[76]; to decide whether to accept a party's application for arbitration if the case was previously withdrawn by the parties[77].

Secretariat

The Secretariat is responsible for handling the day-to-day administrative affairs of CIETAC[78]. The Secretariat is headed by a Secretary General and several deputies. The main task of the Secretariat is to act as the administrator of cases and this includes receiving arbitration applications and

---

[72] CIETAC Rules, Article 9.

[73] CIETAC Rules, Article 9 para.2. and Article 11 para.2.

[74] CIETAC Rules, Article 9 para.2. and Article 11 para.2.

[75] CIETAC Rules, Article 25-27.

[76] CIETAC Rules, Article 30.

[77] CIETAC Rules, Article 44 para. 3.

[78] CIETAC Rules, Article 9 para.2.

statements of defence or counterclaim from the disputants[79]; collecting the deposit on arbitration fees; notifying arbitrators of their appointment by the parties; scheduling hearing and providing interpreters and secretaries[80]; researching legal issues; and assisting in the drafting of arbitral awards.

Sub-commissions

CIETAC has two-established local sub-commissions[81]: the Shenzhen and Shanghi sub-commissions which were established in 1984 and 1990 respectively. Both sub-commissions are an integral part of the CIETAC.[82] Although each sub-commission has its own Secretariat, it has a unified Panel of Arbitrators. [83]

Both sub-commissions have jurisdiction over those cases where the parties agree to have their dispute submitted for arbitration before the designated commissions.[84] In the absence of such an agreement, the place of arbitration will be at the discretion of the Claimant.[85]

It should be noted that CMAC has no sub-commission; all CMAC cases are handled by CMAC's headquarters in Beijing.

Arbitrators

Given the fact that the parties to a CIETAC and CMAC proceedings are required to select arbitrators from the members of the appropriate panel, [86] these commissions are required to maintain a panel of arbitrators. The question is how do they appoint a person to be member of the panel of arbitrators? To answer to this question, both CIETAC and CMAC have the Stipulations for

---

[79] See CIETAC Rules, Article 15, 17, 18.

[80] See CIETAC Rules, Article 75 para.2.

[81] CIETAC Rules, Article 11.

[82] See CIETAC Rules, Article 11.

[83] CIETAC Rules, Article 9 para.2. and Article 11 para.2.

[84] CIETAC Rules, Article 12.

[85] CIETAC Rules, Article 12 para.2.

[86] See CIETAC Rules, Article 24.

Appointment of Arbitrators[87].

Under CAL both Chinese and foreign nationals can be appointed as arbitrator in the PRC. The Stipulations determine the qualification for both Chinese and foreign national arbitrators. Those persons who meet the qualifications for arbitrators have to fill an Application Form for Candidates of CIETAC (or CMAC) Arbitrators together with the written recommendations of one or two expert(s) or professor(s), and also with the approval from the unit where the applicant works if necessary. After receipt of the application, the Qualification Examination Committee of the Arbitration Commission will examine the application, and write its comments on the examination. If the application is approved, it is then submitted to the relevant Arbitration Commission for examination and approval.

If the application is approved, the Arbitration Commission will issue an official letter of appointment and make an announcement in the relevant periodicals and newspapers. The term of appointment of an arbitrator is usually three years. However, this term may be extended before the expiration of each three-year term of appointment.

1.2 CMAC

CMAC was set up in 1958 in accordance with the "Decision of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission within CCPIT," adopted by the State Council on 21 November 1958. It was called "Maritime Arbitration Commission," later renamed the "China Maritime Arbitration Commission". The CMAC Rules were revised in 1995.

CMAC is located in Beijing but[88] it may set up its Sub-Commissions in other places within the territory of the PRC.[89] CMAC has one Chairman,

---

[87] Hereinafter "Stipulations".

[88] CMAC Rules, Article 11.

[89] CMAC Rules, Article 11.

several Vice Chairmen, a number of CMAC's member[90] and a Secretariat to handle its day-to-day work.[91]

The primary function of CMAC [92] is to independently and impartially resolve, by means of arbitration, contractual and non-contractual maritime disputes arising from, or out of the of ,transportation, production or navigation by or at sea, in coastal waters and other waters connected with sea, with a view to protecting the legitimate rights and interests of the parties concerned.

CMAC takes cognizance of maritime cases relating to disputes:

(1) arising from salvage and general average;

(2) arising from collision between vessels, or from damage caused by a vessel to the structure and installation on the sea, waters connected with sea, and in the harbor as well as the submarine or underwater installation;

(3) arising from management, operation, chartering, mortgage, agency, towage, raising, sale, repair, building, dismantling of sea-going/river vessels, as well as transportation by sea or by river by virtue of contracts of affreightment, bill of lading or other documents, and marine insurance;

(4) regarding the exploitation and utilization of the sea resources and pollution damages to the environment of sea;

(5) arising from contracts of freight, supply of ship's stores, employment of seamen aboard a foreign vessel, fishery production and fishing; and

(6) other maritime disputes submitted to arbitration by agreement between the parties.

---

[90] CMAC Rules, Article 9 para. 1.

[91] CMAC Rules, Article 9 para. 2.

[92] CMAC Rules, Article 2.

1.3 Chinese Arbitration Association

As seen, there has been fundamental changes to the old arbitration institutions to establish the arbitration commissions. The major difference between them is that the previous arbitration institutions were strongly administrative in nature whilst the present arbitration commissions are independent of administrative bodies and therefore not subject to subordinate relationships between arbitration commissions and the administrative bodies.[93] Furthermore, there are no subordinate relationships between arbitration commissions. There is however a negative side to the relationship in that after arbitration commissions are established, the question of who will exercise a supervisory function over the commissions, its members and its arbitrators remains unanswered? Secondly, whether there are any specific rules on the conduct of its arbitration procedures?

To address these problems, the CAL calls upon the China Arbitration Association.[94] The CAA, is a legal and social organisation which operates under Chinese law, which serves as a self-disciplinary organisation for arbitrators according to its charter and formulates rules for the conduct of arbitrators in light of Chinese laws and regulations [95]. CAA is composed of all members of China arbitration commissions.[96]

There are two major functions performed by the CAA. The first role is supervision of the arbitration commissions, members and arbitrators. [97] The second is to formulate a set of rules of arbitration in accordance with the CAL and the relevant provisions of the CCPL. [98] The CAA is therefore, in my opinion is a good start to the development of a formal domestic arbitration

---

[93] CAL, Article 14.

[94] Hereinafter "CAA".

[95] CAL, Article 15 para.1.

[96] CAL, Article 15 para.2.

[97] CAL, Article 15 para.2.

[98] CAL, Article 15 para.3.

system.[99]

Party autonomy in practice

The principle of party autonomy is fundamental to the practice of international commercial arbitration. Accordingly, the Chinese arbitration system has been formulated to adopt this principle. A good example of this is illustrated by the right of the parties to choose the place of arbitration.

Under the CIETAC Rules of 1995, parties to arbitration did not have the freedom to choose the place of hearing, the hearings had to be heard in Beijing or in another place with the approval of the Secretary General of the Arbitration Commission.[100] It should be further noted that the CIETAC Rules of 1995 also made a distinction between the 'hearing of a matter' and the 'arbitration of the matter'. In this respect, the hearings were confined to Beijing while the parties had the freedom to choose the place of arbitration. [101] However, the word "hearing" was broadly interpreted to include the substantive arbitration of the matter. As a result, the CIETAC arbitrations were heard and arbitrated in Beijing. [102]

In the practice of international commercial arbitration, it is common to distinguish place of arbitration and from the place of hearing. While the former is the place where arbitral tribunal has arbitrated the case, the latter is the place where arbitral tribunal conduct hearing the witness.[103]

In light of the difficulty cited above, CIETAC has revised Article 35 by providing that: "In case the parties have agreed the place of arbitration, the hearing of the case shall be conducted in the place of arbitration. Unless otherwise agreed by the parties, the cases taken cognizance of by the Arbitration Commission shall be heard in Beijing, or in other places with the

---

[99] D Lewis, "Editor's Notes", 8 *China L.&Prac.* (1994) p.35.

[100] CIETAC of 1995, Article 35.

[101] S Blay, *Op.cit.* footnote 68, at p.336.

[102] *Ibid.*

[103] See UNCITRAL Rules 16(2) and Model Law, Article 20(2).

approval of the Secretary-General of the Arbitration Commission. The cases taken cognizance of by a Sub-Commission of the Arbitration Commission shall be heard in the place where the Sub-Commission is located, or in other places with the approval of the Secretary-General of the Sub-Commission."

Thus parties who submit their disputes to arbitration under the CIETAC Rules now have freedom to choose a place of arbitration other than Beijing. The only limitation is in the case where the parties choose a Sub-Commission in Shanghai or Shenzhen. In such cases, the matter can only be heard "in the place where the Sub-Commission is located or in other place approved by the Secretary-General of the Sub-Commission."[104] In these circumstances, it is essential that the parties take account of their costs.[105]

Although the Chinese arbitration system is developed with respect to the principle of party autonomy, there are certain issues in practice where the parties are best advised to exercise their freedom with great care. It is also worth noting that there are certain practices with respect to party autonomy that are impossible in the PRC. There are many reasons for this practice.

First, the Chinese arbitration process remains protective of local interests.[106] For example, the Chinese courts are likely refuse to enforce an award in favour of a foreign party. [107] Furthermore, if the Chinese party to an arbitration agreement does not voluntarily participate and comply with an award, the arbitration agreement can be a no-win situation for a foreign party with a Chinese entity. [108]

Secondly, Chinese arbitration has its own procedure. The CAL requires that an arbitration agreement should designate an arbitration commission, otherwise it is unenforceable. The CAL also determines the qualifications and

---

[104] See Article 35.

[105] S Blay, *op.cit.* footnote 68, at p. 331.

[106] Harer C, "Arbitration Fails to Reduce Foreign Investors' Risk in China, 8 *Pac.Rim.L.& Pol'y J.* (1999) 393 at p.394.

[107] *Ibid.*, at p.397.

[108] *Ibid.*

selection of arbitrators which fall within the requirements of arbitrators serving as part of arbitration organisations.[109] Furthermore, arbitration organisations are assigned important roles with respect to the appointment of arbitrators and applications for interim measures of protection.[110] This means that every arbitration in the PRC should be under the Arbitration Commission. Consequently, an ad hoc or ICC, LCIA or other similar type arbitration is impossible in the PRC.

Thirdly, the legal environment in the PRC makes arbitration less attractive because under Chinese law a Chinese company needs government approval before it can engage in foreign trade.[111] Thus, an arbitration agreement concerning certain issues which are unpopular with the local authorities may be made void by the government or the courts. [112]

Enforcement of award between HK and the PRC[113]

Before the return of sovereignty over Hong Kong to the PRC in 1997, both Hong Kong and the PRC were parties to the New York Convention. The PRC acceded to the New York Convention on 22 April 1987; while the United Kingdom ratified the Convention on the 24 September 1975. Its application was extended to Hong Kong on the 21 April 1977 and post-handover, Hong Kong remained a party by virtue of the adoption of the New York Convention on its behalf by the PRC. Thus, the enforcement of foreign awards made in signatory states other than the PRC remained unaffected. The problem however, was whether an award rendered in Hong Kong will be considered a domestic or foreign award under the New York Convention in mainland China, or *vice versa*? This was a lacuna in arbitration with respect to the enforcement of awards as between the Mainland and Hong Kong.

---

[109] CAL, Article 13.

[110] CAL, Article 28, 32 and 68.

[111] Harer C, *op.cit.* footnote 106, at p.403.

[112] *Ibid.*

[113] See Herbert Smith (London), "Asia arbitration".

This lacuna lasted for over two years and finally came to an end when the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR[114] ('the Agreement') was signed by the Supreme People's Court of mainland China (the 'mainland') and the Department of Justice of the Hong Kong Special Administrative Region[115] on 21 June 1999 and made effect on the 1 February 2000.

The purpose of the Arrangement is to provide a mechanism for the reciprocal enforcement of arbitral award made in Hong Kong SAR and in Mainland China. The Arrangement contains language similar to that found in the New York Convention. Under the Arrangement Hong Kong may refuse to enforce an award made in Mainland China on one of the following grounds:

(1) a party to the arbitration agreement was under some legal incapacity;

(2) the arbitration agreement was not valid;

(3) one party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(4) the arbitral award deals with a matter not within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;

(5) there was a failure to properly to constitute the arbitral tribunal;

(6) the arbitral award has not yet become binding on the parties or has been set aside or suspended; or

(7) the matter underlying the arbitral award was not capable of being determined by arbitration under Hong Kong law or it would be contrary to Hong Kong public policy to enforce the arbitral award.

---

[114] Hereinafter "Arrangement".

[115] Hereinafter "Hong Kong SAR".

The grounds for refusing to enforce a Hong Kong arbitral award on the Mainland are in essence the same, except that the Mainland reserve the right to refuse to enforce an arbitral award that is contrary to the "social public interest" of the Mainland.

The Arrangement therefore effectively preserves the pre-handover practice in respect of the enforcement of arbitral awards under the New York Convention.

Chinese Arbitration in Practice

As seen, although domestic arbitration institutions are allowed to handle international commercial cases, they are almost always exclusively handled by CIETAC and CMAC. There are many reasons for this. First, CIETAC and CMAC are much more experienced given their 40 years experience compared to the domestic commissions with less than five years experience. Secondly, CIETAC and CMAC have the necessary facilities for the conduct of international commercial arbitration, this includes meeting rooms, simultaneous interpretation and translation capacities and other clerical and logistical support. Thirdly, CIETAC and CMAC maintain a list of competent and experienced arbitrators. Fourthly, CIETAC and CMAC have a proven track and record with respect to the recognition and enforcement of their awards by foreign courts. And finally, CIETAC and CMAC are less susceptible to favoritism than the local commissions may be.

For the purpose of this research focus will be placed on CIETAC. This is because the arbitration rules and practices of CMAC are substantially the same as that of CIETAC, and because CIETAC's economic and trade arbitration represents the mainstream of Chinese international arbitration.

Lao People's Democratic Republic[116]

Based on the law on the promotion of foreign investments in Lao PDR the Prime Minister passed decree No. 106/PM on the Settlement of Economic

[116] Hereinafter "Laos".

Disputes on 15 July 1994[117]. The LSED deals with both arbitration and conciliation. The LSED has set up an organisation called the Office for Settlement of Economic Disputes[118] under the Ministry of Justice.[119] The OSE is composed of one Chief who is appointed or dismissed by the Prime Minister on the recommendation of the Minister of Justice, and one or two Assistant Chiefs who are appointed or dismissed by the Minister of Justice.[120] The OSE contains three Departments; the Department of Administration and Secretariat, the Department of the Management of Disputes Settlement and the Department of Laws and Regulations.

Apart from the Head Office, the OSE has four branches; Oudomsay, Luangprabang, Savannakhet and Champassack. A branch of the OSE is also authorised to settle economic disputes in which amounts do not exceed twenty million kip where both parties are Lao citizens residing in the jurisdiction of the same branch.[121] This means that international commercial arbitration falls solely under the jurisdiction of the Head Office.

The OSE is authorised to settle claims not exceeding twenty million kip, and where the parties are under the jurisdiction of different branches or where either party is a foreign citizen.[122] It is evident that arbitration in Lao is controlled by the government and is a branch of the Ministry of Justice.

One of the major setbacks in Lao's system of international commercial arbitration is that it is not a party to the New York Convention.

Thailand

Although Thailand signed the New York Convention in 1959 a year after it was adopted, the Convention still has not been implemented as part of

---

[117] Hereinafter "LSED".

[118] Hereinafter "OSE".

[119] LSED, Article 11.

[120] LSED, Article 14.

[121] LSED, Article 17.

[122] LSED, Article 18.

Thai law. Accordingly, Thailand uses the Civil Procedure Code[123], to deal with arbitration matters. Under the TCPC, arbitration is classified into two groups: 'in court' and 'out-of-court' arbitrations.

The provision concerning in-court arbitration, aims to supplement the regular court trial procedure, and is provided for in Sections 210 to 220 of the TCPC. In outline, parties can agree to bring their dispute before the court of first instance for arbitration. The case will remain pending if the court allows the parties to bring the matter before it. In-court arbitration still remains effective in the court process but is however not very popular.

With respect to out-of-court arbitration, the TCPC deals exclusively with the enforcement of arbitral awards rendered by out of court arbitrators. This matters relating to the enforcement of foreign awards in Thailand. It is however, surprising that there is only one provision which deals with this issue. There are no provisions on the conduct of arbitral proceedings. Nevertheless, there have been many out-of-court arbitration cases (either voluntarily agreed to by the parties, or required by mandatory provisions of local law, e.g. the Appropriation of Immovable Property Act) which have taken place in Thailand.

Of course, the out-of-court arbitration process does not function effective when it has to deal with commercial arbitration, whether domestic or international. This has led to the enactment of the Arbitration Act 1987[124]. The TAA is regarded as a new beginning in the development of Thailand's arbitration system. One of the TAA's main aims is to educate those who practice in the field of arbitration rather than to modernise arbitration in Thailand. Although the TAA was promulgated in 1987, Thailand unlike many of its South East Asian counterparts did not adopt the Model Law. The reason for this was that the legislators at that time were of the opinion that the Model Law at that time was too modern for Thais who were involved in the practice

---

[123] Hereinafter "TCPC".

[124] Hereinafter "TAA".

of arbitration.

However, when a new Arbitration Act[125] has been drafted and it is the intention of the legislators to adopt the Model Law in this Act. The decision was made to adopt the Model Law because the legislators wanted Thailand to become a likely choice of place of arbitration in the conduct of international commercial arbitrations. In this respect, the TDAA's preamble provides that: "Whereby, it is deemed appropriate to amend the laws regarding out-of-court arbitration."

The provisions of the Arbitration Act of 2530 B.E did not make a clear distinction between international and domestic commercial arbitrations. In order to facilitate foreigners who choose Thailand as a place of arbitration, the spirit of the new Act conforms with the Model Law which is accepted world-wide. It is expected that the TDAA will be passed by the Thai Parliament in the near future. This will be beneficial not only to Thailand, but also to international commercial arbitration in general.

There are two arbitration institutions in Thailand: the Thai Commercial Arbitration Institution[126] and the Arbitration Institute of the Ministry of Justice [127]. The TCAI is the oldest arbitral institution in Thailand, established in 1967 to fulfil the needs of the Ministry of Economic Affairs and the business community to have a set of commercial arbitration rules for Thailand. The establishment of the institutions was influenced by the Economic Commission for Asia and the Far East (ECAFE) which met in Bangkok in January 1962.

The TCAI has adopted the ECAFE rules for International Commercial Arbitration have not been reviewed since the the adoption. The TCAI is not popular in Thailand and son not many cases are submitted to it. The main reasons for its unpopularity is that the Rules are outdated in that while international trade has evolved over the years, the Rules have not been

---

[125] Hereinafter "TDAA".

[126] Hereinafter "TCAI".

[127] Hereinafter "TAIMJ".

reviewed to keep pace with the current developments in international trade. Furthermore, the Institution lacks promotion, its existence is known in a small circle and despite the fact that the TCAI is a private organisation, it is not strong enough to be considered the pillar of international commercial arbitration in Thailand. As result of these shortcomings, the new institution of the TAIMJ was established in 1987 by the Ministry of Justice.

The main objective in establishing the TAIMJ is to promote and develop conciliation and arbitration as methods of alternative dispute resolution parallel with judicial proceedings of the courts. The TAIMJ has been criticised of being a government organisation. This criticism has made foreigners quite wary and distrustful of the TAIMJ. In effect it is considered a branch of the Thai courts.

Notwithstanding the above observations interestingly enough more and more cases are being submitted to the TAIMJ than those submitted to the TCAI. This is as a result of the deeply rooted system of bureaucracy in Thai society, so it is not surprising that the TAIMJ is more popular among Thai businessmen than the TCAI. However, in order to promote international commercial arbitration and to gain the trust of the foreign business community, the TAIMJ in the near future is expected to be separated from the Ministry of Justice and become a non-government organisation. The process has already begun. There was convincing information in support of this fact made available at the time of writing this paper.

The question is whether after the TAIMJ has been separated from the Ministry of Justice, is whether it will still remain as popular as it is now. Will Thai businessmen continue to trust it as they now do? There are no direct answers to these questions right. It is the writers hope that it will be successful and that both Thai and foreign businessmen will have faith in it.

Vietnam

The recent opening up of the Socialist Republic of Vietnam[128] to foreign investment has exposed inadequacies in its court system, particularly in respect of the resolution of disputes between Vietnamese and foreign parties. The former are unfamiliar with many aspects of international trade and the latter is unfamiliar with the country, its judicial system and its language.[129] As a result, in the 1960's, arbitration was introduced as a means of settling disputes arising in the context of international trade. The Vietnamese arbitration system consists of three tiers: The State Economic Arbitration Council[130], the Foreign Trade Arbitration Committee[131], and the Maritime Arbitration Committee[132].

With the growth of investment activity in the 1990's, reorganisation of the system became inevitable hence by an Ordinance dated 10 January 1990, the State Council reworked the old VSEAC system to create new bodies (State Arbitration Bodies), operating at the national, provincial, and district levels.

These bodies were themselves disbanded in 1993 as part of the reorganisation of domestic tribunals which took place in December of that year. They were replaced by a system of "Economic Courts", which came into existence on 1 July 1994. Despite having developed from arbitration bodies, these Economic Courts are in fact courts in the true sense of the word, and form an integral part of the country's judicial system and are under the control of the People's Court. This created a void in that there was no "arbitral" successor to the VSEAC/ State Arbitration Bodies which had operated prior to 1993.

Therefore, in September 1994, a new system of "Economic Arbitration

---

[128] Hereinafter "Vietnam".

[129] Craig W, Polkinghorne M, "Dispute Resolution in Vietnam" p.1 (unpublished).

[130] Hereinafter "VSEAC".

[131] Hereinafter "VFTAC".

[132] Hereinafter "VMAC".

Bodies"[133] were established by decree. The new VEAB constitute a non-governmental organisation, supervised by the Ministry of Justice, in conjunction with the People's Committees and Justice Department of the provinces and centrally-administered cities in Vietnam.

In the meantime, in April 1993, the VFTAC and VMAC were merged to form the Vietnam International Arbitration Centre[134], which was established by Statute of the Vietnam International Arbitration Centre[135] issued in conjunction with Decision No. 204/ TTG dated 28 April 1993, by the Prime Minister. The VIAC is a non-governmental arbitral institution financed by the Vietnamese Chamber of Commerce and Industry[136].

Vietnam also signed the New York Convention in 1995. And passed the Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam on 27 September 1995. This was a big step for the practice of arbitration in Vietnam thus making the enforcement of foreign award in Vietnam more international.

Conclusions

Party autonomy as studied and compared in this research paper will be in the light of the relevant issues in the practice international commercial arbitration. In Chapter 1, I will define the term "party autonomy", Chapter 2 will examine the role of party autonomy, Chapter 3 will explore arbitration agreement which is considered the Bible of arbitration, Chapter 4 will examine the choice of arbitrator, Chapter 5 will focus on the choice of arbitral procedure and finally, in Chapter 6, I will explore the issue of choice of law.

---

[133] Hereinafter "VEAB".

[134] Hereinafter "VIAC". The VIAC established by Statute of the Vietnam International Arbitration Center issued in conjunction with Decision No. 204/ TTG dated 28 April, 1993, of the Prime Minister of the Government.

[135] Hereinafter "SVIAC".

CHAPTER 1

MEANING OF PARTY AUTONOMY IN ARBITRATION

To define the term "party autonomy" for the purposes of arbitration, it is necessary to first define what arbitration is.

1. Definition of arbitration

Defining the term "arbitration" is not an easy task. Further there is no clear definition found in either the domestic or international laws and conventions on arbitration. Although many writers have tried to create a definition, these definitions have been, or can be easily criticised.[137] Nevertheless some writers have still tried to come up with a definition.

The result has been that the definition of arbitration has become more a matter of theory than of practice. This is even more so in particular in the field of international commercial arbitration which generally involves the laws of more than one jurisdictions. The term "arbitration" is more difficult to define in this respect because the concept of arbitration vary from country to country.[138]

Some countries define the term broadly, while others give it a narrow definition. This problem was highlighted when the Model Law was being drafted.

The drafters tried to harmonise the term but failed to do so. The final result was that the the Model Law was classified to cover both ad hoc and institutional arbitration.[139] Given the scope of the Model Law a definition of arbitration became necessary. The reason for this was that a definition would

---

[136] Hereinafter "VCCI". See Article 1 of SVIAC.

[137] Lew J, *Applicable Law in International Commercial Arbitration* (New York: Oceana Sijthoff, 1978) at p.11.

[138] David R, *Arbitration in International Trade* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1985) at p.139.

[139] Holtzmann H and Neuhaus J, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary* (Netherlands, Kluwer, 1989) at p. 150.

serve to determine the scope of arbitration laws and international convention (such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

There are a number of private mechanisms for third-party resolution of dispute that are sometimes very similar in character or in label to arbitration, such as mediation[140] (or conciliation). The general concepts of these two kinds of mechanism are similar but their legal effects are entirely different.

A mediator cannot render a binding decision, but an arbitrator can. This is the same as in the case of various types of "free arbitration" -such as the *arbitrato irrituale* in Italian law, the Dutch *binded advies*, and the German *Schiedsgutachten*. Basically, all of these free arbitrations are procedures that often determine questions only of fact and not of law, and commonly result in decisions that are binding only as contractual provisions and not as arbitral awards.

Another example of the similarity in label between private mechanisms of third-party resolution of dispute and compulsory arbitration is that a compulsory arbitration, different from consensual arbitration, is always labeled "arbitration". In Thailand, for example, a dispute arising from expropriating a piece of land shall be submitted to an arbitrator. In international commercial arbitration context, the term "arbitration" means only consensual arbitration: parties voluntarily enter into arbitration agreement, nobody can force them to do so.

As a result of such difficulties and necessity, identification of essential elements of arbitration will be useful. We therefore need to look at some definitions. To do this, the examination of arbitration laws and international conventions can be quite useful.

Professor Rene David defines arbitration as:

---

[140] The term "mediation" and "conciliation" in this study will be used interchangeably. (see, Brown & Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell 1993, at p. 108).

"Device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons - the arbitrator or arbitrators - who derive their powers from a private agreement, not the authority of a State, and who are to proceed and decide the case on the basis of such an agreement."[141]

In a similar vein, Albert Jan van den Berg explains arbitration as:

"The resolution of a dispute between two or more parties by a third person (arbitrator) who derives his powers from an agreement (arbitration agreement) of the parties, and whose decision is binding upon them."[142]

Although these definitions are different in context, and do not give much detail, they provide a picture of what arbitration is. Furthermore, in examining the structure of all arbitration acts and international conventions, one can have a clearer picture of arbitration. According to the laws and conventions, there are three essential elements, i.e., arbitration must involve a dispute between the parties, arbitration must be nominated as the procedure to settle the dispute, and a binding decision must be the end result.

1.1. Dispute

The basic element of arbitration is that there must be a dispute or difference between parties who agree to submit their dispute to arbitration. Although parties may enter into an arbitration agreement, an arbitration never comes into existence until a dispute arises between the parties. In other words, "there is no dispute requiring arbitration until a matter of fact or law is asserted by one side and denied by the other."[143] The term "dispute" may refer to future, present or past disputes. There is however, no such distinction in the legislations of the states which are considered in this study.

Further, the New York Convention recognises two types of disputes in

---

[141] David R, *op.cit.* footnote 138, at p.5.

[142] van den Berg A, *The New York Convention of 1958* (The Netherlands: Kluwer Law and Taxation Publishers) at p.44.

that it provides that "Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which *have arisen or which may arise between them*"(emphasis added).[144]

Commercial dispute

As an introduction, it is emphasised that the dispute will be commercial. Thus, it is necessary to define the term "commercial".

The term "commercial" plays a significant role both in domestic and international commercial arbitration. In domestic cases, it helps to distinguish arbitration concerning commerce from those concerning other matters such as labour, employment, etc. If a dispute is considered commercial, the parties generally have freedom to agree to arbitrate.

For example, in some countries, future disputes cannot be submitted to arbitration unless it is a commercial one. The reason for this is that parties in commercial arbitration are generally regarded as being more experienced businessmen and are more able to measure the effect of the dangers inherent in a submission of a future dispute, whereas non-businessmen are not so capable.

Therefore, the latter should not be bound by an agreement, the purpose of which they do not clearly understand.[145] The term "commercial" also helps to distinguish international commercial arbitration from arbitration between states concerned with boundary disputes and other political issues.[146]

The term also finds expression in international conventions, such as the New York Convention, which gives a distinction between commercial and non-commercial. If the subject matter is considered commercial, those conventions are applicable.

---

[143] *Cox v. Fremont County Pub. Bld. Auth.*, 415 F.2d 882, 886 (10th Cir. 1969).

[144] New York Convention, Article II(1).

[145] David R, *op.cit.* footnote 138, at p.186.

[146] Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration* (London: Sweet

The term "commercial" first appeared in the Geneva Protocol of 1923 which provided that each contracting state shall be obliged to recognise the validity of an arbitration agreement concerning disputes which might arise from a contract "relating to commercial or other matters capable of settlement by arbitration." Further emphasis was added by the stipulation in the Protocol which stated that each contracting state may limit its obligation "to contracts which are considered as commercial under its national law." This so-called commercial reservation is also expressed in the New York Convention.

Despite the importance of the term, there is no set definition which is universally accepted. Accordingly, there is no definition of "commercial" in any of the national legislations on arbitration. I would submit that, to provide a definition would entail certain risks[147], hence it would be impractical to attempt to give a definition.[148] The term can thus be understood in many ways [149] and its meaning depends very much on a court's interpretation of it.

The drafters of the New York Convention were confronted with much difficulty in attempting to draft a definition of the term in the Convention. On the one hand, they needed a term to determine when the Convention should apply and on the other hand, some civil law countries[150] took the position during negotiations on the Convention that their domestic arbitration statutes differentiated commercial from non-commercial matters, and that they would ratify the Convention only with regard to the former.[151]

Thus, the message from the President on the New York Convention observed that the "commercial matters reservation was included to remove a barrier to accession by nations having separate civil and commercial codes

---

& Maxwell 3rd Ed. 1999) at para.1-28.

[147] U.N.Doc.A/40/17, para.20 (21 August 1985).

[148] Lord Mustill in U.N. Doc. A/CN.9/SR.306, para.17.

[149] David R, *op.cit.* footnote 138, at p.149.

[150] Thailand does not distinguish Commercial Code from Civil Code.

[151] U.N.Doc.E/CONF.26/SR.23.

which allow arbitration only of matters falling within the latter."[152] Accordingly, the final text of the New York Convention reads, "When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that ... it will apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered commercial under the national law of the State making declaration."[153]

Due to the lack of a definition, many countries that signed the Convention entered the reservation. Their interpretation of the term "commercial" vary, hence a transaction what was considered commercial in one country may not have been so in another. Furthermore, some countries avail themselves of the reservation by applying their own law.[154] Overall, the reservation is criticised as being a "bad" conception.[155]

In a case involving transfer of technology, for example, in 1977 the High Court of Bombay held that the transfer of technology is not "commercial" under Indian law.[156]

On the facts, three contracts were entered into for the construction of a polyester shape fibre. The agreement included the supply of technical designs and transfer of technical information required for the implementation of the project. Two of the contracts provided for arbitration in London under the Rules of the ICC, whilst the third contract provided for arbitration in India.

The Indian party brought the case before the High Court of Bombay, who rejected the application made by the defendants to stay the action. Indian law in applying the New York Convention, required the Convention to be

---

[152] Message from the President on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S.Exec.Doc.E, 90th Cong, 2d Sess.18(1968).

[153] Article I(3).

[154] David R, *op.cit.* footnote 138, at p.157.

[155] *Ibid.*, at p.149.

[156] *India Organic Chemicals, Ltd. v. Chemtex Fibres Inc.* (1978) All India Rep. 106 (High Ct. of Bombay 1977).

applied in the case of disputes "considered as commercial under the law in force in India".

This meant that the term "commercial" in the ordinary sense was not broad enough when used for commercial relations as applied in the New York Convention. According to the judge, it must be commercial by virtue of a specific provision of law in force in India. The contract might be in the common parlance, be considered commercial contracts were not commercial contracts within the meaning given to the concept under the India Arbitration Act 1961, section 3.

This narrow interpretation by the Indian Court was contrary to the supreme aim of the New York Convention to facilitate enforcement within the framework of international commercial arbitration.[157] Most commentators rightly suggest that this reservation should be interpreted broadly.[158] There are two reasons in support of this.

First, the commercial reservation in the New York Convention is only an indicator of whether the Convention shall apply. If it is considered commercial, the Convention shall apply and if not, the Convention is not applicable.

When states sign the New York Convention, it is assumed that they will support international commercial arbitration as a tool for the settlement of disputes between businessmen, a purpose for which the Convention was created. Hence, they will make an effort at all times to apply the New York Convention.

There is doubt as to why they should refuse application of the Convention for such simple reasons. If the contracting states with commercial reservation narrowly interpret it, the field of application of the New York Convention will become so narrow that it will be worthless.

---

[157] David R, *op.cit.* footnote 138, at p.150 and see also van den Berg A, *op.cit. footnote 142*, at p.54.

[158] See David R, *op.cit.* footnote 138, at p. 44 and see also van den Berg A, *op.cit. footnote 142*, at p.54.

Businessmen need certainty,[159] hence they will be reluctant to resort to arbitration as a means resolve their dispute if the result is unpredictable. I would submit, the commercial reservation, as discussed earlier, is a necessary reason to compromise the civil law countries' approach, rather than the intention of drafters to allow the contracting states to arbitrarily limit the field of application of the Convention.

Secondly, the New York Convention also makes provision for disputes considered inappropriate for arbitration by providing that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."[160]

As a result, although a signatory state may have entered the commercial reservation, it may still apply the New York Convention, and still have the power to scrutinise the arbitral process again. This is the case if such a dispute, although commercial, if contrary to public policy, they may refuse to recognise or enforce such an award. For example, the U.S. Court refused to refer the parties to arbitration in London in a dispute concerning salvage services rendered to a US warship on the ground that under the Public Vessels Act, recovery against the Government can only take place by suit in the appropriate Federal District Court.

With express reference to the commercial reservation, the Court observed, "Whatever uncertainties may arise when agencies of governments engage in commercial transactions, relations arising out of the activities of warships have never been regarded as 'commercial' within the context of sovereign immunity".[161] This case is evidence that the issue concerns public

---

[159] Rosenthal M, "A Businessman Looks at Arbitration", in M. Domke (ed.), *International Trade Arbitration* (Connecticut: Greenwood Press 1958) 27 at p.28.

[160] Article V(2)(a).

[161] *Bureau Wijsmuller v. United States*, 1076 A.M.C. 2514 (S.D.N.Y. 1976).

policy rather than the true meaning of "commercial".[162]

The next question is how broadly should it be interpreted. This depends on the words specified in the arbitration acts of respective countries and on the interpretation by the courts. The tendency is that internationally the approach is to interpret the term "commercial" as broadly as possible.[163]

In the USA, the attitude of the US Courts is clear - they interpret the commercial relationship requirement of the Convention and Section 202, broadly.[164] They have indicated that the definition of "commercial" under the Convention is broader than that of "commercial" under the domestic Federal Arbitration Act.[165] This means that the term "commercial relationship" includes employee-employer relations,[166] fiduciary relationships,[167] contracts where a foreign state constructs buildings for, and leases them to, a foreign investor,[168] relationships giving rise to antitrust and other public law disputes,[169] cases involving claims by foreign regulatory authorities,[170] insurance and reinsurance contracts,[171] and maritime agreements.[172]

The New York District Court in these cases clearly drew the line between commercial and non-commercial. In *Island Territory of Curacao v Solitron Devices*[173], the court rejected the contention that an award concerning

---

[162] van den Berg A, *op.cit. footnote 142*, at p.53.

[163] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-28.

[164] See *Societe Generale e Surveillance v. Raytheon European Management & Sys.Co.*, 643 F.2d 863 (1st Cir. 1981).

[165] *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp.737, 740 (S.D.N.Y. 1979).

[166] *Faberge Int'l Inc. v. Di Pino*, 491 N.Y.S. 2d 345 (App.Div. 1985).

[167] *Ibid.*

[168] *Island Territory of Curacao v. Solitron Devices, Inc.* 356 F.Supp. 1 (S.D.N.Y.), aff'd, 489 F.2d. 1313 (2d Cir.), cert.denied, 416 U.S. 986 (1973).

[169] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[170] *Corcoran v. Ardra Ins. Co.*, 566 N.Y.S.2d 575 (1990).

[171] *Meadows Indemnity Co. v. Baccala & Shoop Ins. Service, Inc.* 760 F.Supp. 1036 (E.D.N.Y. 1991).

[172] *Antco Shipping Co. v. Sidermar SpA*, 417 F.Supp. 207 (S.D.N.Y. 1976).

[173] *Island Territorial of Curacao v. Solitron Devices*, 356 F.Supp.1,13 (S.D.N.Y.), aff'd, 489 F.2d 1313 (2d Cir.1973), cert.denied, 416 U.S. 986 (1974).

a contract to operate an electronics manufacturing plant on the Island Curacao, would result in the creation of several thousand local jobs, was not commercial. The Court held that there was "nothing to show what the purpose of the 'commercial' limitation was," and that "we may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like."[174]

PRC

In the PRC, there are no reported cases in English to show interpretation of the term by the Chinese courts. The term "commercial" in the PRC may thus be considered from the perspective of its organisation and legislation.

The New York Convention became effective in the PRC on 22 April 1987. However, at the time the PRC adopted the New York Convention, it entered the "reciprocity" and "commercial" reservation in its membership. The Chinese Supreme Court explained the two reservations as follows: [175]

"(1) The "reciprocity" reservation means that if a contracting country of the New York Convention renders an arbitration award, Chinese courts will recognize and enforce the awards under the New York Convention even though Chinese civil procedure may differ from that of the other members of the New York Convention. However, Chinese courts would not recognize a foreign arbitration award from a non-contracting country unless a treaty to which the PRC is a signatory requires recognition, or the other country recognizes and enforces CIETAC arbitration awards.

(2) The "commercial" reservation means that the provisions of the New York Convention cover only commercial disputes between parties, not non-commercial disputes such as administrative disagreements between

---

[174] *Ibid.*

[175] China Supreme Court, Notice on Implementation of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," which China joined on April 10, 1987.

foreign investors and PRC government ministries". [176]

In addition, the CAL provides, "Any disputes arising out of the contracts or property rights between citizens, legal persons and other organisations that are on equal standing may be arbitrated."[177] it further provides that "The following disputes are non-arbitrate: (1) disputes related to marriage, adoption, guardianship and succession; (2) administrative disputes which ought to be handled by the administrative authorities in accordance with the law."[178] This means that the CAL embraces all types of trade or business transactions as commercial.

Although the term "commercial" is not defined in Chinese laws, it is well understood that all contractual disputes and other property disputes are arbitrable. The only exceptions are disputes which arise out of marital, adoption, guardianship, support or succession cases. Administrative disputes which involve the government are also excluded. [179]

Laos

Laos has not yet become a party to the New York Convention. The types of disputes which may be submitted to arbitration are regulated by Decree No.106/PM on the Settlement of Economic Dispute. It defines economic disputes as "dispute occurring during the exercise of commercial activities in the areas of agricultural and industrial production, trade, service and other economic activities".[180]

Thailand

Thailand is one of the few countries which signed the New York Convention without entering the commercial reservation. Although Thailand is

---

[176] Ge Liu, Alexander Lourie, footnote 26, at p.548.

[177] Article 2.

[178] Article 3.

[179] CAL, Article 2.

[180] LSED, Article 2.

a civil law country, unlike other civil law countries, there is no distinction between the civil and commercial codes, both are provided in the Code titled "the Commercial and Civil Code".[181] This is comprised of six Books, i.e. Book I (General Principles), Book II (Obligations), Book III (Specific Contracts), Book IV (Property), Book V (Family) and Book VI (Succession).

The contents considered as basic principles of commerce are provided for in Book III.[182] Books V and VI deal with civil matters and Book III covers all types of commercial trade and business transactions. The TAA on the other hand, provides that "Arbitration agreement means an agreement or an arbitration clause in a contract whereby the parties agree to submit present or future civil disputes to arbitration..."[183]

The problem is the meaning of the term "civil dispute". Is its meaning covered only by Book V and VI in the TCCC? Certainly, it cannot be limited to these meanings. The meaning of the term "civil dispute" in this section is broader than that given in TCCC. It means all kinds of disputes, except criminal ones. The reasons for this is that Thailand signed the New York Convention without entering the commercial reservation.

Besides, the TAA is intended to apply to both domestic arbitration, involving a civil dispute (such as family matters), and to international arbitration. Thus, the term "civil" in TAA is given a broad interpretation to cover both commercial, Book III, and civil matters, Books V and VI, in the TCCC. Thai legislations, unlike those of certain countries, have never considered the status of parties as being essential to determining whether a case is commercial or not. Accordingly, parties may be natural, juristic persons or state enterprises, whether they act in their capacity as businessmen or not.

---

[181] Hereinafter "TCCC".

[182] Book III composes of the followings: Sale, Exchange, Gift, Hire of Property, Hire-Purchase, Hire of Services, Hire of Work, Carriage, Loan, Deposit, Suretyship, Mortgage, Pledge, Warehousing, Agency, Brokerage, Compromise, Gambling and Betting, Current Account, Insurance, Bills, and Partnerships and Companies.

[183] Section 5.

Vietnam

The Vietnamese laws concerning "commercial" defines what matters may be submitted to arbitration. First, the Law on Foreign Investment in Vietnam attempts to make this point clear by providing that, "Any dispute between the partners arising out of a business co-operation contract or a joint venture contract, as well as any dispute between a joint venture or an enterprise with 100 per cent foreign capital and Vietnamese economic organisation, or between enterprises with foreign invested capital, shall first be resolved through mutual consultation and amicable settlement.

If, however, the parties to a dispute fail to reach an amicable settlement, the dispute shall be referred by the parties' agreement to a Vietnamese economic arbitration organisation, or any other arbitration organisation or other dispute resolution board having legally enforceable power".[184]

Apart from this provision, the rules of the VIAC also define the types of dispute over which: "the Centre has jurisdiction. The Centre shall be responsible for the hearing of dispute arising out of international economic relations, such as foreign trade contracts and those concerning investment, tourism, international transport and insurance, transfer of technology, services, international credits and payments, etc.".[185]

This provision is wide enough to cover all international transactions which take place in Vietnam. Furthermore, as a party to the New York Convention, Vietnam's court should interpret the term "commercial" as broadly as possible to fulfil the aim of the Convention.

Model Law

The drafters of Model Law realised that the term "commercial" is important. Thus, they tried to clarify the term in order to avoid narrow

---

[184] Article25.

[185] Article2.

interpretation by courts[186]. They first tried to include a list in the draft. However, this method, although useful, was considered inappropriate, as such a list was contrary to the legislative techniques of many legal systems. Besides, the examples may be interpreted as exhaustive, or may be too wide or too vague to some interpreters.[187] The final text of the Model Law does not contain such a list but provides a useful guide instead.

The list of example of commercial relationships states: "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are *not limited to*, the following transactions: any trade transactions for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road" (emphasis added).

The phrase "not limited to" in the guidance shows that it is not exhaustive. It is intended to illustrate the term broadly. This in my opinion, is a minimum test of interpretation of commercial. Countries which adopted the Model Law as their laws shall interpret the term commercial as broadly as the examples given. Besides, legislative history also provides examples of the relationships that are not meant to be included in the term, among these are labour and employment disputes and ordinary consumer claims.[188]

1.2. Procedure

Arbitration is a private method of private dispute resolution created by the consent of the disputants, and differs from compulsory arbitration which is

---

[186] UN Doc. A/CN.9/216, para.19 (23 March 1982).

[187] UN Doc. A/CN.9/233, paras.53,56 (28 March 1983).

[188] UN Doc. A/CN.9/232, para.32 (10 November 1982).

created by legislation. The essence of arbitration is that it is a mechanism substituted for court litigation.[189] The New York Convention supports this element of arbitration by providing that "Each Contracting State *shall recognise* an agreement in writing under which the parties undertake to submit to arbitration all or any differences..." (emphasis added).[190]

It further provides that "The court of a Contracting State, when seized of an action in a matter of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, *refer* the parties to arbitration..."(emphasis added).[191] This means that the New York Convention has recognised that the agreement to arbitrate will replace the court litigation.

Accordingly, a court is obliged to refer the parties to arbitration. It should be noted that this is a sensitive problem where state courts are concerned i.e., they maybe indifferent towards arbitration[192]. In the past, national court always interpreted that arbitration agreement between disputants was an alternative, not a substitute to court litigation. In other words, an arbitration agreement might not be enforced in a State court.

For example, the Thai Supreme Court interpreted that although there was an arbitration agreement, either party might bring a case to Thai courts and that it was optional for the parties. Such an interpretation was contradictory to the aim of the New York Convention which Thailand signed in 1960.

A person (arbitrator) who carries out the duty of arbitrator cannot himself be a party to the arbitration in question[193] as this would be against a principal of natural justice which "prohibits a man from being a judge in his

---

[189] van den Berg A, *op.cit. footnote 142*, at p.45.

[190] New York Convention, Art.II(1).

[191] New York Convention, Article II(3).

[192] Lew J, *op.cit.* footnote 137, at p.59.

[193] If parties want to settle their dispute by themselves, they can do so by negotiation which is the best method to dissolve their dispute.

own cause".[194] Therefore in every case, the parties must appoint someone else to perform such a function.

All arbitration law gives wide freedom to parties and not to the state to choose a suitable person to decide their case. This is one of the major reasons why persons involved in international trade (who normally come from different culture, legal systems, language) prefer international commercial arbitration (as an arbitrator can fill such gaps) to litigation (to which state judges have a duty to comply, as they are strictly bound by the laws of that country).

The duty of an arbitrator is to make decisions rather than to give an opinion or to seek a compromise. This approach makes arbitration different from other kinds of alternative dispute resolution. For example, a conciliator can only make non-binding recommendations. An arbitrator on the other hand, although in a similar situation to that of a judge; i.e., his activity can be qualified as 'quasi-judicial' but he is not a judge. Accordingly, he does not have a duty to be loyal to the State.[195]

The power of an arbitrator is derived from the agreement between the parties to arbitrate, thus the extent of arbitrator's power depends on the will of the parties. This observation leads to the conclusion that "arbitration is a private system of adjudication: it is the parties themselves, and it is not the state, who *control* the powers and duties of the arbitrator(s)"? (emphasis added).[196]

One commentator gives a negative answer to this by stating that, "It is misleading in suggesting that parties to an arbitration have the exclusive right to assign powers and duties to the arbitrators."[197] He further explains that

---

[194] Jackson P, *Natural Justice* (London: Sweet & Maxwell 1979) at p. 26.

[195] David R, *op.cit.* footnote 138, at p. 410.

[196] Lew J, *op.cit.* footnote 137, at p.12.

[197] Chukwumerije, *Choice of Law in International Commercial Arbitration* (London: Quarum Books, 1994) at p.2.

"although arbitration is essentially a private process, the *assistance* of the national courts may be sought in some cases to assist arbitration proceedings or to enforce an ensuing award. Furthermore, the effectiveness of the arbitration process is guaranteed by the assistance of national courts"[198] (emphasis added and quotation omitted). Both arguments are correct. The term "control" in the former argument means that parties are free to assign, or not assign power or duty to the arbitrator and he must comply. If he fails to follow such a mandate, his award may not be enforceable. In this respect, a state does not have the power to enforce such an award.

For example, A and B may enter a sales contract which incorporates an arbitration clause which provides that a dispute concerning delay in the delivery of goods delivery should be decided by an arbitrator, and the remaining matters by a court. The arbitrator in this case can only determine whether or not delivery of the goods was delayed but he cannot consider the other issues, such as that of damages. In this scenario, a court cannot enforce an award with respect to the arbitrator's consideration of the issues in regards to damages.

The term "assistance" in the latter argument means that it is not possible to continue the arbitration process when the problem is beyond the power of the arbitrator. The state court in this case has to assist to facilitate the smooth running of the arbitral process.

As a further illustration, if the arbitrator needed a third party witness to testify, he has no power to call such a person. This problem can be resolved by court assistance. In such a case, it does not mean that the court takes control of the arbitration but rather assists in the process. In fact, both contentions do not conflict at all. The former is an answer to what arbitration is; whereas, the latter is an answer to how arbitration operates effectively. Whether or not a court assists in the arbitration process is not important to characterise arbitration. It may be proper to conclude that "the parties to an arbitration are

---

[198] *Ibid.*

masters of the arbitral process to an extent impossible in proceedings in a court of law."[199]

Although it is a privilege enjoyed by any person who undertakes the duty of an arbitrator, they cannot control the discretion of the arbitrator. It is universally accepted that discretion, whether that of a judge or an arbitrator, is the most essential part of a quasi-judicial function. It is a privilege enjoyed by any person who performs such an activity.

1.3. Binding decision

The decision of an arbitrator (award) must be binding on both parties. This feature makes arbitration different from other methods of private dispute resolution, for example, in mediation a mediator cannot give a binding decision. This feature is recognised not only in domestic, but also in international arbitration.

All the laws on arbitration have provisions which deal with the enforceability of awards[200]. The New York Convention is signed by more than 100 countries and is deemed to be one of the most effective Conventions on the recognition of awards as being binding. This makes international commercial arbitration more effective than court litigation with regard to international trade disputes.

In order to enforce a foreign judgment, the enforcing country has to resort to the assistance of certain bilateral agreements or some other reciprocal agreement to enforce judgment. This makes enforcement of foreign judgment more difficult and complicated than foreign award.

2. Definition of party autonomy

Party autonomy is recognised in every jurisdiction. The principle is derived from the concept that the intent of the parties shall be respected and

---

[199] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-11.

[200] The Thai Arbitration Act of 1987 Chapter 4, Section 20-26 (domestic award) and Chapter 6, Section 28-35 (foreign award).

enforceable.[201] It was recognised in the last century by judges during the reign of Queen Victoria and is in some way considered one of the supreme values of a developed society.[202]

The concept of party autonomy has thus become one of the most important features in both the law of contract and the private international law of most countries. In the law of contract, parties are free to agree what they want, for example the type of sale contract. In the agreement, they are also free to agree as to the individual rights and obligations and the terms of such an agreement will be respected.[203] Similarly in private international law,[204] parties are free to choose the law under which their contract will be binding.[205] This is because such laws are private law. Private law is a pervasive phenomenon of our social life and is the most elementary manifestation of law.[206] It regulates property and the right people have to use their property as they see fit.[207] Consequently, they have the freedom to make agreements concerning their property in any way they wish.

Therefore, the term "party autonomy" is used to denote the freedom parties have to agree and what they want to contract to. This practise is not however straightforward when autonomy is subject to certain legal limitations imposed by the laws of certain states. In other words, there is no absolute right of party autonomy in the real world.

---

[201] Lew J, *op.cit.* footnote 137, at p.181.

[202] Lloyd, *The Idea of Law* (London: Penguin 1991) at p.144.

[203] See TCCC, Article 151 which provides that: "An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals".

[204] See Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer, 1980) at p.70.

[205] See Thai Conflict of Law, Article 13 which provides that: "...If such intention, express or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

When the contract is made between persons at a distance, the place where the contract is deemed to have been made is the place where notice of acceptance reaches the officer. If such place cannot be ascertained, the law of the place where the contract is to be performed shall govern".

[206] Weinrib E, *The Idea of Private Law*, (London: Harvard University Press) at p.1.

[207] *Ibid.*

As seen, arbitration is the result of the will of the parties and is expressed in the arbitration agreement; this is founded on the principle of party autonomy.[208] In other words, all arbitration rests on the theory of party autonomy.[209] Parties to arbitration can agree upon various aspects of the arbitration process, such as the arbitral procedure or the law to be applied to dispute.

Party autonomy in the context of arbitration therefore means that the parties to an arbitration agreement are free to decide and control the rules and procedures to govern the arbitration. This may entail the choice of arbitrator, the applicable substantive law, the rules of procedure, and the place of arbitration. However, such freedom is often subject to limitation imposed by various statutes, such as mandatory rule or public policy of the state concerned.[210] This practice is universally understood.

The problem remains however, as to the extent of party autonomy in arbitration. The answer to this question entirely depends upon the legal nature of arbitration. There are four significant theories (Contractual theory, Jurisdiction theory, Mixed theory and Autonomous theory) in this regard. However, the relationship between arbitration and the laws of a state is a crucial problem which has long been debated and to date, there has been no solution to this.[211]

2.1. Contractual theory

This theory starts with an arbitration agreement, the origin of which is a contract and consequently "the binding force of the arbitration agreement comes from the principle '*pacta sunt servanda*' as well as other ordinary

---

[208] Schmitthoff, "The Jurisdiction of the Arbitrator", in Schultsz J. and van den Berg A (eds.), *The Art of Arbitration* (Deventer, The Netherlands, Kluwer, 1982) at p.285.

[209] Wetter J, "The Legal Framework of International Arbitral Tribunal -Five Tentative Markings", in Smit, Galston and Levitsky (eds.) *International Contracts* (Matthew Bender, 1981) at.p.272.

[210] Lalive P, "Transnational (or Truly International) Public Policy and Internaitonal Arbitration" in Sanders (ed.) *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1986), 257 at p.307.

[211] See David R, *op.cit.* footnote 138, at p. 76.

contract principles without any state authorisation".[212] Arbitration is thus classified in contractual terms.[213] An arbitration agreement is a voluntary one. No one, not even the courts, can force the parties to make such an agreement. In this respect, it is described as being "created by the will and consent of the parties."[214]

According to this theory, arbitration is based entirely upon the autonomy exercised by the parties involved. The parties have a wide freedom to answer for themselves the questions of what (ad hoc or institution), who (arbitrator to hear their case), where (place of arbitration), when (arbitration shall take place) and how (to regulate the procedure to be followed).

These authorities are derived from the arbitration agreement.[215] This power should be in conformity with the provision of the arbitration agreement. [216] It is the agreement to arbitrate alone that empowers arbitrators to make an award.[217] And, "'the arbitrator', writes Foelix, 'is an agent of both parties; what is done by him has therefore to be regarded as the will expressed by both parties'".[218]

According to Merlin, "Arbitrators are not judges because they do not perform any public function. In resolving disputes, they are not exercising any of the State's powers and, therefore, do not have a territorially based jurisdiction."[219] An award rendered by an arbitrator, according to Bernard,

---

[212] Kitagawa T, "Contractual Autonomy in International Commercial Arbitration", in in P. Sanders, *International Arbitrationl Liber Amicorum for Martin Domke* (The Hague, Netherlands: Martinus Nijhoff 1967), 133, at p. 138.

[213] Lew J, *op.cit.* footnote 137, at p. 54.

[214] *Ibid.*, at p. 55.

[215] See Lew J, *op.cit.* footnote 137, at p. 55.

[216] David R, *op.cit.* footnote 138, at p. 76.

[217] Samuel A, *Jurisdiction Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law* (Zurich: Schulthess Polygraphischer Verlag Zurich 1989) at p.34.

[218] David R, *op.cit.* footnote 138, at p. 76.

[219] Merlin, p.149 cited in Samuel A, *op.cit.* footnote 217, at p.34.

cannot be compared to a judgment,[220] but it is considered contractual because, according to Niboyet, "the arbitrators do not hold their power from the law or the judicial authorities, but from the parties' agreement (arbitration agreement, submission to arbitration)".

The arbitrator decides only what the parties could have done by agreement; [the parties] give the arbitrators a real mandate to decide in their place. The award is thus impregnated with a contractual character, and [according] to the law, it appears to be the work of the parties, it must have, like all agreements, lawful effect, and [it must] possess the authority of a final judgement."[221]

Thus, according to Klein, the municipal court is merely enforcing the obligation contained in the agreement to arbitrate, and the award is simply the way in which the contents of that obligation are determined by the parties.[222] National arbitration laws have very little influence on an arbitration agreement or award because both are based on contract.[223] They are "only to supplement and fill lacunae in the parties' agreement as to the arbitration agreement proceedings and to provide a code capable of regulating the conduct of an arbitration."[224] This theory also does not recognise the influence of the State on arbitration.[225]

There are some merits to this theory in that it is considered an "instrument of free enterprise"[226] which can respond to the needs of the international business community.[227] However, it is also criticised. First, the maximum freedom of contract is doubted even if it is accepted that the

---

[220] Lew J, *op.cit.* footnote 137, at p. 51.

[221] Niboyet, cited in Lew J, *op.cit.* footnote 137, p.54.

[222] Samuel A, *op.cit.* footnote 217, at p.43.

[223] Lew J, *op.cit.* footnote 137, at p. 56.

[224] *Ibid.*

[225] *Ibid.*, at p. 55.

[226] Domke, *Commercial Arbitration* (Prentice Hall, Princeton 1965) at p. 2.

[227] Lew J, *op.cit.* footnote 137, at p. 57.

existence of arbitration is derived from the expressed intention of the parties.[228]

It is considered to be of a contractual nature, to which the parties have maximum freedom to agree. This principle of freedom of contract exists in most legal systems.[229] Such limitations have long been known, as Atiyah explains, "Even before the acknowledgement of the perpetual economic warfare, limitation existed, and although merchants had been left to trade substantially free of economic regulations, that was only if they acted within the general protective framework of national legislation."[230]

The maximum scope of freedom of contract, according to the contractual theory, is therefore not clear[231] and not practical. The legal frameworks of arbitration, whether national arbitration law or international convention, are still subject to limitations, i.e. mandatory rule upon the parties' autonomy.

Secondly, an arbitrator cannot be considered as the parties' agent. The duty of an arbitrator, like that of a judge, is to give the parties a fair hearing and render a decision which may or may not be against both parties. Conversely, an agent is bound to his principal. The principal, of course, is prohibited from being a judge in his own cause, therefore he cannot empower his agent to do the same.[232] Besides, an arbitrator is immune from liability to the parties with respect to defaults committed by him in his capacity as arbitrator.[233] An agent on the other hand, may be liable to his principal for any

---

[228] Domke, *op.cit.* footnote 226, at p.31.

[229] Mann, "The Theoretical Approach towards the Law Governing Contracts between States and Private Persons", XI *Rev belge*, 1975, 562, at pp.562-563.

[230] Atiyah P, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press 1979) at p.27.

[231] Professor David explained: "The reason [why arbitration is considered as an institution of the law of contract] is probably not the such a view is regarded as having a sounder theoretical foundation, but that it is considered more likely to further the development of the practice of arbitration. If arbitration is classified within the domain of the law of contract; then it is thought that parties will enjoy a maximum of freedom in the matter. Whether such a consequence actually occurs in the contractual thesis is not however clear." In David R, *op.cit.* footnote 138, at p.113.

[232] Jackson P, *op.cit.* footnote 194, at p. 26.

[233] See Lew J (ed), *The Immunity of Arbitrators* (London, Lloyd's of London Press Ltd. 1990), pp.1-4.

default committed by him.[234]

Thirdly, an award is not contractual. Supporters try to classify award as contractual so as to explain why the award is enforceable anywhere in the world. However, this is no the case. Most national arbitration laws have a setting aside provision for awards rendered in their territory.[235] There is however, no such provision in the law of contract. Furthermore, according to the New York Convention, an award set aside in one country cannot be enforced in other countries.[236]

As a result, although the contractual approach gives the parties the benefit of autonomy in arbitration, it fails to explain certain other legal aspects of the process. This approach attaches the entire arbitral process to the law of contract and this serves to make arbitration unsound in practice.

2.2. Jurisdiction theory

This theory is the complete opposite of the contractual theory. The main theme of this theory is derived from the idea that every sovereign state is entitled to control any activities which take place within its territory[237] and, "every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law."[238]

A state has monopoly control over the administration of justice in its own territory. Thus, the gist of the jurisdiction theory is based entirely upon the state's power to control arbitration.[239] The validity of the arbitration agreement, the powers of the arbitrators, and the enforcement of the arbitral

---

[234] For example, TCCC Section 812 provides: "The agent is liable for any injury resulting from his negligence or non-execution of agency, or from an act done without or in excess of authority."

[235] TAA does not have such a provision.

[236] Article V(1)(e).

[237] Mann F, "State Contracts and International Arbitration", 42 *B.Y.I.L.* 1 at p. 10 (1967).

[238] Mann F, "Lex Facit Arbitrum", in P. Sanders, *International Arbitration Liber Amicorum for Martin Domke* 157 at p. 160.

[239] Lew J, *op.cit.* footnote 137, at p.52.

award are all derived from a particular national legal system:[240] that is to say, arbitration cannot be carried on without the regulation and control by state law.[241]

In effect, an arbitrator exercises a public function[242] and the source of an arbitrator's authority is derived from the state rather than the agreement of the parties.[243] It follows then that an arbitrator is a constituent part of the judicial organisation of the state.[244] The power and authority of arbitrator closely resembles that of a state judge.[245] Therefore, he has no greater freedom than a judge.[246]

An award is compared to a judgment rendered by a state court in that it is not self-executing and if not voluntarily performed, the winning party may apply to a state court for enforcement in the same way as an ordinary court judgment.[247]

International arbitration is not recognised because "every arbitration is governed by the municipal law where it takes place, there can be no international arbitration in the strict sense."[248] The term "international arbitration", according to Mann, is a misnomer "because all private arbitrations are invariably national in character. In his view, every system of private law is a system of national law.

Consequently, arbitration as a system of private law necessarily derives its legitimacy from a national legal system."[249] He also argues that international

---

[240] *Ibid.*

[241] Mann F, *op.cit.* footnote 238, at p.162.

[242] Lew J, *op.cit.* footnote 137, at p. 52-3.

[243] Samuel A, *op.cit.* footnote 217, at p.55.

[244] David R, *op.cit.* footnote 138, at p. 76-77.

[245] Lew J, *op.cit.* footnote 137, at p.53.

[246] *Ibid.*

[247] *Ibid.*

[248] Mann F, *op.cit.* footnote 238, at p. 159-160.

[249] *Ibid.*, at p.159.

conventions governing arbitration apply only by virtue of their incorporation into national law.[250] Thus, the *lex loci arbitri*, the law of place of arbitration, is recognised as a relevant municipal law to control arbitration taking place in their territory.

An award, for example, can be set aside if the arbitration does not comply with the law of the seat of arbitration.[251] This theory is deeply rooted in certain international conventions. The Geneva Protocol, 1923, provides: "the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties *and by the law of the country in whose territory the arbitration takes place*" (emphasis added).[252] It is further advanced in the Geneva Convention 1927, which provides: "that the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties *and in conformity with the law governing the arbitration procedure*" (emphasis added).[253] Comparably, the New York Convention also recognises the importance of the law of the place of arbitration.

This theory is well-accepted in socialist countries because their arbitration institutions are attached to the national chambers of commerce and retain a close connection with the State. Arbitration is an officially favoured system of resolving international trade disputes.[254]

This theory is however, not without weaknesses. It is arguable that the power and authority of an arbitrator closely resembles that of a state judge. Is it possible for the parties to agree upon the procedures a court should follow? The answer is clearly negative. In the case of arbitration, the parties can do so, and the arbitrator is obliged to follow such an agreement.

---

[250] *Ibid.*

[251] Hirsch, "The Place of Arbitration and the *Lex arbitri*", 34 *Arb.J.* (1979) 43, 45.

[252] Article 2.

[253] Article 1(2)(c).

[254] Lew J, *op.cit.* footnote 137, at p. 54.

An arbitrator is permitted to modify the contract between the parties. A judge on the other hand, usually interprets the terms of the contract[255] not modify them. The question raised is whether the national law gives more power to arbitrators? The answer is negative.

The reason for this is that the nature of party autonomy is the characteristic feature to the principle of arbitration. An arbitrator should respect the freedom of the parties. The arbitrator's principle function is to do what the parties stipulate, rather than maintain the regulations of any state. In other words, party autonomy is a principle of arbitration, and the national law, which limits such freedom is exceptional. However, the jurisdictional theory holds the opposite view and purveys that party autonomy and its scope is entirely dependent on national law.

Furthermore, this theory takes the view that an award is comparable to a judgment rendered by a national court. This conflicts with the argument that an award is more easily enforceable in a foreign country than a court judgment.

It is well recognised that national law is important to arbitration, and that arbitration is less effective without court assistance as arbitrators lack the legal capacity to force a witness or even any other third party to give evidence. from the state because arbitration itself does not have legal power to enforce anybody, even the parties. An arbitral award, for example, means nothing if it is unenforceable thus it is not possible to conduct an arbitration without first looking at the national law of the place of arbitration.

If, however, arbitration is fettered by the courts, it may become ineffective. What if the courts arbitrarily control the arbitration? Some commentators suggest that such control should be limited to ensure respect for traditional standards of fairness, the limits of the arbitral mission and the rights of third parties.[256] This theory treats arbitration as a justice device of a state and

---

[255] TCCC, Section 171.

[256] Park, "The *Lex loci arbitri* and International Commercial Arbitration", 32 *Int'l.&Comp.L.Q.* (1983)

fails to look at the will of the parties.

The party autonomy "exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects"[257]. It ignores the truth that such a device is created by private parties who want to avoid justice provided by the State. It never looks at the practice of arbitration or the need of trade community. This is not useful to the development of arbitration at all. For this reason, David concludes that the idea of jurisdiction fails to explain modern arbitration law[258], such as the Model Law which attempts to liberalise arbitration by respecting party autonomy.

2.3. Mixed theory

This theory is regarded as a compromise between the two foregoing theories. An initial point worth noting is that neither theory accepts the existence of the other. They both ignore the legal nature of arbitration which requires and demands elements from both contractual and jurisdiction viewpoints.[259] This lack of recognition of each other makes them both vague[260] and impractical for modern arbitration. They cannot explain all the legal aspects of arbitration. Sauser-Hall, thus, defined arbitration as "... a mixed juridical institution, *sui generis*, which has its origin in the [parties'] agreement and draws its jurisdictional effects from the civil law."[261] This means that both the need for the parties' autonomy and national law should be respected.

According to Surville, it is recognised, as contractual theory does, that the arbitrator does not perform a public function. The arbitration agreement creates and indicates the arbitrator's power. Besides, according to Sauser-Hall,

---

21, 51.

[257] Mann F, *op.cit.* footnote 238, at p.160.

[258] David R, *op.cit.* footnote 138, at p. 79-80.

[259] Lew J, *op.cit.* footnote 137, at p.57.

[260] David R, *op.cit.* footnote 138, at pp. 78-80.

[261] Lew J, *op.cit.* footnote 137, at p.57.

it substitutes the decision-making power of the State court.[262]

The arbitrator, according to Surville, does not perform a public function. The parties, by their agreement, create and fix the limits of their private jurisdiction. Although an arbitrator's function is similar to that of a judge, he does not act on behalf of the State but on the basis of the arbitration agreement.[263] An award is therefore clearly not contractual but falls "half way between being a judgement and a contract.[264]

It is also accepted that some degree of co-operation between arbitration and the State court is necessary.[265] For instance, the enforceability of arbitral award depends on the attitude taken by the law of the court used. The basic fundamental justice of the forum is subject to the court's control. The enforcing court, for example, has discretion to refuse enforcement of an award if it is contrary to public policy, or if a fundamental principle of natural justice is infringed or if the subject-matter of the arbitration falls within the exclusive jurisdiction of the national court.

Redfern and Hunter rightly conclude, "International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect, and which, on an appropriate condition being met, the courts of most countries of the world will be prepared to recognise and enforce."[266]

This approach is widely accepted. This is so not only because it gives a clear picture of the legal nature of arbitration but also because it is appropriate for current practice in international commercial arbitration. With respect to the parties involved in an arbitration, they still have the right to exercise their

---

[262] Robert J and Carbonneau T, *The French Law of Arbitration* (Matthew Bender, 1983) at I:1-1-2.

[263] Samuel A, *op.cit.* footnote 217, at p.60.

[264] *Ibid.*

[265] David R, *op.cit.* footnote 138, at pp. 77-78.

[266] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-16.

freedom to what is in their best interest and states do not feel that an arbitration is out of its control as they will still have the power to give the last word. Besides, this compromising approach is a better and more desirable path to justice. The effectiveness of this theory depends on how a state strikes a balance between the state's power to control arbitration and the autonomy of the parties.

2.4. Autonomous theory

Supporters of this theory reject the three previous theories. Madame Rubellin-Devichi who first submitted the theory in 1965 stated, "In order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within limits, one must accept, I believe, that its nature is neither contractual, nor jurisdiction, nor hybrid, but autonomous."[267] She rejected the contractual and the jurisdiction theory because they did not correspond with reality. Furthermore, they were in direct contradiction with one another.[268] She also rejected the mixed theory because it is too indefinite and too imprecise.[269]

As a result, this theory is not based upon the three theories explained earlier. Instead, it takes a broader view and it emphasises both the goals, objectives and the guarantees necessary for those parties who decide not to bring their dispute before an official court,[270] but rather on the structure of the arbitral institution. A complete picture of arbitration can only be presented by considering its use and purpose, and the way in which it responds to the needs of those in the business community,[271] which has developed arbitration as a private and flexible means of resolving disputes.[272] The advantage of

---

[267] Samuel A, *op.cit.* footnote 217, at p.67.

[268] Lew J, *op.cit.* footnote 137, at p.59.

[269] *Ibid.*, at p.60.

[270] Lew J, *op.cit.* footnote 137, at p. 59.

[271] *Ibid.*

[272] Mustill, "Arbitration : History and Background", 6 *J.Int'l.Arb.(1989) 43*; See also Lew J, Applicable Law in International Commercial Arbitration (New York: Oceana Sijthoff, 1978) at p.60. According to Mustill, "Arbitration has developed because businessmen have found it a convenient and appropriate method by which to resolve their disputes. Consequently it is the businessmen themselves who, through pragmatic experimentation, have been responsible for the development of arbitration. Yet they

arbitration is the speed and flexibility in the conduct of the proceedings, rather than the enforceability of the award,[273] which is considered an essential requirement for smooth functioning of international commercial relations.[274]

It suggests that party autonomy is crucial to the full development of arbitration.[275] The theory maintains respect for the parties' freedom of choice, and it aims to fulfil the aspirations of those who use arbitration, and also helps in the development of arbitration as an institution.[276] The autonomy of the parties concern control of arbitration and not the will of a particular legal system. This absolute autonomy is a means by which arbitration will attain a truly "supra-national" character. The nature of such an approach is clearly free from the law of place of arbitration, i.e., international commercial arbitration can be applied.

The concept of this theory is attractive as it responds to the needs of the commercial community. Arbitration is thus held to be created by parties and for the parties. The parties' freedom is used as a basis to administer and to control the arbitration. They can do what they want and are responsible for doing so. They parties themselves know what is best and how to accomplish it.

However, arbitration, as a private method of dispute resolution does not have legal force. It has to resort to facilities provided by the state to ensure a smooth procedure. Certainly, such control by the state regulates the rules by which the parties who need assistance from the state need to follow. Thus, in the current practice of arbitration, this theory is far from acceptable.

I conclude that although the four theories of arbitration as outlined above are important, none of them can be regarded as being perfect. The main purpose of the theories is that they attempt to draw the line between the power

---

have done it outside and irrespective of the law; indeed the law has, in large measure, followed existing practice."

[273] Lew J, *op.cit.* footnote 137, at p.59.

[274] *Ibid.*, at p. 60.

[275] Samuel A, *op.cit.* footnote 217, at p. 72.

[276] *Ibid.*, at p.72.

of a state and commercial needs. This purpose cannot be successful as long as the arbitration still needs the state courts' assistance. However, with the increasing use of arbitration in international trade disputes, I am of the opinion that the state courts need to reconsider their role. I am convinced that it is virtually impossible for any state to completely control arbitration and I also believe that arbitration cannot be conducted in a vacuum as it still needs some court assistance.

Thus, I submit that the mixed theory is maybe more suitable for international commercial arbitration in today's world. This is simply because the mixed theory provides a compromise between the state's power and the needs of the arbitration proceedings. The theory is more realistic and more practicable than the others. The contractual and jurisdiction theories are unacceptable in modern world. The former fails to explain many legal aspects of arbitration, whilst the latter lacks flexibility for the business community. The autonomous theory may be good for arbitration but it is unacceptable for certain jurisdictions, particularly in developing systems of arbitration, in which the state courts still exercise control over arbitration.

3. Party autonomy in practice

3.1. Party autonomy in domestic and international arbitration

Currently, international commercial arbitration is not held in a vacuum. For this reason, it has to be attached to the legal system of a particular state. In most cases sometimes more than one legal system may play a part in an arbitration, i.e., the law of the place of arbitration and that of the place of enforcement. However, most States have a dual system,[277] -- there are two sets of rules governing each type of arbitration. The first deals with purely domestic arbitration, while the other deals with international arbitration. The reason for this is that, while there is no true international law imposed upon each state to acknowledge that certain relations such as an international

[277] See French Arbitration Act 1981.

element are subject to special rules,[278] it is inappropriate for the state to apply its own domestic arbitration law to cases with an international element.

The legal system that is considered suitable to citizens of one country is not necessarily appropriate for persons who are not citizens of that country.[279] Countries which have uniform arbitration laws which are applied to both domestic and international cases runs the risk that justice will not be done in certain situations.[280] For this reason, the Model Law of International Commercial Arbitration was developed.

The basic difference between the rules applied to domestic arbitration and those applied to international arbitration is that the latter is more flexible than the former.[281] The party autonomy principle in the context of international commercial arbitration, in most cases, is wider than that of domestic arbitration.[282] The reason for this is that the domestic rules are designed to apply to those cases, which deal with the people of that state, who come from the same background, and who understand that legal system. They thus know how to deal with their own law. On the other hand, international cases deal with people who come from different backgrounds, hence it is difficult to presume that they will understand the legal system of other states well. To avoid any problems, the states should apply international standards to international cases.

However, in certain countries there is only one set of rules applied to both. This is possible if such a law is flexible enough to meet the needs of the international community.[283] Countries which have adopted the Model Law, for instance, can may apply it to both domestic and international arbitration as its provisions are flexible enough to meet modern needs. Unfortunately, certain

---

[278] David R, *op.cit.* footnote 138, at p. 71.

[279] *Ibid.*

[280] *Ibid.*

[281] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-18.

[282] Chukwumerije, *op.cit.* footnote 197, at p.3; David R, *op.cit.* footnote 138, at pp. 189-190.

[283] See The Netherlands Arbitration Act of 1986.

countries, including Thailand,[284] apply strict rules to both domestic and international arbitration.

In countries with a centralised economy such as the PRC and Vietnam, it is necessary to have a dual system. The reason for this is that the law applied to domestic arbitration is governed by the principle of planning. The authorities of these countries decree the duties imposed on local businesses but they cannot impose these duties on businesses of other countries. Thus, international economic relations remain subject to the rules of a 'market economy' when a foreign business is concerned, even if such a business is one of a socialist state.[285] It is interesting that Laos, although considered an economy-planning country, does not have a dual system.

The LSED has declared that the purpose of the Decree is to promote foreign investment in Lao PRD. However, the Decree is based on Laos' law of contractual liabilities. The question which arises is whether the Decree is flexible enough to deal with those arbitrations which have international elements.

Apart from the operation of a dual system, the interpretation by the national courts of international commercial arbitration is also important. Most courts are far less intrusive in the arbitral process in international commercial arbitration than those in domestic arbitration. I would submit, this approach is universally recognised as one of the main reasons why parties to arbitration choose the arbitration mechanism to avoid the complexities of court litigation and the unknown legal system of a particular national court. The more the court intrudes in arbitral process, the less the intent of the parties to arbitration is respected.

3.2. Definition of international

The other questions which remain unanswered is the meaning of the

---

[284] This has been criticized by foreigners. Finally, at the time of writing, the revised Arbitration Act is in process. The tendency is that the Model Law shall be adopted for international commercial arbitration.

[285] David R, *op.cit.* footnote 138, at p. 71.

term "international". It is clear from earlier discussion that the word "international" is used to distinguish domestic arbitrations from those that in some way *transcend national boundaries* and so are international, or, in the terminology adopted by Judge Jessup, "transnational."[286] Further confusion is raised by the New York Convention's use of the word "foreign" award instead of "international" award.

Does the New York Convention uses the word "foreign" because it wants to distinguish domestic awards from those derived from international arbitration, why does it not use the word "international"? Or, does this mean that there is another type of arbitration, i.e. foreign arbitration? This is in fact the case in Thailand. The TAA provides: "*Foreign arbitration* means an arbitration conducted wholly or mainly outside the Kingdom of Thailand and any party thereto is not a Thai national." (emphasis added)[287]

The word "foreign" in the New York Convention was a narrative of the draft of the New York Convention. The ECOSOC Committee tried to avoid the word "international" award proposed by ICC. According to the ICC, "there could be no progress without full recognition of the concept of international awards ... i.e., an award *completely independent of national law*". (emphasis added)

The ECOSOC Committee considered that such conception by the ICC of an "award completely independent of national laws" was unacceptable. The Committee argued that it might well involve ousting the jurisdiction of the courts of the country where the arbitration takes place which may lead to injustice and abuse. The ECOSOC Committee therefore referred, for the scope of the Draft Convention of 1955, to the enforcement of "foreign" awards instead of "international" ones as the ICC Draft suggested. At the New York Conference, the ECOSOC Committee's proposal that the Convention apply the

---

[286] Jessup "Transnational Law" *Storrs Lectures on Jurisprudence* (Yale Law School, 1956).

[287] Section 28.

enforcement of "foreign" awards was retained.[288]

Accordingly, the word "foreign" in the New York Convention is used to distinguish between domestic and international awards. In other words, the word "foreign" has the same function as "international". Both serve to determine what is domestic and what is international. Thus, the term "foreign arbitration" in TAA section 28 means nothing more than international arbitration.

Although the concept of denational arbitration (not attached to any legal system) ensures "supra-national" award is attractive[289] and has its advantages,[290] the lack of legal basis and of recognition by most state courts make such a concept a dangerous undertaking and filled with legal pitfalls.[291] However, some text writers comment: "When an arbitration points to a variety of possible nationalities, it seems that the label "international" is the most apposite term by which to describe an award involving such a wide variety of localising elements. In fact, it is precise in such a setting that the distinction between "foreign" and "national" awards is most meaningful, and ultimately could lead to the recognition of "supra-national" awards -i.e., awards which are properly international in scope."[292]

With respect to party autonomy in international commercial arbitration, it is necessary to identify whether arbitration is domestic or international. Although the identity of arbitration plays a significant role in international commercial arbitration, determination of such an identity is not straightforward.[293] The criteria adopted differs from country to country. Certain

---

[288] van den Berg A, *op.cit. footnote 142*, at p.35.

[289] Paulsson J, "The Extent of Independence of International Arbitration from the Law of the Situs, in Lew J (ed), *Contemporary Problems in International Arbitration* (Queen Mary College, Centre for Commercial Law Studies: University of London, 1986) 141 at p.148.

[290] van den Berg A, *op.cit. footnote 142*, at p.29-30.

[291] *Ibid.*, at p.33-34.

[292] Robert J and Carbonneau T, *op.cit.* footnote 262, at p.II: 1-10.

[293] Cohn, "The Fifth Report of the Private International Law Committee", 25 *Mod.L.Rev.* 449 at pp.450-452.

national laws form such a narrow framework that they categorise arbitration as domestic on the basic of certain tenuous or fortuitous links.[294]

Difficulty may thus arise because an arbitration may be considered domestic in one country but international in another. What is the accepted criterion in determining "international"? There is no uniform rule on this matter. There are many factors relating to accepting the criterion to determine the identity of arbitration. In order to expand the ambit of international commercial law, certain arbitration laws, such as the Model Law,[295] accepted more than one criteria to determine the identity of arbitration. There are four criterions: the place of arbitration, the identity of the parties and the nature of the dispute.

3.2.1. The place of arbitration

The test which is adopted by the New York Convention for the purposes of determining the recognition and enforcement of an award made in the territory of a state other than that in which recognition and enforcement is sought.[296] The Convention therefore provides that: "This Convention shall apply to the recognition and enforcement of arbitration awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, ... "[297]

This test, according to the Convention, may cause some problems. First, the phrase "...awards made in the territory of a State other than the State..." causes difficulties in some courts. This was dealt with in an English case in which an arbitration clause in a re-insurance contract explicitly stipulated London as the place of arbitration. The arbitration was heard in England and conducted under English rules of procedure. In every respect, the

---

[294] Lew J, *op.cit.* footnote 137, at p.36 footnote 18.2.

[295] Section 1(3)(a).

[296] U.N.Doc. E/2704 and Corr. 1, reprinted in, 1 International Commercial Arbitration: New York Convention at III.A.1.7. (G. Gaja ed. 1985).

[297] Article I(1).

the arbitration was English. After the hearing in London, the arbitrator rendered an award on 20 November 1990. The award was dated and signed in Paris.

The problem arose as to whether the award was made in London or in Paris. The High Court rightly held that it was made in London, and rightly reasoned that the arbitration has to be considered as a whole, and the signing of the award merely being the closing event. However, the House of Lords reversed and held: "An award, whilst it is no doubt the final culmination of a continuing process, is not in itself a continuing process. It is simply a written instrument and I can see no context for departing from what I apprehend to be the originary, common and natural construction of the word 'made'. A document is made when and where it is perfected. An award is perfected when it is signed."[298]

Before the decision of this case, one commentator expressed the valuable comment on this matter: "An arbitration which is in every possible sense an English one, could suddenly become foreign, merely because the arbitrator has gone to Paris and signed and, perhaps, dispatched the award there. If there are three arbitrators who hold an arbitration in London, but meet in Paris to consider their award, and sign it in their respective residences, viz. New York, Geneva and Tokyo, the award should be treated as "made" in London, even if each arbitrator has indicated the place where he has signed it. The award, after being submitted, is no more than a part, the final and vital part, of a procedure which must have a territorial, central point or seat. It would be very odd if, possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole."[299]

This problem has now been settled by the new Arbitration Act, 1996. The Act reversed the decision of the House of Lords by providing: "an award

---

[298] [1991] 3 W.L.R. 297.

[299] Mann, "Where is an award made?", 1 *Arb.Int'l.* (1985) 107.

shall be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties."[300]

Secondly, application of this test may cause other problems in that parties in the same country may try to avoid the law of their country by choosing another state as the place of arbitration.

For example, where both parties are of State X , the contract is made and is to be performed in State X, and the contract provides for arbitration under the ICC Rules to take place in State Z. If the law of State X applies the test of the place-of-arbitration, the arbitration which takes place in State Z shall be deemed international arbitration in State X. According to the New York Convention, the award rendered in State Z shall be deemed a foreign award in State X. Thus, many countries including Thailand[301] do not accept the place-of-arbitration test to identify arbitration as international.

In accordance with the purpose of the New York Convention, the place-of-arbitration test is attached to the law of the enforcing state. However, such a test may be inappropriate for other purposes, such as determining what law (domestic or international law) should govern the arbitral procedure which takes place in that state.

If State Z in the above example applies the place-of-arbitration criterion, such arbitration will be considered domestic. As a result, the domestic arbitration law will be applied. This approach seems unsound as this case does not have any connection with State Z. Accordingly, the Model Law which has a broader purpose than that of the New York Convention expands such a test by providing that an arbitration is international if the arbitration proceedings take place outside the place of business of either parties.[302]

Although the place-of-arbitration test is not perfect, there is some

---

[300] Section 100(2)(b).

[301] TAA adopts the place-of-arbitration test in conduction with the nationality test. See Section 28.

[302] Article 1(b)(i).

advantage to it, that is it is not complicate and it determines the identity of arbitration. The various International Conventions on arbitration, such as the Geneva Convention 1927, and the European 1961, prefer such a test.[303]

3.2.2. Identity of parties criterion

This test is based upon the identity of parties: their place of business, their nationality, or habitual place of residence.

a) Place-of-business Test

This test sprang from the European 1961, and Vienna Sales Convention of 1980, and was finally adopted by the Model Law.[304] The test is regarded as a basic one, and is used in most international arbitration cases. Its origin was prompted by the European Convention 1961.[305]

The test, according to the Model Law, identifies arbitration as international if parties to an arbitration agreement have their places of business in different States.[306] The place of business is explained as the place of business location with the closest relationship to the arbitration agreement.[307] Furthermore, the test also adopts a habitual residence test to fill the gap, that is to say, if a party does not have a place of business, the habitual-residence test shall apply.[308]

This test is, of course, wider than that of place of arbitration in that any State which adopts this approach treats any arbitration which satisfies the international test. A party in State X, for example, and a party in State Y choose State Z as a place of arbitration. Such an arbitration is deemed

---

[303] Rubino-Sammartano M, *International Arbitration Law* (Kluwer 1990) at p.17.

[304] Szasz, I, "Introduction to the Model Law of UNCITRAL on International Commercial Arbitration", in (Sanders ed.) *UNCITRAL's Project for a Model Law on International Commcial Arbitration*, (Deventer: Netherlands, 1984) 31 at p.42.

[305] Holtzmann H and Neuhaus J, *op.cit.* footnote 139, at p. 29.

[306] Article 1(3)(a).

[307] Article 1(4)(a); See Holtzmann H and Neuhaus J, *op.cit.* footnote 139, at p. 29.

[308] Article 1(4)(b).

international in State Z.

Although the test covers most international cases, it is not wide enough to cover certain cases in which disputes are truly international in nature. What if parties in the same state undertake a business which is international? On application of the test, such a transaction will be regarded as being domestic. Also, how is the place of business to be determined in the case of a transnational corporation? Is the place of registration or incorporation the appropriate test to determine the place of business?

b) Place-of-residence Test

Arbitration, according to the place-of-residence test, shall be deemed international if the parties to an agreement have different habitual places of residence. This test is adopted by the new Swiss Private International Law Statute of 1987, Chapter12.

The Model Law also adopts it as a second criterion where a party does not have a place of business.[309] The test may be advantageous when eliminating elements which may be difficult to ascertain.[310] The test is considered to be clear.[311] Notwithstanding this, it is not wide enough to cover all cases which are international in nature.

c) Nationality-of-parties Test

According to this test, arbitration is considered international when parties to arbitration are of different nationality. The test is not accepted in most jurisdictions because it is regarded as being too narrow to deal with cases of an international nature, such as international commercial arbitration. In the current practice of international trade, the nationality of parties is irrelevant.

The identity criterion, as seen, is easy to ascertain and is objective in

---

[309] Article 1(4)(b).

[310] Bucher &Tschanz, *International Arbitration in Switzerland* (Frankfurt: Helbing&Lichtenhahn, 1989) at p.71.

[311] *Ibid.*, at p.29.

that even though the place-of-business, place-of-residence, or nationality of parties appears in most legal systems, they are more suitable to deal with domestic transactions than international ones.

In most cases, disputes which arise in international transactions are international in nature, therefore, the criterion of the identity of the parties cannot be considered an appropriate test. It is best to merge this criterion with others as the Model Law does in its application.

3.2.3. Nature-of-dispute criterion

The concept of this test is that arbitration is deemed international if the dispute implicates international commercial interests. This approach first appeared in ICC which defines the function of the International Court of Arbitration of the ICC "to provide for the settlement by arbitration of business disputes of an *international character* in accordance with these Rules"[312] (emphasis added).

Moreover, an ICC publication further explains, "The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders when, for example, a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State."[313] Therefore, according to the ICC, the identity of arbitration shall be determined by the object of the contract instead of by the identity of the parties. If the contract involves more than one country, such a contract will be treated as being international.

Apart from the ICC approach, the concept with respect to the nature of the dispute is widely accepted in France and it has been developed by court

---

[312] Rule 1.1.

[313] *The International Solution to International Business Disputes - ICC Arbitration* (ICC Publication No.301, 1977) at p.19.

decisions and doctrinal writings.[314] The courts have held that "a transaction that an 'international' and 'commercial' character when it has a reciprocal economic impact upon different countries, i.e., when it has a bearing upon private transnational commercial dealings between nationals of different countries."[315]

In consequence, in several subsequent decisions, the highest French court (the *Cour de Cassation*) has recognised that an international arbitration is "arbitration that involves the interests of international trade".[316] Like the ICC approach, the court did not consider the judicial aspects of contract (place of formation and performance, national status of the contracting parties, etc.) as important factors in determining the identity of arbitration.[317]

The French Civil Code has finally adopted the definition given by the Highest French Court, who stated that: "an arbitration is international when it involves the interests of international trade."[318] The term interest is determined by the nature of the transaction,[319] which will be indicated largely by the will of the parties, as expressed in their arbitration agreement.[320]

This criterion is favoured because it defines the term "international" broadly. It is more realistic and responsive to the needs of international commercial arbitration in that it embraces most cases of international trade. However, it is noted that the determination of the term "international" varies in each case.[321] Consequently, it differs from one court to another and from country to country. The application of this criterion is therefore not definitive.

---

[314] Robert J and Carbonneau T, *op.cit.* footnote 262, at p.II: 1-14.

[315] *Ibid.*

[316] Delvolve, "France as a forum for international arbitration - the decree of May 12, 1981 (Articles 1492 to 1507 of the French Code of Civil Procedure)", 2 *Int'l.Contract-L.&Fin.Rev.* at p.422.

[317] Robert J and Carbonneau T, *op.cit.* footnote 262, at p.II: 1-14.

[318] Article 1492.

[319] Robert J and Carbonneau T, *op.cit.* footnote 262, at p.II: 1-14.

[320] Ibid, at p.II: 1-2.

[321] *Ibid.*

3.2.4. Opt-in criterion

This criterion is adopted in the Model Law for the purpose of broadening the scope of application of the Model Law, and shifting somewhat from the strict definition area to a general formula area.[322] One of the reasons for adopting this criterion in the Modern Law is to solve problems not covered by the other criterias. For example, X and Y are parties of State A. X is controlled and managed by a foreign company.

The question arises whether arbitration held in State A is deemed domestic or international. It is obvious that if the place-of-arbitration or the identity-of-parties test is applied, such arbitration shall be deemed domestic. But it is doubtful that such an example can be deemed international with regard to the nature of dispute which is purely domestic. As a result, the opt-in criterion is questionable.

The opt-in criterion was first specified in the draft of the Model Law stating that "the States will be prepared to allow the "opting-in" only if an element of internationality is present. Such elements should have been that not all of the following places are situated in the same state: place of offer of contract containing the arbitration clause or of separate arbitration agreement; place of corresponding acceptance; place of performance of contract or of location of subject matter; place of registration or incorporation or nationality of each party; place of arbitration."[323]

However, the final draft of the Model Law failed to incorporate the above requirements.[324] As a result, this criterion gives wide freedom to parties to determine the term "international", that is to say, they can choose an international arbitration act instead of a domestic one.

The central problem particularly arises in countries which adopt a dual

---

[322] U.N. Doc. A/CN.9/WG.II./WP.40 (14 December 1982).

[323] Szasz, I, *op.cit.* footnote 304, at p.43.

[324] Article (3)(b)(iii).

system. Parties to a purely domestic transaction might be able to evade the mandatory provisions of domestic law. In response, the pro opt-in criterion provides that the benefits of certainty of application is considered to outweigh any concern of evasion by the parties.[325] Besides, some commentators assert that "domestic arbitration laws tend to provide protections that are not needed by sophisticated parties likely to use the opt-in provision."[326]

Most countries have a dual system so as to give wide freedom to parties in international cases. The reason for this is that international commercial arbitration, in most cases, does not have impact on any one particular state, but on the international trade community as a whole.

For example, it is recognised that the term "commercial" in international commercial arbitration is to be given wider interpretation than that in domestic arbitration. States have not, do not and will not give such freedom to domestic arbitration. This is because it directly effects the economic and justice systems of these countries.

If most States think are of the opinion that the level of domestic and international arbitration is equal, then why do they have a dual system? It can be interpreted that the States are willing to control domestic arbitration on the one hand, while on the other hand, they give freedom to parties to evade such control. That is why one commentator rightly concludes, "No doubt many countries will find it difficult to accept a situation where parties might internationalise an arbitration that is otherwise purely domestic."[327]

The understanding of participation in the early draft of the Model Law is correct and proper. The final draft should have incorporated these requirements, which, in my opinion, do not make the opt-in criterion less certain than that in the final text.

---

[325] Holtzmann H and Neuhaus J, *op.cit.* footnote 139, at p.32.

[326] *Ibid.*

[327] Szasz, I, *op.cit.* footnote 304, at p.45.

It is clear that there is no all-inclusive criterion to determine the identity of arbitration. Each criterion has one or more defects. Thus, most countries accept more than one criterion to determine the identity of arbitration. However, countries which accept the same criterion may have a different criterion, as the attitude of their courts or their legal systems are also significant factors in determining the outcome.

England

The Arbitration Act 1996 does not distinguish between domestic and international arbitration. As England is a party to the New York Convention, the Act contains provisions for the enforcement of foreign award (called a "New York Convention") provision separated from that of the enforcement of domestic award. Under the Act, the award shall be deemed a "New York Convention award" if such an award is made in the territory of a state other than the United Kingdom, and that state is a party to the New York Convention.[328] In other words, England takes the place-of-arbitration approach.

PRC

Under the CAL, the line drawn between a "domestic" and "international"[329] arbitration rests with whether the arbitration case is "foreign-related" as defined under Chinese law.[330] While the CAL does not give any guidelines as to which types of disputes should be deemed "foreign-related," a popular local interpretation holds that any dispute between two China-registered entities, regardless of whether they are foreign invested, shall be deemed a "domestic" case, unless the matter in dispute is clearly international in nature.[331]

The CAL provides that an arbitration involving foreign elements means

---

[328] Section 100.

[329] In China the term "foreign-related" is commonly used to mean "international". See S Harpole, "How China Organizes Arbitral Tribunals: Arbitration in China", 52 *Jan Disp.Resol.J.* (1997) 72, at p 73.

[330] *Ibid.*

[331] *Ibid.*

the arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element.[332] This means that the CAL adopts the nature of dispute criteria. This approach is too narrow. Thus, disputes between foreigners doing business in the PRC or between foreigners and Chinese entities doing business in the PRC may not be deemed disputes involving foreign elements.

What constitutes an international or foreign-related element under the CAL remains unclear. To answer the question, the Chinese Supreme Court interpretation of what constitute "foreign-related" civil cases are helpful: "[c] ivil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or foreign organizations; or in which the legal fact of establishment, modification or termination of the civil legal relationship between the parties legally occurred in a foreign country; or in which the object of the action is located in a foreign country, shall be civil cases involving foreign parties". [333]

Some commentators suggest that this definition should be applied to 'foreign-related' as used in Article 65, resulting in arbitration being 'foreign-related' when: (a) one or both of the parties to the dispute is a foreigner, a stateless person, or a foreign legal person; (b) the subject matter of the dispute is located outside the PRC; or (c) the material facts affecting the rights of the parties occur outside the PRC.[334] This definition would therefore cover those arbitrations currently under the jurisdiction of CIETAC.

Commentators have noted that it still remains unclear whether the concept of a "foreign-related" transaction should be extended to include any business transaction conducted by a Sino-foreign joint venture or a wholly

---

[332] Article 65.

[333] Supreme People's Court, Application of the Civil Procedure Law Several Questions, Opinion, reprinted and translated in China L.&Prac., (Jan. 14,1992) 40.

[334] See B Beaumont, D Choi, and John Luk, *Commentary on the Chinese Arbitration Act* (London: Simmonds and Hill Publishing Ltd, 1995) at pp 88-9.

foreign-owned venture with another Chinese venture.[335]

Furthermore, in 1996, the Shanghai Municipal Intermediate People's Court raised a serious problem when it interpreted the jurisdiction of CIETAC Rules of 1995. The Court considered that Chinese-foreign joint ventures are domestic entities. Thus, it concluded that exercise of jurisdiction by the People's Court was inappropriate because CIETAC could not exercise jurisdiction over a dispute that arose between two Chinese legal persons over a domestic contract. [336]

This problem has been clarified by the revision of the CIETAC Rules in 1998. The CIETAC Rules provides that CIETAC has jurisdiction to settle by means of arbitration:

"(1) international or foreign-related disputes;

(2) disputes related to the Hong Kong SAR, Macao or Taiwan regions;

(3) disputes between the enterprises with foreign investment and disputes between an enterprise with foreign investment and another Chinese legal person, physical person and/or economic organization;

(4) disputes arising from project financing, invitation for tender, bidding, construction and other activities conducted by Chinese legal persons, physical persons and/or other economic organization through utilizing the capital, technology or service from foreign countries, international organizations or from the Hong Kong SAR, Macao and Taiwan regions; and

(5) disputes that may be taken cognizance of by the Arbitration Commission in accordance with special provisions of or upon special authorization from the law or administrative regulations of the People's Republic of China." [337]

The CAL and CIETAC Rules accept the identity of parties and nature

---

[335] See Michael J. Moser, "China's New International Arbitration Rules", 11 *J.Int'l.Arb.*(1994) 5, 5-6.

[336] Brown F and Rogers C, "The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China", 15 *Berkeley J.Int'l.L.* (1997) 329, 344-345.

[337] Article 2.

of dispute criteria to identify the scope of international or foreign-related arbitrations.

Laos

According to the LSED, there is no distinction between domestic and international arbitration. With respect to the enforcement of foreign award, the Decree provides that: "The Lao PDR recognises and implements agreements or the arbitral award of the arbitrators on foreign economic disputes under the following conditions:

The agreement or the arbitral award has been made in a member country which is a party to convention to which the Lao PDR is also party;

These disputes may be accepted for consideration by the OSE [the Office for Settlement of Economic Dispute] of the Lao PDR;

The agreement or the arbitral award does not violate the applicable provisions for settlement of disputes;

The agreement or the arbitral award does not violate the law on the security and the order of the Lao PDR".[338]

Although no explanation of what is considered "foreign" under this Article, the term "made in a member of a convention" implies that the territorial theory is accepted. However, the theory applied in Laos is narrow. It is limited only to those territories or States which are members of a convention to which Laos is also a party. Laos is not yet a party to the New York Convention, thus there are only limited number of countries whose award is treated as foreign.

Thailand

Thailand has a single rule which is applied to both domestic and international arbitration, except in the case of its enforcement provisions. The enforcement of foreign awards is separate from domestic awards. Thus, the

---

[338] Article 41.

identity, domestic or international, is applied only to enforcement matters. For this purpose, the TAA adopts the place-of-arbitration criterion in conjunction with the nationality of parties by providing: "Foreign arbitration means an arbitration conducted wholly or mainly outside the Kingdom of Thailand and any party thereto is not a Thai national."[339]

The problem with this provision is the term "Thai national". The Thai National Act of 2508 B.E. amended in 2535 B.E. (No.1 and 2) is applied only to a natural person not a juristic person. With respect to the juristic person, such as a company, there are separate laws for the purpose of defining what a foreign juristic person is.

For example, the National Executive Council Announcement No.281 (the Alien Business Law) regards a limited company with half or more than half of its shares held by foreign nationals, or half or more than half of its shareholders are foreign nationals (irrespective of the number of shares held) as a foreign company, and is restricted from doing certain types of business listed under that law.

The land code, on the other hand, provides that a company with over 49% of its shares held by foreign nationals is treated as a foreign company and is not entitled to own land in Thailand, etc. There is no general law which states what a foreign company is.

Therefore, one must look at the Act on Conflict of Laws of 2481 B.E. which provides that, "In case of conflict as to the nationality of a juristic person, the nationality of such person is that of the country where it has its principal office of establishment".[340] A company incorporated in Thailand whether or not its principal office is located in Thailand, is required to have a registered office in Thailand. It is possible that the court will regard the place of registered office, Thailand, as the "principal office" for the purpose of attributing its nationality. This means that a company which is incorporated in

---

[339] Section 28.

[340] Section 7.

Thailand with foreign nationals holding all or most of the shares may be regarded as a Thai company for the purpose of the Thai Arbitration Act.[341]

Vietnam

To consider arbitration as "international", as an initial step the Rules of the Vietnam International Arbitration Centre combine the nationality-of-parties approach with the nature-of-dispute test. According to the Rules of the Centre, arbitration shall be deemed international if one of the parties is or all the parties are foreign nationals or a foreign corporation, or all the parties were foreign nationals or foreign corporations,[342] and disputes arose from international economics.[343] Later, the Prime Minister's decision of 16 February 1996 on extension of the jurisdiction over disputes of the VIAC extended its power to cover disputes arising from domestic business transactions, in cases where the parties have agreed to submit their dispute to the Centre. In other words, the apt-in approach is adopted.

As a result, this change has become more pleasing to foreigners who do business in Vietnam. They can now escape the domestic courts by choosing the VIAC even though their disputes are purely domestic. This change means that the Vietnamese government uses party autonomy as a tool to protect a foreigner in business.

Furthermore, the Ordinance on the Recognition and Enforcement of Foreign Arbitral Award in Vietnam[344] adopts the test of place of arbitration when an award is enforced in Vietnam. The Ordinance provides, "In this Ordinance, a 'foreign arbitral award' is understood as the award which is made outside the territory of Vietnam by an arbitrator selected by the parties

---

[341] See Bunnag J, "Arbitration Law in Thailand" in *Cases and Materials on Arbitration* (Justice Department, Thailand) at p.234-5.

[342] Article 3(1).

[343] Article 2.

[344] Hereinafter "VEFA".

concerned to settle dispute arising from commercial law relations."[345]

The Ordinance further extends foreign award to include those awards rendered in Vietnam by foreign arbitrators.[346] This criteria seems to liberalise an international commercial arbitration. However, it is doubtful whether a foreigner can be appointed to act as an arbitrator in Vietnam in practice. The structure of the VIAC would seem to negate this. The list of arbitrators kept by VIAC contains no foreigners.

Besides, the language of the hearing is required to be in Vietnamese.[347] This test is thus impracticable without amending the VIAC Rules. However, this trend indicates that Vietnam is moving towards implementing international commercial arbitration.

4. Conclusion

In my opinion, party autonomy is universally understood to mean that parties are free to agree what they want. The difference, however, remains not in its meaning but in its extent and source. The scope and source of party autonomy depends on the approach of the legal theory of arbitration that is applied.

At present, I am convinced that the mixed theory is more favoured over the others. Although the autonomy theory has gradually developed, it is not well-accepted, and it will be difficult or even impossible to undergo further development in the near future because of the existence of the Model Law on International Commercial Arbitration, and the increasing number of countries that have signed the New York Convention which reduces the importance of the autonomy theory.

I believe that the mixed theory will not impose any problems on the international commercial arbitration. Furthermore, the developing systems of

---

[345] VEFA, Article 1 para.1.

[346] VEFA, Article 1 para.2.

[347] VIAC, Article 22 para.1.

arbitration such as Laos, Vietnam, and Thailand, are happier to accept the mixed theory than others. This is because they feel that they do not run the risk of losing their power in controlling arbitration. This may lead to the conclusion that these three countries can accept the Model Law.

However, I submit that these four countries should have dual systems of domestic and international arbitration. This method avoids the undesirable results of the court's interference. I do not believe that the single standard, applied to both domestic and international arbitration is workable. The court, I believe, tend to always apply familiar standards, which of course is the application of domestic standards, to both domestic and international arbitration. I strongly believe that the court will not apply the international standard to domestic cases.

CHAPTER 2

ROLE OF PARTY AUTONOMY IN ARBITRATION

Over the years, the arbitration laws of many countries have undergone amendment or have been dramatically revised. Some countries even have new arbitration laws which make them a more attractive place for arbitration. One of the key elements to such change is the part played by party autonomy. Accordingly, it is more respected by most of these countries. The question is - why and how can party autonomy make arbitration attractive. The answer to this question is explored in this Chapter.

First, we will discuss party autonomy as a tool needed by the international trade community to create a practical mechanism to settle disputes. We will then examine the reasons why international businessmen choose arbitration as their means of dispute resolution, and finally, we will explore the role played by party autonomy in arbitration.

1. Party autonomy response to business community needs

The element of risk is always inherent in all commercial dealings.[348] In domestic business, the risk tends to be less than those in international trade, which in most cases involve the incidents of war, dangers of carriage on the high seas, expropriation, currency fluctuations, boycott, and changes in governmental controls such as tariffs and export and import regulations. Businessmen are all too familiar with the likelihood of taking these risks. Accordingly, they always tend to assess and form their judgements based on these risks.[349] In other words, it is part of a businessmen's job to anticipate correctly the future concerning his business in such matters as market trends, customer needs, future demands and the like.

Apart from those risks, there is another danger which businessmen

---

[348] Lowenfeld A, *International Private Trade*, pp. 2-3 (2d ed.1981).

[349] Katzenbach N, "Business Executives and Lawyers in International Trade", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future* 67 at p.69.

always face. It is a conflict arising from normal competition to honest disagreement about rights, which is unusual. Businessmen are always concerned with these risks, which are a fact of business life.[350] It is true that each person may understand rights and obligations differently no matter how carefully a contract is written; even with good faith, parties may perform at a level less than they promise.[351] This occurs particularly in international trade which in today's world takes place in an environment of great complexity and different cultures.

Businessmen always come from different socio-politico-economic and cultural backgrounds. A dispute between them may thus be sensitive and happen very easily, even though they know that "Being aware of the possibility of disputes and of the importance of preventing them has always been one of the qualities which make a good businessman".[352]

No matter how good a businessmen a person may be, large sums of money will always be spent on negotiations, legal advice and, eventually, on a settlement of dispute.[353] Why does this type of risk matter? The major reason is that it leads to legal risks which businessmen will attempt to avoid. However, because they are not trained to be lawyers, their assessment and decision-making on legal issues will be limited. Hence, most cases will rest upon the lawyers who draft their contracts.

Unfortunately, in most cases, when a dispute arises, the drafter will not be involved. The lawyers who may handle the case when the dispute arises will not necessarily be the same as the one who drafted the contract. As a result, the legal risk becomes even greater and more unpredictable.

Therefore, one important thing that businessmen should do in this

---

[350] van den Hoven H, "Commercial Disputes and Their Settlement, a factor in Business Planning", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future*, 35 at p.43.

[351] Coulson, *Business Arbitration - What you need to know*, (AAA, 2nd ed.1982) at p.11.

[352] van den Hoven H, *op.cit.* footnote 350, at p.36.

[353] *Ibid.*, at p.43.

respect is to search for an appropriate method to resolve the dispute in order to reduce the legal risk. What kinds of mechanism do businessmen need in settling their disputes? What are the essential elements of such a method to meet the needs of the business community? In fact, there are various methods available to them, such as a domestic court, negotiation, mediation, conciliation and arbitration. What, and why, a particular method best responds to the needs of the business community? These problems will now be discussed.

1.1. Domestic court

National courts may not be considered appropriate in a domestic context, but may not be in an international trade transaction. There are a number of reasons to support this claim.

First, all independent countries provide justice for the people in their territories through their national courts. This is a normal function of every state. These courts deal with all kinds of cases which may arise, whether civil, commercial or criminal.

As a result, most states, whether developed or developing, have the similar problem of a number of cases pending in their courts. It often takes a very long time for a court to reach its decision. Besides, the national courts are designed for dealing with the mass, not individuals, and have their own rigid rules which they follow. This makes the process in the national court room too formal for the ordinary person to understand.[354] Judges and lawyers always use technical terms with which the parties may be familiar. This thus raises fear in the court process.[355]

In Thailand, for example, the mediation scheme was established by the Civil Court in 1994 in order to alleviate the caseload of the Civil Court. This scheme, which operates under the slogan "convenient, quick, economical and

---

[354] Schmitthoff, "Extrajudicial Dispute Settlement", *Forum Internationale* No.6, at p.5.

[355] There is an old Thai saying that says "eating feces is better than going to court."

fair",[356] provides a role for judges in helping both parties to find a mutually acceptable solution. In other words, this scheme emphasiss the role of a judge in settling disputes, especially in a pre-trial conference, rather than in making a decision.[357]

The principle the scheme behind the Regulation of the Civil Court Concerning Mediation is that both parties have to voluntarily bring their case to the mediation process. This scheme is separated from the normal division of the Civil Court, and judges who voluntarily participate in this scheme will play a mediator's role throughout the specified day in order so that they can concentrate on mediation work. Nevertheless, they still work as adjudicators. Therefore, after an unsuccessful settlement attempt, the judge who takes part in the mediation process cannot be the judge in that case. This is in order to prevent that judge from knowing facts outside the trial which come to light during the mediation process. This prevents him from being prejudiced against the party who did not cooperate in the mediation.

Furthermore, the files and documents will be destroyed, and the facts received during the mediation process are treated as confidential, and neither of the parties can rely on such facts in a normal trial. The reason for this practice is to encourage the parties to discuss and negotiate freely without any fear of harm to their case.

The Civil Court attempts to create an informal atmosphere. To do this, it convenes the settlement conference in a specific room, not in a court room, with facilities such as telephone, photocopy machine, facsimile machine and refreshments. There is a stipulation which requires that the judge and the lawyers do not wear gowns during the mediation sessions.[358]

All kinds of cases may be taken for mediation, provided that both

---

[356] The Civil Court, *The First Anniversary of the Mediation Scheme of the Civil Court*, (Bangkok: The Civil Court, 1995) p.40.

[357] See Ariyanantaka W, *The Chief Justice Clifford Wallace's Lecture* (unreported).

[358] The Civil Court, *The First Anniversary of the Mediation Scheme of the Civil Court*, (Bangkok: The Civil Court, 1995) at p.26.

parties voluntarily subscribe to use this scheme. The judge will encourage the parties to disclose their information and express their thoughts as he searches for the underlying needs of the parties with a view to helping them come up with solutions which meets the needs of both parties. If the parties reach settlement, the plaintiff may withdraw a suit, or the judge may give judgment according to that agreement. If the mediation fails, that case will be brought back to a normal trial.

The Civil Court has guidelines for judges who act as mediators. For example, they have to read the case carefully and assess what the real needs of both parties are, then ascertain a satisfactory point which may lead the parties to end their case. They have to create an informal atmosphere at the meeting by reducing any tension, and make the parties feel free to exchange their feelings. The judges have to be neutral, although, with respect to the facts of the case, one party will be in the right, but they have to listen to both parties with sympathy.[359]

One success story of this scheme saw the settling of the Mahboonkrong Case in 1994. The case involved a fight between shareholders to get a majority stake in Mahboonkrong Company which was running a huge department store in Bangkok. The first litigation started in 1989 and was still in trial. There were also sixty relevant cases in the Civil Court, the Court of Appeal and the Supreme Court. The Civil Court spent four months with five mediation conferences to settle this case and, finally, the parties reached a satisfactory agreement and withdrew all of cases from the courts.

Such a scheme of the Thai Civil Court is self-evident - the court system has the problem of case delay and the formality of the court process. Similarly, in England, Lord Wolf's research reveals the very same problems in the English Court system.

Secondly, although people believe that judges are not corrupted, and

---

[359] *Ibid.*, at p.31.

are very intelligent and perfectly fair, that it is not to be construed as being the same as being the same as being confident in their decision.[360] In the commercial area, disputing parties often feel that judges in certain jurisdictions do not understand the nature and need of businessmen well enough. Besides, they lack commercial knowledge.

Thus, if a dispute arises from a textile trade transaction and the judge has to have all trade terminology explained to him, the businessman, whose money is at stake, is apt to feel "If there was someone I could trust who really knew the trade, I'd rather have his decision than be judged by this learned man who is taking his first lesson in textiles."[361] Of course, judges are not trained to be commercial experts but legal experts.

Thailand may be a good example for this situation. The Central Intellectual Property and International Trade Court[362] was set up in 1997 to promote international trade and investment. The IP&IT Court is composed of two kinds of judge: judges and associate judges.[363] The quorum of the bench requires that at least two judges and one associate judge shall be present to form a quorum for an adjudication.[364] However, their qualifications are different, the former is lawyer and the latter is required to "have knowledge and expertise in intellectual property or international trade"[365]. The main function of the associate judge helps the judge to discern the facts of the case.

---

[360] Pearson N, "Arbitration and Business Man" in Sanders ed., *International Liber Amicorum for Martin Domke* at p.211.

[361] *Ibid.*

[362] Hereinafter "The IP&IT Court".

[363] The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court (Hereinafter "IP&IT Court Act") Article 12 which provides that "The number of judges and associate judges in an intellectual property and international trade court shall be determined by the Ministry of Justice."

[364] *Ibid.*, Article 19 which provides that "Subject to the provisions of Section 20 and 21, at least two judges and one associate judge shall be present to form a quorum for the adjudication. Judgment or order of the court shall require a majority vote."

[365] *Ibid.* Article 15(4) which provides that "Associate judges shall be appointed by the King from intellectual property or international trade proficient selected by Judicial Service Commission under the Law on Judicial Service, in accordance with the rules and methods prescribed in the Ministerial Regulations. An associate judge shall possess the qualifications specified in (1) to (4), and shall have none of the prohibited characteristics specified in (5) to (9), as follows: (4) Having knowledge and

Thus, most of associate judges are businessmen.[366]

The result is that judges in certain countries are not regarded as suitable for settling international commercial disputes, hence the parties have no freedom to choose their own judge who, they think, is suited to handle their dispute. Parties are thus unwilling to resort to the courts to settle their disputes. Furthermore, apart from doubting the knowledge of judges, the parties sometimes doubt the impartiality of a foreign court.[367] This is because both the judges and local party belong to the same culture and speak the same language.[368]

A third question which always arises in international litigation is - which court of which country has jurisdiction? This inevitably has a bearing on the law to be applied to the case.[369] Nobody knows in advance in which country the court will be deciding the case.[370] The parties thus run the risk of "forum shopping".[371]

But if the parties to the contract provide for jurisdiction in a particular country, the risk of "forum shopping" is avoided. However, certain jurisdictions, such as Thailand, cannot be chosen as a forum if neither party has contact with Thailand. Such contact makes the party rely on that jurisdiction.

Even though the parties may choose the jurisdiction of a particular country, the jurisdiction and competence of the domestic court, governed by

---

expertise in intellectual property or international trade;..."

[366] As the Sub-Committee to select associate judge, I have observed that most applicants to associate judge are the executives of big companies in Thailand. Those applications are of course expert in various kinds of business.

[367] Sanders P, "International Commercial Arbitration", 20 *Neth.Int'l.L.&Rev.* (1973) 37.

[368] Jean-Pierre Bouyssonie, "Commentary on Commercial Disputes and Their Settlement, a factor in Business Planning", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future* at p.45.

[369] van den Hoven H, *op.cit.* footnote 350, at p.39.

[370] *Ibid.*, at p.41.

[371] *Ibid.*

the law of that country[372], may be too complicated for foreigners. In particular, those laws concerning jurisdiction and competence of the court which are mandatory rules which the parties cannot avoid.

Fourthly, court proceedings have some features which are discouraging to the parties for example, court proceedings are formal, and the language used is sometimes unfamiliar to the parties. All of these formalities, again, are sometimes mandatory rules which the parties cannot otherwise agree to.

Fifthly, the decisions of national courts are, of course, enforceable in their own territory. To enforce the same judgment in a foreign country is maybe more difficult, although not impossible. This is because there is no one international convention on a global basis for the enforcement of foreign judgments. On the regional basis, in Europe, the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments exist. The objective of this Convention is to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments obtained in one member state throughout the rest of the other member states. The philosophy is that judgments should be able to circulate freely within the contracting states of the Convention to ensure that economic life in the region is not disturbed and thereby encourage trade. In order to achieve this the Convention provides that recognition is automatic and enforcement is largely a procedural matter.

In Thailand, for example, there is no specific statute which deals specifically with the recognition and enforcement of foreign judgment, nor has Thailand entered into any relationship, bilateral agreement or otherwise, for the reciprocal enforcement of judgments. Nevertheless, there is one reported

---

[372] See the Thai Civil Procedure Code, Section 2, provides that no plaint may be submitted to a Court unless

1) having regard to the nature of the plaint and the grade of the Court, it appears that such Court is competent to try and adjudicate the case under the provision of law governing the organization of Courts of Justice, and

2) having regard to the plaint, it appears that the case is within the territorial jurisdiction of such Court under the provisions of the Civil Procedure Code governing venue and also under the provisions of law fixing the limits of the territorial jurisdiction of Courts.

case[373] which dealt with the enforcement of foreign judgment in Thailand. This case is considered as the only precedent available on the subject of enforcement of foreign judgment.[374]

However, it should be borne in mind that Thailand is a civil law country, and the Supreme Court decision is not the law. Accordingly, this case is cited as an example to help readers understand how the Thai court deals with the problem of the recognition and enforcement of a foreign judgment without a law underlining it.

The case was involved a buyer plaintiff and a seller defendant who failed to deliver the goods. The plaintiff sued the defendant in the Saigon Civil Court and judgment was given in favour of the plaintiff. The defendant then fled to Bangkok where the plaintiff sought enforcement of the Saigon Civil Court Judgment.

The Supreme Court (Dika), reversing both the Bangkok Civil Court and the Court of Appeal, held that "the principle underlying recognition and enforcement of foreign judgment is one of mutual respect among nations. The Court of Siam will recognise and enforce judgment rendered by a foreign court, provided that the judgment was given by the court of competent jurisdiction. The judgment must also be final and conclusive on the merit of the case. In this case, the plaintiff and the defendant were both Vietnamese citizens; thus, the Saigon Civil Court enjoyed competent jurisdiction over the case.

However, the judgment of the Saigon Civil Court was given in default. The plaintiff failed to prove the Vietnamese Civil procedural law concerning the finality and conclusiveness of the judgment given in default. Under the Civil Procedural Act B.E. 2452 (1909) of Thailand, the defendant who has been declared by the court to be in default of appearance and against whom a

---

[373] Supreme Court (Dika) Decision No. 585/2461(1918).

[374] Jaran Pukditanakul and Vichai Ariyanuntaka, "Aspects of Enforcement of Foreign Judgments and Arbitral Awards in Thailand", *in Cases and Materials on Arbitration*, (Ministry of Justice ed. 1992), p.217.

judgment has been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive." The plaintiff's claim was dismissed.

This case was not based on the Thai law on the enforcement of foreign judgments but on mutual respect among nations. Thus, it lacks certainty of what are the legal requirements for the enforcement of foreign judgments. The court's treatment of such matters are dealt with on a case-by-case basis.

The problem of enforcement of court judgments in a foreign court makes the foreign party feel insecure even though he may win the case in that he cannot be certain where such a judgement will be enforced. He thus runs the risk of paying for nothing. It is therefore difficult for parties to assess such uncertain situations.

It can be concluded that a national court is not the preferred method of dispute resolution because its system does not provide much freedom to parties with respect to what they think is suited to their need. The parties are thus forced to observe the rules of a court with which they are unfamiliar. As a result, it is difficult to predict what will happen if a dispute arises. The spin-off effect of these circumstances is the negative impact it may have on the business.

1.2. Arbitration

All of the problems outlined above have led the parties to create their own methods to resolve disputes in order to avoid bringing their case before a national court. Several methods have been used, and they vary from country to country. In Western countries, arbitration is being used more and more to replace litigation. This method is not new as it was and has been used for many decades.

Its use is historical.[375] This is opposite from the history of Asian

---

[375] Sanders, "Trends in the Field of International Commercial Arbitration", 145 *Recueil Des Cours* 1975

countries. Conciliation and not arbitration, has been the main alternative for dispute resolution. Its use is supported by a number of fundamental factors in Asian society, i.e. the value of a merciful mind influenced by Buddhism, the characteristic of Asian people who are compromising, who respect their elders, and the influence of the social hierarchy.

Besides, in the old days, disputing parties always submitted their dispute to an elder person who they respected. Whether the parties won or lost, they wold accept the decision without any arguments. The losing party wold accept that decision obediently, because he knew that if he failed to comply with the decision, society would sanction him. Following such a decision, the losing party did not feel that he had lost face and the relationship between them is not damaged.

From this originates the favoured modern conciliation procedure in handling disputes, rather than litigation. This is quite different from the Western development of conciliation which has been developed from the practice of a modification of the arbitration procedure.[376] However, conciliation has a weak point in that the conciliator's decision is not binding on the parties. This makes it an unpopular method in international transactions.

After World War II, the emergence of socialist countries and of newly independent developing countries has led to a dramatic increase in State trading and participation by foreign government in economic development agreements.[377] Meanwhile, the movement of capital, technology, personnel, and equipment by multinational enterprises presents a formidable challenge to legal counsel participating in planning and implementation.[378] Transactions between developed and developing countries increase continually. While the developing countries need investment from the developed countries, the

---

(2), 220.

[376] Schmitthoff, *op.cit.* footnote 354, at p.10.

[377] Henry P. De Vries, "International Commercial Arbitration: A Contractual Substitute for National Courts", 57 *Tul.L.Rev.* (1982) 42 at pp.45-46.

[378] *Ibid.*, at p. 64.

investors from developed countries need security for their business.

This change in international trade raises the question of what is a suitable mechanism to resolve the dispute between the parties of developed and developing countries. Basically, both are suspicious of each another. They fear that the procedural and substantive laws of the other are radically different from theirs.

Besides, as discussed previously, local judges are considered prejudiced against foreign economic interests, and are ignorant of the technical, specialised knowledge in dispute.[379] The existing conciliation method is not suitable in these circumstances as its result is not enforceable.

The alternative mechanism, arbitration, is considered to be more suitable, although not necessarily the best, method for them. In the view of Asian countries, arbitration is considered an acceptable method because its concept is similar to their methods of conciliation in that they avoid having to resort to the national court. Furthermore, a binding award is rendered to the parties, which is somewhat similar to that of a court decision. Specifically, in the field of international commercial arbitration, this is "the most effective instance of international legislation in the entire history of commercial law."[380] That is the application of the New York Convention which to date, more than one hundred countries have become parties. It is considered "the single most important pillar on which the edifice of international arbitration rests".[381] Thus, the enforcement of arbitral award is more effective than of any other kinds of decisions which exist in the world.

It is believed that the reasons parties to an international contract choose arbitration instead of national court to settle their disputes is its speed, its economy and its flexibility. This may be true in domestic arbitration in some

---

[379] Lynch M, "Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries", 11 *Ga.J.Int'l.&Comp.L* (1981) 670.

[380] Mustill, *op.cit.* footnote 272, at p. 43.

[381] Wetter J, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal" 1 *Am.Rev.Int'l.Arb.* 91 (1990) at p. 93.

countries and certain circumstances. But it is reversed in international disputes today, as Judge Kerr rightly explained, "Lawyers . . . are often rightly sceptical about the apparent advantages of arbitration. They know that their clients will often be disillusioned in the event.

Arbitral tribunals have to be paid, whereas court fees are often negligible. In an important case, three or two arbitrators and an umpire are usually preferred to a single arbitrator; and this adds greatly to the cost and complexities of the case. If the nominated arbitrators are busy men, as they usually are, arbitration can be much more protracted than litigation, certainly in comparison with our court system of an oral hearing which is generally continuous. Only in simple factual disputes can lawyers safely be dispensed with."[382]

Furthermore, the arbitral procedure itself becomes more complicated in that many legal tests are introduced both before and after the hearing. Prior to hearing, there may be legal tests on the validity of the clause, on arbitrability of the issue and on the qualifications of the arbitrator(s).[383] After the hearing, an award may be appealed on the grounds of a fraud or mistake apparent on the face of the award,[384] or of an error of law, or of lack of fairness in the procedure.[385] The traditional reasons supporting the advantages of arbitration may thus no longer be true in international commercial arbitration today.

The question is - what is the real advantage of arbitration? Or does the use of arbitration originate from necessity rather than desirability?[386] The central reason for supporting the advantage of arbitration is that it gives parties the freedom to design the procedure to settle their disputes. This autonomy gives the parties a sense of security in that they can search for the justice they

---

[382] M. Kerr, "International Arbitration v. Litigation", (1980) *J.Bus.L.* 164, at p.164-165. See Higgins, Brown & Roach, "Pitfalls in International Commercial Arbitration", 35 *Bus.Law.* (1980) 1035.

[383] See Wetter J, *The International Arbitral Process: Public and Private*, (New York, Oceana Publications, Inc., 1979) Vol. IV at p.6.

[384] See *Pearl Marin Shipping A/B v. Pietro Cingolani S.A.* [1981] 1 Lloyd's Rep.170 (QB Div'l Ct.).

[385] See Wetter J, *op.cit.* footnote 383, at p.6.

consider more suitable for themselves as businessmen. Businessmen therefore use arbitration, not only because of desirability.

In fact, all of the advantages that have been discussed by authors and legislators from time to time. Nevertheless, they have only just been realised since the early 1980's. It started with the new French Civil Code 1981 which clearly distinguishes international arbitration and domestic arbitration. As a result, parties to international arbitration under the French Code have more freedom than those of domestic arbitration.

Four years later, in 1985, the U.N. adopted the Model Law of International Commercial Arbitration which was the beginning of a new era in the practice of international commercial arbitration. This piece of legislation is considered to be one of the most valuable contributions to international commercial arbitration in terms of its liberalising affect in giving parties the freedom to agree to what they wish.

The Model Law has now been adopted by many countries, among these is including the newly drafted Thai Arbitration Act. It is surprising that some developed countries, such as England, which played a significant role in drafting the Model Law, havet not, and will not, adopt the Model Law. However, although those countries have not adopted the Model Law, they have used it as a guide in drafting their new laws on arbitration. This means that the new legislations tend to respect party autonomy more than the old laws did.

Thailand have not adopted the Model Law, but it passed the new Arbitration Act in 1987. The reason for this is that, according to Judge Jarun, one of the key men in drafting the Arbitration Act 1987 was that most Thai actors, especially Thai judges, dealing with arbitration, were not familiar with the arbitration process. Thus, if the Model Law was adopted, it might be ineffective because of the lack of experience and understanding of the spirit of

---

[386] Henry P. De Vries, *op.cit.* footnote 377, at pp.61-62.

arbitration.

In particular, the Model Law limits the power of the court to intervene in the arbitral procedure. In practice this may have caused difficulties. The drafters of the Thai Arbitration Act therefore reached a solution through a compromise between the old concept of court control of the arbitral process, and the new liberalised concept. The new Act is expected to gradually develop the concept of party autonomy in arbitration proceedings and reduce the court power in certain respects. This means that the parties will have more freedom than they had under the old law, the Thai Civil Procedure, but the courts maintain some power to control the arbitral process.

The Arbitration Act 1987, however, was intended to be used, temporarily, for approximately ten years, in order to give experience to Thai lawyers and those who are involved with arbitration before the Model Law is adopted. At present, the newly drafted Thai Arbitration Act, which adopts the Model Law, is in the Parliamentary process should take effect soon.

It can be fairly stated that the new arbitration laws of the world today, after the advent of the Model Law have given parties more freedom than they had before. It is thus important to know the role of party autonomy in arbitration.

What role does party autonomy have in making parties to arbitration confident in arbitration? The answer is that parties can predict, and are thus more confident in a method which gives them wide freedom to design the procedure for themselves. The following choices indicate that arbitration is created by them and for them.

1.2.1. Choice of arbitrator

One of the most vital and initial steps in any arbitration is the appointment of the arbitrator or arbitrators who are to resolve the dispute.[387] Parties are free to choose the persons who they think are most suitable for their

---

[387] Born G, *International Commercial Arbitration in the United States* (Kluwer 1994) at p.59.

case. They can therefore choose either a lawyer or a non-lawyer, such as a business man, to decide their rights and obligations. In addition, they also have the freedom to choose the number of arbitrators.

The parties may determine the method for appointing an arbitrator. However, there is no set formula in determining this as the range of disputes covered by arbitration vary from case to case. Besides, there are different cases ranging from those that are relatively straightforward to the very complex, or cases with large amounts of money at stake.[388]

1.2.2. Choice of applicable substantive law

The applicable law is important to the parties in an international contract to a great extent in that it may service to determine who is, or is not, liable when a dispute arises. Parties to arbitration are free to choose the norm to measure their right and duties, as well as the rights and obligations of each party, by providing such provisions in their agreement. Besides, any system of law to apply merits of dispute. Furthermore, they may also choose transnational law (the law of non-legal system), such as *lex mercatoria*, as the applicable law. Whatever standard the parties choose, the arbitrator has to respect and follow the same. Otherwise, any award rendered runs the risk of being refused recognition or enforcement at a later stage.

1.2.3. Choice of arbitral procedure

Parties to arbitration may choose ad hoc arbitration or institutional arbitration. If they select the former, they usually agree upon a set of rules designed to govern the essential parts of the proceedings.

On the other hand, they may agree to arbitration under the auspices of an arbitral institutional, such as ICC. In this case, they must incorporate into the agreement, the rules of such an institution. Whatever the parties choose, the arbitrator shall respect and follow the same.

---

[388] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-12.

1.2.4. Place of arbitration

Parties to arbitration are free to choose the place of the arbitration. They can choose it in advance or even after the dispute has already arisen. In practice, it is the norm to choose a neutral forum for their arbitration.

There are two factors which parties take into consideration in choosing neutral territory, that is, the geography of the place and the legal environment. The choice of place of arbitration is related to the psychological state of the parties. It is always unpleasant for a party to travel to his opponent's country to plead his case.

Consequently, the parties prefer to choose a neutral country as the place for their arbitration. There is no doubt that location plays an important part in generating trust.[389] The parties are more confident that no one will have an advantage over them in a neutral place of arbitration. This is one of the reasons why arbitration is more attractive.

The second factor which the parties have to take into account is the legal environment. The legislation attitude of the local courts play a significant role in the arbitration process. Certain countries may impose too many mandatory rules which may make arbitration ineffective. Some courts lack arbitral experience, or show open hostility towards the arbitral process. It should be noted that the importance of the first factor in practice today is less important. This is because the premium for the choice of neutral countries is always high in that the parties may have to pay travelling expenses and accommodation costs for everyone who are involved in the case, this includes the arbitrator(s) or witness(es).

Furthermore, neutral countries may have the disadvantage of inconvenience. In the case of a construction dispute, for example, the place of construction is always located in one of the party's country, and it may be crucial for the arbitrator to examine the construction work. Therefore, if the

---

[389] Pearson N, *op.cit.* footnote 360, at p.211.

arbitration takes place in another country all parties concerned may have some difficulties in performing their functions. It is not surprising then, for example, for a huge case to take place in the PRC instead of a neutral forum.

There is no doubt that party autonomy, as seen above, makes arbitration effective in that it responds to the needs of the business community. However, party autonomy is not absolute, ie., every country has its own set of limitations which it may impose upon the application of the principle.

These limitations will differ from state to state. The parties' choice depends not only upon their desirability, but also upon obtainability. In this respect, striking the balance between party autonomy and the limitations become an important factor, both in theory and in practice. The more freedom the parties have, the more effective the arbitration will be. It can thus be concluded that the advantages of arbitration today do not depend so much on speed and cost, but rather on the scope of party autonomy available to the parties. It should be remembered that states play an important role in this respect in that they must restrain the extent of limitation imposed upon the party autonomy.

2. Party autonomy reduces the court's interference

Although the parties to an arbitration agreement aim to avoid the jurisdiction of the national courts, this does not mean that the arbitration operates exclusively from the state courts. Accordingly, the state courts still tend to play a significant role in the arbitral process, and to a large extent, the effectiveness of arbitration depends on the role played by the court. In this respect, in arbitration proceedings, the courts serve two primary functions: assistance and control.

2.1. The assistance of the national court

It is well recognised that international commercial arbitration cannot function effectively without the assistance of state courts.[390] The reason for this

---

[390] Henry P. De Vries, *op.cit.* footnote 377, at p.47.

is that arbitrators, unlike judges, they do not have coercive power. In this respect, they do not have the power to order a third party to participate in the proceedings, or even to enforce any award made by them. All of these matters are dealt with by the national courts.

The type of assistance provided by the national court usually takes three forms. First, according to the New York Convention,[391] the national court indirectly enforces the arbitration agreement by denying a party of the right to litigate a matter to which they have agreed to resolve any disputes by arbitration.

A Vietnamese court for example, refused to allow a party to bring a dispute to court where the parties have an arbitration agreement on the basis of the general principles of contract.[392] Similarly, in Thailand, the CAA makes it clear that in the event a party commences any legal proceedings in a court against another party to the arbitration agreement in respect of dispute agreed to be referred to arbitration, the party against whom legal proceedings are commenced may file a petition with the court prior to the date of taking of evidence, or prior to the passing of the judgment in case where there is no taking of evidence, for an order to stay the legal proceedings, so that the parties may first proceed with the arbitration proceedings. Upon the court's completion of the enquiry, and there being no apparent cause for the arbitration agreement to be null and void, inoperative, or unenforceable for any other reason or incapable of being performed, then the court shall make an order to stay the proceedings.[393]

Courts of the countries who are which have not yet become parties to the New York Convention also have the same attitude in this respect. An arbitration agreement under the LSED, for example, takes effect and is binding

---

[391] Artilce 2(1).

[392] Interview with Ms Ha Thi Ngoc Ha, Legal Expert of Department of International Law and Treaties, Ministry of Foreign Affairs.

[393] Section 10.

on each party who have agreed to it.[394]

However, the LSED is silent on the issue of how to enforce the arbitration agreement. It only provides that if one of the parties refuses to follow the agreement before the arbitration is commenced, the injured party has the right to appeal to the court so that the court may promptly consider, and pronounce a decision to enforce the agreement.[395]

What if one of the parties brings the case to the Court? According to this provision, although Article 38 says nothing in this case, it is understood that the court shall enforce the arbitration agreement by ordering a stay of the proceedings.

Secondly, the court assists the arbitral proceedings through appointment[396] or replacement of arbitrators, by compelling attendance of witnesses and taking evidence[397]. In the area of provisional remedies, the court assists the arbitral proceedings by invoking measures which allow the attachment of assets or the disposal of the subject matter of the action pending final determination.[398]

During the proceedings, the court may give a preliminary decision on any questions of law, if the arbitrator so requests.[399] Thirdly, according to the New York Convention, the national court can directly enforce an arbitral award. This is the ultimate goal of arbitration. Although these various methods of court assistance exist, they are impossible to be invoked in certain countries such as Vietnam, which do not have an arbitration law.

It is evident that all of these methods of assistance are necessary to facilitate the effective and smooth running of the arbitration proceedings. In

---

[394] Article 38 para.1.

[395] Article 38 para.2.

[396] See TAA, Section 13.

[397] See *Ibid.*, Section 18.

[398] See *Ibid.*

[399] See *Ibid.*

other words, without the assistance of the court, arbitration would be difficult or even impossible. However, it is interesting to note that the arbitration laws of both Laos and Vietnam do not contain such provisions.

2.2. The control of the national court

Apart from the types of assistance mentioned above, the court has another function in controlling arbitration proceedings. Arbitration, unlike mediation and conciliation, provides a legal binding decision in that a winning party can enforce an award via the national court.

Accordingly, it is not surprising that a state will want to impose certain minimum safeguards of basic justice[400] upon those persons involved in arbitration. The most crucial problem which has been long debated is that of judicial review. There are two occasions when a court may review the award rendered by the arbitrator.

2.2.1. Judicial review at the place of arbitration

First, most jurisdictions empower the court to review a challenged award at the place where the arbitration took place. If the court sets aside such award, it cannot be enforced in another state(s) which is party to the New York Convention.[401]

However, the New York Convention does not provide the grounds for setting aside an award. It leaves this open to the state law to regulate the setting-aside provision. The grounds for setting aside an award differs from jurisdiction to jurisdiction. Fortunately, most States attempt to limit the grounds for setting aside awards in order to give as much effect as possible to the award rendered in their countries.

---

[400] Park W, "Eason-Weinmann Center for Comparative Law Colloquilim: The Internationalization of Law and Legal Practice: National Law and Commercial Justice: Safeguarding Procedural Intergrity in International Arbitration", 63 *Tul.L.Rev.* (1989) 647, 686.

[401] Article 5(1)(e).

English

Under the 1996 Act, the court has occasion to review an award when it is challenged. An award can be challenged on the basis of lack of substantive jurisdiction (Section 67), on the basis of serious procedural irregularity (Section 68), and on a point of law arising out of the award (Section 69).[402]

1) Challenge on grounds of serious irregularity

According to Section 67, a party to arbitral proceedings may apply to the court challenging any award of the arbitral tribunal on the ground that it lacked jurisdiction.

The philosophy behind this is that "an award of a tribunal purporting to decide the rights or obligations of a person who has not given that tribunal jurisdiction so to act simply cannot stand."[403]

The party can challenge either a preliminary award on jurisdiction alone[404] or an award dealing with the entire substance of the dispute including jurisdiction.[405] If the party has participated in the proceedings, an objection must have been raised to the asserted jurisdiction of the arbitrators at the relevant time.[406] The term "the relevant time" is interpreted as "being no later than the time that party took the first step in the arbitration proceedings"[407] as per Section 31.

2) Challenge on the grounds of serious irregularity

Under the Act, again a party may challenge any award of the tribunal on the ground of serious irregularity.[408] Section 68 sets out an exhaustive list

---

[402] See also M Hunter, the draft text for the 'commentary' on the English arbitration law title of Butterworths' Encyclopaedia of Forms and Precedents page 44.

[403] DAC Report of February 1996, para.279.

[404] Section 31.

[405] Section 32.

[406] Section 73.

[407] M Hunter, *op.cit.* footnote 402, at p.44.

[408] Section 68(1).

of the circumstances in which the Court may review an award which is challenged on the ground of serious irregularity. I would submit that, no doubt this exhaustive list is clearly better than the vague references to "misconduct" and "mishap" given under Sections 22 and 23 of the 1950 Act. The exhaustive list is based on English case law and Article 34 of the Model Law.

Any irregularity on which the challenging party relies must be considered has caused or will cause substantial injustice to the applicant. [409]

3) Appeal on a point of law

According to the Act, a party has a limited right to appeal on a point of law. The question of law on which a party seeks to appeal must be English law.[410] Thus the arbitrator's conclusion on matters of foreign law can not be appealed. Accordingly, an arbitration which takes place in England but is conducted under a foreign law will give rise to an award which can not be appeal.

Furthermore, an appeal can be brought with the agreement of all the other parties to the proceedings (which is unlikely to happen in practice), or with the leave of the court. Leave of the court to appeal will be given only in very limited circumstances.[411] According to the guidelines laid down by the House of Lords in the *Nema*,[412] the court will grant leave to appeal only if satisfied that:[413]a) the determination of the question of law will substantially affect the rights of one or more of the parties; b) the question is one which the tribunal was asked to determine; c) on the basis of the findings of fact in the award, the decision of the tribunal is either obviously wrong or, in case where the question is one of general public importance, the decision is at least open to serious doubt and d) it is just and proper in all the circumstances for the

---

[409] See section 68(2).

[410] Article 82.

[411] M Hunter, *op.cit.* footnote 402, at p.45.

[412] Pioneer Shipping Limited v BTP Tioxide Limited [1982] AC 724.

[413] See M Hunter, *op.cit.* footnote 402, at p.45.

court to determine the questions. Application for leave to appeal shall generally be on paper without an oral hearing, unless the Court decides that a hearing is appropriate.[414]

To give effect to party autonomy, parties to arbitration have the freedom to exclude, in advance or subsequently, any right of appeal on a question of law.[415] The freedom of the parties in this respect is applied in both domestic and international commercial arbitration cases.[416]

Any application or appeal must be brought within 28 days of the date of the award. [417] It is worth noting that although the 1996 Act allows the award to be considered by a court and gives the court an opportunity to interfere with an award. This is one situation where the court's interference is allowed. The reason for this is that arbitration is a consensual process by which parties are to determine their dispute in any way they see fit. Most arbitration laws, including the Model Law, today show that the state courts today play a supervisory and supportive role in both the arbitral procedure and the enforcement of arbitral award. In view of this observation, it is my opinion that a court should play a supportive role rather than an interfering one. This view is also recognised by the 1996 Act.[418]

PRC

According to the CAL[419], an award rendered in the PRC may be set aside if it can be proved that the arbitration award involves one of the following circumstances:

1) There is no arbitration agreement;

---

[414] M Hunter, *op.cit.* footnote 402, at p.45. See also the 1996 Act, Section 69(5).

[415] See 69(1).

[416] See M Hunter, *op.cit.* footnote 402, at pp.45-46.

[417] Section 70(3).

[418] 1996 Act, Section 1(3).

[419] CAL, Article 58.

2) The matters to be arbitrated are outside the scope of the arbitration agreement or beyond the authority of the arbitration commission to arbitrate;

3) The composition of the arbitration tribunal or the procedures of the arbitration are in contravention of the legal requirements;

4) The evidence on which the award is made is fabricated;

5) The other party has concealed evidence which may be grave enough to affect the fairness of the arbitration;

6) Arbitrators in the course of arbitrating the case have demanded or accepted bribery, displayed favouritism, committed cheating or made the award in total disregard of the law.

If the people's court is satisfied upon finding that the award of the foregoing circumstances outlined then the award shall be set aside. The people's court may also set aside an award if it considers the award to be contrary to public policy and social interest.

Any application to set aside an award must be made within 6 months from the date when the written award is received[420] and the court shall decide whether or not to set aside the award within 2 months after the acceptance of the application to set aside the award.[421]

Although the time to apply to set aside an award under the Chinese Arbitration Act is longer than that provided in the Model Law, the period to have a final result of a court's decision is certain, 2 months. In other words, after receiving the written award, the parties will know the court's decision whether to set aside the award within a maximum period of 8 months.

---

[420] Article 59.

Model Law

The Model Law[422]provides the following grounds for setting aside an award:

1) a party to the arbitration agreement was under some incapacity; or

2) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon; or

3) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

4) the award deals with a dispute that is outside or beyond the arbitration agreement; or

5) the appointing arbitrator or the arbitral procedure was not in accordance with the agreement of the parties; or

6) the subject-matter of the dispute is inarbitrable; or

7) the award is in conflict with the public policy.

It is worth noting that the grounds for setting aside an award in the Model Law are similar to those in the New York Convention, Article V (grounds for refusal to enforcement of foreign award). It was prudent of the drafters of the Model Law to make the grounds for setting aside uniform with those in the New York Convention.

Besides, using similar grounds for refusing to enforce or to set aside an award as those in the New York Convention , the Model Law also makes clear what is unacceptable in international commercial arbitration proceedings. However, certain problems may arise. One award may be reviewed on the

---

[421] Article 60.

[422] Article 34.

same grounds by two jurisdictions. This means that if the interpretations of those courts are not uniform, the award runs the risk of being attacked twice, on the same ground, with two different standards.

An award, for instance, rendered in State X is considered insultive to the public policy of that state despite the fact that such award is not against the public policy of State Y, the award-enforcing State. In effect, the award will be enforceable when it does not go against public policy of both State X and State Y. However, this is a problem of judicial interpretation, not the defect of uniform grounds of setting aside.

As long as the legal structure of the New York Convention permits the court of the country where the arbitration takes place to review the award, nothing can be done more than making uniform the grounds for setting aside. This problem can be solved by making uniform the judicial interpretation of individual states on the basis of promoting the enforcement of arbitral awards.

It is interesting to note that certain jurisdictions, such as Thailand[423], Vietnam and Laos, have no provisions for setting aside. This is not because these countries want to be "Vying for a greater share of the fees paid to arbitrators and attorneys at the seat of an arbitration, the marketing strategy of these nations includes legislative reform of arbitration law to create a more *laissez-faire* standard of review for international arbitration, perceived by these nations as attractive to some arbitral consumers"[424].

Rather, this is because these countries are reluctant to control arbitrations which take place in their territories and they lack experience in arbitration. They want to please foreign investors rather than campaign for a greater share of the fees paid to arbitrators and attorneys in their countries.

---

[423] However, the new drafted Arbitration Act contains the setting aside provision in Article 38 which follows the Article 34 of the Model Law.

[424] Park W, *op.cit.* footnote 400, at pp.689-90.

2.2.2. Judicial review at the enforcement stage

Secondly, the court of the award-enforcing state may, again, review the award before granting the enforcement. According to the New York Convention, the court of the award-enforcing state may refused enforcement on the grounds provided in Article V. This provision uses the exact same words as Article 34 of the Model Law. In Thailand, there are two provisions concerning the enforcement of award.

The first is the enforcement of foreign award provisions which adopts Article V of the New York Convention and the other is the enforcement of domestic award. The latter gives the court wider powers to review the award.

Article V of the New York Convention provides that "In case where the court is of the opinion that an award is contrary to the law governing the dispute, is the result of any unjustified act or procedure or is outside the scope of the binding arbitration agreement or relief sought by the party, the court may deny the enforcement of the award."[425] This Article is most criticised because it gives the court too much power in the control of domestic awards. However, the Article does not apply to the enforcement of a foreign award sought to be enforced in Thailand.[426]

As pointed out above, judicial review can be classified into two categories: natural justice and mistake of law.

2.2.2.1. Natural justice

The first concerns the natural justice. This is contained in Article V of the New York Convention (for enforcement of foreign award) and in Article 34 of the Model Law (for setting aside award). Most legislations also contain similar provisions. It is understandable that the grounds are considered mandatory rules, that is, the parties cannot agree otherwise. However, the

---

[425] Article 24.

[426] Judge Jarun Pukdeetanakul, *Alternative Dispute Resolution : US and Thai Experience*, Seminar on May 15, 1991 at Judicial Institution.

theoretical development of delocalised arbitration leads some jurisdictions to allow parties to exclude the setting-aside provisions. In Switzerland, for example, the law permits, but does not mandate, complete exclusion of review by consent of foreign parties.[427]

The concept of delocalised arbitration has been influenced by the autonomy theory, which does not limit party autonomy as a controlling force in arbitration. As mentioned in the previous chapter, most jurisdictions, in practice, do not recognise such a concept, instead, they recognise the mixed theory, which limits party autonomy in certain aspects such as natural justice.

The aim of a court's intervention in this matter is to ensure the integrity of the arbitration procedure.[428] It is a fundamental assumption of the parties to arbitration that the requirement of natural justice will be followed, and that the proceedings will be conducted fairly.[429] This is well-accepted in most legal systems as it would be unsound for a party to agree to something which will be unfair to himself.

2.2.2.2. Mistake of law

The second matter concerns the question of whether the arbitrator has fallen into an error on a point of law, such as the English Arbitration Act 1996, Section 69. The reason for this kind of review is that courts may at times view the activities of an arbitrator with distrust and distaste and they think that they have to restrain arbitration lest it ousts their jurisdiction on questions of law.[430] There has been a long debate on the issue of whether it is necessary to review an award on these grounds? Where the parties are concerned, the answer may be different. The winner, of course, will not want the award to be reviewed. He

---

[427] L.D.I.P. 192.

[428] South of the Alps, the Italian reforms of 1983 did not affect the basic procedural safeguards contained in article 829 of the Code of Civil Procedure, which permits annulment of an award that has "exceeded the limits of the submission." See translation by Associazione Italiana per l'Arbitrato, *9 Yearbook Com.Arb.* 309 (1984); see also Bernini, "National Report on Italian Arbitration Law", 8 *Yearbook Com.Arb.* 327 (1983), and 6 *Yearbook Com.Arb.* 24 (1981).

[429] Schmitthoff, *op.cit.* footnote 354, at p.14.

[430] *Ibid.*, at p.12.

will want the award to be final to allow him to seek enforcement as soon as possible. On the other hand, the losing party will always feel that an award is unfair to him and will seek to have it reviewed. In other words, he wants to have another chance to win the case or to diminish the damages. Arbitrators on the other hand, do not like the right to appeal as it is viewed as diminishing their sense of authority.

This leads some authors to conclude that "Some businessmen and arbitrators prefer litigation to arbitration because they do not wish to be exposed to the whims of an arbitrator or arbitrators with no right of appeal."[431] Is this argument acceptable? The answer is negative.

First, it should be borne in mind that an arbitrator is selected by the parties and regardless of this practice, they should exercise their right with great care. If anything happens, no one else should be blamed but the parties. This situation cannot be compared with litigation. In litigation, the parties do not have the right to choose a judge to hear their case. Thus, if anything goes wrong, such a judge wrongly interprets the law, the state will be responsible. That is why there are higher courts in all legal systems to review the decisions of the lower courts.

Secondly, by the very nature of dispute resolution, there must always be a loser and generally it would seem that the losing party never appreciates the final decision. In litigation, for example, a losing party will almost always seek to appeal to the higher court to diminish his damages. Otherwise, most if not all cases would be appealed. In many countries, such as Thailand, legislators have to limit the cases which can be appealed to the higher court, otherwise, most, perhaps all, cases will be appealed.

Thirdly, it seems illogical that once the parties avoid litigation by choosing arbitration to resolve their dispute, the case still ends up in court for a decision. If so, why not choose litigation in the first place if it is foreseeable

---

[431] Bernstein R, "Arbitration and the Courts" 59 *Arb.* 5 (1993).

that the arbitration may go wrong? Is it true that the existence of some right of appeal raises the quality of decision making of arbitrators, and increases the confidence of the customers in the arbitration process?[432]

To answer this question, one should understand what is meant by the the quality of decision of the arbitrator and the confidence of parties in the arbitration process is. The quality of decision-making of arbitrators, depends entirely upon the experience and knowledge of the arbitrators. Once the parties select their arbitrator, they know what kind of person, whether a lawyer or a non-lawyer, is appropriate for their case. If the merit of their case deals mostly with legal issues, why then choose a non-lawyer? In other words, the quality of the arbitrator depends on how the parties exercise their autonomy in choosing an arbitrator.

It is difficult to see why the parties would choose a person who has low quality, knowledge and experience, to decide an important case. They must therefore exercise care to safeguard their interest. Furthermore, at the point of selecting an arbitrator, no one can know who is going to win the case.

Therefore, if they are asked whether or not they are pleased with the qualification of the arbitrator, the answer, of course, would be positive. (If not, why did they agree to him in the first place?) However, this answer may change if the lose is asked this question after the final result.

Accordingly, if anything goes wrong, such as a mistake of law, the parties should be blamed, not the arbitrator, as Professor Schmitthoff concluded that "This type of review [mistake of law] should not, in principle, be admitted. The possibility that the arbitrator may err on a point of law is within the contemplation of parties when agreeing on arbitration."[433] With respect to the confidence of the parties in the arbitration process, what makes parties to arbitration confident in arbitration? Or a right of appeal?

---

[432] *Ibid.* at p.6.

[433] Schmitthoff, *op.cit.* footnote 354, at p.14.

It is doubtful whether the right of appeal will make parties more confident in arbitration. The most important factor that makes parties to arbitration confident in the process is the principle of party autonomy. This is because they can search for the justice they consider suitable to their needs and the needs of their dispute.

The right of appeal is a device used by the losing party to diminish his damages. It is true that the arbitration system should protect both the losing and winning parties. However, such protection should be on the basis that the parties tailor the procedure to suit themselves. Further, this does not mean that arbitration should be absolutely detached from national laws and from the national courts, but it means that both the national legislature and the national courts intervention in the arbitration proceedings should be as little as possible. This brings me to say that they should respect party autonomy as much as possible.

Fortunately, the attitude of both the court and the legislature have changed. As far as the courts are concerned, it is their view that "Courts and arbitrators are in the same business, namely the administration of justice. The only difference is that the courts are in the public and the arbitrators in the private sector of the industry."[434] This means that both the arbitrator and the court should respect each other.

With respect to the legislature, most arbitration laws have abolished the right of appeal. The Model Law,[435] for example, permits the parties to attack the award only by application of the setting aside provisions, which do not permit the judicial review of mistakes of the law.

In England, as discussed previously, although the right of appeal to the court on a point of law has been retained, the circumstances in which such a

---

[434] Per Sir John Donaldson in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn.Ltd.* [1973] 3 W.L.R. 471, 479. See also *Kulukundis Shipping Co. v. Amtorg Trading Co.*, 126 F2d 978 (CA2, 1942).

[435] Article 34.

right may be exercised is very restricted.[436] A party may appeal on a point of law with the agreement of the other party or with the leave of the court. Such conditions make the appeal on the point of law is very restrictive, although not impossible. Furthermore, a final point to note is that generally in practice an appeal on a point of law is limited in English law.

This is reiterated in the 1996 Act. In the past, English arbitration law had been characterised as being tainted with extensive judicial intervention in the arbitral process. The scope of judicial intervention has gradually changed over the years. Thus the 1979 Act was designed in part to limit the power of the court to intervene the arbitral process.[437] The 1979 Act abolished the "state case" procedure of judicial review of arbitration.[438] Furthermore, the 1979 Act allowed the parties to an international contract a limited right to exclude review on the merits of the award. The 1979 Act was therefore seen as a reasonable attempt to strike a balance between party autonomy and the need to ensure integrity in the arbitral process.[439]

One of the most important features in the 1996 Act is the provision of general principles. Section 1 lays down the principles upon which the Act is founded. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without any unnecessary delay or expense.[440] The parties should be free to agree on how their dispute is to be resolved, subject only to such safeguards as are necessary in the public interest.[441] In arbitration matters generally the court should not intervene except in those limited circumstances where the law expressly provides that the court is to have a supporting and supervisory role.[442] This means that the 1996 Act accepts an arbitration as an

---

[436] M Hunter, *op.cit.* footnote 402, at p.45.

[437] O Chukwumerije, "English Arbitration Act 1996: Reform and Consolidation of English Arbitration Law", 8 *Am. Rev. Int'l Arb.* 21.

[438] *Ibid.*

[439] *Ibid.*

[440] Section 1(a).

[441] Section 1(b).

[442] Section 1(c).

autonomous consensual process based on the agreement of the parties. The Act gives the freedom and also gives the power to the arbitrator regarding the conduct of arbitration and the efficiency of the whole process.

In respect to judicial review on mistakes of law, I conclude that the provisions concerning this topic should be eliminated. Unlike judicial review on natural justice, which is aimed to protect both parties, the judicial review on mistake of law is designed to scrutinise the arbitrator's discretion. Once an arbitrator is, presumably, carefully selected by the parties, his discretion should be respected. Besides, an appeal to a court on a point of law will, of course, delay the arbitral process and given the likelihood of this occurring, no doubt a losing party will try to invoke this right.

However, if an appeal to a court on a point of law is retained, English law will be followed. This approach, as seen, gives the autonomy to the parties to decide whether the appeal on point of law should be allowed. If one of the parties feels that such procedure will delay the arbitral procedure, he is not obliged to enter the agreement. If this happens, then the appeal cannot occur. Furthermore, the parties also have the freedom to exclude any right of appeal on point of law. This approach is not harmful to the arbitral process. This is simply because the English Act gives the parties the freedom to control the arbitral procedure. Whether an appeal on a point of law is good or bad, if it is the desire of the parties to do so, it should be respected.

The power and jurisdiction of an arbitrator are derived from the arbitration agreement, which is created by the party autonomy. His power and jurisdiction thus depend on the arbitration agreement. In theory, he does not have to follow any laws. However, with regard to his duty to render an enforceable award, in practice, it is necessary for the arbitrator to look at the law which, potentially, is related, for example such as the law of the country where enforcement of the award is sought. The arbitrator has two main functions - to process the arbitration, and to decide the dispute.

The freedom of the arbitrator to manage the arbitration proceedings or

to decide the case depends upon the arbitration agreement. What the arbitrator can or cannot do is specified in the arbitration agreement. However, what the parties can or cannot agree on depends on the exercise of party autonomy.

Thus, the freedom of the arbitrator in this light depends on the will of the parties. Under Swiss law, for example, parties can exclude the setting aside provision. This provision gives the arbitrator the freedom to do whatever he may wish which possibly be in contravention of Swiss' public policy. In other jurisdictions where the parties have no such freedom, the arbitrator's power is limited by the public policy of those countries.

With regard to the Thai Arbitration Act, to comply with the judicial review on mistake of law, the Act requires the arbitrator to give the reason in the award by providing that "An award shall be made in writing, signed by the arbitrator or the umpire, as the case may be, and shall clearly state the reasons for all decisions.

However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the party, except in fixing the fees, expenses or remunerations of the arbitrators or umpire under Section 27, or in case where the award is rendered in accordance with the agreement or the compromise between the parties."[443] This provision is considered a mandatory rule, which the parties cannot avoid. An arbitrator is therefore obliged to follow this provision in order to make an award which is enforceable in Thailand. This provision differs from the English Arbitration Act to which parties can otherwise agree.

3. Conclusion

I conclude that the advantages or weaknesses of arbitration in the international context will, in the first place, depend upon the choices available at different stages in the life of the contract.

At the drafting stage, arbitration is normally viewed as a convenient

---

[443] Section 20.

means of retaining good business relations; the arbitration clause is drafted essentially for the convenience of the parties. When a dispute arises which cannot be resolved by negotiation, one of the parties, despite the fact that there is an arbitration agreement, may well prefer litigation in a national court if jurisdiction is obtainable. Furthermore, even during the arbitral process, if interim measures are sought by either party, such as attachment, compelled production of documents, or testimony, recourse to a court may be necessary.

Finally, when enforcement of an award is sought, either at the place of arbitration or in another country, the imprimatur of judicial confirmation may be unavoidable. At each of these different stages, the relative advantages of arbitration and court proceedings will shift.[444] The major advantage of arbitration is that it is a private means of dispute resolution unlike court proceedings. The parties can therefore tailor the proceedings to meet their needs. Thus, if at every stage of the arbitral procedure the parties resorts to court, the arbitration procedure will not be different from that of the court. In these circumstances, however, the court may be construed as being more advantageous as the procedure will of course be speeder and cheaper.

The shifting advantage of arbitration depends on two factors. The first is the co-operation of the parties. The parties to arbitration have to realise that their disputes is to be resolved by the arbitrator and not by the state court. It is true that an arbitrator lacks the power to deal with certain issues which should be submitted to the national court. However, in practice the disadvantage is that a party always resorts to the national court as a tactic to delay the arbitration proceedings. This is demonstrated in the practice of a challenge to an arbitrator.

The second is the attitude of the court. The court should play a supportive role rather than an interfering one. If the court plays a supportive role this avoids the incidents of delay or other tactics which maybe used to undermined the arbitration proceedings.

---

[444] Henry P. De Vries, *op.cit.* footnote 377, at p.62.

The effectiveness of arbitration, thus, depends very much, although not entirely, upon the attitude of a national court. However, the attitude of the court is also dependent on its national laws.

I am of the view that given the fact that more than 100 countries are now parties to the New York Convention and given the existence of the Model Law, arbitration has become more recognised than it was, arbitration laws have been modernised and the recognition of party autonomy is at its highest, especially at the international level. Once the parties choose arbitration instead of litigation they take responsibility for its conduct. What is justice in the eyes of a judge may not be so in the eyes of the parties. Consequently, the modern laws of most courts are more relaxed.

I submit that, those who are involved in international arbitration must consider party autonomy as an important mechanism for making arbitration effective. With respect to the parties, they must realise that the success of their arbitration depends very much upon how they exercise their freedom. With respect to the courts, they should also realise that arbitration is not an enemy of the court but serves to assist the court in the administration of justice. Thus, the courts must make an effort to support arbitration. To do so, they should respect what the parties agree to do and avoid interfering the parties' decision to arbitrate. However, it should be remembered that the power of the court comes from the laws of the state, thus arbitration laws should also give freedom to the parties to agree to what they want. Any limitations on the freedom of the parties should be as little as possible, otherwise, the role of party autonomy will not be effective.

In England, the 1996 Arbitration Act guarantees the international practice, in that it promotes party autonomy and limits court intervention. The spirit of the Act recognises party autonomy more than it ever did before. With respect of the attitude of the English court, they observed that " Great care has to be used in reading the decisions of a century or half a century ago as to the power of arbitrators today... The growth of commercial arbitrators in the City has been so wide and, as a whole, so beneficial that the courts show increasing

reluctance to interfere with the manner in which these trade bodies carry out their important functions and only interfere in the very rare case where it has been shown that some real impropriety has been committed."[445] This leads to the conclusion that England welcomes the advent of international commercial arbitration in modern practice.

[445] *Henry Bath & Son Ltd. v. Birgby Products* [1962] 1 Lloyd's Rep. 389, 399 [McNair J.].

CHAPTER 3

ARBITRATION AGREEMENT

The arbitration agreement plays a significant role from the very beginning of arbitration process until the end. At the beginning, its validity may be challenged and if it is considered invalid, the dispute will never be arbitrated at all.[446] During an arbitral process, the arbitrator shall resort to the arbitration agreement as a source of his power to decide the case[447] or, at the end of the process, when the winning party seeks to enforce award, the court may refuse to enforce that award if the arbitration agreement is not valid.[448]

Basically the parties to arbitration, like other kinds of contract, are free to enter into the arbitration agreement, and this is deemed the most essential element of the arbitration process. Whether arbitration is considered a contractual or procedural law, is a matter for the parties. Thus, to know what an arbitration agreement is and how it exists under a legal framework are key elements for every arbitration conducted in the world.

1. Definition of arbitration agreement

Although, the idea of arbitration is not the same everywhere in the world,[449] it is commonly accepted that "[T]he ultimate foundation of arbitration is voluntary submission by parties to a special kind of private litigation which is accepted, tolerated and sanctioned by public international law and the laws of most civilised jurisdictions."[450]

Arbitration is derived from the mutual consent of the parties, and this is expressed in the arbitration agreement. In other words, arbitration is the product of the agreement by the parties to submit their dispute to arbitration.

---

[446] Lynch M, *op.cit.* footnote 379, at p.681.

[447] Jarvin S, "The sources and limits of the arbitrator's powers", in J. Lew (ed.), *Contemporary Problems in International Arbitration* (Queen Mary College, University of London, 1986) at p.50.

[448] The New York Convention, Article V(1)(a).

[449] Sanders P, *op.cit.* footnote 367, at p.44.

[450] Wetter J, *op.cit.* footnote 209, at p.274.

Thus, the arbitration agreement can be defined as a vehicle which carries the parties' intent to use arbitration as the method to resolve a dispute, whether existing or future disputes.

There are two types of arbitration agreement. The first type is an agreement to submit an existing dispute to arbitration, generally called "submission to arbitration". The second type is an agreement to submit a future dispute to arbitration, usually called "arbitration clause".[451] The former is a traditional type of arbitration agreement and has been in use for a long time[452] and it is well recognised by all jurisdictions. The latter is a more recent development and is not fully recognised by some jurisdictions.[453] Although prohibition in terms of nullity has become rare,[454] certain restrictions remain in force with respect to this matter.

In France, for example, an arbitration clause is limited to commercial disputes.[455] The reason for this is that they "regard arbitration agreements with suspicion; not only do the judiciary resent losing their jurisdiction to arbitrators, but they argue that agreements relating to future disputes lack "true assent", and "confidential trust". Assent and trust are lacking because the parties cannot immediately name an arbitrator in relation to a specific dispute.

Accordingly, this system recognises only submission agreements."[456] I would submit these reasons are unsound. First, the national courts choose arbitrations because of the large number of cases pending in the national courts. In light of this fact, I am of the view that arbitration should be viewed

---

[451] The term "arbitration agreement" in this research means both arbitration clause and submission to arbitration.

[452] Herrmann G, "The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts", in van den Berg A, (ed.) *International Arbitration in a Changing World* (Kluwer 1993) 41 at p. 42.

[453] David R, *op.cit.* footnote 138, at p. 171.

[454] See Herrmann G, *op.cit.* footnote 452, at p.43.

[455] Carbonneau T, "The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Libeal Civilian Judicial Creativity", 55 *Tul.L.Rev.* 1 (1980).

[456] Lew J, "Arbitration Agreements: Form and Character", in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* (Martinus Nijhoff 1989) 51, 52 (footnote omitted).

as supporting the national courts in providing justice to people.

A Thai judge said,: "We should be pleased to have arbitration in our country because it can help us administer justice effectively." He further explained, "The number of pending cases in our court is considerably increasing, while the number of qualified judges are limited."

And, he questioned, "What if all disputants come to court? Can our courts handle them properly? If not, who gets into trouble?" He replied, "The people, not the judges, will get into trouble." Thus, he concluded, "Arbitration is a branch of justice which people can choose for themselves. They themselves know best what they need and what is suitable for them. The courts must be open-minded to accept arbitration as another method of justice service."[457]

Secondly, the fact that the parties cannot immediately name an arbitrator in relation to a specific dispute does not means that the agreements relating to future disputes lack "true assent" and "confidential trust". Instead, this means that they trust and understand the arbitration process, however, when they enter the main contract, which incorporates the arbitration clause, they have no idea what kind of dispute will arise.

More importantly is the fact that they never think that any disputes will arise, they think they will keep their promise and maintain the relationship between them. Thus, it is impossible for them to choose a person who will be suited to their dispute. And even though they may name an arbitrator, this may cause trouble. What will happen if the arbitrator named in the arbitration clause dies or refuses to act as arbitrator when the dispute arises? It therefore does not make sense for the parties to name an arbitrator in an arbitration clause. It would seem the main reason why the parties may choose to put this in their main contract is to show that they intend to use the arbitration process instead of litigation.

---

[457] Judge Pintip Sujaritkul, Interview on October 22, 1996, at the Central Appeal Court, Bangkok, Thailand.

In practice, this problem is less prevalent in the international arena today. Additionally, arbitration clauses are used more extensively among practitioners than submission agreements.[458] The reason for this is that the arbitration clause is convenient and suitable for international contracts and besides, international conventions and other international instruments recognise and support the use of submission to arbitration as well as arbitration clauses.

The Geneva Protocol on Arbitration Clause 1923, the New York Convention and the European Convention on International Commercial Arbitration 1961, required contracting states to recognise any arbitration agreements, whether a submission, or one relating to future disputes, as long as the dispute arises in international trade.[459]

The New York Convention provides, "Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration *all or any differences which have arisen or which may arise* between them."[460]

The arbitration law of many countries, including England (1996), [461] Thailand, Vietnam, and the PRC also recognises the use of both arbitration clauses and submission agreements.

PRC

The CAL provides, "An Arbitration agreement should include the arbitration clause in the contract and other written agreements for arbitration reached before or after the disputes occurred."[462] An arbitration agreement, according to the CAL, can either take the form of a clause in a larger contract

---

[458] Lew J, *op.cit.* footnote 456, at p.52.

[459] *Ibid.*, at p.53.

[460] New York Convention, Art. II(1).

[461] Section 6(1) provides, "In this Part 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)."

[462] Article 16.

or may be a separate agreement signed by the parties before or after the dispute arises.

The CAL stipulates three requirements to be included in an arbitration agreement for it to be valid. The arbitration agreement is required to contain: (1) an expression of intention to apply for arbitration; (2) matters for arbitration and (3) a designated arbitration commission. [463]

It is clear from CAL that "Where an arbitration agreement has not specified clearly the choice of an arbitration commission, the parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the arbitration agreement shall be void".[464] However, according to the State Council Notice of 1996, Article 1 states that if the arbitration body selected by the parties in arbitration agreement has been terminated, the arbitration is still valid and can provide the basis for acceptance of the case by a domestic Arbitration Commission. [465] This provision has been criticised as being inconsistent with the CAL, Articles 16 and 18. It is concluded that an arbitration agreement void under these provisions of the CAL would nevertheless be considered valid and enforceable under the State Council Notice of 1996.[466]

In practice, the Chinese Supreme Court tends to hold that the arbitration agreement is valid and binding as long as it is operative although some of its items are not definite and clear. [467] For example, the Chinese Supreme Court held that the requirement for a choice of a designated arbitration commission was satisfied when the party requesting arbitration select one of the arbitration institutions agreed upon by both parties. [468]

---

[463] CAL, Article 16.

[464] Article 18.

[465] Brown F and Rogers C, *op.cit.* footnote 336, at p. 346.

[466] *Ibid.*

[467] Zhu Jianlin, "Institutional Arbitration of CIETAC", 1(4) *Int'l.Arb.L.Rev.* (1998) G19-26.

[468] *Ibid.*

On 21 October 1998, the Chinese Supreme Court issued a reply to the High People's Court of Shandong Province on several questions relating to the determination of the validity of an arbitration agreement. The Chinese Supreme Court replied to this as follows:

"1. Where the parties, after the implementation of the Arbitration Law of the People's Republic of China (the 'Arbitration Law') but before the re-organization of the arbitration institution, agreed on the place of arbitration in their arbitration agreement without specifying the arbitration institution, the arbitration agreement was valid if the parties subsequently reached a supplementary agreement with the arbitration institution reorganized in the place of arbitration as the designated arbitration institution; the arbitration agreement was invalid if the parties failed to reach such a supplementary agreement.

2. Where the parties, after the implementation of the Arbitration Law but before the re-organization of the arbitration institution, designated the arbitration institution and one party applied for arbitration and the other party initiated a lawsuit before the people's court, the arbitration agreement will be valid if the people's court is in a position to determine the new arbitration institution according to the relevant regulations; the people's court should not accept the lawsuit." (footnote omitted) [469]

Laos

Decree No.106/PM on the Settlement of Economic Disputes provides, "The economic disputes can be arbitrated at the OSE only-after prior agreement between the parties or if it is stipulated in advance that any dispute which may occur will be submitted for arbitration of the OSE."

Thailand

The TAA provides, "Arbitration agreement means an agreement or an

---

[469] Zhu Jianlin, "Supreme People's Court Pronounces on Validity of Arbitration Agreements", 2(3) *Int'l.Arb.L.Rev.* (1999) N32.

arbitration clause in a contract whereby the parties agree to submit present or future civil dispute to arbitration, irrespective of whether there being the designation of an arbitrator."[470]

Vietnam

The SVIAC provides, "The Vietnam International Arbitration Centre shall exercise jurisdiction over any dispute: (2) Where, before the dispute arises or after it has arisen, the parties agree to refer the matter to the Vietnam International Arbitration Centre or where, by virtue of an international treaty, they are bound to do so."[471]

Furthermore, the Arbitration Rules of the VIAC which complies with the previous Article also provides that the Request for arbitration shall contain, among other things, the specific request(s) of the plaintiff, with a statement of relevant facts supported by evidence.[472] This means that the plaintiff may prove the existence of the arbitration clause or that of the submission.

2. Feature of arbitration agreement

There are three salient features of an arbitration agreement: the source of party autonomy, exclusion of the court's jurisdiction and source of arbitrator's power.

2.1. Source of party autonomy

The principle of parties' autonomy is the foundation of arbitration.[473] It gives the parties, subject to certain limitation, the power to tailor their own remedial process.[474] Most developed legal systems of the world give due regard

---

[470] Section 5.

[471] Article 3 (2).

[472] Article 5(b).

[473] Ball, "Just Do It -Drafting the Arbitration Clause in An International Agreement", 10 *J.Int'l.Arb.* 29 (1993)

[474] Carbonneau T, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce", 12 *Tex.Int'l.L.J.* (1984) 33, 36.

to the principle of party autonomy.[475]

The parties are free to choose their own judge, their arbitrator, their own rules to govern the arbitral process, the place of arbitration, and the law to be applied to the dispute. These issues will be discussed in more detail in the subsequent chapters. The issue here is to identify the sources of party autonomy.

It is accepted that an arbitration is established by the consent of the parties is evidenced by the arbitration agreement between them. Such an agreement is generally regarded as a normal contract. Accordingly, general principles of contract law are applied. It is universally recognised, both at the domestic and international level that parties to a contract have the freedom to agree. One essential element of the arbitration agreement is the autonomy of the are parties' autonomy and the contractual nature of the agreement. [476] Accordingly, the arbitration agreement is essential to party autonomy in the arbitration process.

The object of an arbitration agreement is quite different from that of other kinds of agreement. It is concerned with the method by which the parties' dispute is to be resolved. When parties choose arbitration instead of litigation, they intend to exclude the national court from deciding their dispute, and thus empower a third party selected by themselves to carry out this task. This is an essential element of party autonomy and one that is well-respected.

Apart from these elements, the parties are also free to choose the law to be applied to the arbitration agreement. In the international arena, the arbitration agreement may involve more than one legal system. Therefore, most jurisdictions attempt to avoid the conflict of laws governing the arbitration agreement by giving the parties the freedom to choose the law to be applied to their arbitration agreement.

---

[475] Lynch M, *op.cit.* footnote 379, at p.689.

[476] Lew J, *op.cit.* footnote 456, at p.51.

However, these three elements include the court jurisdiction which empowers the third person to act as a private judge, and the law applicable to the arbitration agreement which differs from country to country and the exercise of the freedom is dependent both upon the national laws and the attitude of the national courts. The following discussion will look into the parties' autonomy in these three basic elements.

2.2. Exclusion of the court's jurisdiction

When the parties choose arbitration instead of litigation, there is no doubt that they want the arbitrator(s) to decide their dispute and to exclude the court's jurisdiction. This view is supported by the various reasons mentioned earlier.

However, although the parties to an arbitration agreement intend to avoid the jurisdiction of the national court, this does not mean that the arbitration will operate exclusive of the court's intervention as arbitration, although a private method; the existence of which is derived from the agreement between the parties, does not have legal force.

A problem of international commercial arbitration is the possibility for an unwilling party to undermine the proceedings by refusing to participate or cooperate. These problems may be eliminated with the assistance of the court.[477] Accordingly, an arbitration will not operate effectively without assistance from the national court.[478] Apart from assisting, the court may also control the arbitration proceedings.

In light of this fact, most legislators empower the court to control arbitration proceedings. In this respect, a court may deny an arbitration agreement, annul an award, or review its provisions on procedural or substantive grounds.[479] In other words, the intervention by national courts

---

[477] Sanders, *op.cit.* footnote 375, at p.217.

[478] Henry P. De Vries, *op.cit.* footnote 377, at p.47.

[479] *Ibid.*, footnote 21.

cannot be completely ousted by virtue of the existence of an agreement to arbitrate.[480]

It is precisely for this reason legislatures usually set limits on the freedom of parties to escape the jurisdiction of the court. The operation of these limitations may question the validity of the arbitration agreement, whether the subject-matter is arbitrable, the form of arbitration agreement, or the intentions of the parties to arbitrate. The first three elements will be discussed later. For this part of the discussion, the relevant issue to be discussed is the intention of the parties.

Parties to arbitration express their intent through the wording of the arbitration agreement. The court usually scrutinises the arbitration agreement to ascertain whether or not the parties intend to resort to arbitration and what issues they intend to submit to arbitration.

These questions raise a crucial problem. First, the arbitration may have no basis from the beginning if the court strictly finds the wording of the arbitration agreement is not clear enough to exclude the court's jurisdiction, whilst seeking to establish the jurisdiction of the arbitrator(s). The reason behind this comment is that traditionally national courts have tended to distrust arbitration. Accordingly, a state court will seek to confirm its jurisdiction if the parties ambiguously confer jurisdiction to an arbitrator.[481]

The Court of Cassation, for instance, held that: "Since the submission of disputes to arbitration implies an exceptional exclusion of the jurisdictional function of the national judge, the interpretation of the arbitration clause must be made in a restrictive way, having regard to the parties' common intent which may be gathered also *aliunde*, and is not to be limited to the literal meaning of the words, which has not a decisive and determining value."[482]

---

[480] Holtzmann, "Arbitration and the Courts: Partners in a System of International Jurisdiction", 1978 *Revue de l'arbitrage*. 253.

[481] Bernardini P., "The Arbitration Clause an International Contract", 9 *J.Int'l.Arb.* (1992) 44, 47-8.

[482] The Court of Cassation decision of 26 May 1989, n.2538 (Mass.Foro It., 1989, p.370); see also

The Thai Supreme Court follows a similar line of interpretation. There are three reported cases which illustrate this. In one case, the arbitration clause provided, "...If arbitration is necessary, both parties agree that the arbitrator's award shall be binding on them."

In response to this the Thai Supreme Court held, "The arbitration clause is not binding on the parties to submit dispute to arbitration. It only means that if they submit their dispute to the arbitration, they shall follow the arbitrator's award.

Accordingly, the parties can bring the case to the court."[483] In the second case the arbitration clause provided "Amiable composition arbitration in Hamburgh." In that case, the Court held, "The arbitration clause is not binding on the parties. It means that if the parties wish to submit their dispute to arbitration, they shall amicably do so in Hamburgh. Thus, the parties can bring the case to the Thai Court."[484]

In the final case the arbitration clause in "Bangkok, Thailand." Again, the Court held that such a clause was not binding on the parties. Hence, they could bring a case to the courts. The Thai Supreme Court applied a literal interpretation of the arbitration clause.[485] In these three cases, the court considered the clauses in question to be subject to the strict rules of interpretation rather than to the rules which are applied to the interpretation of a contract.

In this respect, the Thai Civil and Commercial Code provides, "In the Interpretation of a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions."[486] The Court did not take the trade usage into account.

Werner, "Jurisdiction of Arbitrator in Case of Assignment of an Arbitration Clause", 8 *J.Int'l.Arb.* 2, 17 (1991).

[483] The Thai Supreme Court (Dika) Decision of 945/2498 (1955).

[484] The Thai Supreme Court (Dika) Decision of 49/2502 (1959).

[485] The Thai Supreme Court (Dika) Decision of 3429/2530 (1987).

To the contrary, English and American courts investigate the intention of the parties by looking at the precise wording of the arbitration clause, trade usage and custom and knowledge of the parties.[487] The English courts held that if the term "English law -arbitration, if any, London according ICC Rules" was a valid arbitration agreement, providing for arbitration in London under the ICC Rules with English law as the proper law of the contract.[488]

In the United States, in a case which involved international contract between an American seller and a French buyer for the sale of rice, the words "Arbitration in New York" were held sufficient to oust court jurisdiction on the ground that the language quoted constituted a written agreement to submit all issues to arbitration.[489]

Given the above decisions by the English and American courts, there is an argument that the interpretation of an arbitration clause, should consider all the surrounding circumstances, such as trade usage, it should not be limited to the wording used in the agreement. It is true that the wording in the agreement expresses the intention of the parties, but it is also true that that wording itself declare the full intention of the parties in all the matters involved.

The only thing that is important in this respect is whether the parties want to resort to arbitration. For example, the term "arbitration, if any,..." or "if arbitration is necessary" implies that if a dispute arises, the parties shall resort to arbitration. Thus such a phrase should not be interpreted as an option by the parties to choose arbitration or court to decide their dispute. Such a phrase simply means that if a dispute arises, they shall resort to arbitration, not to litigation. This is because the arbitration may or may not exist, even though there is an arbitration agreement.

---

[486] The Thai Civil and Commercial Code, Section 171.

[487] Lew J, *op.cit.* footnote 456, at p.56.

[488] *Arab African Energy Corp.Ltd. v. Olieprodukten Nederland B.V.* [1983] 2 Lloyd's Rep 419.

[489] *Bauer Int'l Corp. v. Etablissements Soules & Cie.*, 25 N.Y. 2d 871, 250 N.E. 2d 876, 303 N.Y.S.2d 884 (1969).

The need for arbitration never arises if there is no dispute. I am of the opinion that such a narrow interpretation is contradictory to the reality of the world of international commercial arbitration.

As discussed earlier, businessmen always try to avoid submitting their dispute to the courts of their contracting party. The question which follows, then, is why put the term "arbitration" in their agreement as an option? They put it in their agreement because they want arbitration to be used to resolve any disputes which arise. Does it then make sense to simply put the term "arbitration" in an agreement if they do not intend to be bound by it? It is absolutely ridiculous and unreasonable.

2.3. Source of arbitrator's power

The jurisdiction and power of an arbitrator is unlike that of a state court's. Every country empowers its courts to decide all cases which may arise in their territorial jurisdiction by designating them to the jurisdiction of the appropriate court.

For instance, The Thai Civil Procedure Code[490]provides that no plaint may be submitted to a Court unless

1) having regard to the nature of the plaint and the grade of the Court, it appears that such Court is competent to try and adjudicate the case under the provision of law governing the organisation of Courts of Justice, and

2) having regard to the plaint, it appears that the case is within the territorial jurisdiction of such Court under the provisions of the Civil Procedure Code governing venue and also under the provisions of law specifying the limits of the territorial jurisdiction of Courts.

Similarly, the jurisdiction of the Vietnamese Economic Court at the district level is established by the Ordinance of Procedure for Settlement of

[490] Section 2.

Economic Disputes.[491]

All laws concerning the jurisdiction and power of the state court do not allow disputing parties to agree otherwise. These laws are deemed mandatory which must be followed. This is not an unusual practice. Every state establishes its court to provide justice for its people, and not for certain individuals. If a state was to allow its people to organise the running of the court system in any way they saw fit, they would no doubt do so to their own benefit. The result would be a society which would be in a state of confusion.

Arbitration, on the other hand, is initiated by the parties and for the benefit of those parties. An arbitrator, although having a similar duty to that of a judge, is not appointed by the state but with the consent of the parties, via the arbitration agreement. His power and jurisdiction, therefore, is not derived from state law but from the arbitration agreement.[492] This is universally accepted as being the cornerstone of arbitration.[493] It is considered a private code of procedure which should confer upon the arbitral tribunal international jurisdiction over the parties and the subject matter, and indicate the mode of service of the process, the procedure for fact finding, and the form and finality of an award.[494] The arbitrator is obliged to follow the arbitration agreement, just as a judge is obliged to follow the law.

---

[491] Article 13 which provides that: "Jurisdiction of the Courts at different level

1. The people's court of district, town, cities under provincial authority (here after called district court) shall originally try the disputes arising from economic contract and the value of dispute is less than 50 million VND, except cases involving foreign participation.

2. The People's court of province, cities under central authority shall originally try economic disputes, stipulated in Article 12 of this Ordinance, except cases belonging to district's jurisdiction. When it is necessary, the provincial court may try economic disputes, which are under jurisdiction of district court." And, Article 14 also designates the territorial jurisdiction by providing that: "Jurisdiction of the court according to territory

The court, which shall have authority to try originally economic dispute, shall be the court of the defendant's place of office or residence; if the dispute is relating only to real estate, it shall be tried by the court of place of real estate."

[492] Redfern A, "The Jurisdiction of an International Commercial Arbitrator", 3 *J.Int'l.Arb.* 19 (1986) at pp.24-25.

[493] Triantafyllides, "Prima Facie Agreement to Arbitrate -Examination by the ICC Court of Arbitration", 42-43 *Revue Hell?nique de Droit International* (1989-1990) 251.

[494] Henry P. De Vries, *op.cit.* footnote 377, at p.64.

In this respect, there is no national law nor international convention which is regarded as the source of the power or jurisdiction of an arbitrator. The duty of an arbitrator to render an enforceable award is by virtue of a valid arbitration clause or submission agreement. Additionally, he also has to examine the related law, such as the law of the place of arbitration and the law of the prospecting state where the award is sought to be enforced. These laws are however not the source of the power and jurisdiction of the arbitrator but rather, they are a standard with respect to the protection of interest of the parties. Thus, the parties themselves are not able to avoid such standards.

However, to explain the power of arbitrator in determining his own jurisdiction, Professor Goldman contended, "It goes without saying that when the arbitration is governed by one of these conventions or rules, it is that international source which defines the jurisdiction of the arbitrators, even where this would be contrary to the law of the place of the country where the arbitration takes place, or the law which is applicable to the arbitration by virtue of the convention or rules".[495]

There is some doubt to this contention. First, the conventions and rules referred to are the legal guarantee for the power and jurisdiction of the arbitrator rather than the source of power and jurisdiction of the arbitrator. In a voluntary arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties. Indeed, there is no other source from which it can be derived. If the parties who give the tribunal the authority to decide disputes between them.[496]

Secondly, under present legal systems where international commercial arbitration is practiced, an arbitration agreement can not be valid if it is contrary to "the law of the place of the country where the arbitration takes place, or the law which is applicable to the arbitration by virtue of conventions

---

[495] Goldman, "The Complementary Roles of Judges and Arbitrators in Ensuing that International Commercial Arbitration is Effective", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future* 255, 264.

[496] Redfern A, *op.cit.* footnote 492, at pp.24-25.

or rules".[497]

3. Legal framework of arbitration agreement

The legal framework of arbitration has been changed from informal to formal. This is not strange at all. As Professor Schmitthoff said, "We shall note, and this accords with general human behaviour, an evolution from informality to formality. Developments which begin as casual and isolated instances have a habit of becoming, after some time, highly technical and sophisticated institutions."[498]

With respect to international commercial arbitration, its nature involves not only international convention, such as the New York Convention, but also national laws which vary from country to country. The cases which involve more than one jurisdiction are even more complicated. To understand the legal framework of international commercial arbitration it is imperative to first understand the arbitration agreement, which is regarded as the heart of arbitration.

An arbitration agreement means nothing if it is invalid and unenforceable. Thus, the most essential requirement of arbitration is the existence of a valid arbitration agreement.[499] However, its validity depends on both international convention and national law, which varies from country to country. The national law is applied to determine the established rights and obligations of contracting parties whilst the conventions apply international standards.[500]

3.1. Validity of arbitration agreement

3.1.1. Requirements of validity of arbitration agreement

The requirement for valid arbitration agreement can be classified into

---

[497] See New York Convention, Article 5(1)(a).

[498] Schmitthoff, *op.cit.* footnote 354, at p.4.

[499] Herrmann G, *op.cit.* footnote 452, at p.41.

[500] Lew J, *op.cit.* footnote 456, at p.52.

two features:

3.1.1.1. Requirement as general principle of contract

An arbitration agreement results from the consent of the parties. Thus, the general principles of contract law are applied. In this respect, the New York Convention provides, "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that : The parties to the agreement referred to in Article II were, under the law applicable to them, under some *incapacity*, or the said agreement is *not valid* under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made."[501] This provision means that parties are required to meet two basic requirements of contract rule, namely, capacity of parties and consent of parties.

(i) Capacity of parties

According to existing legal systems, not all persons are legally capable of contracting. In this respect this may be impossible if there is extreme physical or mental disability, so extreme that it is impossible for that person to form the necessary intent to contract. In such situations, there will be a lack of capacity hence no valid or binding no contract.

The result will be an invalid, void or voidable contract. In the PRC, for example, an arbitration agreement will be null and void if it is signed by any person who have no capacity for civil conduct or has limited capacity for civil conduct.[502]

In some states, the state itself cannot become a party to arbitration agreement. Although the New York Convention is applied to arbitration agreement to which a state is a party, there are certain national laws which do

---

[501] Article V(1)(a). Emphasis added.

[502] CAL, Article 17(2).

not permit a state to be a party to an arbitration agreement. There are various reasons behind this limitation.

The first reason is an historical one, the countries which are influenced by the Napoleonic Code usually prohibit a state from becoming a party to an arbitration agreement.[503]

Secondly, certain countries have had bad experiences in arbitration. For example, Saudi Arabia prohibits the arbitration of state contracts because of the decision in the famous Aramco Arbitration case in which Saudi Arabia lost.[504]

Thirdly, Latin American countries are pessimistic about arbitration. They fear that private-state arbitration may be attempted by foreign investors to bring undue pressure on the state, and infringement on national sovereignty.[505]

Fourthly, arbitration is not accepted in some state contracts because it is too private. Advocates of this idea hold the view that national courts are competent to solve disputes which arise in state contracts.[506] As a result, all disputes which arise from a state contract are submitted to the jurisdiction of the national courts.

The government of Thailand is not considered a legal person who can make any legally binding decisions hence the government acts through its organisations and the relevant departments. Thus, the Thai government itself cannot become a party to arbitration.

---

[503] Bernardini P., *op.cit.* footnote 481, at p.46;

"The Code Napolion, which was passed with law of 21 March 1804, greatly influenced the codification process throughout Europe. The legal incapacity of the French State or State-owned entities to agree to arbitration based on Article 83 and 1004 of the Code of Civil Procedure then in force was held inapplicable in the case of an international contract by the French Court of Cassation in the well-known decision of 2 May 1966 in the Trisor Public v. Galakis." In Bernardini P., *op.cit.* footnote 481, at p.46.

[504] Berg, "Saudi Arabia", IX *Yearbook Comm.Arb.* 7 at p.14 (1984).

[505] Lynch M, *op.cit.* footnote 379, at p.674.

[506] Bockstiegel K, "Public Policy and Arbitrability", in Sanders (ed.) *Comparative Arbitration Practice*

Although the Thai laws are silent on the capacity of Thai Government organisations to becoming parties to arbitration, there is a committee's resolution that supports arbitration involving state organisation or state-controlled enterprise contracts if such a clause appears in a standard form contract of the Thai Government organisation and is stated as follows : "Any dispute or difference arising out of or in connection with the Contract of the implementation of any of the provisions of the Contract which cannot be settled amicably shall be referred to arbitration."[507] This implies that a Thai organisation may be a party to arbitration agreement under Thai law.

International commercial arbitration in Socialist countries such as the PRC plays a significant role in international commercial and economic activities conducted between Chinese Government enterprises and Western investors.[508] for this reason, inclusion of arbitration clauses in these contracts is standard practice in virtually all contracts between Western corporations and socialist foreign trade organisations.[509]

The State Council Notice of 1996 requires all standard-form government contracts, interpreted to mean most trade contracts, [510] to be revised to incorporate one of two model arbitration clauses. The first option requires that the parties specify an Arbitration Commission. The second option is a model clause providing that any disputes arising out the contract be resolved in the People's Court. [511]

The PRC has been advocating and encouraging the use of arbitration to resolve international commercial disputes. [512] This is because the international

---

and Public Policy in Arbitration, 177, 202.

[507] Standard Form of Thai Government Contract, Clause 33.1.

[508] See Hong-Lin Yu, *op.cit.*, footnote 9, at pp.185-187.

[509] Holtzmann, "Arbitration in East-West Trade", 9 *Int'l.Law.* 77 (1975); Hsiao, "Communist China's Foreign Trade Contracts and Means of Settling Disputes", 22 *Vand.L.Rev.* 503 (1969); Domke, "New Aspects of East-West Trade Arbitration", in *Commercial Arbitration* (1974).

[510] See Stanley Lubman, *op.cit.* footnote 69, at p.38.

[511] Brown F and Rogers C, *op.cit.* footnote 336, at p. 347.

[512] 5/1/99 China Britain Trade Rev., via *1999 WL 19539317.*

commercial arbitration promotes the confidence of Western investors in the settlement of disputes between them and their Chinese counterparts.[513]

The Chinese contract law[514] provides that a contract is an agreement between individual citizens, legal persons, or other organizations who are equal subjects for the purpose of establishing or discharging a civil right or obligation. Article 9 adds that a party to a contract must have "civil rights capacity" and the capacity to undertake civil acts. [515] According to the CAL, [516] physical and legal persons and other organisations having complete civil capacity of acts may be parties to arbitration. Most foreign investors in the PRC enter into contracts with municipal state-owned enterprises. [517] states or state agencies can be parties to international commercial arbitration if they waive their rights to immunity. [518] In other words, state or states agencies can be parties to an international commercial arbitration if they are engaged in commercial transactions.[519]

(ii) Consent of parties

As a general principle of contract of most countries, the intent of the parties must not be defective, namely, it shall not be misrepresented, induced, fraudulent, or unduly influenced, otherwise such a contract is invalid.

3.1.1.2. Requirement as special feature of arbitration

Although an arbitration agreement is viewed as a type of contract, its purpose and feature are different from other contracts. Thus, special requirements are necessary for it to fulfil its objective. For this reason, there

---

[513] Hong-Lin Yu, *op.cit.*, footnote 9, at pp.185-187.

[514] China's new Contract Law was passed by the National People's Congress (NPC) on March 15, 1999, promulgated on March 22, 1999, and comes into effect on October 1, 1999.

[515] R Peerenboom, "China's New Contract Law Fails to Address Concerns Of Foreign Technology Providers; A Missed Opportunity?", *East Asian Executive Reports*, (Sep.15, 1999), p.9.

[516] CAL, Article 2.

[517] Brown F and Rogers C, *op.cit.* footnote 336, at p.336.

[518] Dr Huang Jin, "Comparative Studies of Arbitration Laws in Mainland China, Hong Kong and Macao, via *http://www.ieemacau.com/arbitrat.html.*

are three further requirements.

(i)The agreement is in writing

Most arbitration laws[520] and international conventions[521] require that the arbitration agreement be made in writing. This is to warn the parties and make them aware of their intention to exclude the jurisdiction of the court.[522] In certain jurisdictions,[523]however, this requirement may be relaxed. Such jurisdictions require only proof of the parties' consent to arbitration.[524]

Under the New York Convention, an arbitration agreement shall be recognised and enforceable only if the arbitration agreement is in writing.[525] The reason for this is that since arbitration is derived from arbitration agreement, and designed by the will of the parties, and has the important effect of excluding the court's jurisdiction, it is in both parties' interest to prove its existence by safe and easy means.[526] The majority of legal systems do expressly require the arbitration agreement in writing.[527]

However, certain jurisdictions require the parties to prove consent to arbitrate. The Vietnam Arbitration Rules require the plaintiff to show a statement of relevant facts supported by evidence.[528] This gives the VIAC wide discretion in considering the existence of an arbitration agreement. It eliminates the problem of what constitutes a written agreement.

---

[519] Tang Houzhi, *op.cit.*, footnote 28, at p.2.

[520] See TAA, Section 6.

[521] See the New York Convention, Article II(1).

[522] Herrmann G, *op.cit.* footnote 452, at p.44.

[523] See The 1986 Netherlands Arbitration Act, Article 1021.

[524] Herrmann G, *op.cit.* footnote 452, at p.44.

[525] Article II(1).

[526] Jarvin S, *op.cit.* footnote 447, at pp.50, 51.

[527] See TAA, Section 6, the English Arbitration Act of 1996, Section 5.

[528] The Vietnam Arbitration Rules, Article 5 (b).

(ii)There must be dispute.

As discussed in a previous chapter, one of the basic requirement to an arbitration is the incident of a dispute. The New York Convention widens the term "dispute" by recognising arbitration agreement under which the parties undertake to submit to arbitration, all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. This means that the term "dispute" in the New York Convention means both future and existing disputes, as discussed earlier. The kinds of disputes covered are legal relationships, whether contractual or not; this has a wider scope than a contract.[529]

(iii)The differences concern a subject-matter capable of settlement by arbitration

A general underlying principle of most arbitration laws is that parties are authorised to submit to arbitration those disputes on which they can reach a compromise or other formula, and which involved a subject-matter which is at the free disposal of the parties.[530]

However, there are certain disputes which involve matters of public policy of the state court, the right to which the court reserve the right to resolve the dispute instead of going to arbitration. Hence, the freedom to arbitrate these matters are not at the free disposal of the parties, it depends on the national law and the extent to which the parties are entitled to make use of the arbitration device to settle disputes on these matters.[531] Further, the attitude of the state court is also important where these matters are concerned.

To spur arbitration as a dispute resolution mechanism in international transactions, state courts should not maintain a parochial view that all disputes must be resolved under their laws and in their courts.

---

[529] Foustoucos, "Conditions required for the validity of an arbitration agreement", 5 *J.Int'l.Arb.* (1988) 120.

[530] Sanders, *op.cit.* footnote 367, at p.221.

[531] *Ibid.*

The US Supreme Court rightly concludes that: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[532]

Although the New York Convention broadly provides the term "dispute", it also has provision which stipulates that certain disputes cannot be arbitrated, by providing that "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or..."[533] This is one of the important limitation on parties' autonomy, discussed in Part II. One of the reasons for this is that certain subject-matters, which concerns public policy,[534] are reserved for the State court[535] to determine it. In other words, they are not arbitrable.

3.1.2. Legal consequences of invalidity of arbitration agreement

If an arbitration agreement is considered invalid, there are three legal consequences likely. First, the arbitration agreement cannot be enforced. The party may however bring the matter to the state court if there is no valid arbitration agreement between the parties. The full effect of arbitration depends on the recognition and enforcement of the arbitration agreement.[536] Notwithstanding this, it should be noted that the nature of an arbitration agreement, a court cannot force a party to arbitrate if he does not wish to do

---

[532] 407 U.S., at p.9.

[533] Article V(2)(a).

[534] Foustoucos, *op.cit.* footnote 529, at p.120.

[535] Bernardini P., *op.cit.* footnote 481, at p.47.

[536] Herrmann G, *op.cit.* footnote 452, at p.43.

so.[537]

Accordingly, the arbitration agreement is generally enforced in an indirect manner.[538] That is to say, the court shall refer the case to arbitration. This is a policy in most international conventions and national laws on arbitration[539]. The New York Convention provides, "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[540] To obtain such a legal effect, the two parties have to demonstrate there is a valid arbitration agreement, otherwise the court may refuse to refer the case to arbitration.

Secondly, in order to maintain the basic interest of the state where an arbitration takes place, most jurisdictions have the setting-aside provision. One of the grounds on which a state court may set aside an award is that the arbitration agreement is not valid. For example, the Model Law provides that "An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid ...".[541] The ensuing effect of this provision is that the award can not be enforced in other countries which are parties to the New York Convention.[542] The TAA however, does not have such a provision.

Thirdly, the New York Convention provides that the recognition and enforcement of an award may be refused, if it is shown to have been made

---

[537] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-09.

[538] Herrmann G, *op.cit.* footnote 452, at p.43.

[539] See The English Arbitration Act of 1996, Sec.9(1); TAA, Sec.10.

[540] Article II(3).

[541] Article 34(2)(a)(i).

[542] Article V(a)(e).

pursuant to an invalid agreement.[543] Fortunately, in most arbitrations, the validity of this argument is not an issue in practice.[544]

3.1.3. Applicable law to an arbitration agreement

Another important question is what law is to be applied to an arbitration agreement. The New York Convention distinguishes the law applicable to an arbitration agreement from the law governing the capacity of the parties to arbitrate, as well as that of whether the subject matter is arbitrable.

The law governing the arbitration agreement is applied to limited issues such as the consent, interpretation, effect, and scope of an arbitration agreement. This complies with the system of the private international law of most countries, namely, the parties are free to choose the law governing the arbitration agreement, except on those matters that concerning the capacity of the parties, and, the arbitrability of the subject-matter.

3.1.3.1. Law applied to the arbitration agreement

Since an arbitration agreement is one type of international contract, general principles of conflict of law rules are applied. In this respect, the parties are free to choose the applicable law to be applied to the arbitration agreement.

The Thai Conflict of Law, for example, provides, "The question as to what is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties thereto."[545] By virtue of this section, a contract is to be governed by the law chosen by the parties, provided that the choice is expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[546]

---

[543] Article V(1)(a).

[544] Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed., at p.58.

[545] The Thai Conflict of Law, Section 13 para.1.

[546] K. Sonthikasatarin, *Private International Law* (Nitinunnakan: Bangkok 1992) at p.299.

Thus, the parties are given the freedom to choose an applicable law. Furthermore, they can choose different laws to govern different parts of the contract.[547] This means that a law they may choose to govern the arbitration agreement can differ from the main contract which incorporates the arbitration clause.

International conventions and a majority of arbitration laws also give the same freedom to the parties.[548] As stated in the Dow Chemical case, "[T]he source of law applicable to determine the scope and the effects of an arbitration clause providing for international arbitration does not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases involve the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy, is governed -not only as to its scope, but as to its effect- by its own specific sources of law, distinct from those that govern the merits of the dispute."[549] However, although the parties are free to select the law to govern the arbitration agreement, they do not exercise their right.[550]

A problem arises when the parties do not agree upon the law to govern their arbitration agreement. What law will be applied to the arbitration agreement in such a situation? The answer to this question depends on who decides that question, and when the issue of the applicable law to the arbitration agreement arises.

The issue of applicable law to the arbitration agreement is possibly decided by either the state court or the arbitrator. Thus, the applicable law to the arbitration agreement depends on who, the court or the arbitrator, chooses it. Both have different sources of power, the former receives its power from

---

[547] *Ibid.*, at p.298.

[548] See the New York Convention, Art.V(1)(a), TAA, Sec.34(2).

[549] *Dow Chemical et al v. Isover Saint-Gobain*, IX *Yearbook Com. Arb.* 131 at p.133 (1984)

[550] Robert J and Carbonneau T, *op.cit.* footnote 262, at II:8-22.

the state, while the latter from the arbitration agreement.

(i) State court

The state court has a chance to deal with this issue at three different stages, as discussed earlier. These are, at the enforcement stage of the arbitration agreement, at the setting aside of the award, and at the enforcement of the award.

a) At the enforcement of the arbitration agreement stage

The New York Convention and most arbitration laws are silent on the applicable law to an arbitration agreement when such an agreement is enforced. This is understandable, because the arbitration agreement is intended to be treated as other kinds of international contract, that is to say, the conflict of law of the country where the enforcement of such an agreement takes place shall be applied. This is because the enforcing court shall follow its own conflict of law rules.[551]

According to most of the modern conflict of law rules, there is generally a presumption that the law of the place of arbitration shall be applied.[552] Different results may arise in certain jurisdictions where the Conflict of Law rules are outdated.

The Thai Conflict of Law, for example, provides, "The question as to what is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties thereto. If such intention, expressed or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

When the contract is made between persons at a distance, the place where the contract is deemed to have been made is the place where notice of

---

[551] See Chukwumerije, *op.cit.* footnote 197, at p.35.

[552] Samuel, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate" in Storme and F. Ly (eds.) *The Place of Arbitration* (Mys&Breech 1992) at p.39.

acceptance reaches the officer. If such place cannot be ascertained, the law of the place where the contract is to be performed shall govern."[553] This means that the following laws shall be applied in order, if the parties have failed to choose law applied to their contract : the law of country where the parties have joined the nationality, or the law of country where the contract has been made, or the law of country where the contract has been performed.

Therefore, the law applied to the arbitration agreement in an international case will be the law of country where the contract has been made rather than the law of the place of arbitration.

b) At the setting aside of the award stage

When an application is made to set aside an award on the ground that the arbitration agreement from which the award arises is invalid, the law governing the arbitration agreement is determined in accordance with the laws of the country where the application is made. This approach is accepted by the Model Law[554] and in most jurisdictions.

The Thai Arbitration Act has no setting-aside provision. Therefore, the application for the setting- aside, whether on the ground of the invalid arbitration agreement or otherwise is denied in Thai Courts.

c) At the enforcement stage of the award

The New York Convention provides that recognition and enforcement of an award may be refused, among other things, if the arbitration agreement is invalid "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[555]

The question arises, what is the meaning of the phrase "the country where the award was made"? Does this have the same meaning as the term "the country where the arbitration took place" as per Article V(1)(d)? Given

---

[553] The Thai Conflict of Law, Section 13.

[554] Model Law, Art.34(2)(a); see also Chukwumerije, *op.cit.* footnote 197, at p.37.

[555] The New York Convention V(1)(a).

the fact that both phrases are provided in the same Article, Article V, should there be any difference? Dr. Mann identifies this problem by stating:

"If there are three arbitrators who hold an arbitration in London, but meet in Paris to consider their award, and sign it at their respective residences, via New York, Geneva and Tokyo, the award should be treated as "made" in London, even if each arbitrator has indicated the place where he has signed it. *The award, it is submitted, is no more than a part, the final and vital part of a procedure which must have a territorial, central point or seat.* It would be very odd if, possibly without the knowledge of the parties or even unwillingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole".[556]

According to Dr. Mann's view, the term "the country where the award was made" and the term "the country where the arbitration took place" are identical. This view, in my opinion, is sound both in theory and in practice, otherwise, what would be the result if a sole arbitrator makes an award on the high seas, what then will be the territory of any state?

The House of Lords however, took an opposite view and held that "An award, whilst it is no doubt the final culmination of a continuing process, is not in itself a continuing process. It is simply a written instrument and I can see no context for departing from what I apprehend to be the ordinary, common and natural construction of the word 'made'. A document is made when and where it is perfected. An award is perfected when it is signed."[557]

I am of the view that the decision in Hiscox was unsound. What if, in Hiscox case, the arbitrator had to determine the law governing the arbitration agreement during the arbitral proceedings? Would he have chosen French Law even though he had no idea he would go to Paris to sign the award? For this reason, the term "the country where the award was made" is criticised as

---

[556] Mann, *op.cit.* footnote 299, at p.108. Emphasis added.

[557] *Hiscox v. Outwaite* [1991] 3 W.L.R. 297 (per Lord Oliver of Aylmerton).

"quite arbitrary".[558]

However, the ruling in Hiscox has now become history with the adoption of the Arbitration 1996 Act. The 1996 Act provides that where the seat of the arbitration is England, Wales or Northern Ireland, an award shall be treated as having been made there in any event, regardless of where it is actually signed.[559] This provision thus reverses the decision of the House of Lords.

(ii) International arbitrator

An international arbitrator, unlike a state judge who has to follow the law of his state is not subject to certain limitations. Therefore, the determination of the applicable law in an arbitration agreement may be different from that of a state court.

Arbitrators who face the problem of which law governs the arbitration agreement, have applied different approaches to determine this issue. Some arbitrators have apply the law of the place of arbitration.[560] Some apply the law governing the main contract.[561] There is one case in which the arbitrator applied the rules of an institution to the arbitration agreement.[562] In some cases the arbitrators have vaguely applied the "internationally accepted principles governing contractual relations."[563]

The main duty of an arbitrator is that he shall render an enforceable award,[564] accordingly he at least has to look at the law of the place of arbitration, and possibly the law of the state where enforcement of the award

---

[558] Robert J and Carbonneau T, *op.cit.* footnote 262, at II:8-22.

[559] Section 53.

[560] *Baques Centroamericanos v. Petroles SA*, 13 *Yearbook Com.Arb.*, at p.133 (1988).

[561] The award of the Arbitral Tribunal of the Netherlands Oil, Fats and Oilseed Trade Association, rendered on September 5, 1977, 4 *Yearbook Comm.Arb.* 218 at p.219 (1979).

[562] ICC Case No. 5486, 14 *Yearbook Com.Arb.* 156, at p.161 (1989).

[563] ICC Case No. 3572 of 1982, 14 *Yearbook Com.Arb.* 111, at p.116 (1989).

[564] Lew J, *op.cit.* footnote 137, at p. 536; Geneva 1927 Article 1(c); New York Convention Article V(2)(b).

may be sought. If he fails to do so, this may be damaging to enforcement and may may destroy the arbitral process in that any award made may be set aside or cannot be enforced.

3.1.3.2. Law applied to the capacity of the parties to arbitrate

Unlike the law applicable to the arbitration agreement, the law governing the issue of the capacity of the parties cannot be chosen by the parties.[565] The law concerning the capacity of the parties is a mandatory rule which the parties are obliged to follow. It may not necessarily be the same as the law applicable to the merits of dispute.[566]

The New York Convention does not provide any guidance as to how the applicable law should be determined. It only provides that a State may refuse to recognise or enforce an award where the parties to agreement were "under the law applicable to them, under some incapacity."[567] This provision is open to application by a court where enforcement of an award is sought within its territory.[568]

The court, of course, may apply its own conflict of laws rules in resolving such an issue.[569] The words "under the law applicable to them" can be construed as either incomplete or misleading in that it can be taken to refer to any of a variety of substantive law: the residence of the parties, their domicile or their nationality.[570] The Model Law eliminates this ambiguity by providing "under the law applicable to them" similar to that as contained in the New York Convention.[571]

---

[565] See per Lord Macnaghten in *Cooper v. Cooper* (1988) 13 App.Cas. 88 at p.108.

[566] van den Berg A, *op.cit. footnote 142*, at p.277.

[567] Article V(1)(a).

[568] van den Berg A, *op.cit. footnote 142*, at p.276.

[569] *Ibid.*

[570] Holtzmann H and Neuhaus J, *op.cit.* footnote 139, at p. 916.

[571] *Ibid.*

The Model Law provides that an award may be set aside[572] or cannot be enforced[573] if a party to an arbitration agreement is under some incapacity. The problem is whether the court will apply its substantive law or its conflict rules to determine this. If the conflict rules are applied, dissatisfaction may result. It can thus be concluded that the applicable law to parties to arbitration depends on the conflict-of-law rules of state, which may vary from country to country.

3.1.3.3. Law applied to the subject matter arbitrability

The arbitrability of the subject-matter concerns the public policy of the state involved. Therefore, under the New York Convention, the law applied to the determine the arbitrability of a subject-matter is governed by the law of the award-enforcing state[574] or the state where setting aside of the award may be sought.[575]

Under the present legal framework, in determining the arbitrability this has to comply with both the laws of the setting-aside state and the award-enforcing state. This is because the award-enforcing state may refuse enforcement if the award has been set aside on the grounds that the subject-matter was not arbitrable in another state. Or, it may refuse enforcement on the grounds that the subject-matter is not arbitrable under the laws of the award-enforcing state.

This practice serves to make arbitration less effective as the subject-matter which is to be arbitrated is limited by various laws. To avoid this problem, state courts have to narrowly interpret the issue of arbitrability..

3.2. Separability

Although with the existence of an arbitration agreement, one party may, for various reasons, subsequently attempt to delay the arbitral process by

---

[572] Article 34(2)(a)(i).

[573] 36(1)(a)(i).

[574] Article V(2)(a).

[575] Model Law, Article 34(2)(b)(i).

repudiating the arbitration agreement or subverting the arbitration clause by questioning its existence and validity in a court. [576] As far the arbitration clause is concerned, if the main contract is found to be invalid, this will not extinguish the existence of the arbitration agreement.

Consequently, the arbitration process cannot be easily negated. Arbitration clauses are now used on a world-wide basis in international commercial contracts.[577] If such situations were always to frustrate the arbitration process, arbitration would not be an attractive method of commercial dispute resolution. Given the necessity for confidence in arbitration, two related doctrines have been developed in order to eliminate such obstructions: the doctrines of separability of the arbitration clause, and that of competence and competence.[578]

An initial comment to be made is that these two doctrines are quite different, although they are both concerned with the jurisdiction of the arbitrator.[579] The former deals with the question of whether the arbitration clause inserted in the main contract, being contested, is in reality a separate contract which is severable from the contested main contract.[580] The latter deals with the question of whether an arbitrator can be a judge on his jurisdiction.[581]

The primary question concerning the separability concept is - what is the legal effectiveness of the validity of the arbitration clause if the main contract which contains that clause is invalid. Does the arbitration clause share

---

[576] See Szurski, "Arbitration Agreement and Competence of the Arbitral Tribunal" in Sanders (ed.) *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, at p.76; See also Robert J and Carbonneau T, *op.cit.* footnote 262, at p.11:2-9.

[577] Bagwell J, "Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena -*Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991)", 22 *Ga.J.Int'l.&Comp.L.* 487, at p.491 (1992).

[578] See J. Lew, "Determination of arbitrators' jurisdiction and the public policy limitation on that jurisdiction", in J. Lew, *Contemporary Problems in International Arbitration*, 73 at p.74-76.

[579] Schmitthoff, *op.cit.* footnote 208, at p.288.

[580] *Ibid.*

[581] *Ibid.*

the same fate as an invalid main contract?

The arbitration clause has traditionally been considered as an integral part of the main contract. In consequence, when a question is raised concerning the legal effectiveness of the main contract, the question also encompasses the arbitration clause.[582] However, this view has now been changed. The arbitration clause constitutes a separate agreement severable and independent from the main contract in which it is contained.[583]

As Judge Stephen Schwebel of the International Court of Justice has pointed out, "[T]he very concept of the phrase 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreement if it needs to be." [584] This means that there are two separate sets of contractual relations in the same substantive contract, namely, the first regarding the commercial deal, and the other regarding the arbitration in case commercial disputes arise.

The court in Black Clawson case clearly explained that: "[T]here are not one, but two, sets of contractual relations which govern the arbitration of disputes under a substantive contract ... First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms part. Prima facie it will run for the full duration of the substantive agreement, and will then survive for as long as any disputes remain unresolved.

Second, there are one or more individual sets of bilateral contractual obligations which are called into existence as and when one party asserts against the other a claim falling within the scope of the initial promise to arbitrate, which they have not been able to settle."[585] Thus, the validity of the

---

[582] Wilner, *Domke on Commercial Arbitration*, Vol.I (Clark Boardman Callaghan 1985) at p.89.

[583] Schmitthoff, *op.cit.* footnote 354, at p.13; see also 202. Schmitthoff, *op.cit.* footnote 208, at p.285.

[584] Schwebel S, *International Arbitration: Three Salient Problems* (Grotius Publications 1987) pp.21-22.

[585] *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* (1981) 2 Lloyds Rep.446, 455.

arbitration clause does not depend on the validity of the main contract in which it is contained.

As noted, separability only applies to the arbitration clause, but not to submission agreements. In the latter case, the main contract is in fact the actual arbitration agreement, hence it is already both physically and conceptually separate. Hence there is no place for the separability doctrine to be applied. Although this concept is relatively new, it is widely recognised by both national legal systems[586] and international convention.[587] The majority of national laws recognise the concept of the independent character, or at least, they make a presumption in this sense.[588] Besides, most international rules also recognise this doctrine.[589] Professor Sanders, a distinguished arbitrator and scholar, rightly concludes, "[s]eparability has become....a truly international rule of law."[590]

The New York Convention also implicitly supports the separability doctrine.[591] The reason is that the grounds on which a court may deny the recognition or enforcement of an arbitral, among other things, is that the *arbitration clause is not valid* under its governing law.[592] The Convention is silent on validity of the main contract. This means that an arbitration clause is separable from a defective contract.[593]

There are two main reasons behind the wide acceptance of this doctrine. First, it is the needed practice. As discussed earlier, the existence of this concept, although probably far from the expectation of businessmen when

---

[586] Redfern A, *op.cit.* footnote 492, at p.23.

[587] Szurski, *op.cit.* footnote 576, at pp.76-77.

[588] Wetter J, *op.cit.* footnote 383, at p.449.

[589] J. Lew, *op.cit.* footnote 578, at p.77.

[590] Schwebel S, *op.cit.* footnote 584, at p.60.

[591] *Ibid.*, at p.22.

[592] The New York Convention, Article V(1)(a).

[593] Schwebel S, *op.cit.* footnote 584, at p.22-23 note 37;see opposite view in Lynch M, *op.cit.* footnote 379, at p.680 note 48.

they sign a contract,[594] is derived from the necessity to eliminate application of a delay tactic by a recalcitrant party.

Besides, there are certain cases in which an arbitration will be needed following the termination of the main contract. Thus, it would be a nonsense if for some reasons the arbitration clause was held to have been terminated. This is the time when it is most needed, as a method of determination of the claims and counterclaims of the parties.[595]

Secondly, the concept of separability complies with the doctrine of parties autonomy. When the parties to a business agreement which contains an arbitration clause enter into an agreement, they conclude not one but two agreements. Their primary intent is a commercial agreement, such as a sale contract, at the same time they also intend to have arbitration of any dispute not settled otherwise.[596] Both intentions are separate.

The objectives of both agreements are: the business objective and that of arbitration, which are both conceptually different. Both intentions of the parties should be given effect.[597] However, this intent is a legal presumption.[598] Thus, the implementation of this idea depends mostly or perhaps entirely upon the interpretation of the agreement by a state court. In certain jurisdictions, the courts have no experience in international commercial arbitration because they have not faced the issue before.

There is a case in which the court gave an unsound reason in this respect, "[a]utonomy seems to mean different things to different authors."[599] Thus, the effects of this concept was not conclusive, not even in the countries

---

[594] Wetter, "Salient Features of Swedish Arbitration Clauses", in *1983 Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce* 34; Craig, Park and Paulsson, *op.cit.* footnote 544, at p.5.04.

[595] Redfern A and Hunter M, *op.cit.* footnote 146, at para.3-31.

[596] Schwebel S, *op.cit.* footnote 584, at p.3.

[597] *Ibid.*

[598] *Ibid.*, at p.5.

[599] *Sojuznefte export v. JOC Oil Company*, 1987 *Int'l.Arb.Rep.* 420, at p.482.

which accept it.[600]

For the sake of international commercial arbitration, Justice Steyn's recommendation is an important step towards this "gradual evolution of a broader concept in the interpretation of the parties' arbitration agreement".[601]

Although the doctrine of separability enjoys considerable international support, it is not applied uniformly. Certain countries strictly apply the rule by applying it only in the case where a contract has come to end prematurely or by performance. The rule is not applied to the case where a contract is *void ab initio* and where a contract is non-existent. England is one such country.

However, the policy changed with the enactment of the Arbitration Act 1996. Other countries, such as Sweden, widely apply the rule, i.e. they apply the doctrine, both in cases where a contract is *void ab initio,* i.e. where a contract has come to an end prematurely or by performance, and in cases where a contract is non-existent.[602]

There are some countries, such as the United States, where the rule is not applied to cases where a contract is non-existent. The are however, split as to whether the doctrine should be applied to a contract that is *void ab initio.* In one case the court held that "it is for a court to determine issues of fraud in the inducement, not an arbitrator,"[603] which means that the arbitration clause contained in the main contract is as invalid as the main contract is. But in other cases the court held that a party who has agreed to arbitrate under an arbitration agreement cannot avoid the arbitration by claiming that the main contract is *void in initio.*[604]

It is sound to apply the doctrine to a main contract which is *void ab*

---

[600] See Craig, Park and Paulsson, *op.cit.* footnote 544, at p.68-9.

[601] Svernliv C, "The Evolution of the Doctrine of Separability in England: Now virtually complete?", 9 *J.Int'l.Arb.*,121 (1992).

[602] See *Hermansson v. AB Asfaltbelggningar*, Judgment of Mar. 24, 1976 in Stock Chamber of Commerce, Arbitration in Sweden at p.26.

[603] *Shawn v. Kuhnel & Assoc., Inc.*, 102 N.M. 607, 698 P.2d 880, 882 (1985).

[604] *Flightways Corp. v. Keystone Helicopter Corp.*, 459 Pa. 660, 331 A.2d 184 (1975).

initio. It is presumed that even though the parties may have signed an invalid contract, they nevertheless expressed a separate and valid intent that any dispute arising out of or in connection with the contract should be resolved by arbitration. That intent is then viewed as extending to cover the consequences of the invalidity of the contract.[605]

However, the application of the doctrine to non-existent contracts is not quite legally logical because arbitration originates from the consent of the parties'. A party who denies the existence of a contract is denying that he has given his consent to arbitrate. However, it is accepted that the principle is based more on practical rather than on a theoretical basis.[606] It is however, not easy to justify the principle on the basis of pure logic.[607] The true justification for the separability principle is practicality rather than theory.[608] Nevertheless, the doctrine is deemed as the "conceptual cornerstone of international arbitration".[609]

England

In England, the separability idea was historically not recognised ; instead the one-contract theory was accepted. Under the one-contract theory, if the main contract which contains an arbitration clause does not bind the parties, such an arbitration clause, as part of the agreement, could not bind them either.[610] Later, the doctrine was adopted but was strictly applied. Sir John Steyn spelt it out, "English courts have categorised and treated the arbitration clause in a contract as a wholly severable agreement for certain purpose, i.e., it survives the termination of the principal contract by fundamental breach, breach on condition of frustration."[611] Some authors

---

[605] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.66.

[606] See Schwebel S, *op.cit.* footnote 584, at p.60.

[607] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.67.

[608] *Ibid.*, at p.67.

[609] *Ibid.*, at p.65.

[610] Samuel, "Separability in English Law", 3 *J.Int'l.Arb.* 100 (1986).

[611] Steyn, "England", in 1 *Int'l.Handbook on Comm.Arb.*, 9 (1984).

viewed this as, "England effectively has adopted the separability doctrine."[612]

However, after adopting the English Arbitration Act 1996, the attitude of the English courts towards separability dramatically changed. The Act not only adopts the doctrine of separability but also intends it to be widely applied by providing, "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."[613]

PRC

An arbitration agreement is regarded as an independent contract under Chinese laws. CAL,[614] Foreign Contract Law,[615] and CIETAC Rules[616] state that the arbitration clause exists independent of the other clause contained in a contract. Furthermore, they provide that any modification, rescission, termination or revocation of the contract in dispute shall not affect the validity of an arbitration clause or agreement.

Thailand

In Thailand, the Arbitration Act is silent on this issue. However, the Thai Civil and Commercial Code, as a general rule, provides, "If any part of an act is void, the whole act is also void, unless it is assumed under the circumstances of the case that the parties intend the valid part of the act to be severable from the invalid part."[617]

---

[612] Wetter J, *op.cit.* footnote 383, at p.540.

[613] Section 7.

[614] Article 19.

[615] Article 35.

[616] Article 5.

[617] Section 173.

This provision is derived from the general principle that the intent of the parties shall be respected.[618] In a loan agreement, for example, there are two main parts, namely, the capital and the interest. If the agreement designates an interest rate, higher than the rate allowed by law, the interest part shall be void; whereas, the capital part, which is severable from the first part, will still be valid.[619]

In such a case, it is more difficult to find the intent of the parties in a loan agreement (whether or not they want to separate the interest part from the capital part) than in the case where an arbitration clause is inserted in the main contract. Thus, by analogy, the doctrine of separability is accepted in Thailand by virtue of Section 173 of the Civil and Commercial Code. One may argue that this Section is not applicable to an arbitration case. This argument has no merit. Arbitration, as mentioned in various parts of this thesis, is a creature of contract.

Thus, the general provisions of the contract law, such as offer and acceptance should be applied unless the arbitration law provides otherwise. According to the TAA, which is silent on this issue, the Civil and Commercial Code is applied. Obviously, the doctrine applies to the case where the main contract is *void ab initio*. The problem is whether it can also be applied to non-existent contracts. There is no reported case in this respect. However, the answer is probably negative.

The Thai Civil and Commercial Code, Section 173 applies only when the arbitration agreement is valid. If the main contract is non-existent, the arbitration clause contained in that main contract will also be non-existent. Thus, the situation is outside the ambit of Section 173.

The problem of separability becomes clearer in the drafting of the new Thai Arbitration which adopts the doctrine. It provides, "The arbitral tribunal may rule on its own jurisdiction, including the validity of the arbitration

---

[618] Sanee Promoj, *Contract and Obligation*, (Aksornsarn: Bangkok, 2nd ed. 1962) at p.249.

[619] See The Thai Supreme Court (Dika) decision No. 478/2488, 607/2494, 1380/2500, 1238/2501.

agreement or of the constitution of the arbitral tribunal, or the scope of the authority of the tribunal. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the main contract, and shall not become void or invalid merely because of the void or invalidity of the main contract."[620] However, the new draft is still silent on the issue of non-existent contracts.

Vietnam

The Statutes of the Vietnam International Arbitration Centre and the Vietnam Arbitration Rules are silent on this respect. However, there are two reasonable grounds which indicate that the separability doctrine is applicable in Vietnam. First, Vietnam was a member of CMEA.

Despite the fact that the old Vietnam Statute of the Foreign Trade Arbitration Committee of 1963 and the Vietnam Rules of Procedure of the Foreign Trade Arbitration Committee of 1963 were silent on this issue, the practice of CMEA accepted that the doctrine was recognised.

One commentator said, "The practice of the foreign trade arbitration courts of CMEA countries is to recognise the independence of the arbitration clause and to consider it as valid even when the foreign trade contract is invalid."[621] Furthermore, Article 1 of the 1987 Uniform Rules of Arbitration Courts Attached to the Chambers of Commerce in CMEA States provides that "[t]he Arbitration clause is considered to have legal force regardless of the validity of the contract in which it appears."[622] The doctrine, has thus been recognised in Vietnam since then.

Secondly, by analogy, the Soviet law is also silent on the separability doctrine but Rule 13 of the 1988 Arbitration Court's Rules of Procedure permits reference to trade usages in arbitration proceedings. When filling gaps

---

[620] Section 22.

[621] Gardner, "The Doctrine of Separability", 28 *Colum.J.Transn'l.L.* 307 (1990).

[622] *Ibid.*, at p.307 note 28.

in Soviet legislation in relation to the absent provisions on separability, the court may consider trade usages reflected in the rules of major international arbitration courts, convention on international arbitration and to the practices of other states.[623]

This gap filling applies well in Vietnamese law. The Vietnam Arbitration Rules of 1993 provides that "The arbitral tribunal or the sole arbitrator, as the case may be, shall settle the dispute on the strength of the terms and conditions of the original contract, if the dispute arises from relations thereunder, in accordance with the law applicable to it and with any related international treaty, taking into account the trade usages and international practice."[624] As a consequence, separability is applicable in Vietnam's legal system.

3.3. Competence-competence doctrine

An arbitrator may be challenged for various reasons, such as objection as to his impartiality. One of the commonly used devices is to object to the jurisdiction of the arbitrator.[625] For that purpose, the challenging party may allege that the main contract is invalid or non-existent so as to render the arbitration clause invalid. These allegations put the jurisdiction of the arbitrator in dispute.

If the challenging party acts in bad-faith, he can easily delay or destroy the arbitration process in order to gain time or to discourage the claimant. Such a tactic has become more common in practice in international commercial arbitration and is becoming increasingly sophisticated.[626] As a result, to a party honestly seeking arbitration, such a tactic can be a source of frustration.

The challenge to an arbitrator's jurisdiction is not unusual. There are

---

[623] *Ibid.*, at p.307.

[624] Section 23, paragraph 1.

[625] Poncet, "Challenges to the Jurisdiction of International Arbitrators: an Important Decision of the Swiss Supreme Court", 50 *Arb.* 156 (1984).

[626] Redfern A, *op.cit.* footnote 492, at pp.19-20.

many cases in which there is a real doubt as to the jurisdiction of an arbitrator to rule on a particular dispute that has arisen.[627] Thus, the challenge to the arbitrator's jurisdiction is a necessary measure to control justice in the arbitral process by the parties to arbitration.

The real problem here is how to eliminate the tactic when it delays the case. In other words, challenging of the jurisdiction of an arbitrator must be determined as fast as possible in order to prevent the delay tactic. If such an issue is decided by the court, there is no place available in the arbitration process, or if any, the arbitration process will be delayed.

Suppose the main contract, is in fact, invalid, the court will dismiss the claim. This means that the arbitration proceedings will be terminated. But if the main contract, is in fact, valid, the arbitration proceedings will be suspended until the court decides on the issue.[628]

However, if the arbitrator, instead of the court, decides that issue, the opposite consequence will arise; namely, the arbitration proceedings are not terminated but are suspended. As a result, the concept of separability and that of competence-competence have been developed in order that the arbitrator may retain jurisdiction, even though the main contract may be invalid.

According to the competence-competence doctrine, the arbitrator has the competence to be judge of his own jurisdiction.[629] In other words, the arbitrator may determine the existence of the arbitration clause,[630] as well as its validity[631]and scope,[632] while the parties need not invoke the jurisdiction of a national court to determine these issues.[633]

---

[627] *Ibid.*, at p.20.

[628] Triantafyllides, *op.cit.* footnote 493, at p.251.

[629] Schwebel S, *op.cit.* footnote 584, at p.2.

[630] Redfern A, *op.cit.* footnote 492, at p.30.

[631] Schwebel S, *op.cit.* footnote 584, at p.11.

[632] David R, *op.cit.* footnote 138, at p. 192.

[633] Rosen, "Separability and Competence", 17 *Fordham Int'l.L.J.* 608 (1994)

There is often confusion between the doctrine of separability and competence-competence.[634] These two doctrines are related, but they are distinct.[635] The former concerns the question of whether an arbitration clause inserted in a main contract is separable from the main contract.[636] It is a matter of interpretation of a contract entered into by the parties to a dispute.[637] The latter concerns the question of whether an arbitrator can be a judge in his own cause.[638]

However, an autonomous arbitration clause gives an arbitrator a basis to determine his own jurisdiction. Thus, jurisdictions which do not accept the separability doctrine, will deny an arbitrator the power to decide on his own jurisdiction.

This doctrine of competence-competence raises the relevant question of whether it is contrary to the natural justice derived from the maxim *nemo iudex in re sua* which prohibits a man from being a judge in his own cause.[639] The best explanation in this respect is that of the distinguished scholar Professor Schmitthof.

He said that "I see no magic in the phrase that a person cannot be a judge in his own cause. The true meaning of this rule is that an arbitrator should not deal with a matter in which he conceivably or potentially may have a personal interest because this may cast a doubt on his impartiality. But if the parties endow the arbitrator with power to decide his own jurisdiction, if they agree that he may deal with this legal question in the same manner as with other legal matters arising in the arbitration, the courts should respect the contract of the parties, provided that the arbitrator exercises this power in good faith.

---

[634] David R, *op.cit.* footnote 138, at p. 192.

[635] *Ibid.*

[636] Schmitthoff, *op.cit.* footnote 208, at p.288.

[637] Lew J, *op.cit.* footnote 456, at p.55.

[638] Schmitthoff, *op.cit.* footnote 208, at p.288.

There is, of course, a danger that an arbitrator may deliberately abuse this power, by assuming jurisdiction or refusing to exercise it, contrary to his better judgement. But it should not be overlooked that the award eventually has to be enforced in a national jurisdiction and that the court will refuse enforcement if it is shown that the arbitrator did not act with impartiality. A deliberate abuse of the power to decide his own jurisdiction would disclose lack of impartiality on the part of the arbitrator.

The interest of the parties are thus sufficiently safeguarded. The true test for the determination of the question whether the arbitrator has abused his power to determine his own jurisdiction;. This is a question of whether he was guilty of lack of impartiality, and not whether he had unintentionally fallen into an error in honestly and fairly attempting to determine the limits of his own jurisdiction".[640]

However, it is accepted that competence-competence "contains a large element of legal fiction... It is ... very difficult to explain how an arbitral tribunal whose jurisdiction derives from an instrument alleged to be invalid... can be the sole judge of its own competence... While most developed jurisdictions have come to accept the thesis as an axiom, because failing it the arbitral process would be ineffective, the doctrine militates against strict reason, assuming the existence of an alternative remedy".[641]

Despite the fact that the doctrine of competence-competence is difficult to understand, there are two grounds to justify the doctrine. The first is that such jurisdictional power has been conferred by the will of the parties when they entered an arbitration agreement.[642] This means that the parties to arbitration are assumed to empower the arbitrator to determine his own

---

[639] Jackson P, *op.cit. footnote 194*, at p. 26.

[640] Schmitthof in his work International Commercial Arbitration commenting on one such judicial decision. Cited in Triantafyllides, *op.cit.* footnote 493, at p.255.

[641] Wetter, *op.cit.* footnote 594, at p.35.

[642] Shihata, *The Power of the International Court to Determine Its Jurisdiction*, (Martinus Nijhoff 1965) at pp. 25-26.

jurisdiction. This is because the arbitrator could not exercise his power "if the parties stipulated to reserve it to themselves or to another organ. The whole question is then reduced, in this view, to the interpretation of the silence of the parties in accordance with a rebuttal presumption that favours attributing the *competence de la competence* to the tribunal."[643]

The second considers the competence-competence power as inherent in all judicial bodies and essential to their ability to function.[644] This theory is supported by modern writers' views.[645] Competence-competence as a power both "inherent in every judicial organ, and ... independent from the will of the parties."[646]

It is arguable whether the arbitrator can exercise his so-called 'inherent power' if the foundation for his exercise of jurisdiction, the arbitration agreement, is called into question.[647] Under this view, the arbitrator's jurisdiction competence is a power "necessary for the mere functioning of the tribunal."[648]

The doctrine of competence-competence is widely accepted[649] by national law[650], international convention[651] and the rules of international arbitration[652]. The reason for this is that the doctrine is considered a product necessary in practice in that it can eliminate the delay tactic used to object the arbitrator's jurisdiction.[653]

---

[643] *Ibid.*

[644] *Ibid.*

[645] See Redfern A and Hunter M, *op.cit.* footnote 146, at para. 5-33.

[646] Shihata, *op.cit.* footnote 642, at pp. 25-26.

[647] Chukwumerije, *op.cit.* footnote 197, at p.32.

[648] Shihata, *op.cit.* footnote 642, at pp. 25-26.

[649] Redfern A, *op.cit.* footnote 492, at p.27.

[650] See the French Civil Procedure Code, Article 1466; The English Arbitration Act of 1996, Section 30.

[651] See European 1961, Article 5.3; The Wahsington Convention 1965, Article 41.

[652] See UNCITRAL Arbitration Rules, Article 21.

[653] Holtzmann H and Neuhaus J, *op.cit.* footnote 139, at p.479.

Furthermore, the doctrine shows that party autonomy is respected.[654] The doctrine of competence-competence becomes "axiomatic in international law".[655] As the arbitrator said in Topco/Calasialic case that "International case law has continuously confirmed that arbitrators are necessarily the judges of their own jurisdiction, since Lord Chancellor Loughborough in the *Betsey* case decided to adopt that rule.

The same rule has been expressly confirmed in the contemporary era by several decisions of the International Court of Justice, notably by the judgment in the *Nottebohm* case, and by the judgment related to the case concerning the arbitral award made by the King of Spain on December 23, 1906. It has been formally adopted in a great number of International Instruments."[656]

Later the arbitrator said,

"It is not only international case law but also municipal case law which upholds the autonomy or the independence of the arbitration clause whenever the local courts are called upon to decide questions of private international law relating to international commercial arbitration."[657]

There was one case where the arbitrator did not accept this doctrine by denying his own jurisdiction when the arbitration agreement was invalid and contrary to international public policy. He concluded that "I have no jurisdiction ..."[658]. Two decades later, another arbitrator in an ICC arbitration was faced with the same issue in a similar case. The arbitrator in this case assumed e jurisdiction, i.e. he applied the competence-competence doctrine, but then dismissed the respective claim for a commission in the procedure on the merits, since it was based on a contractual clause which was null and

---

[654] Bockstiegel K, *op.cit.* footnote 506, at p.186.

[655] Schwebel S, *op.cit.* footnote 584, at p.10.

[656] Wetter J, *op.cit.* footnote 383, at p.441.

[657] *Ibid.*, at p.446.

[658] See Bockstiegel K, *op.cit.* footnote 506, at p.201.

void.[659]

England

The doctrine of competence-competence is adopted in the Arbitration Act 1996 which provides that "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement."[660]

PRC

According to the CAL, the validity of an arbitration agreement may be challenged in the arbitration commission or in the Chinese Courts.[661] When parties dispute the validity of the arbitration agreement and raise the issue before both an arbitration tribunal and a Chinese court, the decision of the court will prevail if the decisions conflict.[662]

However, it is not clear whether and/or when arbitral proceedings at CIETAC should be suspended if one party applies to the People's Court for a ruling that the arbitration agreement is invalid. On 21 October 1998, the Chinese Supreme Court issued a reply to the High People's Court of Shandong Province on several questions relating to the determination of the validity of an arbitration agreement. [663] In that matter, the Chinese Supreme Court replied that "where the parties hold conflicting opinions regarding the validity of their arbitration agreement, and one party applies to an arbitration institution for recognition of the validity of the arbitration agreement and the other party

---

[659] *Ibid.*, Goldman, *op.cit.* footnote 495, at p.272.

[660] Section 30(1).

[661] Article 20.

[662] Article 20.

[663] See Zhu Jianlin, *op.cit.* footnote 469, at N.33.

petitions the court to invalidate the arbitration agreement, the court should not accept the lawsuit if the arbitration institution has already accepted the application and made a decision. If the arbitration institution has accepted the application but has not made a decision yet, the people's court should take cognizance of the case and notify the arbitration institution to suspend the arbitration proceedings."[664]

The Chinese Supreme Court further replied that "where one party refers the contractual dispute or other disputes over property rights to arbitration and the other party, who challenges the validity of the arbitration agreement, applies to the people's court for a ruling that an arbitration agreement is invalid and files a lawsuit on the same dispute, the people's court should notify the arbitration institution to suspend the arbitration proceedings after accepting the case. After a ruling on whether the arbitration agreement is valid or not has been rendered, the people's court should serve the copy of the ruling on the arbitration institution, on the basis of which the arbitration institution may determine to resume the arbitration proceedings or dismiss the arbitration case". [665]

Where the people's court makes a ruling that the arbitration agreement is invalid and one party refuses to make a defense, the people's court may determine the lawsuit by default; it does not affect the hearing of the case by the people's court if the arbitration institution which previously accepted the application for arbitration fails to dismiss the case after the people's court has ruled that the arbitration agreement is invalid." [666]

In this respect, the CIETAC Rules provides that when a challenge to the jurisdiction of an arbitrator is raised in a CIETAC arbitration before the formation of an arbitration tribunal, the arbitration commission will make the decision itself on the basis of the written materials submitted by the parties.

---

[664] See *Ibid.*

[665] *Ibid.*

[666] Zhu Jianlin, *op.cit.* footnote 469, at N33.

Where a challenge is put forward after the formation of the arbitral tribunal, the decision will be made by the arbitration commission in consultation with the arbitrator. In such a case, arbitrators play an important role in assisting the arbitration commission to clarify certain facts and reach a conclusion.[667]

Thailand

Although the doctrine of separability is accepted in Thailand, the Arbitration Act is, again, silent with respect to the doctrine of competence-competence. According to the separability doctrine, an arbitrator in Thailand can rule on the validity of the main contract, although it is *void ab initio*.

However, it is doubtful whether an arbitrator can rule on the validity of the arbitration agreement itself. There was a case[668] where two arbitrators were required. One of the arbitrators was challenged because his power of attorney was in dispute: that is to say, one party challenged the arbitrator did not have the authority to decide the case because his power of attorney was not properly signed.

The problem then arose as to whether the remaining arbitrator could decide on his colleague's jurisdiction. Both arbitrators were split on the issue of competence-competence. The challenged arbitrator, who was a retired judge, viewed that the remaining arbitrator could rule on his jurisdiction. The remaining arbitrator on the other hand, who was a professor of law, did not agree with that concept because he was of the opinion that this was against natural justice. The final result was that the case was withdrawn from arbitration.

However, the newly drafted Arbitration Act accepts the doctrine of competence-competence by stating that "The arbitral tribunal may rule on its own jurisdiction, including the validity of the arbitration agreement or of the constitution of the arbitral tribunal, or the scope of the authority of the

---

[667] CIETAC Rules, Article 4.

[668] This case was not reported, but I had a chance to observe the case and to talk to individual arbitrators personally.

tribunal...."[669]

Vietnam

The Vietnam Arbitration Rules and the Statute of the Vietnam International Arbitration Centre are silent on this subject. The Vietnam Arbitration Rules only provides only for situations where an arbitrator is challenged due to his impartiality. In such cases, the remaining arbitrator has the power to decide on the challenged arbitrator's jurisdiction. But in cases of sole arbitrator arbitration, the President of the VIAC shall have the power to do so.[670] This means that the challenged arbitrator cannot determine his own jurisdiction if he is challenged on the ground of his impartiality.

Is this doctrine also applied to the case where the arbitrator's jurisdiction is challenged because the arbitration agreement or the main contract is invalid? If not, who is to decide such issue, the challenged arbitrator or the President of the Vietnam International Arbitration Centre?

The answer should be the arbitrator. There are two reasons to support this approach. First, as already discussed, the doctrine of separability is available in Vietnam legal system. Thus, there is a basis for the competence-competence doctrine to be applied.

Secondly, Article 11 concerns the impartiality of an arbitrator, that the arbitrator himself cannot determine his own jurisdiction because, as Professor Schmitthoff explained earlier, it is against natural justice. Why are the Rules silent on the invalidity of the contract issue? I would submit, this absence of legislation should be interpreted that an arbitrator can determine his own jurisdiction which is challenged on the ground that the arbitration agreement is invalid. If the legislature does not want an arbitrator to decide on his own jurisdiction, it should make a similar provision to that of Article 11.

---

[669] Section 22, paragraph 1.

[670] Article 11.

4. Conclusion

I am of the view that the arbitration agreement is the Bible of the whole process of arbitration. It should therefore, be respected by all parties who are involved in the practice of arbitration. However, its validity and its legal effect depend on the state law and the attitude of the courts, which makes it vulnerable and likely to be broken. In light of this the courts should deal with arbitration agreement with an open mind. If they maintain a parochial view and strictly interpret it, this may undermine the arbitral process from the outset. Therefore, the courts should try not to view arbitration as a competing procedure but one that assist.

Besides, it should be respected that the power of an arbitrator, is derived from the arbitration agreement. If an arbitrator is not given the full power to exercise his duty, again arbitration may be less effective. This is important because if the arbitrator is not allowed to apply his power in the control of the arbitral process, a recalcitrant party may use a challenge of the arbitrators jurisdiction as a means to delay the process. This result is of course undesirable.

I am convinced that if the parties have a well-drafted arbitration agreement, these undesirable consequences can be avoided. Thus the parties should consider the choices available to them with care, as some choices may be fit for one case but not for another.

CHAPTER 4

CHOICE OF ARBITRATOR

An arbitration is as good as the arbitrators.[671]

Parties who choose arbitration would like to have the smooth and effective settlement of their dispute. One the main factors in fulfilling this objective is the choice of arbitrator(s). An arbitrator not only decides the right and duties of the parties, but also manages the arbitration procedure.

Thus, the first question that faces the parties when they decide to arbitrate, is their choice of arbitrator. The arbitration laws of most countries give wide freedom to parties to choose their arbitrator. However, there are many factors which limit the exercise of the parties' right in choosing their arbitrator(s). To date the studies in this area has been limited.[672]

Choosing an arbitrator may be an easy task, but choosing a competent one maybe a more difficult one. There are two main reasons for this. First, when parties enter their contract, they cannot foresee what kind of dispute(s) may arise in the future. They thus cannot decide what kind of person should be selected to decide their dispute i.e. whether an engineer or lawyer or how many arbitrators they should appoint. Generally this problem cannot be addressed until the dispute arises. At this stage, the negotiations between the parties may have broken down and it will be more difficult to decide on these matters but in practice it is not impossible to do so.[673]

Secondly, particularly in international contracts, the parties usually come from different countries, which may have different legal, economic, and social systems. They may thus have the fear that the arbitrator is biased because of his nationality, residence, or other relationship(s) with the country

---

[671] P. Sanders, "The birth of the School of International Arbitration" in J. Lew (ed.) *Contemporary Problems in International Arbitration*, p.9.

[672] Meason J and Smith A, "Non-Lawyer in International Commercial Arbitration: Splinters on the Bench" 12 *Nw.J.Int'l.L.Bus.* (1991) 26.

[673] Gagnon P, "The Constitution of the Arbitration Tribunal" 22 *Revue Generale de Droit*, 447 (1991).

of the other party.

This chapter will concentrate on party autonomy, and its application to the choice of an arbitrator.

An initial step is to define the term "arbitrator". Secondly, there will be a study of the qualification of an arbitrator. Thirdly, there will be an examination of the appropriate number of arbitrators to be appointed. Fourthly, the procedure of appointment of arbitrator will be discussed. Finally, there will be consideration of the question of who is a good arbitrator for the purposes of international disputes in the countries being studied in this research.

1. Definition of Arbitrator

Before choosing an arbitrator, it is important for the parties to know who an arbitrator is. In agreements the parties may use the words "arbitrator" but it may not be in the context of an arbitrator for the purposes of this study. This may lead to difficulties in enforcement. If that person is not considered to be an arbitrator, his opinion, or decision may not be enforceable as an arbitral award and may be outside of the purview of the New York Convention.

There is no clear definition of the term 'arbitrator' given in any of the laws or international conventions on arbitration of any country. In practice most legal writers tend to discuss what an arbitration is rather than who is an arbitrator. I would submit that, an understanding who an arbitrator is, will be useful in understanding what an arbitration is. And the understanding of the former will lead to an understanding of the latter.

According to the Dictionary of Law, an arbitrator is "a disinterested person selected by agreement of contesting parties (or by court) to hear and settle some disputed question between them."[674]

It is clear from this definition that an arbitrator is a private judge i.e. he

[674] Curzon, L. "Dictionary of Law" p.24.

is the judge of the dispute submitted to him.[675] He is private because he is chosen and paid by the parties and not by the state. In addition his authority and power is derived from an arbitration agreement (the mandate of which he must follow), not state law.

There are four basic elements to this definition which will be considered below.

First, an arbitrator must be a person. Secondly, the arbitrator must be chosen and appointed by the parties or, in exceptional cases, by the court. This means that the parties are free to determine the number and qualifications of an arbitrator and this freedom is recognised by most national laws.

Thirdly, an arbitrator must be a disinterested person. This is a requirement of natural justice i.e. he must be independent and impartial.

Fourthly, and finally, the arbitrator must give a decision, not an opinion or suggestion, which is binding on both parties. This feature makes arbitration different from other types of private adjudication, such as that of a valuer. The last element is already discussed, thus it will not be repeated in this Chapter.

1.1. Person

Basically, any natural person, whether male or female, can be appointed to act as an arbitrator.[676] The question is whether a legal person can be appointed an arbitrator. The nature of arbitration is that the parties entrust an arbitrator to make a decision on their dispute. The personality of an arbitrator is thus considered an important feature.

Thus an arbitrator cannot assign his duty to someone else, unless with the consent of the parties. A legal person is not a human being. It is an artificial person who is recognised by law and cannot carry out business on its own. It must employ the services of a natural person to carry out this function

---

[675] See *Arenson v. Casson Beckman Rutley & Co.* [1976] 1 Lloyd's Rep 179.

[676] Mustill M and Boyd S, *Commercial Arbitration* (London: Butterworths 2nd ed. 1992) at p.247.

on its behalf.

If the parties want to appoint a legal person as an arbitrator, it will have to appoint a representative to carry out this function on its behalf. It is therefore impossible for the parties to appoint a legal person to act as an arbitrator.[677]

As a result, the agreement which appoints a legal person to act as arbitrator cannot be enforced under the New York Convention Article II(3), discussed below. In addition the arbitration laws of certain jurisdiction[678] imposes on the capacity requirement which a legal person cannot possess. In the real world, a legal person has thus never been appointed an arbitrator.

1.2. Capacity of arbitrator

Most legal systems make provisions on the limitation as to the capacity of certain persons, such as a minor, becoming a party to a contract.[679] The reason for this is that the law wants to protect such persons from being taken advantage of. The question with respect to the capacity of an arbitrator is whether a person who lacks legal capacity can be appointed as an arbitrator. In practice the domestic laws and international laws on arbitration do not pay much attention to this issue.

Most countries, including England, Laos, Thailand, United States of America and Vietnam, do not require legal capacity of arbitrators. The parties can choose any person, whether or not he has legal capacity [680] to act as an arbitrator. The parties must bear in mind that an arbitrator exercises a judicial function, to hear and settle the dispute between them. If they appoint someone who is unable to exercise such a function properly, they bear the risk.[681] Accordingly, any award made by such a person maybe unsound and possibly

---

[677] *Ibid.*

[678] The CAL, Article 13.

[679] Thai Civil and Commercial Code, Article 21.

[680] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-35.

[681] Mustill M and Boyd S, *op.cit.* footnote 676, at p.247 note 5.

not binding.

Furthermore, if they appoint someone who has no capacity at all, such as an infant, the arbitration agreement may not be enforceable in the countries [682] which apply to the New York Convention. The New York Convention Article II(3) provides that

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

There is no doubt that an infant cannot act as an arbitrator. The arbitration agreement, which appoints an infant as arbitrator, will be deemed inoperative or incapable of being performed.[683]

However, the Chinese Arbitration Act 1994, [684] requires legal capacity of an arbitrator by providing that the arbitration committee shall appoint arbitrators from fair and righteous persons. Arbitrators shall meet one of the following conditions:

(1) at least 8 years in arbitration work;

(2) at least 8 years working as lawyer;

(3) at least 8 years as adjudicator;

(4) a senior post in legal research or education;

(5) having legal knowledge and engaged in professional capacity in economic trade in a senior post or equivalent.

Thus, although the national law may not require the parties to have

---

[682] England (Arbitration Act 1975, article 1), USA, Thailand and China but not Vietnam and Laos.

[683] van den Berg A, *op.cit. footnote 142*, at p.159.

[684] Article 13.

legal capacity, it is the duty of both parties to select a person who can exercise a judicial function. It is also to the parties' benefit to do so. The consequence of a wrong selection of arbitrator may prove troublesome from the very beginning of the arbitral process until the enforcement stage of the award. In institutional arbitrations, the institution will select a person who has the capacity to perform the duty as arbitrator.

In certain institutional arbitrations, such as London International Court of Arbitration[685], those persons who can be listed on the LCIA have to pass the Institutional examination. This guarantees that the arbitrators under the LCIA will perform their function effectively. Other institutions, such as the Arbitration Institute Ministry of Justice, select persons who are specialists in various fields, such as law, engineering, etc. Although this can ensure that these persons can carry out their duty, it is not always a guarantee that they will, even if they are lawyers. This is simply because they may only know the field with which they are familiar, but not the legal framework of an arbitration. This may cause substantive damage to the parties who nominate them and any award rendered by them may not be legally enforceable.

It is worth noting that, although the national law does not require an arbitrator to have legal capacity, the parties to an arbitration should exercise extreme care in selecting their arbitrator(s).

2. Appointment of Arbitrator

The appointment of an arbitrator to decide a dispute is the most essential factor at the initial stage of any arbitration i.e the arbitration cannot processed without the appointment of an arbitrator.

Thus, the appointment of an arbitrator should be carried out without delay. There are two main problems in appointing an arbitrator. First, how many arbitrators should be appointed and secondly, how should the arbitrator be appointed.

---

[685] Hereinafter "LCIA".

2.1. Number of arbitrators

The first question that arises in choosing an arbitrator is how many arbitrators should be appointed. The number of arbitrators may be agreed by the parties, either in advance by virtue of an arbitration clause, or later on in a submission agreement. In practice, it is generally difficult for the parties to determine the number of arbitrators in advance.[686] How many arbitrators will be appropriate for their case depends upon the type of dispute(s) which may arise. However, if the parties intend to determine the number of arbitrators in advance, such a pre-determination does not necessarily have to have disastrous consequence.[687]

As a general principle, the parties are left free by the law to organise the arbitral tribunal as they see fit. In particular, they are allowed to freely determine the number of arbitrators that suits their case best.[688] They enjoy the complete freedom to appoint one or more third parties, in even or uneven numbers to determine their dispute.[689]

In practice, it is important to select an uneven number in order to avoid the incidents of a deadlock.[690] It is difficult to envisage the circumstances in which it is appropriate appoint an even number.[691] In some jurisdictions an uneven number of arbitrators is a mandatory requirement. Thai law and Laos law do not require an uneven number. The TAA requires that there may be one or several arbitrators. [692] The LSED also provides that there may be one or several arbitrators depending on the agreement of the parties. [693]

However, the new draft Thai Arbitration Act requires that the number

---

[686] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.205.

[687] Redfern A and Hunter M, *op.cit.* footnote 146, at para. 4-12.

[688] David R, *op.cit.* footnote 138, at p.227.

[689] *Ibid.*, at p.229.

[690] Born G, *op.cit.* footnote 387, at pp.59, 60.

[691] Redfern A and Hunter M, *op.cit.* footnote 146, at p.4-14.

[692] TAA, Section 11 para.1.

[693] LSED, Article 28 cops with Article 22 para.1.

of arbitrator be an uneven number.[694] The Chinese Arbitration Act also requires an uneven number by providing that "An arbitration tribunal may be constituted by either three arbitrators or one arbitrator. An arbitration tribunal composing three arbitrators shall have a presiding arbitrator". Vietnam law is silent on this matter. However, it is understood that Vietnam law takes the same line as Chinese law. The Statute provides for the appointment of one[695] or three[696] arbitrators. It says nothing about an even number. Thus, an even number of arbitrators in Vietnam is impossible.

The Model Law does not require an uneven number of arbitrators, it gives the parties the freedom to determine the number of arbitrators[697] by providing that the parties are free to determine the number of arbitrators.[698]

I would submit that, the number of arbitrators should be uneven in order to avoid the incidents of deadlock and the mandatory rules of the place of arbitration.

2.1.1. Sole arbitrator

The parties to an arbitration agreement often choose a sole arbitrator. The reasons for this is speed and economy.[699] In international commercial arbitration, arbitrators live in different countries and will generally have some other occupation.[700] Appointments for meetings or hearings can be more easily arranged with a sole arbitrator than with an arbitral tribunal of three arbitrators, as there will be a smaller number of people to consult.[701]

Besides, the arbitration proceedings will be carried out more quickly

---

[694] Section 16 para.1.

[695] SVIAC, Article 7.

[696] SVIAC, Article 6.

[697] UN Doc. A/CN.9/233, para.93 (28 March 1983).

[698] Article 10(1).

[699] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.113.

[700] David R, *op.cit.* footnote 138, at p.224.

[701] Redfern A and Hunter M, *op.cit.* footnote 146, at p.4-15.

since a sole arbitrator does not have to spend time consulting with colleagues in an endeavour to arrive at an agreed or majority determination of the matters in dispute. He needs only to make up his own mind.[702] With respect to cost this should be significantly lower as the parties will need to bear the costs of the fees and expenses of one arbitrator rather than three.

In cases where parties do not agree upon the number of arbitrators, most institutional rules or certain laws have supplementary provision for nomination of a sole arbitrator.

The ICC Rules provide that "Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such a case, the Claimant nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the Respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the Claimant."[703]

The English Arbitration Act 1996 prefers a sole arbitrator by providing that if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.[704]

The new Draft Thai Arbitration Act also provides that where the parties fail to reach agreement on the number of arbitrators in an arbitral tribunal, the arbitral tribunal shall consist of a sole arbitrator[705].

At present, the Thai Arbitration Act provides for three arbitrators in such a case. The reason for this change is that the new Draft is expected to be applied at both the domestic and international level. Most domestic cases are small ones. Thus, the presumption of three arbitrators may cause unnecessary

---

[702] *Ibid.*

[703] Rule 8.2.

[704] Section 15(3).

[705] Section 16, para.3.

expenses.

However, although a sole arbitrator is recommended by most authors,[706] in practice, there are certain factors which the parties should take into account when deciding this matter. It should be borne in mind that a sole arbitrator has to carry out his task alone. When he deals with a case involving complex questions of law or fact, no matter how strong his personality maybe, he will have the burden and responsibility of deciding the case alone[707].

In such a situation the deliberations of a panel of arbitrators maybe necessary to ensure a more thorough analysis of the issues.[708] For this reason in international disputes, arbitrators prefer to sit with two other arbitrators with whom they can discuss the case.[709]

Furthermore, I would submit that a sole arbitrator is not suitable for international commercial arbitration. Parties, in most cases, are from different countries and they may have different views on the standards of justice. It is therefore appropriate to have the different views represented by a panel of arbitrators.[710]

2.1.2. Two arbitrators

As already mentioned, the freedom to choose the number of arbitrators may be denied in certain jurisdictions. The two-arbitrator system is well recognised in England. In the practice of certain trades and specialised markets, two arbitrators are preferred, plus a subsequent umpire if the two party-appointed arbitrators cannot agree between themselves.[711]

The Arbitration Act 1996 also recognises the two-arbitrator system. In

---

[706] See Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-15; Deen B, "Arbitration Improves the Justice System", 50 *Dis.Res.J.* 57 (1995).

[707] David R, *op.cit.* footnote 138, at pp.224-245.

[708] Bond, "The International Arbitrator", 12 *J.Int'l.L.Bus.* (1992) 4.

[709] Redfern A and Hunter M, *op.cit.* footnote 146, at p.4-17.

[710] David R, *op.cit.* footnote 138, at p.225.

[711] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-16.

order to break a deadlock, the Act provides for an additional arbitrator by providing that "Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal."[712]

The Act also provides for the function of a Chairman as "(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.

(2) If, or to the extent that there is no such agreement, the following provisions apply.

(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).

(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3)."[713]

There have been certain changes in the English approach with respect to this matter. According to the Arbitration Act 1950, every agreement which refers to two arbitrators shall be deemed to include a provision that the two arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree.[714] The function of an umpire is to make decisions if the arbitrators cannot agree.[715]

There were some problems with this system. An umpire only plays the role of breaking a deadlock should one arise. He could be appointed at the beginning of the hearing or at the end after the two arbitrators are deadlocked

---

[712] Section 15 (2).

[713] Section 20.

[714] Section 8(1).

[715] See Arbitration Act of 1950, Section 8(2)(3).

in their decision. If he is appointed at the beginning and the two arbitrators in fact reach a decision, the appointment would be meaningless and also resulted in wasted costs and time.

On the other hand, if the umpire was appointed at the end of the hearings and deliberations, he would have to spend extra time to rehear witness testimonies or to request additional information in order make his decision.

Under to the new approach, a Chairman is required by virtue of Section 15(2) to be appointed in the case where the parties appoint two arbitrators. The Chairman should be appointed at the beginning of the hearing.[716] Unlike, an umpire, his tasks is not to break deadlocks but rather that of arbitrator in that he actually participates in deciding the dispute.[717]

It is worth noting that the Act still retains the umpire system with some changes. An umpire shall be appointed only by the arbitration agreement. This differs from the 1950 Act, where an umpire could be appointed by the arbitration agreement or by the two party-appointed arbitrators[718] or by the court[719].

The 1996 Act requires that the umpire may be appointed before the substantive hearing[720], while according to the 1950 Act, an umpire could be appointed at the beginning or at the end of the hearings and deliberations.[721]

It is interesting to note that the Thai Arbitration Act also provides for the appointment of an umpire, but he can only be appointed in situations where the two arbitrators cannot agree.[722] However, the new Drafted Arbitration Act

---

[716] See Arbitration Act of 1996, Section 16(5)(b).

[717] See *Ibid.*, Section 20(3).

[718] See Section 8(1).

[719] See Section 8(3).

[720] See Section 16(6)(b).

[721] See Section 8(1).

[722] See Section 16.

has abandoned use of even numbers of arbitrators. Accordingly, the umpire system no longer exist in Thailand.

In practice, in international contracts, the appointment of two arbitrators is not preferred as it can prove troublesome in cases where there is a deadlock decision. When such a situation arises, the appointment of an umpire may result in the waste of time and money.

Accordingly, three arbitrators are generally nominated in international contracts. Although the 1996 Act has been amended in order to replace the use of an umpire with the use of a Chairman, in effect the Chairman has more power than an umpire does.

The question which may be asked is whether this new provision may operate to conflict with the will of parties who desire to have two arbitrators to determine their dispute. It is my submission that, parties are best advised to avoid the appointment of two arbitrators to determine a dispute.

2.1.3. Three arbitrators

There is a growing preference in international commercial disputes, to submit them to an arbitral tribunal consisting of three arbitrators, save in cases where there is a small amount of money involved.[723] There are many reasons underlying this preference.

First, international commercial disputes today tend to involve substantive sums of money. In addition, most of these cases tend to involve complex questions of law and fact. It is therefore, very difficult although not impossible, for a sole arbitrator to handle these cases. Consequently, the parties may not have much confidence in the final decision rendered by a sole arbitrator. If the arbitral tribunal is composed of three arbitrators, no doubt this has the advantage of bringing wider knowledge and experience to the decision-making process. Thus, the ultimate award is more likely to be acceptable to the

[723] Domke M, *op.cit.* footnote 226, at p.312.

parties.[724]

Secondly, there is also the psychological aspects.[725] Parties to international commercial arbitration tend to come from different cultures and legal systems. They will therefore have more confidence in a tribunal if their appointed arbitrator is someone from their country and a similar background.. This may serve to reduce the possibility that there will be major misunderstanding by the other parties. Thus, the parties may feel a sense of reasonable completeness in the examination of the issues, which no doubt would be enhanced with the use of a three-arbitrator tribunal.[726]

The UNCITRAL Rules[727] and Model Law[728] prefers the use of three arbitrators and so provides, that if the parties have not previously agreed otherwise, three arbitrators will be appointed. The Thai Arbitration Act 1987 also prefers the use of three arbitrators and provides that if the agreement does not specify the number of arbitrators, the parties shall each appoint one arbitrator, and the said arbitrators shall jointly appoint a third person as an additional arbitrator.[729]

Conclusion

In my opinion, there is no hard and fast rules on the selection of the number of arbitrators, i.e. it is determined on a case-by-case basis. Although, in theory, a small case should appoint a sole arbitrator, this is not always the case, if the parties think the case involves complex legal issues. The same parties in a different situation may however, use a different number of arbitrators – it all depends on what the parties need in a given situation.

---

[724] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-18.

[725] See Goldstajn A, "Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects", in P. Sarcevic (ed.), *Essays on International Commercial Arbitration*, 27 at p.44.

[726] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.113.

[727] UNCITRAL Rules Article 5.

[728] Model Law Article 10(2).

[729] Article 11 para.2.

I would submit, that what the parties should avoid doing is appointing an even number of arbitrators. Notwithstanding this comment, in special circumstances it maybe more appropriate for the parties to nominate an even number of arbitrators but they must do so with great care. In this respect, they should examine the law of the place where the arbitration is to take place to determine whether or not such this number is permitted. In addition, they should prepare in advance how they will deal with the event of a deadlock should one arise in the proceedings.

2.2. Methods of Appointing an Arbitrator

The right to appoint an arbitrator is a fundamental right enjoyed by the parties to an arbitration.[730] All institutional rules and national laws guarantee the freedom for the parties to provide for the appointment of an arbitrator(s) in any terms which they consider appropriate. However, this freedom is not without some restrictions.

A restriction on the freedom of the parties in this respect would seem to be the norm in most countries: it is imperative that the parties be assured of the full equality in the constitution of the arbitral tribunal.[731] Although the implications of the principle of equality are not always clear, under no circumstances will one of the parties be permitted to appoint all or the majority of the arbitrators (discussed below).[732]

Although the parties have the freedom to choose a third person to act as arbitrator, this does not mean that they can force this third person to do so. The Thai Arbitration Act provides that the appointment of an arbitrator shall be carried out with the consent of the person to be appointed.[733]

Apart from the consent of the appointee, according to certain

---

[730] Bedjaoui, "Challenge of Arbitrators, in International Arbitration", in van den Berg A, (ed.) *International Arbitration in a Changing World*, 85 p. 86.

[731] David R, *op.cit.* footnote 138, at p.230.

[732] *Ibid.*

[733] Section 12; see also Section 18 of the TDAA.

jurisdictions, the appointment of an arbitrator is required to be in writing. This is because the appointment is considered an important part of the process. In effect , it may also verify whether or not these third persons have the power to act as arbitrator.

The Thai Arbitration Act provides that "...The appointment shall be made in writing, dated and signed by the person appointing the arbitrator".[734] The LSED also requires that in all cases, the arbitrator must agree in writing to his appointment.[735]

The method of appointing an arbitrator depends entirely on the arbitration agreement. Most national laws leave the choice to the parties to determine the method of appointment of an arbitrator(s).

Consequently, there are various methods of appointing an arbitrator. The most usual ones are as follows:

1) by the arbitration agreement ;

2) by a list system ;

3) by an appointing authority ;

However, if the method agreed to by the parties fails, the appointment of an arbitrator will by a court, will become necessary. Each method of appointing an arbitrator is considered below.

2.2.1. By arbitration agreement

The parties may determine the third person to be appointed as an arbitrator by naming such person in the arbitration agreement or they may do so after the dispute arises. In some countries there is no binding arbitration agreement if the parties have not agreed on the actual name(s) of the arbitrator (s).[736] The reason for this is that it is regarded as sufficient to eliminate all

---

[734] Section 13; see also Section 18 of the TDAA.

[735] Article 28 cops with Article 22 para.6.

[736] Bond, *op.cit.* footnote 708, at p.4.

dangers of partiality.[737] However, the requirement of putting the actual name(s) of arbitrator(s) on the arbitration agreement has been eliminated in almost all countries for two important reasons.

First, such a requirement constitutes a major obstacle in the development of the practice of arbitration.[738] There is no guarantee that when a dispute actually arises that the person named in the arbitration clause will still be independent, available, trusted, or even be alive.[739]

Secondly, closely related to the first is the arbitration clause which has named the arbitrator who is not able to act as arbitrator when a dispute arises will be regarded as an inoperative clause and cannot be enforced[740], unless it is saved by some provisions of the relevant applicable law. That means that the arbitration agreement cannot be enforced.

If the parties to an arbitration agreement want to determine the third person who is to act as their arbitrator, it is suggested that they do so after a dispute arises. They need only to put the number of arbitrators in the arbitration clause and should leave the names of the arbitrators to be determined after a dispute arises.

It should be understood, however, that should such a situation arise, it will not necessarily be an easy task to agree on. However, most laws and institutional rules are prepared for these a situations, i.e., if one of the parties fails to appoint an arbitrator, the national court or institution will make the appointment on their behalf. (discussed below).

2.2.2. By list system

In the case where parties have to jointly appoint a sole arbitrator or the third arbitrator, it is quite difficult, although not impossible, for them to reach

---

[737] David R, *op.cit.* footnote 138, at p.252.

[738] *Ibid.*, at p.230.

[739] Bond, *op.cit.* footnote 708, at p.4.

[740] Article 2(3).

an agreement. In such a case, the appointment by an agreement is less effective. This is simply because often the parties do not trust each other and so a name proposed by one party may possibly be rejected by the other party. In other words, the name comes from what is considered by each party a suspect source. The success of this method is explained simply by reason of the fact that each side does not know what the other is doing.

The appointment of an arbitrator(s) by the list system is used in both *ad hoc* and institutional arbitrations. When it is used in an *ad hoc* arbitration, the parties exchange a lists of arbitrators whom they consider acceptable. It is very much a "hit and miss" system, since the odds are slight that the same names will appear on each list.[741] This method makes it easier for the parties to choose an arbitrator.

Many institutional arbitrations, such as the LSED, VAIC and CIETAC, also use the list system. However, the system used by the institutional rules may be different from that used by *ad hoc* arbitration. In the latter case, each party compiles a list of persons he considers acceptable.

In the former case, a list of prospective arbitrators is compiled by the institution. That institution invariably sends out the same list of names to each party. It is therefore possible that the list does not reveal a person acceptable to both parties, or that a person acceptable to the parties is not able or does not wish to accept the appointment, and there are no other eligible persons on the lists. Or it may be that a conflict of interest becomes evident in respect of an otherwise acceptable candidate. However, in such a situation, the appointment is then made directly by the institution.

PRC

Under the CIETAC Arbitration Rules, when the claimant submits his Application for Arbitration, along with his other documents, he should appoint one arbitrator from the Panel of Arbitrators of the Arbitration Commission, or

---

[741] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-27.

authorise the Chairman of the Arbitration Commission to make an appointment on his behalf.[742]

After receipt of the Application for Arbitration with the attachments and after examination, the Secretariat of the Arbitration Commission decides that the claimant has completed the formalities required for arbitration, the Secretariat shall immediately send to the respondent a Notice of Arbitration together with other documents a the list of arbitrators.[743]

The respondent shall, within 20 days from the date of receipt of the Notice of Arbitration, appoint an arbitrator from the Panel of Arbitrators of the Arbitration Commission, or authorise the Chairman of the Arbitration Commission to make such appointment.[744]

Laos

The LSED Rules provide that when the parties agree to have a sole arbitrator, the OSE will send the same list of at least three arbitrators to every party for selection, and setting order of preference within twenty days from the date of the receipt of the list. After receipt of the list of arbitrators chosen by the parties, the OSE will appoint an arbitrator based on the order of preference submitted by the parties.[745]

Thailand

TAIMJ

Under the TAIMJ rules[746], if a sole arbitrator or the presiding arbitrator is to be appointed, the following procedure shall apply:

1) The institute shall dispatch, without delay, an identical list containing at least three names from the list of arbitrators to the parties;

---

[742] Article 14 (3).

[743] Article 15 para.2.

[744] Article 16.

[745] Article 28 cops with Article 22 para.2.

2) Within 15 days from the date of the receipt of this list, each party may return the list to the Institute after having deleted the name or names to which he objects and number the remaining names on the list in order of his preference;

3) After the expiration of the above period of time, the institute Director shall appoint the sole arbitrator or the presiding arbitrator from among the names approved on the lists which are returned to him and in accordance with the order of preference indicated by the parties;

4) If any party fails to perform his duty under (2), the Director may exercise his discretion in appointing the sole arbitrator or the presiding arbitrator. In making the appointment, the Director shall consider mainly the independence and impartiality of the arbitrator;

5) The parties may, by consensus, appoint a person not registered with the Institute to be the sole arbitrator or the presiding arbitrator.

TCAI

According to Article 8 of the TCAI Rules, the parties may jointly appoint a sole arbitrator, or they may appoint one arbitrator each from among the persons whose names are listed on the panel provided by the TCAI, or they may appoint any other person.

In the case of there being two arbitrators, both of them shall jointly appoint as Chairman a third arbitrator to complete the arbitration tribunal. If they are unable to agree on the appointment of the third arbitrator within 30 days, the matter shall be referred to the Thai Commercial Arbitration Committee who shall make the appointment.

Vietnam

The VIAC Rules also take the same approach as the CIETAC Arbitration Rules. Under the Vietnamese system, a plaintiff who wants to

---

[746] See Rule 11,12(2).

submit his dispute to the Centre must request for arbitration to the Centre. Such a request must be written in the Vietnamese, English, French or Russian.[747] The request should contain the name of the arbitrator whom the plaintiff has chosen from among the listed arbitrators of the Centre,[748] or a request made by the plaintiff that an arbitrator be appointed by the President of the Centre on his behalf.[749]

After receipt of the Request for arbitration, the Registrar of the Centre shall notify the defendant thereof and send to the latter a copy of such Request and those of the accompanying documents together with the List of arbitrators.

The Registrar of the Centre shall, at the same time, request the defendant to submit to the Centre his statement of defense, supported by pieces of evidence, within thirty days from the date of receipt of the copy of the Request for arbitration. At the request of the defendant, this time-limit may be extended but shall not, however, exceed two months.

The defendant shall, within the said time-limit, proceed with the choice of his arbitrator and notify the Centre thereof or, alternatively, request the President of the Centre to appoint an arbitrator on his behalf.[750]

Unlike the Thai and Laotian systems under which the list of arbitrators should be sent to both parties at the same time, giving both parties equal time to consider the list of arbitrator- under the CIETAC and Vietnamese system the plaintiff has more time to consider the person on the list than the defendant does. The plaintiff, of course, will request for arbitration after he takes as much time as he wants. The defendant has twenty or thirty days, under the CIETAC Arbitration Rules or Vietnamese Arbitration Rules respectively. It is doubted whether or not both systems treat both parties equally.

---

[747] Article 5 para.2.

[748] The list can be obtained from the Centre.

[749] Article 5(e).

2.2.3. By appointing authority

Apart from the appointment of an arbitrator by mutual agreement, and selection by the list-system, an arbitrator may also be appointed by a third party authorised by the parties in disputes.

The parties may not want to have the burden of choosing an arbitrator. They thus may empower someone to exercise this power on their behalf. Although it is recommended that the parties agree to an appointing authority in *ad hoc* arbitration[751], it should be borne in mind that in certain situations an inappropriate arbitrator may be appointed. The appointing authority may know more about particular arbitrators than the parties do, but they know less about the dispute than the parties do.[752]

2.2.4. By court

Another problem with arbitrator appointment is that the parties may fail to appoint an arbitrator, or cannot agree with each other on who should be appointed in the case where a sole or third arbitrator is required.

Most of the national laws and institutional rules on arbitration contains provisions with respect to the situations where the parties fail to or cannot agree on an appointment, the national court or the institution in question will do so on their behalf.

It is sound for the court to intervene in such a situation. Once the parties choose arbitration as a means to settle their dispute, the arbitration should not fail easily because of a defaulting party. Or in the case where the parties cannot agree on who to appoint, this does not mean that they both should attempt to avoid the arbitration process. Instead, it means that the arbitration should proceed albeit that they cannot agree on the aspect of appointing an arbitrator and in which case the court should assist. If the parties

---

[750] Article 8.

[751] Born G, *op.cit.* footnote 387, at p.63.

[752] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-13.

no longer want to arbitrate, they should then voluntarily terminate the arbitration agreement.

PRC

The CAL provides that "Where parties fail to agree on the method to form an arbitration tribunal or to select an arbitrator within the time limits prescribed by the rules of arbitration, the supervisor of the arbitration commission shall make the necessary appointment"[753].

It is interesting to note what happens when a court appoints an arbitrator because the parties have failed to exercise this right. In this situation, the appointment is made directly by the court and the Institution stated above without using the list procedure. The court is not bound to use the arbitrator list of any institution. In addition, the institution will not use its list of arbitrators because it is exercising this function as consequence of a default by the parties, a right attached to the parties individually, in which case, the list procedure is considered inappropriate.

Laos

According to the LSED, if a party or the two parties fail to choose the arbitrator, or do not do so within the required time, the OSE will request the People's Court to do so within fifteen days, to ensure the independence and impartiality of the conciliator.[754]

Or, if the two arbitrators do not choose a third, are unable to choose or do not choose within the required fifteen days from the date of the appointment, the OSE will request the People's Court to do so.[755] Again, the court is not obliged to appoint the arbitrator from the institution's list.

---

[753] Article 32.

[754] Article 28 coped with Article 22 para.5.

[755] *Ibid.*

Thailand

The TAA provides that the appointment shall be carried out within the time specified in the arbitration agreement, or, if such a stipulation is absent, within a reasonable time.[756] If a party fails to do so within the said time, or is not willing to appoint an arbitrator, another party may then file a petition with a competent court for an order appointing an arbitrator.[757]

The Model Law also provides for this situation by requiring that, if a party fails to appoint an arbitrator within thirty days after receipt of a request to do so from the other party, the appointment shall be made, upon request of a party, by the court.[758]

The difference between the TAA and the Model Law is the period within which the party may make the request to the court. The Thai Act uses the term "a reasonable time" which is quite flexible and accommodating to each case. On the other hand, this term leaves it open to interpretation by the court. It may also be used as a tool to delay the arbitration process. The Model Law is quite clear on this matter.

Vietnam

The appointment of an arbitrator by the court is not impossible in Vietnam. This is by virtue of the fact that there is is no set arbitration law.

3. Requirement of Equality of Parties to Appoint Arbitrator

According to the New York Convention, an award will be enforceable only if the party against whom the award is invoked is given proper notice of the appointment of arbitrator. This means that the Convention requires the exercise of equality between the parties in appointing an arbitrator. This is conforms to to the spirit of arbitration which requires complete equality

---

[756] Section 12.

[757] Section 13.

[758] Article 11(3)(a)(b).

between parties.[759]

Thus, the formulas for appointing an arbitrator which prevail in both arbitration law and institutional rules are that

1) When a sole arbitrator is required by parties, they shall jointly appoint such an arbitrator.

2) If two arbitrators are required, each party appoints one arbitrator.

3) In the case of three arbitrators, each party appoints one arbitrator, and the third arbitrator is jointly appointed by both parties or by the appointed two arbitrators.

These approaches respect both party autonomy in the appointment of an arbitrator, and the equal right of the parties to do so. In effect, there is a balance between party autonomy and equality of the parties. However, in practice, the appointment of an arbitrator(s) is not straightforward.

There are certain situations which may cause difficulties of equity between both sides. This is evident in the case of multi-party arbitrations which involves more than one party on either side[760], such as an arbitration in a consortium agreement.

The situation always arises when two or more parties enter the same arbitration agreement which contains the provision that requires three arbitrators. When a dispute arises, all parties will be automatically divided into two sides, claimant and respondent. It may be joint claimant or joint defendant, as the case may be.

In such a case, each side appoints one arbitrator and the two appointed arbitrators will appoint the third one. The problem of equality of the parties arises when one party can appoint one arbitrator but the rest of the parties (more than one) have to jointly appoint one arbitrator. This was the situation in

---

[759] David R, *op.cit.* footnote 138, at p.232.

[760] Wetter J, "Overview of the Issues of Multi-party Arbitration", in *Multi-party: View for international arbitration specialists*, ICC Publication No. 480/1 (1992), at p.10.

the Dutco Construction Co. (PVT) Ltd. v. BKMI Industriean Lagen GmbH and Siemens AG case[761].

The cited case concerned a consortium agreement between three parties, Dutco, BKMI and Siemens. The agreement contained a standard ICC arbitration clause. Later on, Dutco became the claimant and BKMI and Siemens became the joint respondents. Dutco appointed its arbitrator, and the ICC instructed the two respondents to jointly appoint an arbitrator.

The two respondents took the position that each had different interests and therefore they were each entitled to appoint their own arbitrator. Since, under the ICC system, it is possible to have only three arbitrators (two party-appointed arbitrators and one presiding arbitrator), the ICC maintained its position that the respondents should together appoint an arbitrator.

The Dutco company, BKMI and Siemens entered into a consortium agreement which contained an ICC arbitration clause expressly providing for the settlement of dispute by an arbitral tribunal composed of three arbitrators. Dutco, as claimant, filed a request for arbitration against BKMI and Siemens.

The time came for the designation of the arbitrators. Whilst Dutco, claimant, freely appointed its arbitrator for the approval of the ICC International Court of Arbitration, each of the defendants argued for the right to appoint their own arbitrator. The ICC Court denied this contention. The defendants proceeded to make the required appointment under protest, and then challenged the arbitral award, after it had been made, on the basis that the arbitral tribunal had been irregularly constituted.[762]

The Cour de cassation emphasised the equality of the parties by holding that "any and all parties to an arbitral agreement should be kept on the same footing in their right to contribute to the constitution of their arbitral tribunal. Hence, a party who, in contrast to other parties, has been deprived of

---

[761] XV Yearbook Com. Arb. 124 (1990).

[762] Delvolve, "Note: Multipartism", 9 *Arb.Int'l.* 198 (1993).

such a right as an effect of either the arbitration agreement or the circumstances of the case, could claim annulment of an award rendered in that arbitration."[763]

Furthermore it was held that "none of the parties could waive its right in advance; such renunciation could be valid only if expressed after a dispute had arisen".[764]

The Court's decision gave rise to confusion between party autonomy and equality of the parties. The Court attempted to widely interpret the term "equality". In this case, once the parties entered into the arbitration agreement, none of them knew who was going to be claimant or respondent. The one thing they could be sure of was that, one of them must stand alone on one side and the other two jointly stand on the other side. Nevertheless, they still required three arbitrators, two of them to be appointed by three parties but two sides.

What was their intention? Should it be interpreted that they wanted "each side" to appoint one arbitrator? If so, can it be deemed that the parties have "equal" right to appoint?

If the term "equality" is to be interpreted in accordance with the Court's decision, what should be the interpretation in the case where the arbitration agreement determines that "the arbitral tribunal composes of three arbitrators appointed by each party". Certainly, all parties have an equal right to appoint their own arbitrator; the claimant appoints one, and the respondents appoint two.

Consequently, the arbitral tribunal is composed of one arbitrator from the claimant and the other two from the defendants. Is this "equal" in the sense of the Court's decision? Is not it strange if such a situation is deemed "equality"? Can the claimant have a chance to win the case? Can one say that such a case is "fair play"?

---

[763] *Ibid.*

[764] *Ibid.*

In the Dutco case, it should be recognised in the first place that the parties had the freedom to appoint their own arbitrator. In theory, it is not wrong for them to determine the arbitral tribunal composed of three arbitrators; each party appoints one, and the two appointed arbitrators shall appoint the third one.

The problem at this moment is the intention of the parties. They knew that each party could not equally appoint two arbitrators. They also knew that each side, claimant and defendant, could equally appoint two arbitrators. In other words, they never intended to waive the "equal right" to appoint an arbitrator. But they need equal right for each side to appoint arbitrators in order to constitute a truly "neutral" arbitral tribunal. They knew that the equal right for each party could hardly be realised. Therefore, they tried to let "each side" equally appoint an arbitrator. Thus, the arbitration clause should be interpreted that "each side" can appoint one arbitrator, and that then the two appointed arbitrators shall appoint the third one.

It is true that the fundamental principle of the arbitral process and its basis has been, and must always be, the equal treatment of the parties.[765] However, there are many circumstances in which equality of the parties, in a commercial contract is more a fiction than a reality.[766]

Is it true that parties to arbitration search for justice for themselves by using arbitration instead of a national court? If so, do they need equality for this? The answer, of course, is positive. What is the equality they expect? Is it correct to say that the equality of the parties to appoint their arbitrator is aimed to constitute a neutral arbitral tribunal?

The answer should be positive. It is evident that in normal situations when two parties to an arbitration agreement can each appoint one arbitrator, and the two appointed arbitrators appoint the third one, they can be said to have an equal right of appointment and it can also be said that the arbitral

---

[765] Herrmann G, *op.cit.* footnote 452, at p.47.

[766] David R, *op.cit.* footnote 138, at p.238.

tribunal is "neutral".

In the case of multi-party arbitration, the situation is different. In the case like Dutco, the term "equality" for each party to appoint an arbitrator, and "neutral" for an arbitral, can hardly go together. The parties in Dutco carelessly incorporated Article 2(4) of the ICC Rules. The problem, like in other cases of multi-party arbitration, was as a result of careless drafting.[767]

However, as a general rule of party autonomy is that the will of the parties will be respected. In this regard, the court should interpret the arbitration clause by examining the real intention of the parties when they enter into an arbitration agreement. How do they understand the term "each party"? And each side?

In the case of multi-party arbitration, like the Dutco case, parties should empower the appointing authority to appoint an arbitrator on their behalf. By doing so, the parties can achieve equality, both with regard to having the the right to appoint an arbitrator and having the benefit of a neutral arbitral tribunal.

4. Qualification of Arbitrator

The function of arbitrators is considered a judicial one. Thus, they "should posses the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion."[768] However, the qualification of arbitrator may be determined either by the parties agreement, or by the law of arbitration, or the rule of arbitration institution, or by all three.

4.1. Arbitrator qualification determined by parties[769]

The parties have the freedom, subject to certain limitations of the applicable arbitration law which will be discussed later, to determine the qualification of an arbitrator whether he should be a lawyer or non-lawyer.

---

[767] Wetter J, *op.cit.* footnote 760, at p.14.

[768] *American Eagle Fire Ins. Co. V. New Jersey Ins. Co.*, 240 NY 398, 148 NE 562 (1925).

[769] This is deemed a true qualification. Mustill M and Boyd S, *op.cit.* footnote 676, at p.247.

They may determine the qualification of an arbitrator either in the positive form (such as "The arbitrator is to be a 'merchant' or a 'commercial man' or an 'indifferent person'"[770]), or negative form (such as "The arbitrator shall not be a lawyer"[771]).

I have come to the conclusion that it is not always easy to determine what qualifications an arbitrator should have. I believe, that the qualifications of an arbitrator depends on the facts of the case and on the nature of the dispute. I am also of the opinion that the personality of a prospective arbitrator is important as well. A person may be well qualified in one case, but not in another. It is impracticable, for the purpose of this study, to enumerate a full list of qualifications of an arbitrator, but it may be useful to discuss what professional qualifications an arbitrator should have.

4.1.1. Lawyer

International commercial arbitration does not take place in a vacuum. There are usually at least two legal systems which may underlie the transaction, i.e., the arbitration law of the place of arbitration, and that of the place of enforcement. In addition, most arbitrations will deal with the rules, either institutional arbitration or an *ad hoc* one, which the arbitrator is obliged to follow. An arbitration will run smoothly and effectively if the arbitrator understands all of the laws and rules being applied.

Should a lawyer[772] be selected to act as an arbitrator? It is reasonably inevitable that a lawyer appointed to act as an arbitrator may create certain difficulties if he does not understand the requirements of businessmen, which are basically two-fold - the resolution of the dispute, and the maintenance of a good relationship with their corresponding disputant.[773] He may make the

---

[770] *Ibid.*, at p. 248.

[771] *Ibid.*, at p.249.

[772] Kerr M. says that "It is no over-generalising to say that businessmen generally prefer arbitration to litigation whereas lawyers do not." in M. Kerr, *op.cit.* footnote 382, at pp.164-165.

[773] Meason J and Smith A, *op.cit.* footnote 672, at p.26.

arbitration procedure unnecessarily complicated.[774] This may cause some serious problems, such as delay as generally the members of the arbitral tribunal come from different legal systems, particularly civil and common law systems.

The lawyer who has no experience in arbitration may also cause similar problems. In practice, arbitration is an art, it not only covers complicated rules of law or rules of arbitration but may also deal with aspects of a particular business and the parties' intent. Arbitration has been used as an effective mechanism of dispute settlement for many centuries[775] because of these merits. To fulfil the goal of arbitration, the parties must carefully select an arbitrator who "should be experienced in the law and the practice of arbitration..."[776].

In practice, most parties appoint a lawyer to act as an arbitrator.[777] There are two main reasons for this. First, in the case of three arbitrators, when each party appoints one arbitrator and the appointed arbitrators appoint the third one, each party fears that the opposite side will appoint a lawyer to act as arbitrator. This means that if one party does not appoint a lawyer, he may be at a disadvantage when the tribunal deliberates on the case.

The question is whether a lawyer can turn the situation to benefit his appointing party better than a non-lawyer. This is not necessarily the case. It is a misunderstanding of the parties. It should be borne in mind that both domestic law and international convention require an arbitrator to be impartial i.e. he is not does not represent the party who appoints him.

Secondly, at the heart of international commercial arbitration is that requirement that the award made is enforceable without complications. The

---

[774] *Ibid.*, at pp.42-43.

[775] Phillips, J., *Arbitration Law, practice and precedents* (ICSA Publishing 1988)pp.8-9.

[776] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-44.

[777] "Western nations have typically appointed full slates of attorneys, while developing nations have appointed a mixture of attorneys and non attorneys, with an emphasis on the latter. And of those actually appointed to serve as arbitrators, "they have almost uniformly been lawyers." (Meason J and Smith A, *op.cit.* footnote 672, at p.38).

whole arbitration process is worthless if that award is not enforceable. The parties tend to feel more confident that a lawyer will better render such an enforceable award[778]. This may be true but not necessarily the case, particularly in the cases that involve a trade association, which requires more specialist knowledge than legal knowledge.[779]

Although the laws of many countries are silent on this issue, it is understood and the practice that lawyers can be appointed to act as arbitrators in the PRC, Thailand, England, Laos and Vietnam. The list of arbitrators of institutions which are located in these countries includes both lawyers and non-lawyers. The PRC guarantees this by stating in the CAL that "The arbitration commission shall compile a list of arbitrators according to different professions."[780]

4.1.2. Judge

Parties sometimes would like to appoint a judge to act as arbitrator. The main reason for this is that a judge has been trained to be a decision maker in settling conflicts both with regard to the facts of the case and the law. However, in certain jurisdictions, a judge is prohibited from being appointed as arbitrator for ethical reasons. In the USA, for example, the American Bar Association Code of Judicial Conduct Cannon 5(E)[781] prohibits active judges from acting as arbitrators.

Other countries, such as Thailand, have no law prohibiting a judge from acting as arbitrator. The question is whether a judge can be appointed as an arbitrator in this jurisdiction. Legally, this can be done. The CPC affirms this approach by providing that a judge can be challenged, among other things, if he has acted as an arbitrator in the same case.[782] This means that in a case

---

[778] This is not always true. See *Hiscox v. Outhwaite*[1991] 3 W.L.R. 297

[779] See Meason J and Smith A, *op.cit.* footnote 672, at p.43.

[780] Article 13.

[781] See also New French Code of Civil Procedure Article 1451.

[782] CPC, Article 11(5).

where a judge is appointed as the arbitrator will be valid but he can not sit as judge in the same case. An judge can thus be legally appointed to act as an arbitrator in Thailand.

However, the former Supreme Court judge, Professor Jitti Thingsapatiya, has strongly recommended that an active judge should not act as arbitrator. He is of the opinion that such a function is against the ethics of judges. In practice, there is no active judge who has ever been appointed an arbitrator in Thailand.

4.2. Arbitrator qualification determined by law

4.2.1. General

It is generally accepted that a person who acts as a judge must be a disinterested person. This is derived from the maxim *nemo iudex in re sua*, which prohibits a man from being a judge in his own cause. This requires that a judge must be impartial.[783] The judge is expected to deal equally with the parties, otherwise, "the controversies of men cannot be determined but by war".[784] It is not impossible that a man may judge impartially even in his own cause.

However, it is fundamental that justice should both be done, and manifestly and undoubtedly be seen to be done.[785] It cannot be said that justice is seen to be done where there is a likelihood of bias arising from the fact that the judge has a relationship in the case which he judges.[786] In other words, the judge must be impartial and independent.

The rule of natural justice is applied not only to a national justice system but also to private arbitration. An arbitrator, according to the natural

---

[783] Jackson P, *op.cit. footnote 194*, at p. 26.

[784] *Ibid.*

[785] *Ibid.*, at p. 84.

[786] See *Ibid.*, at p. 85.

rule, must therefore be impartial and independent.[787]

According to Mustill and Boyd, "A person who is approached with a request to act, and knows that he has some kind of relationship with one of the parties, should remember that there is no keener sense of injustice than is felt by someone who has doubt about whether the arbitrator is doing his honest best. He should also bear in mind that the question is not just whether he really is impartial, but whether a reasonable outsider considers that there is a risk that he is not."[788]

All jurisdictions recognise this concept. The reason for this is that it is fundamental that states exercise its duty to serve and guarantee justice for its people. In order to achieve this every state gives courts the power to carry out this duty. They also support other means of justice, such as arbitration. Thus, justice, maybe carried out through a national court or an arbitrator and must be beyond all suspicion be independent and impartial.[789]

To fulfil the requirement of natural justice rule, most arbitration laws impose impartiality and independence qualifications as a requirement for an arbitrator. These two requirements are both viewed as being vitally important and rest at the heart of the arbitral process.[790]

The New York Convention, although it does not directly mention either of these requirement, implicitly recognises the consequences where there is a lack of independence or impartiality. On this basis the recognition and enforcement of an ward may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, is not in accordance with the law of the country where the arbitration takes place.[791] The laws in the PRC, Laos,

---

[787] Jackson P, *op.cit. footnote 194*, at p. 26.

[788] Mustill M and Boyd S, *op.cit.* footnote 676, at p.252.

[789] David R, *op.cit.* footnote 138, at p.252.

[790] Born G, *op.cit.* footnote 387, at p. 63.

[791] Article 5(1)(d).

Thailand and Vietnam also require that an arbitrator must be impartial and independent.

4.2.2. Impartiality

As stated above, the justice carried out by an arbitrator must be done, and must be seen to be done. Impartiality may ensure that justice is done, but cannot ensure that justice is seen to be done. The factor which can ensure the latter is the independence of the arbitrator. Thus, both terms are not interchangeable,[792] but they are related concepts.[793]

However, in practice, both terms have always been rightly or wrongly, used together. Most legislations and institutional rules require that an arbitrator must be independent and impartial.[794]

The term "impartiality" is more abstract than that of independence. It is the state of mind which may be the caused of a biased relationship between the arbitrator and one of the parties, or a relationship between the arbitrator and the issue in dispute.[795]

Proving the bias of an arbitrator is very difficult, as one court explained "Bias is always difficult, and indeed often impossible, to 'prove'. Unless an arbitrator publicly announces his partiality, or it is overheard in a moment of private admission, it is difficult to imagine how 'proof' would be obtained."[796]

It is, particularly, impossible to prove in the case where the arbitrator is biased because of covert sympathy with one of the parties.[797] However, it may seem to be the case when the majority of the decisions are in favour of one particular party. This may lead the losing party to feel a real sense of grievance

---

[792] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-54.

[793] *Ibid.*

[794] See Born G, *op.cit.* footnote 387, at p. 63.

[795] Mustill M and Boyd S, *op.cit.* footnote 676, at p.250.

[796] *Morelite Construction Corp. v. N.Y.C. District Council Carpenters' Benefit Funds*, 748 F.2d 79 (2d Cir. 1984).

[797] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-51.

and suspect that the arbitrator is partial. This is of course illogical, because the arbitrator may be right in his decision, or even if wrong, may still be acting impartial.[798] In certain cases, which involves the overt taking of instruction from one of the parties, however, the proving of bias of an arbitrator is more possible.

Confusion might arise in using the term "neutrality" to convey a sense of impartiality.[799] The AAA Rules, for example, provides that, "If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as provided in Section 14, and the parties have authorised them to appoint a neutral arbitrator within a specified time, but no appointment is made within that time or any agreed extension thereof, the AAA may appoint a neutral arbitrator, who shall act as chairperson.".[800]

The term "neutrality" is broader than impartiality and independence. It includes neutrality of nationality, geography, and legal system. When it is applied to an arbitrator in the international commercial sphere, it is used in a political or cultural sense: that is to say, an arbitrator is "neutral" if his nationality is different from that of either of the parties.[801] However, a neutral arbitrator has to be independent and impartial as well.[802]

The impartiality of the arbitrator is a fundamental requirement of all arbitrations and it is considered a mandatory rule of most jurisdictions. Although the notion of abandoning the requirement of impartiality of arbitrator seems to extend the scope of party autonomy to choose the arbitrator, it will extend the problems as well.

---

[798] Mustill M and Boyd S, *op.cit.* footnote 676, at p.254.

[799] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-52.

[800] Article 15, para.1.

[801] Donahey, "The Independence and Neutrality of Arbitrators", 9 *J.Int'l.Arb.* (1992) 31-32.

[802] Coulson, "An American Critique of the IBA's Ethics for International Arbitrators", 4 *J.Int'l.Arb.*, 104 (1987).

4.2.3. Independence

The term "independence", although its definition remains elusive[803], is used to measure the relationship between an arbitrator and the parties in relation to their family, profession or financial transaction. The closer their relationship, the less "independent" the arbitrator will be.[804] This will lead to doubt regarding the impartiality of the arbitrator. In other words, the closer the relationship between one of the party and the arbitrator, the more the impartiality of the arbitrator is doubted.

Professor Sanders rightly observed that the requirement of the "independence of an arbitrator may well be regarded as an aspect of the condition of impartiality".[805] Although the term "independence" is less abstract than that of "impartiality", a problem still remaining is how close the relationship between a party and the arbitrator should be in deeming that the arbitrator is not independent.

I believe that the answer to this question should be addressed on a case-by-case basis. This is because each case is governed by its own circumstances, and involves different persons. It may be concluded, although not conclusively, that the relationship which disqualifies an arbitrator must be "direct, definite and capable of demonstration, rather than remote, uncertain or speculative".[806]

Another important factor which cannot be overlooked is the culture of each individual society. In a case under CIETAC, for instance, which concerned the relationship between student and teacher. It was reported that "One morning, before a hearing, some representatives and lawyers of the parties to a CIETAC case were waiting for the lift in the lobby of the building

---

[803] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.221.

[804] Donahey, *op.cit.* footnote 801, at p.31.

[805] Voskuil and Freedberg-Swartzburg, "Composition of the Arbitral Tribunal", in Sarcevic (ed.), *Essays on International Commercial Arbitration* 64 at p. 81.

[806] See *Giddens v. Board of Education of City of Chicago*, 398 Ill 157, 75 NE2d, 286 (1947).

in which CIETAC is located. An arbitrator happened to arrive. He was a former teacher of the agent of a party to the case. Seeing his former teacher, the agent stepped forward to warmly greet and shake hands with the arbitrator and then helped him with his briefcase and escorted him to the lift. The representative of the other side was standing nearby, looking at the teacher/arbitrator and the student agent who were on such intimate terms. They were puzzled and reasonably threw doubt upon the arbitrator."[807]

The question arose as to whether the relationship between the student and his teacher should lead to the disqualification of the arbitrator? It may be considered that such social contact is *ex parte* communication. However, in the Asian culture, students always respect their teachers. Such behaviour, therefore, is considered normal. However, it may be considered improper.

4.2.4. Nationality of arbitrator

Certain jurisdictions, particularly in developing countries, require that an arbitrator shall be a local national. This requirement is unnecessary. The main reason for such a requirement is that they do not want a foreigner to practice law in their country.

I believe that this reason ignores the fact that an arbitrator may or may not be a lawyer and in many cases arbitrators are experts who have specialist knowledge. Thus the effect of this requirement is to obstruct the development of international commercial arbitration. Consequently, making those involved in international commercial arbitration becoming more skeptical of the process.

What if an arbitration takes place in State X which has such requirement while one of the parties is an X national? The Standing Committee of the National People's Congress of the People's Republic of China rightly and properly concludes that "This is required in the practice of foreign-related arbitration. It will be conductive to impartial handling of cases;

---

[807] Yanming, H., "The Ethics of Arbitrators in CIETAC Arbitration", 12(2) *J.Int'l.Arb.* 10, (1995).

it will enable parties from other countries to trust arbitration in China; ...; it will help enhance the prestige of China's foreign-related arbitration in the world; it will expedite China's efforts to modernise and internationalise its foreign-related arbitration; and it will be advantageous to implementation of China's reforms and open policy and to expansion of China's economic relations and trade with others countries."[808] For this reason, a number of arbitrations take place in the PRC rather than in other places.

Fortunately, most jurisdictions, including the PRC, Laos, Thailand and Vietnam, have abandoned this requirement. I suspect that other jurisdictions will do the same in the near future.

4.2.5. Qualification of arbitrator by law in practice

4.2.5.1. Impartiality and independence requirement

Because of the indefinite meaning of the term "impartiality", the current ICC Rules require only the independence of an arbitrator. They are silent on the matter of impartiality. According to the Rules, a party is permitted to challenge an arbitrator for "lack of independence or otherwise". The reason for this is that the concept of impartiality is "subjective", and there is no satisfactory definition of the term.[809] However, the phrase "or otherwise" leaves it open to the ICC Court of Arbitration to view it as including the concept of impartiality.[810]

Apart from ICC Rules, the new Swiss Private International Law ("new Swiss PIL") also deletes the term "impartiality". Under the old rules of the Concordat, an arbitrator was required to be as impartial and independent as a judge[811]. The new Swiss PIL provides for the challenge of an arbitrator if

---

[808] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *op.cit.* footnote 43, at p.90.

[809] Donahey, *op.cit.* footnote 801, at p.32.

[810] *Ibid.*

[811] An impartiality of judge is provided in Article 58 of the Federal Constitution.

circumstances give rise to justifiable doubts about his independence.[812] There are some arguments as to whether an arbitrator is required to be impartial. On the one hand, Marc Blessing confirms that the deletion of an impartiality requirement in the new law is a deliberate attempt to restrict the requirement to a more objective notion of independence alone as a compromise designed to meet the necessities of practice.[813] On the other hand, according to Smith, the new Swiss PIL does not delete impartiality from the former requirements of the Concordat in relation to international arbitrations. This is simply because the new Swiss PIL cannot override the constitutional right, which is deemed a mandatory rule.

The main reason for the attempt to abandon the requirement of impartiality is derived from a constitutional pattern of arbitral tribunal. The preferred pattern, particularly in international commercial arbitration, still calls for each of the parties to make his own choice of one arbitrator, from whatever source the party wishes, and from joint selection of a third arbitrator.[814]

In such a situation, a party seeks maximum advantage from its right to control the identity of the decision-makers, and seeks to have as one of the members of the tribunal, a person whose ability and general inclination of views can be assessed in advance.[815] In practice, it has been shown that the appointing party often chooses his arbitrator without the aid of any arbitral body.[816] Such a party would often explain his case to the potential arbitrator, with a view to convincing the said arbitrator to adopt and defend its viewpoint. [817] By doing so, the party draws up a short list of possible candidates and attempts to interview each of those candidates before making a final decision.

---

[812] Article 180(1)(c).

[813] Blessing, "The New International Arbitration Law in Switzerland", 5 *J.Int'l.Arb.*, 339 (1988).

[814] Carter J, "Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice", *The American Review of International Arbitration: Essays in Honor of Hans Smit*, at p.153.

[815] *Ibid.*

[816] Hejailan S, "The Pre-arbitral Phase: Matters Affecting the Arbitral Award", in van den Berg A, (ed.) *International Arbitration in a Changing World*, 51at p. 53.

In most cases, the party-appointed arbitrator will listen to the appointing party.

This practice leads to the concept that a party-appointed arbitrator can be partial to the party who appoints him. This is well-recognised in the American system, but not in Europe. Such a dichotomy between the two systems "goes to the heart of the arbitral process and causes practical problems in most proceedings".[818]

Most laws require that all arbitrators shall be independent and impartial and that they maintain this qualification throughout the entire process.

PRC

The CAL[819] provides that an arbitrator must withdraw and parties shall have the right to apply for his withdrawal under one of the following conditions:

(1) Where the arbitrator is a party in the case or a close relative of the party or his agent;

(2) Where the arbitrator has an interest in the case;

(3) Where the arbitrator is related with a party or his agent in other ways which may affect the determination of a fair award;

(4) Where the arbitrator privately meets a party or his agent or accepts a gift or entertainment from a party or his agent.

CIETAC Rules also provide that "A party may make a request in writing to the Arbitration Commission for the removal of an appointed arbitrator from his office, if the party has justified reasons to suspect the impartiality and independence of the appointed arbitrator. Such a request must state the detailed facts and reasons on which the request is based."[820]

---

[817] *Ibid.*

[818] Wetter J, *op.cit.* footnote 383, at p 6.

[819] Article 34.

[820] Article 29, para.1.

Laos

According to the LSED, an arbitrator is required to be independent. He must not be a relative or have some interest or conflict of interest with either party.[821] Furthermore, the LSED prohibits a conciliator to be an arbitrator in the same dispute.[822] However, it says nothing about impartiality.

Thailand

According to the TAA, an arbitrator is required to be both independent and impartial[823]. The Act enumerates the term "independence":[824]

(1) he has no vested interest in such a case;

(2) he is not related to any of the parties, either as an ascendant or descendant to any degree, or as a collateral within the third degree, or by affinity within the second degree;

(3) he has not been cited as a witness on account of his knowledge of the facts, or as an expert on account of his having expert knowledge in connection with such case;

(4) he has not been, nor is the legal representative or representative, nor has been the lawyer of any of the parties;

(5) there is not another case pending between himself, his wife or his relative in direct ascending or descending line on the one part, and any or the parties, the wife or any relative in direct ascending or descending line of such party on the other party;

(6) he is not a creditor or debtor or employer of any of the parties.

---

[821] Article 8.

[822] Article 28 coped with Article 22 para.9.

[823] Section 14 paragraph 3 coped with the TCPC, Section 11(8).

[824] Section 14 paragraph 3 coped with TCPC, Section 11(1)-(7).

Vietnam

The Statute of Vietnamese International Arbitration Centre provides that "The arbitrators shall discharge their responsibilities in an independent, impartial and objective manner in the entire process of handling the disputes."[825]

The VIAC Rules provide that "Either of the parties shall have the right to challenge an arbitrator or the chairman of the arbitral tribunal or the sole arbitrator, as the case may be, if the challenging party has doubt about his impartiality, particularly if the latter contends that he is directly or indirectly related to the dispute..."[826]

4.2.5.2. Requirement of nationality of arbitrator

PRC

The CAL makes it clear that a foreigner can be appointed an arbitrator. It provides that, "The foreign-related arbitration committee may engage arbitrators from the persons with foreign nationalities who are equipped with knowledge of law, economy, trade, science and technology."[827] This provision applies only in cases of foreign-related arbitration, one party or both parties being from abroad, or if the case involves a foreign element.[828]

However, a foreigner arbitrator, in practice, shall meet the following requirements:

"1) to be devoted to arbitration, and uphold the principle of independent and impartial handling of cases;

2) to be versed and experienced in the fields of law, economics and trade, science and technology, or maritime commerce and other maritime affairs;

---

[825] Article 9.

[826] Article 11.

[827] Article 67.

[828] Article 65.

3) to be ready to observe the arbitration rules of the arbitration commission, the rules on the work of arbitrators and other relevant provisions; and

4) to have a good mastery of the English language and some knowledge of the Chinese language (some exceptions may be allowed here in the case of a few distinguished members of the international arbitrators circle)."[829]

It is not surprising therefore that the names of arbitrators listed in the CIETAC includes those of a number of foreign nationals.

In practice, foreigners are not always nominated or designated to every international arbitration case handled by CIETAC. [830] Furthermore, it has been quite unusual for foreigner to be appointed as a Chairman of the tribunal, although foreigners have been appointed as Chairman in other cases. [831]

Laos

The LSED is silent on this matter. However, the structure of the LSED implies that it is impossible for a foreigner to be appointed in Laos. The hearing language, for example, is required to be the Lao language,[832] which is difficult, and in many cases, impossible for foreigners to understand.

Thailand

The TAA says nothing about this matter. However, the problem of whether a foreigner can be appointed to act as arbitrator in Thailand is a crucial one. This is because the Alien Occupation Act of 1978 completely prohibits foreign nationals from engaging in providing legal services or services in connection with court disputes.

This problem is relaxed in practice for many reasons. First, the Alien Occupation Act of 1978 is a law which limits the freedom of people so it

---

[829] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *op.cit.* footnote 43, at p.91.

[830] S Harpole, *op.cit.* footnote 329, at p 74.

[831] *Ibid.*, at p 73.

[832] See Article 9.

should be strictly construed. It should not construe the duty of an arbitrator as a legal service. Many good quality arbitrators in the world, even in Thailand, are not lawyers.

The purpose of the Alien Occupation Act of 1978 is to prohibit foreign lawyers from practising in a Thai court. This approach is supported by the Lawyer's Act of 1985. According to the latter Act, a lawyer is defined as a person who is licensed by the Law Society of Thailand. Such person must be a member of the Law Society, the membership of which is confined to Thai nationals. The Act only prohibits an unlicensed person from pleading cases in court, draft complaints, answers or other pleadings for other persons. In other words, a lawyer who practices in a Thai court must be a Thai national.

Secondly, all officers, such as law lecturers in a government university, are not permitted to become practising lawyers. Nevertheless, in practice, they can still be chosen to act as an arbitrator.

Finally, as a general rule, arbitration is a private method to settle disputes between disputing parties, who may be foreigners. They can choose arbitration instead of litigation because, as well as choosing an arbitrator who is suited to their dispute. The Arbitration Act is designed to be based on the principle of natural justice which requires equal rights to both parties. There is no reason why foreign parties can not choose a foreigner to act as their arbitrator.

Vietnam

Vietnam tries to make it clear that a foreigner can be appointed as an arbitrator. To do so, it passed the Ordinance on the Recognition and Enforcement of Foreign Arbitral Award in Vietnam.

According to the Ordinance, "a 'foreign arbitral award' is understood as the award which is made outside the territory of Vietnam by an arbitrator selected by the parties concerned to settle dispute arising from commercial law

relations."[833] And, they also include "awards that are made in the territory of Vietnam but not by Vietnamese arbitrators."[834] There is therefore no doubt that a foreigner can be appointed to act as an arbitrator in Vietnam.

However, the current Vietnamese System does not comply with such a provision. The hearing language, for example, is required to be the Vietnamese language.[835] Thus, Article 1, para.2 of the Ordinance is impractical without an amendment to the VIAC, or passing a New Arbitration Law.

4.3. Mechanism to guarantee qualification of arbitrator

All the national laws and institutional rules provide a safeguard to guarantee the qualification of an arbitrator by imposing the duty on an arbitrator to disclose any relationships that might lead to doubts as to his independence. The other measure is the right of the parties to challenge the arbitrator as to his qualification.

4.3.1. Disclosure

It has become an international custom and practice[836] that most legislations and institutional rules stipulate the requirement that upon approaching an arbitrator to disclose those facts and circumstances that might conceivably give rise to a challenge as to his suitability to act as arbitrator.

Disclosure is a tool used by an arbitrator to prevent incidents which may call his independence into question.[837] In international arbitration, such a duty helps a party to have easy access to information regarding the reputation and relationships of an arbitrator who lives in a foreign country.[838]

It should be noted that most legislations and institutional rules only

---

[833] Article 1 para.1.

[834] Article 1 para.2.

[835] See VIAC, Article 22.

[836] Donahey, *op.cit.* footnote 801, at p.36.

[837] Bond, *op.cit.* footnote 708, at p.14.

[838] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.224.

impose the duty to disclose a fact or circumstance which may raise the question of independence or impartiality of an arbitrator. It does not include those facts or circumstances concerning the qualification agreed by the parties, such as his being a lawyer or non-lawyer. It is the duty of the parties, not the arbitrator, to do so.

Although such a duty is a key element to ensure[839] the principle of independence and impartiality[840], it is not conclusive[841]. The disclosure only provides the parties with an opportunity to examine the independence of an arbitrator.

I believed that although an arbitrator may disclose all relationships relevant to his independence, this does not mean that he will be impartial. Conversely, for those arbitrators who fail to disclose any relevant circumstances or facts, it does not mean that he will be partial. Furthermore, the independence of an arbitrator is not a mandatory rule, parties can agree otherwise.

There are, however, two problems that should be considered in this respect. First, what will happen if an arbitrator does not disclose all the facts required of him? Secondly, what facts must an arbitrator disclose?

4.3.1.1. Consequence of non-disclosure

The duty to disclose is important for an arbitrator. If he fails to do so, he may be discharged from his office. However, what will happen if such a failure is maintained and a party, for whatever reasons, does not challenge the non-disclosing arbitrator until he renders the award? Is such an award enforceable? Is it against public policy requirement of the New York Convention?

---

[839] *Ibid.*, at p.211.

[840] Redfern A and Hunter M, *op.cit.* footnote 146, at para.4-57.

[841] Bond, *op.cit.* footnote 708, at p.14.

The courts in many countries have annulled such awards.[842] However, there is one reported case where the court enforced the award rendered by the arbitrator who did not disclose a relevant fact. In this case, the defendant knew the relevant fact, i.e. that the arbitrator appointed by the plaintiff, had been its counsel in at least two other legal proceedings after the award had been rendered.

The question was whether such an award could be enforced? The court recognised that public policy generally favoured "full disclosure of any possible interest or bias .... whenever one is in a position to determine the rights of others"[843], but held that the non-disclosure by the arbitrator of the relationship in question had not "tainted the proceedings as to nullify the award." In conclusion, the court stated that "public policy defense should be narrowly construed," that "awards should not be vacated because of an appearance of bias," and that "[t]he stronger public policy ... is that which favours arbitration, both international and domestic."[844]

I believe that this is a crucial problem. As previously mentioned, full disclosure does not guarantee the independence and impartiality of an arbitrator. It is provided in order to facilitate the assessment of the qualification of an arbitrator by one or both parties. Although the arbitrator fails to disclose relevant facts, he may be independent and impartial. Despite the fact that he discloses all relevant facts, he may be challenged if he does not perform his duty with impartiality and independence. It is very strange if the arbitrator who renders an award with impartiality and independence is challenged because he fails to disclose certain circumstances. If the court annuls an award rendered by an arbitrator who fails to disclose, but honestly performs his duty, the dishonest party will resort to this channel to delay the arbitral process. This, of course, damages the spirit of the arbitration.

---

[842] See Tupman, "Challenge and Disqualification", 38 *Int'l.&Comp.L.Q.* (1989) 32.

[843] *Fertilizer Corp. of India v. IDI Management Inc.*, 517 F.Supp. 948, 954 (S.D. Ohio 1981).

[844] *Ibid.*, at p. 955.

4.3.1.2. The extent of facts that must be disclosed

The next question is what facts should an arbitrator disclose. Despite the fact that the disclosure is used to assess the independence and impartiality of an arbitrator, there is no uniform criteria for the arbitrator to determine what facts he should disclose. There are two tests is this respect.

The first is a subjective test. What relevant facts should be disclosed depends on the discretion of the approached arbitrator. He should disclose the circumstances which he considers may give rise to suspicion.[845] Any relationships which he determines "direct" rather than "remote", "substantial", and "ongoing" and "significant" rather than "uncertain" and "speculative" should be disclosed"[846].

According to this test, the same facts and a different arbitrator may give different results. However, it is suggested that "candour is always the best way to prevent misunderstanding."[847]

The second test is an objective one. This test is brought about by the ICC Rules. It determines that an arbitrator must disclose any facts or circumstances which may be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.[848] This test seems to be more realistic than the first one. The disclosure is provided for eliminating the parties' doubt as to the independence of the arbitrator.

Thus, what is relevant should be in the parties' eye, not the arbitrator's. An arbitrator may consider that certain circumstances or facts are irrelevant, but the parties may consider them relevant.

---

[845] Mustill M and Boyd S, *op.cit.* footnote 676, at p.252.

[846] Donahey, *op.cit.* footnote 801, at p.38.

[847] Mustill M and Boyd S, *op.cit.* footnote 676, at p.252.

PRC

Under the CAL,[849] an arbitrator must voluntarily disclose relevant information concerning his personal interest in a case and must withdraw from the appointment if:

(1) the arbitrator is a disputing party or an immediate relative of the parties to the case or their agents;

(2) the arbitrator has a personal interest in the case;

(3) the arbitrator has some other relationship with the parties to the case or their agents which may affect the case to be arbitrated fairly; [or]

(4) the arbitrator has had private meetings with the parties concerned or their agents, or has accepted gifts or has attended banquets provided by the parties concerned or their agents. [850]

The CIETAC Rules also provide that "Any appointed arbitrator having a personal interest in the case shall himself disclose such circumstances to the Arbitration Commission and request withdrawal from his office".[851] This provision has two important issues.

First, the arbitrator shall disclose to the Arbitration Commission. Secondly, the Rules follow the first test. This means that the arbitrator shall disclose all facts or circumstances which he considers relevant. However, the arbitrator should bear in mind that he may be removed from his office if a party has justified reason to suspect his impartiality and independence.[852] It is suggested therefore that an arbitrator, under the CIETAC Rules, should follow

---

[848] Article 7, para.2.

[849] CAL, Article 34.

[850] CAL, Article 34. Under the CIETAC Rules, "[w]here the chosen or appointed arbitrator has personal interests in a case, he shall disclose such interests to the Arbitration Commission by himself and ask for withdrawal." CIETAC Rules, Article 28.

[851] Article 28.

[852] Article 29 para.1.

both tests.

Model Law

The Model Law follows this reasoning by providing that "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."[853]

Laos

LSED requires only that an arbitrator must inform the two parties as to his relationship with them.[854] This means that he shall inform both parties of those relationships which concern his relatives or any interest or conflict of interest with either party.[855]

Thailand

The TAA is silent on the duty of an arbitrator to disclose. However, the new TAA requires that "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."[856]

The TAIMJ also requires that the arbitrator shall disclose to the Director any circumstances likely to give rise to justifiable doubts as to his

---

[853] Article 12(1).

[854] Article 28 copes with Article 22 para.7

[855] Article 8.

[856] Section 19 para.2.

impartiality and independence."[857] However, the TCAI is silent on this matter.

Vietnam

Both SVIAC and VIAC Rules are silent on the duty of an arbitrator to disclose.

4.3.2. Challenge

Apart from the duty of an arbitrator to disclose, the qualification of arbitrator, whether by agreement or by law, can be challenged by the parties. The challenging of an arbitrator is a useful procedure.[858] It is an important procedure which favours the parties in that,[859] the parties have an opportunity to control the integrity of the arbitration process.

In order to make the system really effective, the parties must believe that their dispute will be decided by a fair tribunal, therefore, the challenging procedure is necessary.[860] Thus, most countries contain challenge provisions in their legislations.

Despite the fact that the challenging of an arbitrator is important, the use of a challenge remains, a question of tactics rather than philosophy.[861] There are cases where parties will challenge arbitrators on the slightest pretense as a dilatory tactic rather than as a reflection of a *bona fide* case of partiality.[862] This may lead to the withdrawal or arbitrary disqualification of a highly skilled arbitrator who has been selected by careful search.[863]

While the challenge provision is important, the dilatory tactic is undesirable. Whether the dilatory tactic will be successful or not depends

---

[857] TAIMJ, Rule 14.

[858] David R, *op.cit.* footnote 138, at p.257.

[859] Glossner, "Sociological aspects of international commercial arbitration," in *The Art of Arbitration* (Liber Amicorum for Pieter Sanders) at p.145 (1982).

[860] Tupman, *op.cit.* footnote 842, at p.26.

[861] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.223.

[862] *Ibid.*, at p. 227.

[863] *Ibid.*

mostly upon the challenge procedure. Accordingly, the challenge procedure is considered very important here. The relevant question then is, who has the power to decide the qualification of an arbitrator.

As discussed earlier in Chapter 3, when an arbitrator's jurisdiction is challenged, the arbitrator shall have the power to decide his own jurisdiction, *competence-competence*. The situation here is different. Can an arbitrator decide his own qualification?

I believe that the answer to such a question is undoubtedly negative. This is because it is a matter of natural justice. As shown earlier, Professor Schmittof clarifies this point. Thus, the challenged arbitrator cannot decide his own qualification. In the case of a sole arbitrator, the decision shall be made by the national court; otherwise the arbitral process will fail. However, if the tribunal is composed of more than one arbitrator, can the rest of the arbitrators decide the qualification of the challenged arbitrator? Legislations vary on this matter.

In order to eliminate the dilatory tactic, I submit that the rest of the arbitrators should have the power to decide such a question.

PRC

According to the CAL,[864] an arbitrator shall of himself withdraw from the case, and the parties thereon shall be entitled to apply for his withdrawal in any of the following circumstances:

a. being a party to the case or a near relative of a party or an agent to the case;

b. being an interested party in the case;

c. having some other kind of relationship with a party or an agent to the case, which might affect the impartiality of arbitration;

d. interviewing a party or agent privately, or accepting any treat or gift

[864] Article 34.

from the parties and their agents.

A challenging party, under the CAL, must put forward to the Arbitration Commission[865] in writing a challenge against an arbitrator for removal from his office within fifteen days before the date of the first oral hearing.

However, the challenge may be raised after the first hearing but before the end of the last hearing if the grounds for challenge are disclosed or are made known after the first oral hearing.[866] Such a challenge shall be decided by the Chairman of the Arbitration Commission.[867]

Laos

According to the LSED, each party has the right to challenge an arbitrator.[868] If the party who has been challenged accepts, a new arbitrator must be appointed to handle the same dispute. If he does not accept the challenge, the OSE will decide.[869]

The arbitrator also has the right and the obligation to withdraw from the settlement of the disputes when he is a relative or has some interest or conflict of interest with either party. [870]

Thailand

Basically, the TAA guarantees that no arbitrator who has been duly appointed may have his appointment revoked except with the consent of all the parties.[871] This guarantee can eliminate the use of challenge as a delay tactic.

However, an arbitrator may be challenged on the grounds of

---

[865] Article 29 para.1.

[866] Article 29 para. 2.

[867] Article 30.

[868] Article 8.

[869] Article 28 coped with Article 22 para.8.

[870] Article 8.

[871] Section 14 para.1.

independence or impartiality. [872] If the arbitrator is appointed by the court or by a third person, he may be challenged by any party.[873] But no party shall challenge the arbitrator whom he has appointed or whom he has jointly appointed, except where the said party did not know of or could not have known of, the grounds for challenge at the time of appointment.[874] If the challenge is sustained, a new arbitrator shall be appointed to replace the challenged arbitrator by the same method of appointment as that of the challenged arbitrator.[875]

There are various disadvantages in the TAA concerning the challenge to an arbitrator. First, it says nothing about challenging an arbitrator who is not qualified by the agreement. Secondly, the parties have the freedom to determine the challenging procedure. Thirdly, there is no time limit for challenging an arbitrator. This can be used as a tool to delay the arbitral procedure.

However, the new Thai Arbitration Act has resolved these shortcomings. First, an arbitrator can be challenged if he is not qualified by the agreement i.e., if he does not possess the qualifications agreed to by the parties.[876]

Secondly, the new Act stipulates a time limit for challenging an arbitrator. It says that, "Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in the last paragraph of Section 19, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators not challenged shall decide on the challenge.

---

[872] Section 14 para.3 coped with TCPC, Section 11.

[873] Section 14 para.2.

[874] *Ibid.*

[875] TAA, Section 14 para.5.

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph two of this Section is not successful, or if there be no majority among the unchallenged arbitrators, or the arbitration is one with a sole arbitrator, the challenging party may file a petition requesting the competent court to decide on the challenge, within thirty days after having received notice of the decision rejecting the challenge, or after having been informed of the constitution of the arbitral tribunal, or after being aware of any circumstance stipulated in the last paragraph of Section 19, as the case may be. After having made due enquiry, the court may sustain or reject the challenge.

While such a petition is pending before the court, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render the award, unless the court otherwise orders."[877]

TAIMJ

According to the TAIMJ, a party may challenge the arbitrator appointed by another party if circumstances exist that give rise to justifiable doubts as to the impartiality and independence of the arbitrator.[878] The challenge shall be made in writing, notifying the grounds for challenge and submitted to the Director within 15 days from the date of the notification of the name and particulars of the arbitrator."[879]

TCAI

According to Article 10 of the TCAI, an arbitrator may be challenged on the following grounds:

(1) bankruptcy;

(2) a person who has been convicted and sentenced to imprisonment except for petty offences or negligence;

---

[876] Section 19 para. 3.

[877] Section 20 para.2,3,4.

[878] Rule 15(1).

(3) an incompetent or quasi-competent person, legally or technically speaking;

(4) a person, who because of ill-health cannot take part in the proceedings of the Arbitration Tribunal or who, for any other reason, is unable to perform the functions of an arbitrator;

(5) an interested person, or one whose behaviour bespeaks partiality to either party;

(6) a person who has previously been appointed and served as conciliator in the same dispute.

The challenging procedure under Article 11 of the TCAI is more detailed than those of the TAIMJ. A party is not entitled to challenge an arbitrator whom it has appointed, except in the case where grounds for disqualification exist under Article 10, and that party proves that it was not aware of the facts at the time of the appointment. The party challenging an arbitrator must notify the Arbitration Tribunal thereof as soon as the challenger is aware of the existence of any of the impediments listed in Article 10. A copy of such challenge must be sent to the other party. In any case, the challenge must be made before an award is given.

The Chairman of the Arbitration Tribunal shall decide whether such a challenge is justified or not. The decision of the Chairman of the Arbitration Tribunal may be appealed to the Thai Commercial Arbitration Committee. The appeal shall be submitted within 30 days after the party concerned has been informed of the decision of the Chairman. The decision of the Thai Commercial Arbitration Committee shall be final.

However, in the event of a challenge to a sole arbitrator or the Chairman, the party concerned shall submit the challenge to the Thai Commercial Arbitration Committee and shall send a copy of the challenge to the other party. The Thai Commercial Arbitration Committee shall decide

---

[879] TAIMJ, Rule 15(2).

whether the challenge is justified or not, and its decision shall be final.

If a challenge is sustained, the party or parties concerned or the Thai Commercial Arbitration Committee, as the case may be, shall appoint a new arbitrator in replacement and shall, where appropriate, notify the appointment in writing to the other two arbitrators and the other party within 30 days of the decision on the challenge being made.

Vietnam

According to Article 11 of the VIAC, parties have the right to challenge an arbitrator or the Chairman of the arbitral tribunal, if the challenging party has doubt about his impartiality, or if he contends that the challenged arbitrator is directly or indirectly related to the dispute. Like TAA, the challenging party is able to challenge the arbitrator appointed by him only on the grounds which become known after making the appointment.

The challenge must be sent to the arbitral tribunal for examination. It is the power of the remaining arbitrator to examine and make a decision. If the remaining arbitrators can not reach a decision, the matter shall ultimately be examined and decided by the President of the Centre. Likewise, if most or all arbitrators are challenged, the President of the Centre has power to examine and decide the issue.

If the challenge is sustained, the new arbitrators or a new Chairman of the arbitral tribunal or a new sole arbitrator shall be chosen or appointed in accordance with the present Rules. Likewise, an arbitrator or the Chairman of the arbitral tribunal or the sole arbitrator shall have the right of self-recusation.

5. Conclusion

The most important factor in choosing an arbitrator is the requirement of his legal qualification as well as his nationality. Although some countries, such as Vietnam or Laos, attempt to allow foreigners to be appointed as arbitrators in their jurisdiction, their rules or laws concerning this matter are still unclear. In the case of Thailand, it is a matter of interpretation of the

existing legal system.

However, in practice, it seems clear that it is possible for a foreigner to be appointed. In this respect, the state laws should guarantee the rights of foreigners to be appointed in this respect. This is necessary, not only to satisfy the principle of party autonomy but also to support the growth of international commercial arbitration in their countries.

CHAPTER 5

CHOICE OF ARBITRAL PROCEDURE

One of the advantages of arbitration over litigation is that the arbitral procedure is more flexible and informal than court procedure. Parties can tailor the rules suitable to their case, i.e. they may directly set the rules of procedure, or indirectly set them by choosing to arbitrate under the institutional arbitration rules.

As a result, the arbitrator should follow those rules determined by the parties, otherwise any award rendered may not be enforceable. However, to determine what arbitral procedure to follow is not an easy task. A number of factors may impact on the effectiveness of the arbitration procedure.

Participants in international commercial arbitration tend to come from different cultures or legal systems. Lawyers who come from the civil law countries, for example, are familiar with the inquisitional system unknown to those who come from common law countries. Furthermore, the flexibility and informality themselves[880] can yield a difficulty of procedural confusion and inconsistency that makes parties long for judicial proceedings.[881]

Apart from these, there are certain considerations which the parties will need to take into account. The most important is the mandatory rules of the arbitration law which governs the arbitration. In this respect, they should know from the beginning what law governs the arbitration.[882] This chapter will explore the freedom of parties to arbitrate with respect to their right to determine their own rules of arbitral procedure.

In a domestic court there procedural rules which the judge must

---

[880] One commentator concludes that "After careful analysis of my own experience I have come to the conclusion that the root cause of the problem is, paradoxically, the very flexibility and relative informality of the arbitral process itself. These characteristics are, of course, those which figure prominently amongst the perceived advantages of arbitration over litigation." Fletcher L, "Unrealised Expectations -The Root of Procedural Confusion in International Arbitrations", 2 *J.Int'l.Arb.* 8 (1985).

[881] Born G, *op.cit.* footnote 387, at p.43.

[882] The question of whether or not they have the freedom to choose the law governing arbitration will be

follow. The parties do not have much freedom to agree otherwise. All the participants, whether the judge, or the lawyers of both sides have to abide by the same rules, normally provided in the civil procedure of each state. The rights and duties of the claimant and defendant are known.

Besides, a state court has the power to sanction those who do not follow the rules. The court also has the power to order third parties to cooperate. To this end, it seems that the court procedure is more advantageous than the arbitration procedure. This is always true if it is a domestic case.

As seen in international cases, on the other hand, parties always come from a different culture and legal system. The civil procedure, which may be suitable for domestic matters, may not be appropriate for international matters. In an arbitral procedure, most laws allow the parties to decide their own rules. Only the parties know best what the gaps are between them, and what they need to bridge those gaps.

1. The recognition of party autonomy to determine the arbitral procedure

One of the most basic characteristics of international commercial arbitration is that parties in any arbitration proceedings have the freedom, subject, of course, to certain limitations, to determine how the proceedings shall be conducted and how the evidence shall be presented. This principle is well recognised by both the national laws and institutional rules on arbitration.

This was affirmed by the drafting of the Model Law, which adopted the principle without any contrary view being expressed. The working paper for the Model Law expressed that; ". . . probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitrations according to their expectations."[883]

---

discussed in the following chapter.

[883] See, *e.g.* UN Doc. A/CN.9/207, para. 17:

1.1. International convention

1.1.1 The Protocol on Arbitration Clause, League of Nations, Geneva,1923. [884]

The principle of party autonomy to determine the arbitral procedure was first adopted in the international convention at in Geneva in 1923. It recognised the central role of party autonomy in fashioning the arbitration procedure, and provides sanctions for failure to comply with the agreed procedures. It provide that "the arbitral procedure, including the constitution of the arbitral tribunal shall be governed by the *will of the parties...*" (emphasis added) [885]

However, the principle is narrowed by further providing that: "... *and* by the law of the country in whose territory the arbitration or shall takes place." (emphasis added) [886]

1.1.2 New York Convention

The principle was further developed by the New York Convention which not only reconfirms the principle, but also widens it by providing that recognition and enforcement of the award may be refused if "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".[887]

The New York Convention fully respects the will of the parties to determine the arbitral procedure. The law of the country where the arbitration takes place will play its role only if the parties fail to exercise their autonomy. However, the mandatory rules of the country where the arbitration takes place may well limit this exercise of party autonomy. The parties can not completely

---

[884] Hereinafter "Geneva 1923".

[885] Article 2.

[886] Article 2.

[887] The New York Convention, Article V(1)(d).

ignore them.

According to the present system, an award rendered contrary to the mandatory rules of the country where the arbitration takes place may be set aside in that country. As a result, it cannot be enforced in any other country. The New York Convention provides that the award cannot be enforced if it is set aside by a competent authority of the country in which, or under the law of which, that award was made.[888]

1.1.3 ICSID

ICSID adopts a similar line. Although detailed provisions are set out with regard to the conduct of the proceedings, the ICSID Arbitration Rules state:

"As early as possible after the constitution of a Tribunal, its President shall endeavour to ascertain the views of the parties regarding questions of procedure. For this purpose, he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(1) the number of members of the Tribunal required to constitute a quorum at its sittings;

(2) the language or languages to be used in the proceedings;

(3) the number and sequence of the pleadings and the time limits within which they are to be filed;

(4) the number of copies desired by each party of instruments filed by the other;

(5) dispensing with the written or the oral procedure;

(6) the manner in which the cost of the proceeding is to be apportioned; and

(7) the manner in which the record of the hearings shall be kept.

In the conduct of the proceeding, the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations."[889]

1.2. Arbitration laws

Most arbitration laws recognise that parties have the freedom to agree on the arbitral procedure. The problem here is not whether or not the principle of party autonomy is recognised but to what extent (of such autonomy).

In this respect, the national laws are different from country to country. Certain jurisdictions gives this freedom to the parties as a general rule. In this respect, the arbitration laws either directly or indirectly give the parties autonomy to determine the arbitral procedure. In a direct way, the arbitration law will provide freedom to the parties. In an indirect way, it will give freedom to the arbitrator to tailor their procedural rules. However, in certain jurisdictions, party autonomy, although recognised, is limited. The parties can agree only what the law allows. Most socialist jurisdictions fall in this category.

1.2.1. Model Law

The provision of party autonomy to determine the arbitral procedure is regarded as "the most important provision[s] of the model law."[890] It provides that "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[891] This means that the Model Law fully recognises the principle of party autonomy. It not only provides freedom to the parties but also to the arbitrator(s).

---

[888] New York Convention, Article V(1)(e).

[889] Rules 20(1)and(2).

[890] Seventh Secretariat Note, A/CN.9/264, Article 19 para.1.

[891] Model Law, Article 19.

1.2.2. PRC

The CAL does not provide direct freedom to the parties to determine the arbitral procedure. Nor does it provide freedom to the arbitrator. Furthermore, the CAL provides that the award can be attacked, among other things, if "the composition and arbitration tribunal are against the procedure stipulated by the law concerned."[892] This means that the award can not be attacked if the arbitral procedure is against the arbitration agreement.

However, the CAL enumerates certain aspects that the parties can otherwise agree. The parties can agree upon the number of arbitrators[893], upon the hearing[894] and upon the publicity of the hearing.[895]

1.2.3. Laos

The Economic Arbitration Organisation Lao PDR[896] takes the same line as the CAL. It says nothing about party autonomy to determine the arbitral procedure, only certain aspects that the parties may agree otherwise. The parties can agree on the number of arbitrators.[897] Apart from this, the Act is silent.

1.2.4. Thailand

The Thai Arbitration Act follows the same line by providing that "Unless otherwise provided by the arbitration agreement or law, an arbitrator shall have the power to conduct any procedure as he deems appropriate taking the principle of natural justice as prime consideration."[898] This principle

---

[892] CAL, Article 58(3).

[893] CAL, Article 31.

[894] CAL, Article 39.

[895] CAL, Article 40.

[896] Hereinafter "LEAO".

[897] LEAO, Article 28 copes with 22.

[898] TAA, Article 17.

remains in the TDAA. Section 23 has the same words as in the TAA.[899]

1.2.5. Vietnam

Although there is no arbitration law in Vietnam, the SVIAC suggests that the parties have freedom to determine their arbitration.[900] The SVAIC is silent on other matters.

1.3. Institutional rules

Apart from those conventions and national laws, the principle is also recognised by most institutional rules. Again, the scope and the method of exercising party autonomy are different from institution to institution.

1.3.1. The direct party autonomy

Many institutional rules give direct freedom to parties to determine their own procedure. These are the ICC Rules and the LCIA Rules.

1.3.1.1. ICC

The ICC Rules guarantee this principle by providing that "The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."[901]

1.3.1.2. LCIA

The LCIA Rules are even more flexible: "The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times:

(i) to act fairly and impartially as between all parties, giving each a

---

[899] TDAA, Section 23.

[900] SVIAC, Article 6.

[901] ICC Rules, Article 15.1.

reasonable opportunity of putting its case and dealing with that of its opponent; and

(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

Such an agreement shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties."[902]

1.3.1.3. TAIMJ

Among the institutional rules under this category, parties under the TAIMJ have less freedom. They can agree otherwise only when the Director of the Institute consents. It provides that

"Except where the parties agree otherwise in writing with the consent of the Director, the Arbitration Rules shall apply to arbitration organised by the Arbitration Institute.

(2) Matters falling outside the scope of the Arbitration Rules shall be dealt with by agreement between the parties or by the discretion of the arbitrator or by the resolution of the Arbitration Commission respectively."[903]

However, in practice, the Director has never denied party autonomy to circumstances agreed otherwise.[904] There are many cases submitted to the Institution with the agreement that the rules of other institutions, such as the ICC, be applied.[905]

According to these rules, the parties can agree initially what they need

---

[902] LCIA Rules, Article 14.1.

[903] TAIMJ Rules 4.

[904] Interview with Judge Voravuthi Dvadasin, Director of the Arbitration Institute, Ministry of Justice, at the Office of the Arbitration Institute, Ministry of Justice, Thailand, 24 October 1996.

[905] *Ibid.*

and this is straightforward. The parties know at the beginning what their duties and rights are. They can prepare themselves for the procedure which they know well. And they also know that if they fail to agree, the whole procedure will then be in the hands of the arbitrator. If they think that the arbitrator is inexperienced and the agreement between them is difficult, they can indirectly exercise their freedom by not agreeing in this respect. This approach therefore gives the parties the choice to do what they need.

1.3.2. The indirect party autonomy

Other rules provide the contrary. They pass the freedom of the parties to the arbitrator. The rules which fall under this category are the UNCITRAL Arbitration Rules, and the AAA Rules.

1.3.2.1. UNCITRAL Arbitration Rules

It provides that "Subject to these Rules, the *arbitral tribunal* may conduct the arbitration in such manner as it considers appropriate . . . ."[906] However, a number of freedoms, still rest with the parties; for instance, they may request hearings[907]; agree upon the place of arbitrations[908]; agree upon the language or languages to be used in the arbitrations"[909]; and so on.

1.3.2.2. AAA Rules

The Commercial Arbitration Rules of the AAA adopt a similar line. It gives the arbitrator the power to "order of proceedings." [910] However, in practice any specific agreement made by the parties as to the procedure will be respected both by the AAA and by the arbitral tribunal.

The AAA's 1991 International Arbitration Rules permit wide latitude to the arbitral tribunal in determining procedure, subject to the agreement of

---

[906] UNCITRAL Rules, Article 15(1).

[907] UNCITRAL Rules, Article 15.1.

[908] UNCITRAL Rules, Article 16.1.

[909] UNCITRAL Rules, Article 17.1.

[910] AAA Commercial Rules, Article 29.

the parties.[911]

1.3.2.3. CIETAC Rules

The CIETAC Rules says nothing as to the freedom of the parties to determine the procedure. Like the AAA Rules, they give the arbitrator the freedom to hear the case in the way he deems appropriate.[912] They leave certain matters open to the parties to agree otherwise, but this is very limited. The parties have freedom only to agree on the language, to be used in the arbitration procedure. It provides that "The Chinese language is the official language of the Arbitration Commission. If the parties have agreed otherwise, their agreement shall prevail."[913] Thus, party autonomy under the CIETAC Rules is less liberal than that of the AAA.

The pre-existing CIETAC rules required that all arbitrations were conducted in accordance with CIETAC procedural rules. The revised rules give the parties more freedom to tailor the arbitration procedures according to their requirements. CIETAC Rules provides that: "Once the parties agree to submit their dispute to the Arbitration Commission for arbitration, they shall be deemed to have agreed to conduct the arbitration under these Rules. The parties' agreement shall prevail if they have agreed otherwise and their agreement is approved by the Arbitration Commission."[914]

For instance, the parties may thus choose to apply UNCITRAL Rules or any other institutional arbitration rules. They may also set a detailed timetable for the arbitration proceedings or simply change a few aspects of the applicable CIETAC procedural rules. However, in order to remain distinct from ad hoc arbitration, CIETAC requires that all the parties' agreements be approved by it before being adopted.[915]

---

[911] AAA International Arbitration Rules, 1(2) and 18.

[912] CIETAC Rules, Article 67.

[913] CIETAC Rules, Article 75 para.1.

[914] Article 7.

[915] Zhu Jianlin, "CIETAC: Changes", 1(5) *Int'l.Arb.L.Rev.* (1998) N77.

1.3.2.4. TCAI

Another Institution which follows this line is the TCAI. The Rules say nothing as to the freedom of the parties. Instead, they give the power to the arbitrator to process the arbitration by providing that "The Arbitration Tribunal shall be empowered to call for the testimony of witnesses; also for documentary and other tangible evidence as may be deemed appropriate and necessary for the purpose of the proceedings; further, to specify the time and place for the conduct of the proceedings and for the hearing of testimony from witnesses and the verbal statements of the parties to the dispute.

As it may consider necessary, the Arbitration Tribunal may question the parties to the dispute and/or the witnesses, and may demand them to give testimony under oath or by affirmation".[916]

1.3.2.5. VIAC

Finally, the VIAC Rules also adopts a similar approach. Like the TCAI Rules, they only mention the power and freedom of the arbitrator but not party autonomy. It provides that "After being duly chosen or appointed, the arbitrators shall proceed with a study of the file of the dispute and conduct an inquiry by all appropriate means."[917]

2. Basic principle of arbitral procedure

As discussed earlier in Chapter 4, the parties must be equal in their appointing of an arbitrator. This is also applied to the arbitral procedure. It is a fundamental principle[918] that the parties in an arbitral procedure must be treated equally and be given a full opportunity to present their case. The equality of the parties is sometimes described as the key element of the "Magna Carta of Arbitral Procedure."[919]

---

[916] TCAI, Article 26.

[917] VIAC, Article 14.

[918] See Herrmann G, *op.cit.* footnote 452, at p.47.

[919] Seventh Secretariat Note, A/CN.9/264, Article 19, para.1.

It is true that the equality principle in arbitral procedure is similar to the principle of "due process" [920] in a national constitution which guarantees the system of justice. Accordingly, an arbitrator empowered to conduct the arbitration must exercise his discretion with extreme care. If the principle is broken, the award cannot be enforced. The role of arbitrator is to be equitably, rather than legally, right. [921] What he is asking for is equity. [922]

The principle is underlined by the New York Convention. The award, according to the New York Convention, cannot be enforced if the party against whom the award is invoked was not given proper notice of the arbitration proceedings, or was otherwise unable to present his case.[923] The Model Law guarantees such equality by providing that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[924]

The LEAO also adopts this principle in the Act by providing that "In the settlement of economic disputes the two parties have equal rights."[925] This Article guarantees that the parties have the equal opportunity to present their case and that they will be treated equally.

In the PRC, although the CAL does not directly provide for the equality of the parties, it provides that "This Law [The Arbitration Act] is formulated to guarantee the timely and just arbitration of the economic disputes, to protect the lawful rights and interests of the parties concerned and to ensure the healthy development of the socialist market economy."[926] This provision is composed of three interrelated elements.

---

[920] See Second Secretariat Note, A/CN.9/WG.II/WP.35 para.25.

[921] Goekian, "The Conduct of International Arbitration" *11 Lawyers of the Americas* (1979) 418.

[922] *Ibid.*

[923] The New York Convention, Article V(1)(b).

[924] Model Law, Article 18.

[925] LEAO, Article 5 para.1.

[926] CAL, Article1.

First, it ensures the impartial and prompt arbitration of economic disputes.[927] Secondly, it protects the legitimate rights and interests of the parties. [928] And finally, it safeguards the sound development of the socialist market economy. [929]

To fulfil these purposes, it is important that the equality of the parties is guaranteed. One cannot say that the arbitration is impartial if the parties are treated equally. Besides, the various provisions of the Act also confirm the principle.

Nor is there a precise provision in Vietnam which guarantees the principle of equality of parties. However, the legal environment shows that the principle of equality of the parties exists. The Ordinance on Procedure for Settlement of Economic Disputes[930] provides that "The parties are equal in respect to process's rights and duties."[931] Although this provision is applied in the state court, there is no reason why it cannot be applied in the arbitral procedure.

Neither does the TAA contain a provision which guarantees the equality of the parties. However, in practice both in court and in arbitration, the equality of the parties to present their case is considered as a rule of public policy. Thus, it is deemed to be against the public policy if the parties do not have the equal right to present their case. The TDAA makes this point clear by following the line of the Model Law approach. It provides that "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."[932]

---

[927] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *op.cit.* footnote 43, at p.29.

[928] *Ibid.*

[929] *Ibid.*

[930] Hereinafter "VPSED".

[931] VPSED, Article 6.

3. Factors to make arbitral procedure effective

Arbitration, like other things in life, is not absolutely perfect. There are various many defects which may occur during the proceedings. There are two major desirabilities in arbitration which takes place in the world.

The first is that the award must be enforceable, and the second, as important as the first, is that the parties must keep their costs as low as possible. One of the key elements of arbitration to fulfil these desires is the arbitral procedure. An illegal arbitral procedure, such as when the parties are treated unequally, may render an unenforceable award. At the same time, an improper arbitral procedure may also cost the parties. It is possible in practice that parties may have to pay a high cost for an arbitration which renders an enforceable award. In this situation, it can not be said that arbitration is good.

The arbitral procedure therefore is at the heart of every arbitration, especially in international commercial arbitration.

The nature of the arbitral procedure concerns not only the legal systems but also its management. The management of the arbitral procedure is an art. It can, and should not be formulated into one single form. It depends on the nature of the individual case. Thus the proper management of the arbitral procedure in one case may be improper in others.

There are three major factors which affect the arbitral procedure; these are the form of arbitration, the legal background of the arbitrator, and the *lex arbitri*, the law which governs the arbitral procedure.

3.1. Forms of arbitration

Once parties to arbitration agree to choose arbitration as the mechanism to resolve the dispute between them, they should further determine how the arbitration will be conducted. There are various ways to conduct an arbitration.

One of the relevant factors which determines the manner of the arbitral

---

[932] TDAA, Article 23.

procedure is the form of the arbitration. There are two forms of arbitration which take place in the world today; 'ad hoc arbitration' and 'institutional arbitration'. Neither of these two types of arbitration suitable for all the different types of dispute which may arise. It depends on the facts and the circumstances of individual cases, and on the needs of the parties.

3.1.1. Ad hoc arbitration

The parties to an ad hoc arbitration will set out their own rules of procedure. They retain for themselves complete control of every aspect of the procedure to be followed.[933] They decide the place of arbitration, the method of appointing of arbitration, and the jurisdiction and the power of the arbitrator. And they also decide the arbitral procedure to be followed.

In this respect, they may choose the rules of certain institutions or even decide for themselves the exact rules to be followed by the arbitrators. They sometimes select a pre-existing set of procedural rules designed to govern and, utilised [934] easily for ad hoc arbitration.[935]

Thus, the great value of ad hoc arbitration is that it may be shaped to meet the wishes of the parties and the facts of the particular dispute. Besides, ad hoc arbitration is self-administered, so there is no administration fee required as that in an institutional arbitration.

Although ad hoc arbitration is more flexible and less expensive, there are disadvantages which should be taken into consideration. The administration of ad hoc arbitration will be carried out by the arbitrator. He must act both as administer and secretary, fix both the times and place of hearing, find the necessary accommodation, communicate with the parties, etc. This can be both inconvenient and unfair.[936]

---

[933] Lew J, *op.cit.* footnote 137, at p. 33.

[934] Goekian, *op.cit.* footnote 921, at p.411.

[935] Born G, *op.cit.* footnote 387, at p.10; see also Lew J, *op.cit.* footnote 137, at p 7.

[936] Lew J, *op.cit.* footnote 137, at p.34.

Drafting of the rules to cover all aspects of an arbitration can be a very difficult task although not impossible. It is also expensive and time-consuming.[937] However, these difficulties can be avoided by adopting the rules established for the purpose of ad hoc arbitration, such as the UNCTIRAL Rules. In In some cases the parties have adopted both the rules of a particular institutional and their own ad hoc rules. Although this is possible, it can be very risky.

Most institutional rules are designed for the purpose of that particular institution. In addition, they have administrative staff to solve certain problems or to perform the functions which the rules may impose. There is no such administrative support in an ad hoc arbitration which may adopt these rules. Accordingly, these rules may not be performed effectively or may not even work at all in an hoc arbitration.

The effectiveness of an ad hoc arbitration depends upon the co-operation between the parties and their counsels. When the parties co-operate well, the need to request the court's assistance will be unnecessary. On the contrary, if there is no such co-operation, not only will the court's assistance be necessary,[938] but the arbitration proceedings will also be delayed.

Unfortunately, the inherent nature of an ad hoc arbitration is such that there is no tool to sanction a party who does not cooperate. Thus, the advantages of ad hoc arbitration will mean nothing. Professor Gerald Aksen rightly concludes that "The advantages of ad hoc arbitration presume an essential caveat a dash not a hyphen that the disputing parties, their counsel and the arbitrators work together to make the process work without need to resort to administrative or judicial oversight. Without this co-operation, the theoretical advantages of ad hoc arbitration have, in my own experience, proven sadly illusory."[939]

---

[937] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-83.

[938] See Lew J, *op.cit.* footnote 137, at p 34.

[939] Gerald Aksen, "Ad Hoc Versus Institutional Arbitration", *The ICC international Court of Arbitration*

However good or bad it may be, ad hoc arbitration is a preferred and appropriate mechanism to resolve disputes between parties where one of the parties is a state.[940] Many of the largest international commercial arbitrations, particularly oil trade disputes, nominate ad hoc arbitration.

The major reason for the use of the ad hoc arbitration in these situations is that these cases deal involve a lot of money. The parties involved will feel secure if they can fully exercise more freedom, i.e. they can tailor the arbitration to exactly what they need. They are therefore willing to pay for their autonomy. Besides, in cases involving state contract, the state does not usually want to be controlled by any institution.

Basically, an ad hoc arbitration can take place in any country. Most arbitration laws provide for both institutional and ad hoc arbitration. However, there are certain countries, such as Vietnam, which has no arbitration law. In these countries, an ad hoc arbitration, although possible, is very difficult. Details will be discussed later in this chapter.

3.1.2. Institutional arbitration

Alternatively, the parties can avoid the difficulty of an ad hoc arbitration by referring their arbitration to an institutional arbitration. To do so, the parties simply incorporate the clause which refers the arbitration to a particular institution. This clause is a convenient short form.

For example,[941] if the parties want to refer their arbitration to TAIMJ, they simply need to stipulate in their arbitration agreement that "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance

---

Bulletin Vol. 2/No. 1(1991) p 8.

[940] See Lew J, *op.cit.* footnote 137, at p.34.

[941] Other examples; the TCAI, Article 39 provides that: "Both parties agree to accept the Thai Commercial Arbitration Rules to govern settlement of disputes. In the event of any disagreement or dispute concerning or arising from this contract where the parties are unable to reach agreement, settlement shall be made by arbitration under the Thai Commercial Arbitration Rules in force at the time the disagreement or dispute arose".

with the Arbitration Rules of the Arbitration Institute, Ministry of Justice, applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Arbitration Institute."[942]

As a result, the rules of the TAIMJ will apply. Unlike an ad hoc arbitration, the parties to an institutional arbitration do not have to give details of every aspect of the arbitration procedure. The rules of the leading institutions, such as ICC, LCIA, AAA, generally will have passed the test of working well in practice.[943]

In this respect, it is right to say that "A principal advantage of institutional arbitration is the case of incorporating by reference the institution's rules in an international contract. Instead of trying to reinvent the wheel, so to speak, the parties can take comfort in the time-tested rules and procedures drafted by professionals in the institutional commercial arena." [944]

Apart from this convenience, an institutional arbitration is generally an organisation established to administer arbitrations and not to decide the dispute (s), which the parties agree to refer to it. They have the necessary experience to administer the arbitration procedure and their staff are generally trained to deal with any particular problems of the arbitration procedure. The institutions also provide a list of arbitrators who have extensive knowledge of the practice of arbitration. Thus the parties have the opportunity to select an experienced arbitrator.

Above all, the institutional rules set forth important substantive principles on particular subjects. It regulates the way in which the arbitration is to be conducted and administered when one of the parties is reluctant to cooperate with the arbitration proceedings, or even when both parties cannot agree on some matters.

---

[942] TAIMJ, Article 2.

[943] See Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-79.

When one of the parties, for example, is unwilling to arbitrate, fails or refuses to appoint an arbitrator, the rules of the institution contain provisions which deal with this situation. Besides, the rules also guarantee that advance payments are made in respect of the fees and expenses of the arbitrators, that time limits are kept in mind and, generally, that the arbitration will run as smoothly as possible.[945]

Although institutional arbitrations eliminate some of the problems which occur in ad hoc arbitrations and help the arbitrators as well as the parties and their counsels to cope with difficult situations,[946] there are certain disadvantages. First, the framework of the institutional rules, whilst they ensure certainty of the arbitral procedure, are very formal and inflexible to cover every type of arbitration.[947] This sometimes leads to the inevitable delay.[948]

A major disadvantage of institutional arbitration is its cost, which is substantial, for rendering its various services. Furthermore, it is possible that such fees may exceed the schedule of fees. [949]

However, it is true that each arbitral institution does not offer the same products.[950] The quality of arbitral institutions is different. It depends upon the type of institution. There are two types of arbitral institutions; international institutional arbitration, such as ICC, and national institutional arbitration, such as CEITAC. [951] The former is established to serve the international business community. Also it is more experience in international commercial arbitration

---

[944] Gerald Aksen, *op.cit.* footnote 939, at p.8.

[945] Redfern A and Hunter M, *op.cit.* footnote 146, para.1-80.

[946] Merlis, "Comment", *30th Anniversary and its Ceremonial International Arbitration Symposium*, Oct.10, 1996 at p.119.

[947] Lew J, *op.cit.* footnote 137, at p.33.

[948] Redfern A and Hunter M, *op.cit.* footnote 146, at para.1-84.

[949] Goekian, *op.cit.* footnote 921, at p.415.

[950] Born G, *op.cit.* footnote 387, at p.11.

[951] See Lew J, *op.cit.* footnote 137, at p.19.

than the latter. However, it is more expensive.

In national institutional arbitrations, there are differences among them. It depends on their experience and the legal system of the country where it is established. Although the primary purpose of establishing an arbitral institution is to settle commercial disputes, the organisation and the policy of the state which establishes them differ from country to country. It is worthwhile for the parties to examine the national arbitral institutions in each country before selecting them.

Some lawyers, unfamiliar with the many types of institutional rules and forums, select the leading institutional rules, such as ICC, because it is one type which is most often mentioned. [952] Many lawyers said that have always suggest that their clients select the ICC Rules because "It was the only one I had ever heard about, so I put it in the agreement." [953] This could be very dangerous for clients. The parties may not appreciate having to pay more for the best rules. The rules of arbitral institution of some other countries may be more suitable than those of the leading institutions.

The details of each institution in the PRC, Laos, Thailand and Vietnam are examined in the Introduction Chapter.

3.2. Legal background of arbitrator

An arbitrator is not only the decision-maker for the dispute, but is also the manager of the arbitral procedure. He is free to determine how the arbitration will be conducted. He, for example, has the power to decide what kinds of evidence are admissible. Although it is accepted that the procedure in the national court does not affect the arbitral procedure, the legal background of the arbitrator plays a significant role.

Those who come from common law countries may conduct the arbitral procedure differently from those who have civil law experience. The arbitral

---

[952] Goekian, *op.cit.* footnote 921, at p.411.

[953] *Ibid.*

procedure rules today are not uniform, so the different legal backgrounds of arbitrators will inevitably affect the arbitral procedure. This may give rise to undesirable results.

However, one thing the parties can do is to choose the right arbitrator for the right arbitration, as discussed in the previous chapter. It is sometimes not easy for parties to know who the right arbitrator is. However, the arbitrator's legal background can assist in deciding who the right arbitrator is. For example, an arbitrator who has a common law background will be familiar with the adversarial system. The parties can therefore anticipate what is going to happen in the arbitral procedure, and can thus prepare for that situation. Hopefully, the arbitral procedure will run smoothly, saving time and money.

One of the key elements of the procedure, whether in court or in arbitration, is the fact- finding process. There are two methods of finding facts in the current legal systems of the world. The first is the adversarial system used in common law countries. The other is the inquisitorial system used in civil law countries. These two systems are very different.

The adversial system is derived from common law countries. The principle is that the parties are required to present their evidence. The judge only follows the rules of evidence, and gives a decision at the end on who has won the case. The judge has no duty to investigate the facts of the case. By contrast, a judge in the inquisitorial system takes a more active part in the proceedings and in the presentation of evidence, including the examination of any witnesses. [954]

PRC

The CAL gives arbitrators the power to conduct their own investigations and to collect evidence on their own initiative. [955] Any arbitrator

---

[954] See Lowenfeld A, "The two-way Mirror: International Arbitration as Comparative Procedure", 7 *Mich.Y.B.Int'l.Leg. Stu.* (1985) 166.

[955] See CAL, Article 43, and 68; CIETAC Rules, Article 38.

may collect evidence as it considers necessary. [956] Under the CIETAC Rules, arbitrators also have the power to conduct their own investigations and collect evidence on their own initiative. [957]

CIETAC Rules further allow an arbitrator to consult experts, and to require parties to produce experts/appraisers and related information, documents, property or goods for browsing, inspection, and or appraisal by the experts/appraisers.[958] If the arbitrator does investigate, it may need to offer opportunity for parties to comment on their findings. For instance, if the arbitrator uses an appraiser, the parties may question the appraiser subject to the permission of the arbitral tribunal.[959]

Thailand

The Thai system is a mixed system. The legal framework shows that the Thai system is inquisitorial. The TCPC gives wide power to the courts to play their role. When a court is of the opinion that it is necessary, in the interest of justice, it may require that further evidence be taken in regard to any issue in a case, even without an application by any party, including the recalling of any witness for re-examination.[960] The court has the power to question a witness for the purpose of making the witness's testimony complete or clearer, or for the purpose of enquiring into the circumstances which have prompted the witness to give testimony as he did.[961] The court also has wide discretion to accept the hearsay witness.[962]

Despite the fact that the TCPC's framework fits the inquisitorial system, the acquisitorial system has in fact been indirectly adopted by the Thai

---

[956] CAL, Article 43.

[957] CIETAC Rules, Article 38.

[958] CIETAC Rules, Article 39. Fishburne B and Lian C, "Commercial Arbitration in Hong Kong and China: A Comparative Analysis, 18 *U. Pa. J. Int'l Econ. L.* (1997) at 324.

[959] CAL, Article 44.

[960] TCPC, Article 86 para.3.

[961] TCPC, Article 119 para.1.

[962] TCPC, Article 95 (2).

Court. This is because the lawyers (particularly Kom Laung Ratburi-Direclit who is called the "father" of the modern Thai legal system) who greatly influenced the Thai legal system and was a graduate from England. Those lawyers imported the acquisitorial rules into the Thai legal system. Consequently, both approaches exist in the Thai legal system. The judge does not play much of a role in practice. He, like the common law judge, only decides who wins after listening to the witnesses of both sides. It is not surprising that the Thai lawyers are more familiar with the acquisitorial system than the inquisitorial one, despite the fact that the Thai legal system is classified as that of a civil law country.

Vietnam

Vietnam adopts the acquisitorial system. According to the VPSED, the burden of providing evidence in support of their respective position lies with the parties. [963] The court is not obligated to investigate and collect evidence when deciding a case. It may identify and collect evidence only for the purpose of ensuring that the dispute resolution is correct.[964] However, the inquisitorial approach may be used in certain cases, such as criminal case, as a matter of custom and practice.[965]

Apart from this distinction, each system can have many variations.[966] Therefore, lawyers who participate in the arbitral procedure, whether in their capacity as arbitrator or counsel, always have different viewpoints on the conduct of the procedure. Despite the fact that the court procedure is not applied to the arbitral procedure, lawyers always follow the court proceedings with which they are familiar. [967] Whilst lawyer/arbitrators from the Continent, for example, tend to exercise their discretion like judges would in civil

---

[963] VPSED, Article 3.

[964] VPSED, Article 4.

[965] Interview Ms. Ha Thi Ngoc Ha, Department of International Law and Treaties, Ministry of Foreign Affairs.

[966] Sandifer, *Evidence before International Tribunals* (revised ed., 1975), pp.2 and 3.

[967] See Lowenfeld A, *op.cit.* footnote 954, at p.168.

proceedings. They will follow proceedings before national courts,[968] even where such a procedure is not required by law.[969]

The problem of the differences between the two systems can be eliminated by arbitrators who have experience of international commercial arbitration. They will usually seek to arrive at a procedural decision that is "international," rather than follow the procedural rules in local courts.[970] They would not attach themselves to the patterns of procedure most familiar to them. To fulfil the supremacy aim of the arbitration, those involved at the international level relax the procedure as much as possible, otherwise the arbitral procedure would not be different from that of a court.

3.3. The place of arbitration

Every arbitration should have a location where it is to take place. The place of arbitration plays a significant role in the arbitral process. The arbitration law of the place of arbitration will govern any arbitration which takes place in its territory. The mandatory rules of the *lex arbitri*, the law of arbitration, can not be agreed to otherwise. The arbitration shall follow the mandatory rules of the country where the arbitration takes place, otherwise the award may be set aside by the court. This means that, under the New York Convention, it can not be enforced in other states which are party to the New York Convention.

The *lex arbitri* provides the facility for the parties to arbitration which takes place in its territory. The *lex arbitri*, for example, empowers the court to call a third witness not obliged to appear before the arbitrator. However, in certain cases, the *lex arbitri* restricts the freedom of the parties. It can result in an undesirable outcome of the arbitral procedure.

However important it is, the *lex arbitri* of certain countries, particularly

---

[968] See Triebel, "An Outline of the Swiss/Germann Rules of Civil Procedure and Practice Relating to Evidence", 47 *Arb.* (1982) 222.

[969] *Ibid.*

[970] Born G, *op.cit.* footnote 387, at p.48.

in developing countries, is not sufficiently developed, and sometimes these counties may have no arbitration law at all.[971] In Vietnam, for example, there is no *lex arbitri*. The question is whether an ad hoc arbitration can take place in Vietnam. The answer could be positive, but it is a very difficult question to answer.

What if a party calls a third witness and such a witness does not appear before the arbitrator? However, if the parties to such ad hoc arbitration cooperate and nothing goes wrong, the losing party will comply with the award. In such an ideal situation, an arbitration law is not needed. The *lex loci arbitri* is thus very important in every arbitration, in that it affects the arbitral procedure which takes place in a particular territory. Details of *lex arbitri* and the place of arbitration will be discussed in the next Chapter.

4. Arbitration procedure

Although an arbitration may be conducted in many ways, there are certain basic elements which are found in every arbitration which takes place today; the commencement of arbitration, pre-hearing, hearing and post-hearing. Each stage is very important. The arbitration may fail or succeed, depending on how each stage the procedure progresses.

4.1. Commencement of arbitration

The commencement of arbitration is the initial and most important stage of the arbitral process. It not only stops the time limit, if any, but also initiates the arbitral procedure. All parties prepare themselves for the hearing. The arbitrator(s) has to be appointed, among other things. The commencement of arbitration takes different various forms from jurisdiction to jurisdiction. It depends on what form of arbitration is chosen, whether ad hoc or institutional, and where the arbitration takes place.

Basically, the arbitral procedure commences when a request for

---

[971] Redfern A and Hunter M, *op.cit.* footnote 146, at para.6-22.

arbitration[972] is made. However, there are two approaches with regard to its scope and significance. [973] Under one approach, the request for arbitration is a document which merely identifies the parties, the cause of action and the claim in summary fashion, and contains only those elements which are required to set in motion the formation of a tribunal and getting the time clock running. [974]

The other approach is that the initial request for arbitration is merged with the full claim. [975] All institutional rules considered here follow the line of the second approach.

4.1.1. PRC

Under the Chinese system, the party who wants to apply to CIETAC shall satisfy the following requirements when submitting his Application for Arbitration:

(1) An Application for Arbitration shall be in writing[976] and shall be signed and/or stamped by the party and/or the attorney authorised by the party.

(2) Such Application for Arbitration shall contain;

(a) the details of the parties concerned. These are slightly different in this respect. According to the CAL, the Application for Arbitration shall provide details, not only of the two parties but also their legal representatives.[977]

It provides that the Application for Arbitration shall contain "names, sex, age, profession, working unit and domicile of the parties concerned; names and the office address of the legal persons or other organisations, and the names and titles of their legal representatives or main leaders," The CIETAC Rules, on the other hand, only require the details of both parties, but not the

---

[972] Wetter, "The Conduct of Arbitration", 2 *J.Int'l.Arb.* (1985) 7, 12.

[973] *Ibid.*

[974] *Ibid.*

[975] *Ibid.*

[976] CAL, Article 22 and CEITAC, Article 14(1).

[977] CAL, Article 23.

details of the legal representatives.[978] It provides that the Application for Arbitration shall contain "the name and address of the Claimant and those of the Respondent, including the zip code, telephone number, telex number, fax number and cable number, if any;"[979]

In this respect, the CIETAC Rules are more practical than the CAL. If the Application for Arbitration requires the detail about the parties' representative, what will be the result if a party changes his representative or his representative dies after he has submitted the Application for Arbitration? The party, of course, may re-submit the Application for Arbitration, but this wastes time, particularly where there is a time limit involved. The requirement with respect to the details of representative should be submitted after the Application for Arbitration is accepted. At this stage, the requirements should concentrate on the certain aspects of the case, such as the existence of the arbitration agreement, more than on any other circumstances related to the case. The CIETAC approach is therefore preferable.

(b) the arbitration agreement relied upon by the party;[980]

(c) the details of the case, namely the facts of the case and the main points of dispute [981] which causes the party to bring the case to arbitration;[982] and such dispute should be within the range of the arbitration committee. [983]

(d) the party's claim, and the facts and evidence on which his claim is based. [984] The relevant documentary evidence on which the party's claim is based shall accompany the Application for Arbitration.[985]

---

[978] CEITAC Rules, Article 14(1)(a).

[979] CIETAC Rules, Article 14(1)(a).

[980] CAL, Article 21(1) and CIETAC Rules, Article 14(1)(b).

[981] CIETAC Rules, Article 14(1)(c).

[982] CAL, Article 21(2).

[983] CAL, Article 21(3).

[984] CIETAC Rules, Article 14(1)(d).

[985] CIETAC Rules, Article 14(2).

Apart from these requirements, the party should pay an arbitration fee in advance to the Arbitration Commission according to the Arbitration Fee Schedule of the Arbitration Commission.[986]

In effect, the arbitration proceedings do not commence when the party applies for arbitration. This is because the application for arbitration may be accepted or refused. According to the CAL, after receiving the application for arbitration, the arbitration committee should agree to proceed if the application meets the requirements for arbitration, and inform the applicants concerned within five days; if not, the committee should refuse to accept it, and inform the applicants concerned in written form also within five days.[987] However, if the party has not completed the formalities required for arbitration, it may be demanded that he completes them.[988]

In this respect, it should be noted that the Secretariat of the Arbitration Committee should have the power only to examine the correctness of the documents and all the requirements; it should not examine the facts of the case, this is within the power of the arbitral tribunal. As will be seen, both the CAL and the CIETAC Rules do not require the arbitration commission to examine the answer of the respondant.

If the application is accepted, the arbitration committee should immediately send the following items to the respondent:

(1) a Notice of Arbitration;

(2) one copy of the claimant's Application for Arbitration and its attachments;

(3) one copy of the Arbitration Rules;

(4) one copy of the Panel of Arbitrators; and

---

[986] CIETAC Rules, Article 14(3).

[987] CAL, Article 24.

[988] CIETAC Rules, Article 15.

(5) one copy of the Arbitration Fee Schedule of the Arbitration Commission.

Simultaneously, the following items are also sent to the Claimant

(1) one copy of the Notice of Arbitration;

(2) one copy of the Rules; and

(3) one copy of the Panel of Arbitrator; and

(4) one copy of the Fee Schedule.

According to the CIETAC, the arbitration proceedings shall commence from the date on which the Notice of Arbitration is sent out by the Arbitration Commission or its Sub-Commissions.[989]

After receiving the Notice of Arbitration which cannot be extended, both parties, within 20 days from the date of receipt of the Notice of Arbitration, have to appoint an arbitrator from the list received, or authorise the Chairman of the Arbitration Commission to make such appointment.[990]

Apart from such appointment, the respondant has two further steps to take. First, within 45 days from the date of receipt of the Notice of Arbitration which cannot be extended, the respondant must submit his written defence and relevant documentary evidence to the Arbitration Commission.[991] It is a requirement that this written defence is sent to the Claimant within the time prescribed by the CIETAC.[992] However, CIETAC is silent in this respect. If the respondent fails to submit an answer, the process of arbitration should not be affected.[993]

Secondly, at the latest, within 60 days from the date of receipt of the

---

[989] CIETAC Rules, Article 13.

[990] CIETAC Rules, Article 16.

[991] CAL, Article 25 para.2 and CIETAC Rules, Article 17.

[992] CAL, Article 25 para.2.

[993] CAL, Article 25 para.2 and CIETAC Rules, Article 21.

Notice of Arbitration which can be extended by the arbitral tribunal if it deems that there are justified reasons, the respondent shall lodge with the Secretariat of the Arbitration Commission his counterclaim in writing, if any.[994] The counterclaim must contain the specific claim, reasons for his claim, and facts and evidence upon which his claim is based, and attach to his written statement of counterclaim the relevant documentary evidence.[995] And again, the arbitration fee shall be paid by the respondent according to the Arbitration Fee Schedule of the Arbitration Commission.[996]

The claim and the response can be amended. However, such amendment may be refused if the arbitral tribunal considers that the amendment is requested too late and are likely to affect the arbitral proceedings.[997]

4.1.2. Laos

The LSED, unlike CIETAC, does not expressly make provision as to when the arbitral proceedings should begin. However, it is understood that the arbitral proceeding begins when the OSE receives the claimant's request for arbitration. This is because the LSED provides that the arbitral procedure must be carried out promptly and be completed not later than eighteen months from the date of the receipt of the request for arbitration.[998]

Under the LSED,[999] the request for arbitration must be in writing and should contain the following details:

(1) Name and surname, age, profession and address of claimant or of his representative, address of the claimant's company;

---

[994] CIETAC Rules, Article 18 para.1.

[995] CIETAC Rules, Article 18 para.2.

[996] CIETAC Rules, Article 18 para.3.

[997] CIETAC Rules, Article 19.

[998] EAOL, Article 29.

[999] EAOL, Article 19.

(2) Name and surname, profession, address of the other party;

(3) Reason, purpose and amount of the request;

(4) Evidence and addresses of witnesses;

(5) The consent of the parties to submit the dispute for settlement by the OSE;

(6) Statements concerning previous attempts, if any, to settle disputes before submitting the request;

(7) Desired mode of settlement : conciliation or arbitration.

The request must be sent to the Office or to the appropriate branch.

After receipt of the request, the OSE must consider the admissibility of the request and inform the claimant within thirty days from the date of receipt. If the OSE rejects the request, the reasons for the rejection should be communicated to the claimant.[1000] However, the LSED does not state when such rejection should be sent to the claimant.

If the request is accepted, the agent of the OSE must register the request and send a copy to the other party immediately. The latter must send an answer in writing to the agent of the OSE within thirty days from the date of receiving the request.[1001] After the expiration of the thirty day time limit, if no answer has been received, the agent of the OSE must remind the party concerned that they should give an answer within twenty days. After the expiration of this time limit, if no answer has been received, the agent of the OSE will proceed to appoint the arbitrator.[1002]

There are still some issues which are unclear under the LSED. Among these are, whether the respondant can lodge a counterclaim? And, if he can, when should this be lodged? And, whether the parties can amend their claim

---

[1000] EAOL, Article 20 para.1.

[1001] EAOL, Article 20 para.2.

[1002] *Ibid.*

or counterclaim? The LSED is silent on all of these questions.

4.1.3. Thailand

The TAA is silent on the issue of when the arbitral proceedings commence. Similarly, the TAIMJ Rules do not say anything in respect to this issue. The TCAI Rules, on the other hand makes provision for this issue. Accordingly, the parties to a TCAI arbitration should submit to the Registrar a petition.[1003] Such petition must contain the following details:

(1) Full names and addresses of the parties;

(2) Relevant details of the dispute; and

(3) Originals or copies of pertinent documents and evidence of any related facts that a party desires to submit.

After receiving the petition, the Registrar shall send a copy thereof to the respondant who shall submit his statement of defence and all documents or facts supporting his statement within thirty days of the date of receiving the copy of the petition.[1004] If the respondant needs to lodge a counterclaim, he shall do so together with the statement of claim.[1005] The claimant shall submit the statement of reply, together with relative documents and any other evidence within thirty days.[1006]

Under the TCAI framework, the respondant is at a disadvantage, in that he has thirty days to submit both his statement of defence and counterclaim while the claimant has enough time to submit his petition and another thirty days to submit the statement of reply.

4.1.4. Vietnam

The VIAC, like the CIETAC, expressly provides for when the

[1003] TCAI, Article 14.

[1004] TCAI, Article 18.

[1005] See TCAI, Article 19.

[1006] *Ibid.*

arbitration procedure should commence. The main difference between them is the point of commencement. According to the CIETAC, the arbitration procedure is deemed to have commenced when the Notice of Arbitration is sent. Conversely, the arbitral procedure under the VIAC is deemed to have commenced when the Request for Arbitration is submitted by the claimant to the Centre.[1007] The date of submission of the Request for arbitration is either the date of handing the Request to the Registrar of the Centre or the date of dispatch stamped on the envelope by the local post office, if the Request for arbitration is sent by post.[1008]

The Request for arbitration must be in written in Vietnamese, English, French or Russian[1009] and is required to contain the following details:[1010]

a) The names and addresses of the plaintiff and the defendant respectively;

b) The specific request(s) of the plaintiff, with a statement of relevant facts supported by evidence;

c) The legal ground(s) on which the plaintiff proceeds with his Request for arbitration;

d) The amount of the claim;

e) The name of the arbitrator whom the plaintiff has chosen from among the listed arbitrators of the Centre, or the request made by the plaintiff that an arbitrator be appointed by the President of the Centre on his behalf.

On the filing of the Request for arbitration, the plaintiff is required to make an advance of the total amount of the arbitration fees payable under the relevant "Schedule of Arbitration Fees and Costs of the Vietnam International

---

[1007] VIAC, Article 4 para.1

[1008] VIAC, Article 4 para.2.

[1009] VIAC, Article 5 para.2.

[1010] VIAC, Article 5 para.1.

Arbitration Centre and expenses of the parties" annexed to the present Rules.[1011] The document evidencing the remittance of the advance shall be filed together with the Request for arbitration.[1012] The advance payment is very important in that, if the plaintiff fails to make the whole advance payment, the case will not be accepted for hearing.[1013]

After receipt of the Request for arbitration, the Registrar of the Centre shall notify the defendant thereof and also send him a copy of such Request along with the accompanying documents and the List of arbitrators.[1014] At the same time, the Registrar shall request the defendant to submit to the Centre his statement of defence, supported by pieces of evidence, within thirty days from the date of receipt of the copy of the Request for arbitration.

Such a time-limit can be extended, but shall not exceed two months.[1015] The question arises, what if for whatever reason, the Registrar sends the defendant the Request for arbitration but does not request the defendant to submit to the Centre his statement of defence?

Does the time limit to submit the statement of claim commence when the defendant receives the Request for arbitration? The result should be the same. Thus, the term "the Registrar requests the defendant to submit to the Centre his statement of defence," is superfluous. Although the Registrar may not request this, it is the duty of the defendant to submit his answer.

The defendant shall, within such a time limit, chose the arbitrator and notify the Centre thereof, or he may request the President of the Centre to appoint an arbitrator on his behalf.[1016]

[1011] VIAC, Article 7 para.1. The Rules require that such amount shall be credited to the account of the Chamber of Commerce and Industry of Vietnam at the Bank for Foreign Trade of Vietnam. See Article 7 para. 2.

[1012] VIAC, Article 7 para.3.

[1013] VIAC, Article 7 para.4.

[1014] VIAC, Article 8 para.1.

[1015] VIAC, Article 8 para.2.

[1016] VIAC, Article 8 para.3.

The defendant may lodge a counterclaim before the setting of the arbitral procedure.[1017] However, the counterclaim shall meet the requirements for the Request for arbitration stated above. Similarly he is required to make an advance of the total amount of the arbitration fees as the plaintiff.[1018] The plaintiff shall reply to the counterclaim within thirty days of receipt of the notification of the counterclaim.[1019]

4.2. Pre-hearing

After the arbitral procedure commences, the next step in the procedure is the constitution of the arbitral tribunal. At this stage, the arbitral procedure will be in the hands of the arbitrator. He first facts the allegations, i.e. he determines whether the issues questions of fact or law or both for both sides. The parties always need to provide evidence to support their allegations.

As mentioned earlier, an arbitrator's duty is not only to render an award, but also to manage the conduct of the arbitral proceedings. It is his responsibility to conduct the arbitral procedure smoothly and effectively.

What should an arbitrator deal with first in this difficult task? Basically he should first clarify the issues, whether they are any questions of fact or law, before both parties prove the contents. In fact, certain issues, particularly those issues concerning the facts of the case, may be admitted by the parties. Some other issues may be considered as being preliminary issues.[1020] In other words, the arbitrator should seek to cut through the surrounding foliage and get to the essential issues.[1021] To do so, it is important for the arbitrator to define the contested issues of law and fact and to devise an efficient means of considering them.

[1017] VIAC, Article 13 para.1.

[1018] VIAC, Article 13 para.1.

[1019] VIAC, Article 13 para.2.

[1020] See Redfern A and Hunter M, *op.cit.* footnote 146, at para.6-38-6-40.

[1021] *Ibid.*, at para.6-42.

The pre-hearing stage is established to deal with these matters.[1022] It can be of great value in expediting otherwise involved and protracted arbitration proceedings.[1023] Thus, the pre-hearing conference is generally desirable in every arbitration[1024] and it has become customary in the practice of arbitration.[1025] The pre-hearing stage is well-recognised in most jurisdictions, institutional rules and international conventions on arbitration.

4.2.1. ICSID

Pre-hearing conferences have been accepted by ICSID, which has formulated a Rule to provide for them:

"(1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

(2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorised representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement."[1026]

4.2.2. UNCITRAL Rules

The UNCITRAL Rules provide in this matter that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate",[1027] and further states that "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by

---

[1022] Hunter M, "Pre-hearing Conference", in Sanders (ed.) *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) at p.64.

[1023] Hoellering, "Pre-hearing Conference", in Sanders (ed.) *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) at p.63.

[1024] Wetter, *op.cit.* footnote 972, at p.22.

[1025] Hoellering, *op.cit.* footnote 1023, at p.63.

[1026] ICSID Rules 21.

[1027] UNCITRAL Rules, Article 15(1).

witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings, or whether the proceedings shall be conducted on the basis of documents and other materials".[1028]

However, the UNCITRAL Rules, unlike the ICSID, do not give details as to what should be done in the pre-hearing conference. Thus, the Iran-United States Claims Tribunal, in which pre-hearing conferences were used to a considerable extent, has supplemented Article 15 with a Note, numbered 4, which provides that "The arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference.

The pre-hearing conference will normally be held only after the Statement of Defence in the case has been received. The order will state the matters to be considered at the prehearing conference."[1029] The term "the matters to be considered" was clarified in considerable detail by the so-called Internal Guidelines of the Tribunal of 28 January 1982. Such details are:

"(a) clarification of the issues presented and the relief sought;

(b) identification of any issues to be considered as preliminary questions;

(c) status of any settlement discussions;

(d) whether any further written statements, including any reply or rejoinder, is requested by the arbitrating parties or required by the arbitral tribunal (see Tribunal Rules, Article 22);

(e) fixing a schedule for submission by each arbitrating party of a summary of the documents or lists of witnesses or other evidence it intends to present (see Tribunal Rules, Article 24, para. 2);

(f) fixing a schedule for submission of any documents, exhibits or other evidence which the arbitral tribunal may then require (see Tribunal Rules,

---

[1028] UNCITRAL Rules, Article 15(2).

[1029] "Final Tribunal Rules of Procedure" May 3, 1983, Note 4 to Art. 15.

Article 24, para. 3);

(g) whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs;

(h) desirability of appointing an expert by the arbitral tribunal, and if so the expert's qualifications and term of reference; whether the arbitrating parties intend to present experts, and, if so, the qualification of and the areas of expertise to be covered by any such expert;

(i) determining what documentary evidence will require translation;

(j) fixing a schedule of hearings;

(k) other appropriate matters." [1030]

4.2.3. PRC

Both CAL and CIETAC are silent with respect to the pre-hearing conference. It is allowed in Chinese System. For example, the CCP accepts such procedure by providing for this in Chapter XII, Part Two and Articles 113-119. Thus, the pre-hearing conference in the arbitral process is not prohibited by the Chinese system. However, it is not the practice of the Chinese to convene a pre-hearing conference between the arbitrators, the parties and their counsel.[1031]

4.2.4. Laos

The LSED says nothing about pre-hearing conferences.

I would submit that, although both the PRC and Laos makes no mention of pre-hearings, they are allowed to do so. This is so because such a practice is not against the justice of these countries. Pre-hearings are beneficial to both parties.

[1030] Iran-U.S. C.T.R. 18,98; set out in (1983) VII *Yearbook Commercial Arbitration*, p. 255.

[1031] C Dejun, M Moser and W Shengchang, *op.cit.*, footnote 29, at p.89.

4.2.5. Thailand

Under the Thai legal system, a pre-hearing conference is accepted both litigation and in the arbitral process. According to the TAA, an arbitrator, unless otherwise agreed to by the parties, shall have the power to conduct any procedure as he deems appropriate, taking the principle of natural justice as a prime consideration.[1032]

The TAIMJ also provides that "Subject to these Rules and the agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[1033] However, both TAA and TAIMJ do not give guidance as to what subject matter should be reviewed in the pre-hearing. The arbitrator is free to determine all these matters. The TCAI, on the other hand, is silent on the matter.

4.2.6. Vietnam

According to the VIAC, after being appointed, the arbitrator shall proceed with a study of the file of the dispute and conduct an inquiry by all appropriate means.[1034] He has the power to personally meet the parties for their verbal statements whether at the request of either or both of them, or on his own initiative.[1035] He may decide to acquaint himself with the matters from other persons, either in the presence of the parties or after notifying the latter thereof. [1036] At this stage, the arbitrator may assign one or more experts if he requires expert assistance. [1037]

In addition, the arbitrator shall supervise the preparations for the

---

[1032] TAA, Article 17 para.2.

[1033] TAIMJ, Rule 21.

[1034] VIAC, Article 14 para.1.

[1035] VIAC, Article 14 para.2.

[1036] VIAC, Article 14 para.2.

[1037] VIAC, Article 14 para.3.

hearing of the dispute and, where necessary, take such measures as requesting the parties to provide written explanations, pieces of evidence and related documents. In such cases, the arbitrator shall fix a time limit for the execution of these matters.[1038]

Although the pre-hearing conference is an effective means to manage the arbitral procedure and is widely accepted, there are certain jurisdictions, such as the PRC and Laos which are silent on this matter. The question is whether an arbitrator in these jurisdictions can set up a pre-hearing conference if he wishes?

There is no single law or rule which prohibits an arbitrator from doing this. It is the inherent power of an arbitrator to do so in order to conduct the arbitral proceedings smoothly. It is interesting to note that the pre-hearing, according to certain jurisdictions, can be set up by the arbitrator or at the request of either party. However, there are certain jurisdictions, such as Thai, and Vietnam, that say nothing about setting up a pre-hearing conference at the a request of a party. The TAA says that the arbitrator has "the power to conduct any procedure as he deems appropriate".[1039]

The VIAC also follows the same line. The term "appropriate" should include the provision that a party may request the arbitrator to set up a pre-hearing conference. Then the arbitrator should set up a pre-hearing if it is requested by the parties. As mentioned earlier, the pre-hearing is "appropriate" method which assist in the smooth conduct of the arbitral procedure. It is an unsound result if a party seeks a pre-hearing conference but this is refused by the arbitrator.

4.3. Hearing

All the rules of the leading international arbitration institutions provide for a hearing, or a hearing to take place at the request of either party, or at the

---

[1038] VIAC, Article 15 para.1.

[1039] TAA, Article 17 para.2.

instigation of the arbitrator himself.[1040] It is possible that an arbitration takes place without a formal hearing. The CAL, for example, provides that arbitration may be done without opening tribunal sessions if the parties agree to this.[1041] In practice, most arbitrations will involve at least one set of evidentiary hearings.[1042] The hearing, if any, shall be under the following requirements.

4.3.1. Requirement of hearing

4.3.1.1. Advance notice

Most laws and institutional rules require that before a hearing takes place, sufficient advance notice should be communicated to both parties. The Model Law requires that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of goods, other property or documents.[1043] The UNCITRAL Rules also has the same requirement.[1044]

PRC

The CAL requires that an arbitration committee should inform the parties to the case of the dates for the opening of tribunal sessions within the time limit prescribed by the CIETAC Rules.[1045] The CIETAC Rules says that the date of the first oral hearing shall be determined by the arbitrator in consultation with the Secretariat of the Arbitration Commission.[1046] The date of hearing shall be communicated by the Secretariat of the Arbitration Commission to the parties 30 days before the date of the hearing. [1047]

[1040] Redfern A and Hunter M, *op.cit.* footnote 146, at para.6-95.

[1041] CAL, Article 39.

[1042] Born G, *op.cit.* footnote 387, at p.85.

[1043] Model Law, Article 24(2).

[1044] See UNCITRAL Rules, Article 25(1).

[1045] CAL, Article 41.

[1046] CIETAC Rules, Article 33.

[1047] CIETAC Rules, Article 33.

The thirty day period is not required in the case of subsequent hearings.[1048] Either party may request a postponement of the date of the hearing if it meets the following requirements: there are justified reasons, and the request is communicated to the Secretariat of the Arbitration Commission 12 days before the date of the hearing. [1049] The postponing request shall be decided by the arbitral tribunal. [1050]

Laos

The LSED also requires that the arbitrator shall give the parties advance notice. Unlike, the CIETAC, the LSED does not stipulate the time limit of the advance notice. It only says that "After having compiled evidence, the panel of arbitrators arranges the date and the place of the hearing and informs the parties accordingly."[1051] Although this Article does not mention the amount of time necessary for sufficient advance notice, it is understandable that such a period determined by the arbitrator shall be sufficient for both parties to prepare themselves in order to appear before the arbitrator.

Thailand

The CAL is silent on the matter of advance notice of hearing. Neither does the TCAI and TAIMJ make mention of it. However, in practice, the arbitrator will give sufficient advance notice to both parties.[1052]

Vietnam

The arbitrator determines the date of hearing[1053] and shall call the parties to the hearing by issuing a summons which clearly indicates the time

---

[1048] CIETAC Rules, Article 34.

[1049] CIETAC Rules, Article 33.

[1050] CIETAC Rules, Article 33.

[1051] EAOL, Article 31 para.1.

[1052] Interview with Judge Voravuthi Dvadasin, Director of the Arbitration Institute, Ministry of Justice, at the Office of the Arbitration Institute, Ministry of Justice, Thailand, 24 October 1996.

[1053] VIAC, Article 16.

and place of hearing. [1054] However, the summons shall be served thirty days prior to the date of hearing. [1055] Such a time limit is not a mandatory rule. It may be agreed otherwise by the parties, if not, it can be reduced or reasonably extended by decision of the Chairman of the arbitral tribunal. [1056]

4.3.1.2. Language

The language used in the hearing is important because in international commercial arbitration the parties usually come from different countries, different cultures and use different languages. Basically, the parties have freedom to agree on what language should be used in the arbitral proceedings.

The Model Law, for example, provides that "(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal."[1057] However, although other arbitration laws and rules give the parties freedom to agree, there are certain aspects which do not comply with the Model Law.

PRC

The CIETAC Rules do give the parties the freedom to agree on language to be used in the arbitral proceedings by providing that "The Chinese language is the official language of the Arbitration Commission. If the parties

---

[1054] VIAC, Article 17.

[1055] VIAC, Article 17.

[1056] VIAC, Article 17.

[1057] Model Law, Article 22(1)(2).

have agreed otherwise, their agreement shall prevail."[1058] It is different from the Model Law in that if the parties fail to agree, the arbitrator has no power to determine the language used.

What if a foreigner is appointed as arbitrator but the foreign parties has failed to designate a language? This means that all foreigners who participate in arbitral proceedings will have to use the Chinese language. Or, if one of the parties in the mentioned situation is Chinese, will this be fair for the foreign party? It is true, the parties should be blamed because they failed to agree upon the language to be used in their arbitral proceedings.

But solving such a situation by using the Chinese language should also be blamed. The arbitrator knows best what language should be used if the parties fail to agree. Thus, the UNCITRAL Model Law approach is the better approach with respect to this matter.

However, at the hearing, if the parties or their attorneys or witnesses requires an interpreter, the Secretariat of the Arbitration Commission may provide an interpreter for them, or the parties may bring their own interpreter. [1059] Furthermore, the arbitral tribunal and/or the Secretariat of the Arbitration Commission may, if it deems it necessary, request the parties to submit corresponding translation copies in the Chinese language, or other languages of the documents and evidential materials submitted by the parties.[1060]

Laos

Under the LSED, the principal language used in arbitral proceedings is Lao.[1061] A foreign language, if necessary, can be used but it must be translated in Lao. [1062] The parties have no freedom to agree in advance on the language to be used in the arbitral proceedings.

[1058] CIETAC Rules, Article 75 para.1.

[1059] CIETAC Rules, Article 75 para.2.

[1060] CIETAC Rules, Article 75 para.3.

[1061] EAOL, Article 9.

Thailand

The CAL and TCAI are both silent on the issue of the language to be used in arbitral proceedings. However, as a general rule, the parties can agree on what language is used in the arbitral procedure. The TAIMJ provides that "The parties may agree upon the language or languages to be used in the arbitral proceedings."[1063] However, it is not clear under the Thai system, what should be done if the parties fail to agree on the language to be used.

Vietnam

Although Article 5 of VIAC are both allows the parties to use other languages in the request for arbitration, according to the VIAC, the Vietnamese shall be used in the hearing.[1064]

However, at the parties request, the Centre can provide interpreters at its own expense. [1065] This is because all arbitrators on the list of the Centre are Vietnamese. This also implies that it is very difficult, although not impossible, for a foreigner to be appointed as arbitrator to act in Vietnam under the VIAC. If it is true that the Centre is prepared to put the name of foreigners on the arbitrator list, the provisions of Article 22 of the VIAC need to be amended.

4.3.1.3. Confidentiality

Under the major national laws and rules on arbitration, it is a requirement that the hearings will be confidential.

PRC

The CAL suggests that the arbitral proceedings should not be open to the public except where the parties agree otherwise.[1066] However, any cases

---

[1062] EAOL, Article 9.

[1063] TAIMJ, Article 20.

[1064] VIAC, Article 22 para.1.

[1065] VIAC, Article 22 para.2.

[1066] CAL, Article 40.

involving state secrets, the hearings can not be conducted in public. [1067]

Laos

The LSED provides that in the settlement of economic disputes, the arbitrator, the parties and others involved must preserve confidentiality.[1068] The information and documents provided during the arbitration should not be revealed to the parties outside the case.[1069]

Thailand

The CAL and TCAI are silent on this matter. It is understandable that the parties have the freedom to agree on the matter. However, if they fail to agree, the proceedings should be in camera. This is simply because the confidentiality of the arbitral procedure is one of the main reasons parties to choose arbitration to settle their disputes. In practice, hearings under the TCAI are held in camera.

The TAIMJ provides that the hearing shall be held in camera unless otherwise agreed by the parties.[1070]

Vietnam

The VIAC also guarantees the confidentiality of the arbitral proceedings by providing that all disputes shall be heard in private.[1071] It is not clear under the VIAC whether the parties can agree that the arbitral procedure can be conducted in public. The Rules only say that "With consent of the parties, the arbitral tribunal may allow persons not involved in a dispute to

---

[1067] CAL, Article 40. However, it is noteworthy that once parties to arbitration have to resort the people's court, the case shall be heard in public (See Civil Procedure, Article 120 para.1). Furthermore, the people's court shall make public the names of the parties, the subject matter of the case (See Civil Procedure, Article 122). And the people's court shall publish the judgments of all its cases heard either in public or in private (See Civil Procedure, Article 134). Thus, the arbitral hearing may not be in confidence if it has to go to the court.

[1068] EAOL, Article 7.

[1069] EAOL, Article 7.

[1070] TAIMJ, Article 22(4).

[1071] VIAC, Article 24.

attend the hearing." [1072]

4.3.2. Evidentiary hearing

Although it is possible that an arbitration may proceed without a hearing, it is always open to hear the evidence. According to the evidentiary hearing, the hearing may be based on documentation only, or on an oral hearing.

Basically, the former should prevail. This is simply because it saves time for the arbitral tribunal to decide the case. Documents are always considered the best evidence. On the other hand, oral hearings have various problems, that is, they are generally lengthy, although conducted rather informally.

The most difficult as concluded by Wetter that "Oral hearings being the *tour de force* of Anglo-American legal trial tradition, it is only natural that they tend to mirror the practice in those jurisdictions of recent (if not historical) origin. This means that if and to the extent the counsel members are well trained in oral presentation, a heavily adversarial and oral trial pattern naturally emerges.

On the other hand, although English and American lawyers may be well versed in adversarial trial techniques, international arbitration has the potential to pit two non-English speaking parties against one another; this not only creates additional complications due to the language differences, but often, the lack of familiarity with or uniformity in the procedure to be observed in an arbitration, places additional administrative burdens on the tribunal." [1073]

However, most laws and institutional rules leave this issue open to the parties to decide what type of evidentiary hearing should be held. If the parties fail to agree, it is at the arbitrator's discretion to decide this.[1074]

[1072] VIAC, Article 24.

[1073] Wetter, *op.cit.* footnote 972, at p.25.

[1074] See the Model Law, Article 24(1).

PRC

The CAL prefers oral hearings and provides that the arbitral tribunal shall hold oral hearing when examining a case.[1075] The parties have less freedom to agree otherwise. The documentary hearing can be held only when the parties request, or with their consent, and if the arbitral tribunal considers an oral hearing unnecessary.[1076]

Laos

Under the LSED, during the session, the arbitrator holds hearing for the parties to advance their arguments and present their complete testimonies.[1077] This Article seems to prefer oral hearings. It says nothing about whether the parties can agree otherwise or whether the arbitrator has the power to determine that the hearing should be based on documents only.

Thailand

The CAA is silent on this matter. It is understood that Article 17, para.2 shall prevail in this situation, i.e. the parties have the freedom to determine whether the hearing should be oral or by document only. If the parties fail to agree, it is the power of the arbitrator to determine it.

TAIMJ also follows this line by providing that "Subject to these Rules and the agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[1078] Therefore, the hearing is conducted based on oral or documentary evidence depending on the agreement; if such an agreement is absent, the decision is made at the discretion of the arbitrator.

[1075] CIETAC Rules, Article 32.

[1076] CIETAC Rules, Article 32.

[1077] EAOL, Article 31 para.2.

[1078] TAIMJ, Rule 21.

TCAI provides that "The Arbitration Tribunal shall judge and decide the arbitration on the basis of written and other evidence bearing on the dispute."[1079] However, it is possible that the arbitrator may decide the case should be based on evidence only. This Article implies that it is the power of the arbitrator to determine what form the hearing should take. And, it is possible for the parties to agree what form the hearing should take.

Vietnam

VIAC says nothing on what form hearing should take. I believe this is at the discretion of the arbitrator.

4.3.3. Presentation of evidence

Similar to a court procedure, a party is responsible to prove the facts necessary to support his claims or defence[1080] except those facts which relate to those propositions which are so obvious, or notorious, that proof is not required.[1081] If the party fails to prove, most arbitrators will conclude that "[w] hen a party ... has access to relevant evidence, the Tribunal is authorised to draw adverse inferences from the failure of that party to produce such evidence."[1082] The hearing of the evidence of both parties is therefore an important event in the arbitral proceedings.

Evidence presented to the arbitrator can be classified into four categories; witnesses, expert, documents and inspection. Basically, the parties have freedom to present them to the arbitrator. It is at the discretion of the arbitrator whether to admit them.

PRC

The CAL imposes the duty on both parties to provide evidence for their

---

[1079] TCAI, Article 25.

[1080] See UNCITRAL Rules, Article 24(1); TAIMJ, Rule 23.

[1081] Redfern A and Hunter M, *op.cit.* footnote 146, at para.6-66.

[1082] *Ultrasystems, Inc. v. Islamic Republic of Iran* Award No. 27-84-3 (Concurring Opinion of R. Mosk March 4, 1983), 2 Iran-United States C.T.R. 114, 115 (1983).

claims.[1083] The CIETAC also provides that "the parties shall produce evidence for the facts on which their claim, defence or counterclaim is based."[1084] This means that the parties are free to present all kinds of evidence.

However, there is a kind of evidence which the CAL specifies how it is to be presented. According to the CAL[1085], when an arbitration tribunal thinks it necessary to have a specialised issue appraised, it may present it for appraisal to the appraisal department designated by the parties to the case. The arbitration tribunal may designate an appraisal department to appraise a specialised issue.

The question is what is an appraisal department. The CAL does not explain what an appraisal department is. The CAL provision is very similar to the provision in the CCPL [1086] which is a state organisation. [1087]

Judge Yang Jian-Cheng therefore concludes that the appraisal department in CAL is a state organisation. [1088] The appraisal departments are composed of various experts and are situated in several cities and provinces.[1089]

At the request of the parties or the arbitration tribunal, the appraisal department should send the person in charge of the appraisal to the tribunal sessions. With the permission of the arbitral tribunal, the parties to the case

---

[1083] Article 43.

[1084] CIETAC Rules, Article 38 para.1.

[1085] CAL, Article 44.

[1086] The CCPL, Article 72 states that:

" When the people's court deems it necessary to make an expert evaluation of a problem of a technical nature, it shall refer the problem to a department authorize by the law for the evaluation. In the absence of such a department, the people's court shall appoint one to make the expert evaluation.

The authorized department and the experts designated by the department shall have the right to consult the case materials necessary for the evaluation and question the parties and witness when circumstances so require.

The authorized department and the experts it designated shall present a written conclusion of the evaluation duly sealed or signed by both. If the evaluation is made by an expert alone, the institute to which the expert belongs shall certify his status by affixing its seal to the expert's conclusion."

[1087] Interview with Judge Yang Jian-Cheng, President Judge of Guang Zhou Intermediate People's Court. via telephone on May 5, 2000.

[1088] *Ibid.*

[1089] *Ibid.*

may question the person in charge of the appraisal.

This Article means that the parties are free to agree to submit highly specialised issues to an appraisal department. If they fail to agree on such a department or if the department which they have agreed on is not professionally competent, the arbitrator may designate one for the purpose. Such an appraisal department should send its appraiser to attend the hearings, when it will be useful in clarifying the facts. The parties, with the permission of the arbitrator(s), may question the appraiser. Furthermore, the CIETAC Rules[1090] also empower the arbitral tribunal to consult an expert or to appoint an appraiser for the clarification of special questions relating to the case. Such an expert or appraiser can be an organisation or a citizen, Chinese or foreign. The arbitration tribunal also has the power to order the parties and the parties are also obliged to submit or produce to the expert or appraiser any materials, documents, properties or goods related to the case for check-up, inspection and/or appraisal.

Under the CAL system, the parties may make a request for the preservation of evidence, if such evidence may possibly be destroyed or lost or it would be hard to get later on. When the parties concerned ask to have evidence preserved, the arbitration committee should present their application to the local people's court, which has jurisdiction as to the location of evidence.[1091]

This provision is important. As it is known, an arbitrator has no power to force a third party to cooperate in the arbitration procedure. The situation, which is very common, is that important evidence, may be in the hand of the third party. If this provision did not exist such evidence, however important to the case, could not be introduced to the arbitral procedure.

[1090] CIETAC Rules, Article 39.

[1091] CAL, Article 46.

Laos

Under the LSED, parties are free to present documents and testimonies to the arbitrator.[1092] Furthermore, if an arbitrator considers that the evidence provided by the parties is not sufficient, he is empowered to carry out further investigation.[1093] And, if necessary, the arbitrator on his own, or at the suggestion of the parties, can collect data on the spot. Furthermore, an expert, an individual or an organisation may be consulted for clarification, or appropriate documents may be submitted to the arbitrator.[1094]

Thailand

TAIMJ

To present documentary evidence and witnesses, the TAIMJ provides that "Unless otherwise agreed upon, the hearings of evidence shall be in the following manner:

The parties shall submit all the documents in support of their claim or their defence to the arbitral tribunal on the first day of the hearings. In case where the arbitral tribunal deems it appropriate, the tribunal may order the parties to submit all the relevant documents to it.

The taking of evidence shall be conducted by the arbitral tribunal..."[1095]

This means that the parties are free to present documentary evidence and witness. Besides, the parties are also free to determine how to present them. However, this Article says nothing about expert witness and inspection. With respect to inspection, it is at the discretion of the arbitrator to allow the parties to do so if he deems it appropriate.[1096]

The only problem here is whether the parties can appoint their own

---

[1092] Article 30 para.1.

[1093] Article 30 para.2.

[1094] Article 30 para.2.

[1095] TAIMJ, Rule 22(1)(2).

[1096] TAA, Article 17 para.2.

expert witness. And whether, it is within the power of the arbitrator to do the same with inspection? The answer would be negative. The TAIMJ approach concerning the expert follows the line of Article 27 of the UNCITRAL Arbitration, that is, an expert should be appointed by the arbitrator. The TAIMJ Rules provide that "The arbitral tribunal may appoint one or more experts to report to it in writing. In such case, the parties shall disclose the facts demanded by the expert." [1097] A copy of the report shall be sent to the parties.[1098]

The parties may however, file a request to question an expert witness.[1099] After examining the copy of the report, the parties may file a request to question the expert witness. It is within the power of the arbitrator to grant this request.[1100]

TCAI

With respect to the presentation of evidence, the TCAI Rules, unlike other Institutional Rules, fully empowers the arbitrator to administer the evidence. It provides that

"The Arbitrator Tribunal shall be empowered to call for the testimony of witness; also for documentary and other tangible evidence as may be deemed appropriate and necessary for the purpose of the proceedings; further, to specify the time and place for the conduct of the proceedings and for the hearing of testimony from witnesses and the verbal statements of the parties to the dispute.

"As it may deem necessary, the Arbitration Tribunal may question the parties to the dispute and/or the witnesses and may demand them to give

---

[1097] TAIMJ, Rule 24 para.1.

[1098] *Ibid.*, Rule 24 para.2.

[1099] *Ibid.*, Rule 24 para.3.

[1100] *Ibid.*, Rule 24 para.3.

testimony on oath or by affirmation."[1101]

And, the arbitrator, again, may employ the services and advice of experts in deciding the dispute if the problem is technical in nature.[1102]

Accordingly, it seems that the presentation of evidence under the TCAI Rules is not in the hands of the parties but the arbitrator's. This may have some advantage in that it can avoid the use of the delay tactic. The arbitrator should do what is necessary for the case. However, the arbitrator is not the person who knows best what evidence is relevant to support the parties' allegations. Thus, the parties still have the right and duty to present their evidence to the arbitrator.

Vietnam

VIAC Rules say little about the presentation of evidence. Article 15 of the VIAC Rules only says that "The arbitral tribunal shall supervise the preparations for the hearing of the dispute and, where necessary, take such measures as requesting the parties to provide written explanations, pieces of evidence and related documents." And, "The arbitrators may seek the help of one or more experts, assign them specific duties, receive their written reports and/or personally listen to their verbal statements."[1103]

I submit that, it is clear from these Articles that the parties are free to present documentary evidence, and experts may be assigned by the arbitrator. However, the Rules are silent on the matter of witnesses. I am minded to conclude, that parties are free to present their witnesses.

As already mentioned, the experience of arbitrators is important in that they are normally familiar with the rules of evidence of the country where they are trained. They may thus apply such rules to the arbitral procedure. However, all Rules discussed here tend to adopt the inquisitorial approach,

---

[1101] Article 26.

[1102] Article 28 para.2.

[1103] Article 14 para.3.

which empowers the arbitrator to investigate the case. Besides, after hearing all evidence, the arbitrator has the power to weigh the evidence and give a decision based on such evidence. In hearing the evidence presented by the parties, the arbitrator is not required to follow the rule of evidence of a court practice to admit such evidence. Hearsay witness, for example, is not prohibited in an arbitration. The rule which the arbitrator should follow, as mentioned earlier, is equality between the parties.

4.3.4. Settle dispute during arbitral procedure

It is possible and desirable that parties negotiate during the arbitral procedure, and they can settle the dispute which is in the arbitral. Although settlement is desirable, a legal problem may arise. What is the legal status of such settlement? Is it viewed in the same light as an award made by the arbitrator or only as a new agreement between the parties? The legal consequence of these are different.

If it is considered an award, such a settlement can be enforced immediately as if it were an award rendered by the arbitrator. However, if it is considered a new agreement between the parties, such a settlement cannot be enforced immediately. It is treated like another contract. Thus any subsequent disputes may be later brought to a court or to a new arbitration, as the case may be. Another problem is whether the pending arbitral procedure is then terminated. The clear result is that the arbitration will end. This is simply because the parties can agree to end an arbitration at any time they want.

Most arbitration laws and institutional rules recognise the freedom of parties to settle their dispute during the arbitration procedure. They also provide that the settlement is an award which can be enforced under the law concerning the enforcement of the award. It is true that if the term "award" is strictly construed, the agreement to settle the dispute between the parties can not be interpreted as an award. In this respect, a settlement may be contrary to the award rendered by an arbitrator.

For instance, the parties settle their dispute by the defendant having to

pay damage for $100,000 while the arbitrator, according to the evidence in the case, maybe minded to believe the defendant, and not yet give an award in favour of the plaintiff because the defendant is not liable. However, the agreement to settle their dispute will prevail and the arbitrator should support the settlement by rendering an award as the parties agree. In other words, this award is called "consent award."[1104]

PRC

Under the Chinese system, during the arbitration procedure, disputes can be settled by two methods. First, like other systems, the parties may settle their dispute on their own.[1105]

When a settlement agreement is reached, the parties may request the arbitral tribunal to make an award according to the agreement, or withdraw their application for arbitration.[1106] In the case where the parties withdraw their case instead of requesting the arbitrator to make an award, the original arbitration agreement still stands.

Thus, after withdrawal, if one of the parties fails to perform the agreement, an application for arbitration can be made again on the basis of the original arbitration agreement.[1107] In other words, the original arbitration agreement is valid although the parties may have withdrawn the first case.

In addition, the parties may request an arbitrator to dismiss the case after they have settled their dispute. The CIETAC Rules, which comply with the CAL, stipulates that "If the parties to an arbitration case reach an amicable settlement agreement by themselves, they may either request the arbitration tribunal to make an award in accordance with the contents of their amicable settlement agreement to end the case, or request a dismissal of the case.

[1104] See LCIA, Article 26.8.

[1105] CAL, Article 49.

[1106] *Ibid.*

[1107] CAL, Article 50.

The Secretary-General of the Arbitration Commission shall decide on the dismissal of an arbitration case if the decision on dismissal is made before the formation of the arbitration tribunal, and the arbitration tribunal shall decide thereon if the decision on dismissal is made after the formation of the arbitration tribunal.

If the party or the parties refer the dismissed case again to the Arbitration Commission for arbitration, the Chairman of the Arbitration Commission shall decide whether to accept the reference or not."[1108]

Secondly, an arbitrator may settle the dispute by mediation before making an award. This method has existed in the East for a long time and is now expanding to the West and other parts of the world.[1109] In practice, in a CIETAC arbitration, almost 50% of the cases have been conciliated during the arbitration procedure, and the success rate is 40-50%.[1110]

Clearly, a conciliation conducted successfully during the arbitration is also different from the settlement reached by an agreement during the arbitral procedure. In the latter situation, the parties make the settlement on their own, and they submit their settlement to the arbitrator who has nothing to do with their settlement. He still retains his arbitrator status. On the other hand in the case of a conciliation conducted during the arbitral procedure and if the settlement is made under the conciliation of the arbitrator, he transforms his status to that conciliator.

In this respect, the CAL stipulates that "The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If the conciliation is unsuccessful, an arbitration award should be made

---

[1108] CIETAC Rules, Article 44.

[1109] Houzhi T, "Is there an expanding culture that favours combining arbitration with conciliation (mediation) or other ADR procedure?", *30th Anniversary and its Ceremonial International Arbitration Symposium*, Korea, Oct.10, 1996, at p.1.

[1110] *Ibid.*, at p.3.

promptly." [1111]

In my opinion, conciliation during the arbitration procedure can occur only by the free will of the parties. It is not a pre-requisite for the arbitrator to give an award. It can be conducted separately or simultaneously with the arbitration procedure However, the conciliation must be conducted on condition that the facts are ascertained and the rights and wrongs have been distinguished, and it must be conducted realistically and on fair and reasonable grounds.[1112]

The Combination of arbitration with conciliation is unique to the practice of arbitration in the PRC.[1113] Under the Chinese system, a person can act both as mediator and arbitrator. The Chinese approach conflicts with that of the Western world. An example the UNCITRAL Rules of Conciliation do not permit a conciliator to act as an arbitrator in the same dispute.[1114]

According to Professor Neil Kaplan, "In the West, however, conciliation and arbitration are viewed as two very different procedures. It is unthinkable that an arbitrator, in the course of his or her arbitration, would switch hats to act as a conciliator and, should the attempt at conciliation fail, continue with the arbitration. Parties would be reluctant to put all their cards on the table before a conciliator knowing that the same person may, in the end, arbitrate their dispute".[1115]

In this respect, Professor Tang Houzhi argues that it would be best to have the same person to arbitrate the case because he knows everything of the case. [1116] The arbitrator is required to be impartial. [1117] Thus, the more he knows

---

[1111] Article 51 para.1.

[1112] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *op.cit.* footnote 43, at p 79.

[1113] Tang Houzhi, *China Commercial Arbitration Yearbook*, (1992) at 87.

[1114] UNCITRAL Conciliation Rules, Art. 19.

[1115] Quoted in Tang Houzhi, *op.cit.* footnote 1109, at p.21.

[1116] Tang Houzhi, *op.cit.* footnote 1109, at p.21.

[1117] *Ibid.*

about the case, the more impartial he can be if he is a person who really cherishes impartiality. [1118]

There remains a question concerning the legal consequence of a settlement which is derived from the conduct of a conciliation. The CAL empowers the arbitrator to render either an arbitral award or a written conciliation statement by providing that "If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect." [1119] And details the written conciliation statement by providing that "A written conciliation statement shall specify the arbitration claim and the results of the settlement agreed between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and then served on both parties.

"The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof.

"If the written conciliation statement is repudiated by a party before it signs for receipt thereof, the arbitration tribunal shall promptly make an arbitration award."[1120]

Why does the CAL provide both a "written conciliation statement" and an "arbitration award"? Does this mean anything? What criteria should an arbitrator use to make a written conciliation statement or an arbitration award?

The reason for distinction between a written conciliation statement and an arbitration award is simply because, if the conciliation is a success a written conciliation statement should be issued. However, an award should be rendered only in two situations. The first, is when the written conciliation

---

[1118] Tang Houzhi, *op.cit.* footnote 1109, at p.21.

[1119] Article 51 para.2.

[1120] Article 52.

statement is repudiated by a party before both parties have signed for receipt of it.[1121] According to the CAL, the written conciliation statement and the award have equal legal effect[1122]. The difference is that the former shall become legally effective immediately after both parties have signed for receipt of it[1123], while the latter will be legally effective as of the date on which it is made[1124]. Thus, in case where the written conciliation statement is repudiated by a party before it is legally effective, the CAL determines that an award should be rendered.[1125]

The second situation in which an award should be rendered is when a settlement agreement is reached through conciliation and needs to be enforcement abroad. This is because the problem remains whether or not a written conciliation statement can be enforced abroad under the New York Convention. To avoid such a problem, it is suggested that if the dispute is domestic, either an arbitration award or a written conciliation statement may be made, as the parties wish. [1126] However, if it is enforced abroad, an award shall be rendered. [1127]

Laos

According to the LSED, the parties may come to an agreement and end the dispute before an award is reached. The arbitrator shall report confirming this and the agreement should be signed by the two parties and the arbitrator. The LSED confirms that such agreement will have the same binding force as an arbitral award.[1128] Although the LSED says nothing about the pending

---

[1121] CAL, Article 52 para.2.

[1122] CAL, Article 51 para.2.

[1123] See CAL, Article 52 para.2.

[1124] See CAL, Article 57.

[1125] CAL, Article 52 para.3.

[1126] The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *op.cit.* footnote 43, at p.80.

[1127] *Ibid.*

[1128] See Article 32.

arbitral procedure, it is understandable that in such circumstances, the procedure will end. The agreement between the parties implies that the parties intend to end the arbitral procedure.

Model Law

The Model Law provides that "If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms."[1129] The Model Law makes it clear that the arbitral procedure is terminated by a settlement between the parties.

Thailand

The TAA, TAIMJ Rules and TCAI are silent on this issue. It is understandable that if parties reach a settlement during the arbitral procedure and submit it to the arbitrator, the arbitrator has no choice but to make an award pursuant to the settlement. The question is, what if the arbitrator does not do so and makes an award that contradicts the settlement. This is very rare in practice and the problem is more a theoretical one.

However, Section 17, para.2 of the TAA provides that "Unless otherwise provided by the arbitration agreement or law, an arbitrator shall have the power to conduct any procedure as he deems appropriate taking the principle of natural justice as prime consideration." This means that the arbitrator should follow the arbitration agreement although he may consider that the arbitration agreement is inappropriate. However, the settlement agreement is not an arbitration agreement.

Should the arbitrator follow the settlement agreement? As seen, the existence or the termination of an arbitration depends solely on the agreement between the parties. Thus, the arbitration agreement envisaged by Section 17, para.2 should be widely interpreted to cover those agreements reached during

---

[1129] Article 30(1).

the proceedings.

The arbitration agreement, for example, provides that the arbitral procedure shall be conducted in the course of the oral hearing. Before the hearing begins, if the parties reach a new agreement by saying that the arbitral procedure shall be conducted on the basis of documents only, should the arbitrator follow the new agreement? Certainly, he should do so. In the case of a settlement agreement, therefore, the same should apply. The arbitrator, under Section 17, para.2, has no choice but to make an award pursuant to the settlement agreement. He cannot decide otherwise.

Vietnam

The VIAC follows the same line. It provides that "If, in the course of proceedings at the Centre, the parties reach a direct mutual conciliation, the arbitral tribunal shall cease the proceedings thereafter. The parties may, however, request the President of the Centre to confirm such a conciliation in writing. Any such confirmation shall be valid as an arbitral decision."[1130] The President of the Centre shall fix the arbitration fees and costs are to be borne by the parties respectively.

4.3.5. *Ex parte* procedure

Parties sometimes decide not to participate in arbitration proceedings unless there is a legitimate ground to do so. This occurs in particularly, where the party is a state-entity that enjoys the security that comes with sovereign immunity and its related prerogatives.[1131] Such an idea is considered a very bad one. This is because most arbitration laws and institutional rules have provisions to deal with such a situation.

A defaulting party may either be a claimant or a defendant. The legal effect of both situations is different. If the claimant claims that the defendant is liable in one way or the other abandons his claim, the arbitration between the

---

[1130] Article 35.

[1131] Born G, *op.cit.* footnote 387, at p 58.

parties is useless. The claimant does not want to exercise his right under the arbitration agreement. No one can force him to use his right. The defendant who has no right, but a duty under the arbitration agreement but cannot do anything either. In fact, he may appreciate the claimant abandoning the case, unless he has a valid counter-claim.

In such circumstances, the arbitration procedure should be terminated. The situation is different where the claimant is the defaulting party. If the defendant who claimed liability on the claimant, who becomes the defaulting party, the arbitration procedure will not be terminated. The claimant still has the right under the arbitration agreement to bring the dispute to arbitration. The defendant who breaches his duty by not co-operating with the arbitration should be blamed and punished.

The arbitration procedure should thus continue on the basis of *ex parte* proceedings. This means that the arbitrator shall proceed without the defaulting party's presentation and issue an award.

All the Western Rules are unanimous in adopting such an approach. [1132] The ICC Rules, for example, provides that "If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral Tribunal shall have the power to proceed with the hearing." [1133]

However, before the beginning of the *ex parte* proceedings, the arbitrator should make sure that the defaulting party does not intend to participate in the proceedings by ensuring at every step of the way, the defaulting party receives notice of the ongoing proceedings. This is because there is a general presumption that a party who boycotts an international commercial arbitration intends to resist enforcement of any award that is ultimately be rendered. [1134]

[1132] Blessing M, "A comparison of the Rules" 6 *J.Int'l.Arb.* 24 (1989).

[1133] ICC Article 21.2. See also the UNCITRAL Arbitration Rules, Article 28(1).

[1134] Redfern A and Hunter M, *op.cit.* footnote 146, at para.6-108.

Since it is a legitimate ground for refusal of recognition or enforcement of an award, under the New York Convention, that a party has not had a full opportunity to present his case, it is desirable that the award should itself show, on its face, the circumstances in which the respondent did not participate. [1135]

Furthermore, it should be borne in mind that an arbitrator, unlike a court, has no power to issue a default judgment predicated by one party's non-participation. Accordingly, the arbitrator in an *ex parte* proceedings should make a determination of the dispute submitted to him.[1136] To do so, he should satisfy himself that the claimant's claims are well-founded in law and fact. [1137]

PRC

CAL

The CAL provides that if the claimant fails to appear before the arbitration tribunal without justified reasons after having been notified in writing, or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, it may be deemed to have withdrawn its application for arbitration.

If the respondent fails to appear before the arbitration tribunal without justified reasons after having been notified in writing, or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, a default award may be made.[1138]

CIETAC

The CIETAC also provides that the arbitration proceedings shall not be affected in case the where the respondent fails to file his defence in writing or the claimant fails to submit his written defence against the respondent's

---

[1135] *Ibid.*

[1136] See Born G, *op.cit.* footnote 387, at p 58-9.

[1137] See *Ibid.*

[1138] Article 42.

counterclaim.[1139]

The question then is what is the effect of a default award. According to the CAL, there are four kinds of awards; interlocutory or interim awards, partial awards, consent awards, and final award. The first award is not the final award. The last three awards are final awards, which are enforceable. A final award is a definitive award rendered by an arbitral tribunal on all matters in dispute between the parties. [1140] Final awards are rendered after the conclusion of all hearings and deliberations in a case. [1141] The CAL says nothing about the effect of a default award. However, as seen, a default award is rendered when a respondent fails to appear before the arbitral tribunal without justified reasons. If the CAL does not allow the arbitral tribunal to make an award, the arbitration process can be easily destroyed. Thus, a default award is final award, which is enforceable. This is a measure used to punish those parties who do not cooperate in the arbitral process.

It is worth noting, that the CAL empowers an arbitral tribunal to render a default award but not to make a decision *ex parte* during the arbitral procedure, such as interim relief. In these situations, a claimant may apply to arbitration commission (not arbitral tribunal), such as CIETAC, for the preservation of property measures. The arbitration commission should then submit the party's application to the People's Court in accordance with the relevant provision of the CCPL.[1142] A court may issue a property preservation measure ruling if it considers the measure necessary. The court may further order the claimant to provide a security guaranty for the property preservation measure. If the claimant fails to provide the guaranty, the court shall deny the application for property preservation. [1143]

If a claimant believes that the case is urgent, it may apply for an

---

[1139] Article 21.

[1140] C Dejun, M Moser and W Shengchang,, *op.cit.* footnote 29, at p.114.

[1141] *Ibid.*

[1142] CAL, Article 28 and Code of Civil Procedure, Article 251 and Article 92.

emergency ruling on his application for property preservation. The court may make its ruling within forty-eight hours, and execution of property preservation measures take immediate effect. [1144] Thus, an arbitral tribunal in the PRC has no power to make an *ex parte* decision on the subject.

Laos

LSED is silent on this matter. It only provides that in conciliation proceedings, the conciliation can be terminated, among other things, if one or both parties fail to participate in the procedure of conciliation without valid grounds.[1145] Does this provision also apply to the arbitral procedure? The answer appears to be negative.

The conciliation is provided in Section II (Article 21-26), while the arbitration is in Section III (Article 27-33). If the LSED wants the Section II applied to Section III, it must expressly provides so. The appointment of an arbitrator, for instance, in Article 28 (in Section III) expressly provides that Article 22 (in Section II) also applies to the appointment of arbitrator. With respect to the termination of an arbitration procedure, the LSED is silent. Accordingly, there is no room for Article 24 in Section II on the termination of conciliation, to be applied to Section III with respect to the termination of a arbitration. This situation is still unclear with respect to arbitration.

Is an arbitrator empowered to act in ex parte proceedings? If so, how? Can the defaulting party claim that the award rendered by the arbitrator in *ex parte* is invalid because it is against the mandatory rule of provision of Article 5, i.e. equality between the parties? I am convinced that this is a loophole in the LSED which needs to be amended.

Thailand

The TAA is also silent on this issue and problems, similar to those in

---

[1143] Code of Civil Procedure, Article 92.

[1144] *Ibid.*

[1145] Article 24.

Laos, may arise. However, the new Draft Act has filled this gap by providing that "Unless otherwise agreed by the parties, if, without showing sufficient cause,

(1) the claimant fails to communicate his statement of claim in accordance with Section 28, the arbitral tribunal shall terminate the proceedings;

(2) the respondent fails to communicate his statement of defence in accordance with Section 28, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(3) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."[1146]

Vietnam

The VIAC provides that in the absence of one or all of the parties without any legitimate reason, the arbitral tribunal or the sole arbitrator, as the case may be, can proceed with the hearing on the basis of the available documents and evidence. [1147]

5. Conclusion

The arbitral procedure is very important. The success of arbitration depends very much upon the effectiveness of the arbitration procedure. Thus the parties must carefully agree on this. There is no single standard for all arbitrations with respect to this matter. The parties must first decide what kind of arbitration they want, whether an ad hoc or institutional one.

An ad hoc arbitration is good in that the parties can agree on what they want. However, it poses certain problems such as, the parties have to manage

---

[1146] Article 30.

[1147] Article 20.

the administrative matters. On the other hand, institutional arbitrations provide the parties with this facility and take care of all administrative matters. Additionally, they also provide the arbitral rules for the parties and there are many arbitral institutions in the world from which the parties can choose. The qualities of these institutions are different.

The arbitration laws concerning arbitration procedure differ from country to country. These laws are normally flexible on procedural issues. However, they are sometimes silent on certain issues. For instance, the laws of the PRC, Laos, Thailand and Vietnam are silent on the matter of pre-hearing. Such a silence should not be interpreted as meaning that pre-hearings are prohibited, otherwise, arbitration may be impossible.

I submit that the parties to arbitration must tailor, whether directly or indirectly, their arbitration procedure with care. They may directly design their procedure by choosing an ad hoc arbitration. Alternatively, they may indirectly design their procedure by choosing an institutional institution. There is no single institution which is suited to all cases. Besides, the parties must examine the law applicable to the arbitration as well and the determined rules must comply with this law.

CHAPTER 6

CHOICE OF LAW

International commercial arbitration potentially involves three levels of law. The first is the law applicable to the arbitration agreement, this determine the obligation of the parties to settle their dispute by arbitration (discussed in Chapter 3). The second is the law applicable to arbitration proceedings, this regulates the conduct of the arbitration proceedings. And the third and final is the law applicable to the substance of the dispute, this determines the rights and obligations of the parties in relation to their main contract.

It should first be noted that all three laws, under the New York Convention framework, may be different laws. This was recognised by the English courts in Naviera Amazonica y Intemacional de Sequos[1148] where Lord Justice Kerr stated:

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases, all three would be the same. But (1) will often differ from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."[1149] However, this approach depends on the concept of the party autonomy, which may differ from country to country.

As the applicable law to the arbitration agreement has already been discussed in Chapter 3, it will not be necessary to discuss it here. The first part of this discussion will been dedicated to the choice of law applicable to arbitration proceedings. The second part will focus on the choice of substantive law.

[1148] [1988] LLR Rep. 116, 166.

[1149] *Ibid.*, at p.199.

Part 1

Choice of *lex arbitri*

As discussed earlier, international commercial arbitration does not take place in a vacuum. State law still plays a significant role in its conduct. All parties who deal with arbitration must respect and follow the applicable *lex arbitri.*

First, the extent of party autonomy depends on the *lex arbitri.* The parties cannot agree on what is prohibited by the *lex arbitri.* For example, if the *lex arbitri* provides that an arbitrator must be lawyer, the parties cannot agree otherwise.

Secondly, the arbitrator who is to render an enforceable award should follow the *lex arbitri* of the place of arbitration, otherwise any award rendered may be set aside. Such an award cannot be enforced in another New York Convention state.

Thirdly, the assistance of the state court is unavoidable. It is common for a disadvantaged party not to cooperate with the other party or with the arbitrator. This may lead an undesirable result in the arbitration, such as delay. The assistance from the court will thus be necessary.

Fourthly and finally, parties sometimes do not agree on certain points for whatever reasons. The *lex arbitri* will apply to fill these gaps, otherwise the arbitration may easily come to an end.

However, the problems of current practice are that the *lex arbitri* is not uniform. This causes difficulties to those who deal in international commercial arbitration i.e. a practice in one country may or may not be accepted in others.

The following question arises whether the parties can agree on what *lex arbitri* applies to their arbitration. This question will be discussed in this Part.

1. Scope of the *lex arbitri*

The scope of the *lex arbitri* is different from country to country[1150] Even though the provisions maybe similar, the interpretation of the state courts could be different. Furthermore, the scope of *lex arbitri* may differ between domestic and international arbitration. Nevertheless, most laws of arbitration now contain two relevant elements: substantive and procedural. [1151]

The first deals with the validity of the arbitration agreement and arbitrability. The *lex arbitri* is often applicable to the validity and interpretation of the arbitration agreement. For example, the *lex arbitri* of most countries requires that the arbitration agreement should be in writing. The *lex arbitri* is also applicable to the question of what subject matter can be arbitrated.

The second focuses on the arbitral procedure which deals with the appointment of the arbitrator, the conduct of arbitration and the power of the state court. The power of the courts in this respect is to enforce the arbitration agreement, to set aside the award, to enforce the award and to assist in the conduct of arbitration.

Normally, the *lex arbitri* gives freedom to the parties to design their arbitration. As seen in previous Chapters, the parties can agree on who the arbitrator is and how the arbitration should be conducted. However, the provisions of the *lex arbitri* dealing with the power of the court cannot be agreed otherwise. This is because the courts follow only the laws of their countries. For example, the parties cannot the grounds on which a court can refuse to enforce an award. In other words, the provisions concerning the power of the state court is mandatory.

The problems of the *lex arbitri* in international commercial arbitration

---

[1150] Smedresman P, "Conflict of Laws in International Commercial Arbitration," 7 *California Western International Law Journal* 267-268 (1977).

[1151] See Thomas D, "The curial law of arbitration proceedings", *Lloyd's Maritime and Commercial Law* 491 (1984).

are that its scope differs from country to country. The parties maybe able to exercise their freedom under the *lex arbitri* of one country but they may not be able do so under others.

As a result, the parties to arbitration attempt will try to avoid the *lex arbitri* of a country which may prove troublesome for them. They, for example, may desire the *lex arbitri* of the country which allows them to appoint a foreign arbitrator. Or they may want the *lex arbitri* of the country where judicial review is not available. The question here is whether they are free to choose any *lex arbitri* they wish.

2. The applicable *lex arbitri*

The basic question here is what *lex arbitri* should be applied to an arbitration. There are many laws of arbitration which are possibly applicable to international commercial arbitration. It may be the law of the nationality of the parties, the nationality of the arbitrator, the place of arbitration or of the award-enforcing state(s). What law should be applied? The arguable answer is the law of the place of arbitration, the *lex loci arbitri.*

This concept is influenced by the legal concept of the jurisdiction theory (discussed in Chapter 2). According to this theory, all activities which take place in the territory of any state shall be subject to the law of that state. That means that arbitration which takes place in State A shall be under the *lex arbitri* of State A. Most jurisdictions accept this approach. One of the reasons why this should be so is that it ensures what law should govern the arbitration, and it eliminates the problem of the power of the local court to fulfil this or to carry out this function.

In England, for example, the High Court of *James Miller v Whitworth Street Estates*[1152] held that the *lex loci arbitri* shall apply to the arbitration which takes place in its territory.

In that case, an English company contracted with a Scottish

[1152] [1970] 1 All E.R. 796 (H.L.).

construction company for work on a building in Scotland. English law governed the interpretation of the contract. Scotland, however, was the "seat" of the arbitration, where the proceedings were held. After evidence had been heard, the English company asked that the arbitrator "state a case" to the High Court. The arbitrator refused, since under the law of Scotland he was the final adjudicator of legal as well as factual questions. The House of Lords upheld the arbitrator's refusal. The arbitration was governed by the law of Scotland, the place of the proceedings, notwithstanding that English law governed the contract. [1153]

However, parties sometimes choose the place of arbitration for the reason of neutrality[1154] or convenience[1155] rather than of *lex arbitri*. If so, does the *lex loci arbitri* still apply to such a case? There is no reason why it should not be so. It is true that in such cases the place of arbitration does not have a legally related interest to the arbitration and there is no physical contact between them. Consequently, the arbitration should be governed by the law of another country.

However, it should be borne mind that arbitration cannot survive without the assistance and supervision of the local court. If the forum allows the foreign law of arbitration to apply to arbitration which takes place in its jurisdiction, how does the court deal with the foreign law? The local court, of course, would not be familiar with such a law. What if the court improperly or mistakenly applies the foreign law? Will that comply with the needs of the business community? Is this the aim of international commercial arbitration?

These problems should not be ignored or overlooked. The parties should answer these questions. What do they need more besides convenience, or neutrality, and the risk of mistakenly applied foreign law? Fortunately, it is

---

[1153] Park, *op.cit.* footnote 256, 22-3.

[1154] See Danilowicz V., "The Choice of Applicable Law in International Arbitration" *9 Hastings Int'l.&Comp.L.Rev.* (1986) 235, 253.

[1155] See Lew J, "Applicable procedure law in the English common law", in M. Storme & F. Ly (eds.) *The Place of Arbitration* (Mys&Breesch, 1992) 77, at p. 79.

very rare in a case for an arbitral clause to stipulate the *lex arbitri*, but call for the place of arbitration in another country. [1156]

3. Choice of *lex arbitri*

Now, turning to the question of whether parties to arbitration can choose the *lex arbitri*, or otherwise. There are two possible ways to be considered: direct choice and indirect choice.

3.1. Direct choice

To avoid having an undesirable *lex arbitri*, the parties may directly choose the *lex arbitri* which is suitable for their case instead of the applicable *lex arbitri*. This theory seems to overlook the importance of the *lex loci arbitri* and gives the freedom to arbitration instead. The question then is whether the parties can choose their own *lex arbitri*.

As previously discussed, the *lex arbitri* embraces both non-mandatory rules, to which the parties have freedom to agree otherwise, and mandatory rules. One area of the mandatory rules is the power of the court. The parties cannot decide on the power of the court. The courts in most countries shall follow what the laws stipulates. As a result, the parties cannot decide the *lex arbitri* which is applicable to their arbitration. For example, the parties cannot agree in advance the grounds for refusing the enforcement of an award.

However, the New York Convention seems to allow the parties to agree on the *lex arbitri*. Article V(1)(e) reads: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is evoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof 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*, the award was made." (emphasis added)

[1156] Hirsch, *op.cit.* footnote 251, at p. 46.

The term "under the law of which the award was made" gives rise to some doubts. Does it mean that parties can agree on a *lex arbitri* other than that of the place of arbitration? To understand this term, it is necessary to look at the framework of the New York Convention.

There are two criterions for the application of the New York Convention. The first is the territorial criterion. The Convention shall apply in those cases in which an award is made outside the territory of the enforcing state. The second concerns the "not considered domestic award". This criterion shall be applied to those cases in which the awards were made in the award enforcing state, but the applicable law is not the law of that state. In other words, the New York Convention will be applied to cases in where the awards were made in the award enforcing state if the law governing those awards are not the law of the award enforcing state.

The second criterion is the historical reason. When the New York Convention[1157] was drafted, there was no second criterion at all. However, there were delegates from countries whose legal systems allow some other *lex arbitri* to be applied to arbitrations which took place within their territory. This criterion is a compromise provision. As a result, Article V(1)(e) has added the term "under the law of which the award was made" to comply with the Article I(1). The freedom to directly choose *lex arbitri* is thus possible if the law of the place of arbitration allows it. However, the second criterion is called the dead letter.[1158] This is because it is used in very rare cases.

From the concept of the direct choice of *lex arbitri*, the concept is further developed. The question is whether the parties can detach their arbitration from the *lex arbitri*. This is called 'delocalisation' of arbitration.

3.2. Delocalisation

The origins of the theory was derived from the concept 'sovereign

---

[1157] See van den Berg A, *op.cit. footnote 142*, at pp. 22-23.

[1158] See *Ibid.*, at p. 22.

immunity' which exempts states from the jurisdiction of courts in foreign states. This means that when a state is a party to an arbitration, this arbitration should not be under the law of any country.

The first case in which delocalisation of arbitration was applied was the *Aramco Arbitration*,[1159] which involved Saudi Arabia and an American company (the Saudi Arabian Maritime Tanker Ltd.). The arbitrator in *Aramco* Arbitration refused to apply the law of the place of arbitration to the proceedings:

"The jurisdictional immunity of States ... excludes the possibility, for the judicial authorities of the country of the seat, of exercising the right of supervision and interference in all the arbitral proceedings which they have in certain cases. Considering the jurisdictional immunity of foreign States, recognised by international law in a spirit of respect for the essential dignity of sovereign power, the tribunal is unable to hold that arbitration proceedings to which a sovereign State is a party would be subject to the law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a party to the arbitrations."[1160]

Twenty years later, the same position was taken in in the case involving when the Libyan government nationalised its oil concessions to various companies including Texas Overseas Petroleum Company. Arbitral proceedings were instituted during which the sole arbitrator held that arbitration was directly governed by international law to respect the position of the sovereign state of Libya and since the parties, from the beginning, had intended to keep their distance from the jurisdiction of the respective Courts.[1161]

The concept of delocalisation has been moving away from its historical

---

[1159] 17 I.L.M. 3 (1978).

[1160] 17 I.L.M. 155-156 (1978).

[1161] *Texaco Overseas Petroleum Company (US) and California Asiatic Oil Company (US)* v *The Government of the Libyan Arab Republic*, January 19, 1977, 4 *Yearbook Com.Arb.* 177 (1979).

origin it is now available not only in arbitrations involving states contract but also in international arbitrations in general. Today, delocalisation is derived from the legal concept of arbitration. According to the contractual theory, all the essential elements of arbitration, including submission, proceedings and award, are contractual.

Under this view, arbitration is a series of contractual relations between parties who have agreed to submit disputes to arbitration and abide by any award rendered. Accordingly, arbitration can function independent of any national legal order, and arbitrators would be free to choose any procedural law. [1162] However, there are two current concepts of delocalisation.

The first view is that the international commercial arbitration should be free from the *lex loci arbitri* and should be subject only to the international minimum standards which are incorporated in the national law.[1163] In other words, delocalisation is not subject to international law but to a transnational standard. The theory gives more weight to the party autonomy than to the national law.[1164] This view is possible only if all states open their mind to accept transnational standards which is still questionable.

The second concept has gone a step further. According to this view, international commercial arbitration should be completely detached from the state. It considers international commercial arbitration as stateless. This seems to be rejected by the New York Convention. According to van den Berg, delocalised awards are outside the field of application of the New York Convention because delocalisation is against the "system and text" of the Convention, runs contrary to the Convention's presumption that an award is governed by national law, and is inconsistent with the Convention's legislative

---

[1162] Danilowicz V., *op.cit.* footnote 1154, at p.250.

[1163] See Paulsson J, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", 30 *Int'l.Comp.L.Q.* 358 at p.370 (1981) and also Paulsson J, "Delocalization of International Commercial Arbitration: When and Why it Matters" 32 *Int'l.Comp.L.Q.* 53 (1983).

[1164] See Carbonneau T, *op.cit.* footnote 474, at p.36.

history.[1165]

It is my submission, that international commercial arbitration is still attached to national law. The freedom of the parties to tailor the arbitration depends on the policy and the interpretation by the courts. The stateless character of arbitration is not accepted in most countries as it is not considered a sound concept.

First, it is common that one party to arbitration may not, for whatever reason, follow the arbitral process. For example, he does not perform the award. In this situation, supervision and assistance from a state court is necessary. How does the courts function without the national law? The scope of the national law and the interpretation by the court is not dependent on whether arbitration is delocalised or not.

Rather, it depends on the policy of that state. If the state is open to international commercial arbitration by adopting transnational standards, that will make international commercial arbitration more acceptable. The development of delocalisation is useful in that it is a guideline for those states that want to make their law more acceptable. On the other hand, the concept of stateless arbitration is a hollow idea. It cannot be accepted in the real world, and it will be useless to do so. The PRC, Laos, Thailand and Vietnam do not accept the concept of stateless arbitration.

3.3. Indirect choice

As seen above, the *lex arbitri* applicable is the law of the place of arbitration, the *lex loci arbitri*. Thus, if the parties to international commercial arbitration agree on the place of arbitration without referring to the *lex arbitri*, the *lex loci arbitri* shall be applied.

As a result, the parties may choose the place of arbitration of which the *lex arbitri* is desirable. In other words, the place of arbitration is chosen because of the local law. For instance, in the B.P. arbitration, the arbitrator

---

[1165] van den Berg A, *op.cit. footnote 142*, at p.34-40.

chose Copenhagen as the seat of the tribunal because of the "wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law." [1166] Although in this example the arbitrator made a choice, the same reason should be applied when the parties do so.

The indirect choice of *lex arbitri* is an easy method in current practice. The parties under most jurisdictions have complete freedom to choose where the arbitration should take place, i.e. they can choose any location they want. However, a problem may arise if the place where the *lex arbitri* is desirable may be different from a place that it is convenient for the parties. The parties may thus incur some extra cost for their choice of *lex arbitri.*

More important, the lack of complete conformity and party autonomy mean that the choice of place of arbitration is especially important.[1167]

4. Conclusion

The problem of choice of *lex arbitri* has been discussed at length in legal literature, probably too much, given its practical importance. Some authors insist on complete party autonomy, which is derived from the contractual theory, to choose the *lex arbitri* or even detach the arbitration from local law. Others think that the *lex arbitri* of the place of arbitration, which is influenced by the jurisdiction theory, should be applied to arbitration. Whatever the difference in theory, it is accepted that the parties may choose that place freely.[1168]

This conflict is a matter of theory rather than that of practice. In practice, the place of arbitration is chosen because of the legal consideration. As seen, international commercial arbitrations still take place in developed countries, whose laws of arbitration have long been developed. This attitude has changed with the introduction of the Model Law.

[1166] BP arbitration, 53 *I.L.R.* at p.309.

[1167] Perloff S, "The Ties That Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration", 13 *U.Pa.J.Int'l.Bus.L.* (1992-3) 323, 342.

[1168] Hirsch, *op.cit.* footnote 251, at p.46.

I believe that today international commercial arbitration often takes place in developing countries. For example, a large number of cases have been taking place in the PRC since its adoption of the Model Law. This phenomenon clearly indicates that the parties to international commercial arbitration often choose the place of arbitration because of legal considerations rather than that of neutrality or convenience.

Part 2

Choice of Substantive Law

Another important issue in international commercial arbitration is the role played by the "applicable substantive law". An award based on the law applied will finally settle the contrasting interests of the parties. Parties are thus very concerned as to which law should be applied. In this respect, party autonomy gives the parties freedom to choose the applicable law. Generally, there are two forms of party autonomy.[1169]

First there is the autonomy which is clearly expressed by the parties either in the written contract, or alternatively, before a court or arbitrators.[1170]

Secondly, there is implied autonomy which through the words or acts of the parties, clearly manifest their intention and expectation that a particular law should govern their contractual relation.[1171]

1. Express choice

It is important for a wise lawyer who drafts international contracts to determine the applicable law and to ensure that such a contract expresses a clear choice of law. This practice will ensure the avoidance of the application of some law undesirable to the contract. Therefore, it is rightly suggested that: "The determination of the proper law of the contract will not involve any difficulty if the parties have been wise enough to record expressly which legal

---

[1169] Lew J, *op.cit.* footnote 137, at p. 69.

[1170] *Ibid.*

[1171] *Ibid.*

system is to apply to their agreement."[1172]

Although it is unclear that the practice of stating which law is to govern the contract is as a result of or of itself induced by the acceptance of party autonomy in the various national private international law systems;[1173] allowing parties to determine the applicable law has been well-recognised with "slight dissent"[1174] by most legal systems. In England, for example, the courts in one case held that: "Parties are entitled to agree what is to be the proper law of their contract." [1175] There is no provision of party autonomy on choice of law in Laos and Vietnam, but in the PRC and Thailand there is.

PRC

In the PRC, according to the Foreign Economic Contract Law (FECL), parties are allowed to choose the law for the settlement of disputes. It provides that: "The parties to a contract may seek settlement to disputes in accordance with laws of their choosing applicable to such disputes."[1176] Besides, the General Principle of the Civil Law also provides that: "The application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China".[1177]

Thailand

The Thai Conflict of Laws, section 13, paragraph 1 provides:

"The question as to what is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties thereto."

By virtue of Section 13, paragraph1, a contract is to be governed by the

---

[1172] Schmitthoff, *The English Conflict of Laws*, at p. 109.

[1173] Lew J, *op.cit.* footnote 137, at p. 71.

[1174] Rabel, *Comparative Conflicts*, Vol.1, 1st ed.

[1175] *Whitworth Street Estates (Manchester) Ltd* v. *James Miller and Partners Ltd* [1970] A.C. 583, 603 per Lord Reid.

[1176] Article 5.

[1177] Article 150.

law chosen by the parties, provided that the choice is expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[1178] Thus, parties are given the freedom to pick and choose the applicable law. Moreover, they can choose different laws to govern different parts of the contract.[1179] This clearly allows *depecage*, i.e. the act of severing the contract between different legal systems.

In respect of choice of law, party autonomy concept has been developed from the difficulties encountered in the past toward a more straightforward approach today. This is simply because the world has come closer and no country can stand alone. Accordingly, most states are more open-minded. However, the current problem is, what is the extent of the freedom of the parties. Is it necessary for them to choose the national legal system? Can they choose the non-legal system such as *lex mercatoria*? These problems will be considered here.

1.1. National legal system

Most legal systems allow parties to choose any legal system to govern their contract. However, there are some countries which do not allow this in state contracts. This is simply due to the matter of sovereignty. The well-known Calvo doctrine was adopted by developing counties in Latin America in the nineteenth century to stop military intervention by developed countries on the pretext of diplomatic protection of their citizens.

According to the doctrine, foreigners must submit disputes arising out of state contracts to resolution by local courts. However, this doctrine was scrapped when most Latin countries signed the ICSID Convention. It provides that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.

In the absence of such agreement, the Tribunal shall apply the law of

---

[1178] Sonthikasathin, *op.cit.* footnote 546, at p.299.

[1179] *Ibid.*, at p. 298.

the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[1180] This provision is at odds with the Calvo Doctrine. The Calvo Doctrine is therefore no longer applicable in Latin America.

However, the doctrine still exists in other countries. In Laos and Vietnam the courts do not recognise the application of a foreign law in an international contract. Although private international law does not exist in Laos, most judges in Laos do not recognise the application of foreign law. Vietnam follows the same line by providing that: "Any dispute between the enterprise with foreign invested capital and foreign contracting parties or economic organisation of Vietnam shall be settled by Law of Vietnam at a trial body of Vietnam"[1181]. This means that foreign law is not recognised under the current law of Vietnam. This is, however, not a problem under the Thai system. As stated above, the Thai Conflict of Law recognises the application of foreign law.

The question is, what if the parties to arbitration agree that a foreign law should govern their contract? According to the legal systems of both jurisdictions, the answer to this question is unclear. Will awards based on foreign law be set aside on the ground of avoiding the mandatory rules or the public policy of these countries?

The answer should be negative. It is well-recognised in both jurisdictions that if the terms of a contract determine the right and duty of the parties, the court should respect such terms. Thus, instead of directly referring to foreign law, the parties stipulate in their contract the provision of foreign law without saying that the law is a foreign law. This should be enforceable as a term of contract. There is no reason why the parties cannot indirectly agree on the foreign law.

[1180] Article 42(1).

[1181] Article 101 of the Decree No. 18-CP Dated 16 April 1993 of the Government on Implementing Regulations of the Law on Foreign Investment in Vietnam.

1.2. Non-national legal system

It is common for parties to international contract to determine the non-legal system, called the *lex mercatoria*, as the applicable law. Why should *lex mercatoria* be applied instead of a particular national law There are a number of reasons for this question.

First, it is used particularly in state contracts between a government or government enterprise on the one hand, and a private enterprise on the other. [1182] The state party does not want to submit to a foreign law. [1183] A private party will not be happy to have the contract governed by the laws of a foreign government, as these may be subsequently changed to his disadvantage after the contract is made. [1184]

Secondly, it is also necessary for businessmen who are generally rational rather than adversarial" [1185]. Accordingly, they desire autonomy and fairness, rather than a strict legal interpretation of their rights and duties. [1186] This has been proven when an arbitrator applies the *lex mercatoria* to fill the gap of the applicable law. This is why *lex mercatoria* is seen as a tool "to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries' laws, often not designed for international transactions at all." [1187]

Thirdly, application of a national law may not be suitable in certain situations. In long-term contracts, for example, a national law may have an unexpected impact.[1188] It has long been recognised by commercial people and

---

[1182] Lew J, *op.cit.* footnote 137, at pp. 367, 372.

[1183] Lando O, "The *Lex mercatoria* in International Commercial Arbitration", 34 *Int'l.&Comp.L.Q.* (1985) 747, 748.

[1184] *Ibid.*, at p. 748.

[1185] Kerr, "Equity" Arbitration in England, 2 *Am.Rev.Int'l.Arb.* 377, 400 (1991).

[1186] *Ibid.*

[1187] Lowenfeld A, "*Lex mercatoria*: an Arbitrator's View, in *Lex mercatoria* and Arbitration: A Discussion of the New Law Merchant" in Carbonneau T (ed), *Lex mercatoria and Arbitration* (New York: Transnational Jurist Publications, Inc., 1990), 56.

[1188] Park W, "Control Mechanisms in the Development of a Modern *Lex mercatoria*, in *Lex mercatoria* and Arbitration" in Carbonneau T (ed), *Lex mercatoria and Arbitration* (New York: Transnational Jurist Publications, Inc., 1990), at. p. 109.

jurists that the business community is independent in the sense that they always manage the activities of their community. [1189]

They regulate the rules for themselves without any guideline from any state. As a result, they have their own rules, not state law, to regulate their community. This can be traced to the merchant law of the Middle Ages[1190]. This was true until the current practice of international transaction.

Although the *lex mercatoria*, as an independent system of law, has raised questions which are not easily answered and which have long been debated, most countries do accept it.[1191] Among those who accept *lex mercatoria*, the scope of the *lex mercatoria* still varies. This leads to difficulties for the parties who want to choose *lex mercatoria* as the applicable law. The first and a most important question is, what is *lex mercatoria*? Then, what are its sources? Two primary questions may lead to an understanding of and the recognition of the system of the *lex mercatoria*.

1.2.1. Definition

Black's Law Dictionary defines the term of the *lex mercatoria* as "that system of laws which is adopted by all commercial nations, and constitutes a part the law of the land. It is part of the common law."[1192] Lando has a similar view by explaining the concept of the *lex mercatoria* as follows: "The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead, they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade, or to those States which are connected with the dispute.

[1189] See C Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", 16 *Int'l.Law.* (1982) 613, 623.

[1190] Sanders, *op.cit.* footnote 367, at p.263.

[1191] For example, the French Code (Article 1496) permits the use of *lex mercatoria* when expressly provided for by the parties. See Weinberg K, "Equity in International Arbitration: How Fair is "Fair"? A Study of *Lex mercatoria* and Amiable Composition", 12 *B.U.Int'l.L.J.* (1994) 238.

[1192] Black's Law Dictionary (Fifth Edition) at p.821.

Where such common rules are not ascertainable, the arbitrator applies the rules, or chooses the solution which appears to him to be the most appropriate and equitable. In doing so, he considers the laws of several legal systems. This judicial process, which is partly an application of legal rules, and partly a selective and creative process, is here called application of the *lex mercatoria.*"[1193]

According to the concept of *lex mercatoria*, it is clear that the *lex mercatoria* is the law which was created by merchants a long time ago. The merchants used it as a tool to determine the rights and duties among them. However, it is a known fact that it has been developed to form the new *lex mercatoria.* This is simply because, naturally, it adapts itself to the new situations which may arise.

Transport by air, for example, was not known in the past, but is common in the present society. Thus, the development of the new *lex mercatoria.* However, the new *lex mercatoria* has not lost its basic concept, as Pollock noted with regard to English law: "Yet the law merchant has not wholly lost its old character.

It has not forgotten its descent from the medieval law of nature which claimed to be a rule of universal reason embodied in the various forms of cosmopolitan usage. Conforming to English procedure and legal method, it can still be reinforced by additions from established general customs."[1194] This is very important because it makes the *lex mercatoria* a system not a single law. When it is deemed a system, it is flexible enough to survive. Otherwise, it will be a dead law which is no longer used". The next question then is, what are the sources of *lex mercatoria*?

[1193] Lando O, *op.cit.* footnote 1183, at p.747.

[1194] Pollock F, "Introduction to the Commercial Law of Great Britain and Ireland" in W. Bowstead and Sir Thomas Scriitton (eds) *Copitniercial Laws of tize World*, vol.XIII, 11.

1.2.2. Sources

One thing can be sure, *lex mercatoria* is not derived from the system of any one state. As mentioned above, it exists to meet the needs of the world business community, rather than the needs of a state.

Moreover, *lex mercatoria* spirit is not for the benefit of any one state, but for members of the business community at large. However, *lex mercatoria* has now become the part of state law. This is because states, today, directly or indirectly deals with business, both domestic and international. States always directly enter into international contract for commercial purposes.

The states may indirectly deal with the business community when their citizens increasingly do business. As a result, it is necessary for a state to understand the needs of the business community. One thing is for sure, is that states adopt the law of the merchants in their own laws.

The source of the *lex mercatoria* is broad and unclear. Danilowicz suggested that the sources of the modern *lex mercatoria* are customs and trade usages, general principles of law, international convention, acts of international organisations, and codes of conduct.[1195]

O Lando attempted to list the relevant sources as being: public international law, general principles of law, uniform laws, rules of international organisations, customs and usages, standard form contracts and the jurisprudence of arbitral awards.[1196] M Pryles has listed: public international law, international conventions, uniform laws, general principles of law, customs and usages, standard form contracts and principles derived from reported arbitral awards.[1197]

C Schmittoff gives a comprehensive sources of *lex mercatoria* as being

---

[1195] Danilowicz V., *op.cit.* footnote 1154, at p.272.

[1196] See O Lando, "The Law Applicable to the Merits of the Dispute" in P Sarcevic, *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989), 129 at pp. 144-146.

[1197] Pryles M, "Choice of Law Issues in International Arbitration, p.3 (unpublished).

international legislative and international commercial customs.[1198] J Lew also puts forward the proposition that the sources of *lex mercatoria* are the substantive rules of international trade, the code of practice of international trade, and the customs and usages of international trade.

Although the sources put forward by the writers mentioned are not quite the same, the sources which are commonly agreed on by the supporters of the *lex mercatoria* are as follows: general principle of law, customs and usages, international legislation, and arbitral jurisprudence which will now be discussed.

1.2.2.1. General principle of law

Although the principles of law in each system differ from country to country, there are certain principles which are common to all systems. This may be called "the general principle of law". That is why it is sometimes called "world law".[1199] As a result, the general principles of law are universally accepted.[1200] However, it is not always easy to ascertain which rules are common to all nations. Some authors suggest the possibilities of doing so are improving with the growing volumes of literature on comparative law.[1201]

Nevertheless, the general principles of law which are universally accepted are very few.[1202] Among those are *pacta sunt servanda*,[1203] *force majeure*[1204] and good faith[1205] mitigation of damages, estoppel and unenforceability of contracts contrary to international morality,[1206] all of which

---

[1198] Schmitthoff C, *Commercial Law in Changing Economic Climate*, 2nd ed (London: Sweet & Maxwell, 1981), at pp. 22-23.

[1199] See Lando O, *op.cit.* footnote 1183, at p.750.

[1200] Danilowicz V., *op.cit.* footnote 1154, at p.273.

[1201] See Lando O, *op.cit.* footnote 1183, at p.750.

[1202] Chukwumerije, "Applicable Substantive Law in International Commercial Arbitration" 23 *Anglo-Am.L.Rev.* 265 (1994) 265, 274.

[1203] See Danilowicz V., *op.cit.* footnote 1154, at p.273.

[1204] See *Ibid.*, at p.273.

[1205] Chukwumerije, *op.cit.* footnote 1202, at p.273.

[1206] See Craig, Park and Paulsson, *op.cit.* footnote 544, at p.621-631.

are recognised by the business community.

The general principles of law are well- accepted as the applicable law in international commercial arbitration. In the Sapphire arbitration, which is one of the best examples of an award based on general principles of law, the arbitrator concluded that the parties intended to avoid national law and to submit the interpretation and performance of the agreement to the "general principles of law based upon the practice common to civilised countries."[1207] The arbitrator gave the following grounds for the application of the general principles of law:

"Article 38 of the agreement, which confirms an intention already expressed in the preamble, provides that the parties undertake to carry out its provisions according to the principles of good faith and good will, and to respect the spirit as well as the letter of the agreement ....

"It is ... perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilised nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them ....

"The arbitrator will therefore apply these principles, by following, when necessary, the decisions taken by international tribunals. He points out that, this being so, he has no intention of deciding the case according to "equity," like an "*amiable compositeur.*" On the contrary, he will try to disentangle the *rules of positive law,* common to civilised nations, such as are formulated in their statutes or are generally recognised in practice."[1208]

Thailand adopts the general principles of law by the provisions of the law. TCCC provides that:

[1207] Award of Mar. 15, 1965, 35 I.L.R. 136, 173 (1967).

[1208] *Ibid.*, at pp. 172-5 (1967).

The law must be applied in all cases which come within the letter or the spirit of any of its provisions.

Where no provision is applicable, the case shall be decided according to the local custom.

If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."[1209]

It is noted that the term "general principles of law" is used to fill gaps in the TCCC. However, this shows that the general principles of law is recognised in the Thai legal system.

1.2.2.2. International legislation

Another source of *lex mercatoria* is the so-called "international legislation."[1210] There are many international legislations which recognise *lex mercatoria* as a source of law. This includes International Conventions and Uniform Laws: The Convention on International Sale of Goods 1966, revised in 1980; the Convention on the Carriage of Goods by Sea 1968; the Convention on the Contract for the International Carriage of Goods by Road 1956; the Uniform Law for Bills of Exchange and Promissory Notes 1930; the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929, revised in 1955 and several others. [1211] It is worth noting that these international legislations are the uniform[1212] laws of international trade which are accepted by most countries.

Once these international legislations have been adopted by the major countries, they will represent international trade practices which are considered

---

[1209] TCCC, Article 4.

[1210] Schmitthoff C, "The Law of International Trade, Its Growth, Formulation and Operation" in Schmitthoff C (ed) *The Sources of the Law of International Trade*, (New York 1964) 16.

[1211] Schmitthoff C, *Export Trade*, XXXV (London 7th ed. 1980).

[1212] Chukwumerije, *op.cit.* footnote 1202, at p.274.

the *lex mercatoria*. On the other hand, if such international legislations are not accepted by major states, they cannot be said to be the *lex mercatoria*.

1.2.2.3. Customs and usages

Customs and usages are another important source[1213] of *lex mercatoria* and are perhaps the primary source. This is because *lex mercatoria* is developed from the agreement between private parties which over time, have become the customs and usages of international trade. [1214] This practice started when international merchants started including these provisions in their contracts and through their regulation of these new exigencies.[1215] The repetition of these contractual provisions over time transformed them into custom and usage to which international traders felt bound.[1216]

Generally speaking, the customs and usages are derived from rules regulated by businessmen. However, it will be considered as being *lex mercatoria* when it is accepted by most countries. Customs and usages can be found in international rules and standard form contracts. Customs and usages are widely accepted and applied, either as a particular type of commercial activity, or in a more general way. Customs and usages have been developed not only by the business community, but also by international organisation such as the International Chamber of Commerce. The most important customs and usages developed by the ICC are the INCOTERMS, which codifies customs and usages, the Uniform Customs and Practice for Documentary Credits and the adopted *force majeure* and hardship clauses.

1.2.2.4. Arbitral jurisprudence

Those who support the modern *lex mercatoria*, view arbitration as the vehicle for the articulation and elaboration of the principles of the *lex*

[1213] See Lando O, *op.cit.* footnote 1183, at pp.750-1.

[1214] See C Croff, *op.cit.* footnote 1189, at p.644.

[1215] See *Ibid.*, at p. 634.

[1216] See *Ibid.*

mercatoria.[1217] They argue for the formulation and publication of reasoned awards in the hope that this will lead to the development of generally accepted principles which may be applied without reference to specific national laws.[1218]

The supporters of *lex mercatoria* suggest that the systematic examination of arbitral awards reveal certain principles which are accepted by the international commercial society, and which are applied, not because they are mandated by some national law, but because they conform to the legitimate expectations of the parties.[1219] The reporting of arbitral awards is an important element of *lex mercatoria.*[1220] In the past, most arbitral awards were not published, and were kept secret even from the members of the trade.[1221]

However, during the last few decades, there has been a tendency towards extending the publication of arbitral awards. The first publication which is a systematic examination of arbitral awards is the "Applicable Law in International Commercial Arbitration", written by J Lew in 1978.

Since then there have been other publications which collect ICC awards. What does this demonstrate? It certainly shows that arbitral awards are increasingly important and Parties to international contract can expect what should be done on the one hand. On the other hand, international arbitrators can resort to such awards as a source of reference to establish to the intention of the parties.

However, there is an argument for the arbitral jurisprudence as a source of *lex mercatoria.* It is claimed that arbitral awards are not broad enough to cover all aspects of complex contractual relations.[1222] This argument is in doubt. What current system of law can govern all aspects of contractual

---

[1217] Lew J, "The Case for the Publication of Arbitration Awards" in Schultsz J. and van den Berg A (eds.), *The Art of Arbitration* (Deventer, The Netherlands, Kluwer, 1982) 223.

[1218] *Ibid.*

[1219] Craig, Park and Paulsson, *op.cit.* footnote 544, at p.619.

[1220] See Lando O, *op.cit.* footnote 1183, at p.751.

[1221] See *Ibid.*

[1222] Chukwumerije, *op.cit.* footnote 1202, at p.277.

relations? There is no such single system. It is true that all systems of law have loop-holes and judges fill these gaps. It is accepted that the interpretation of law is at the heart of the system of law to govern any issues which may arise. The real problem of arbitral jurisprudence is the experience of the arbitrator.

1.2.3. Problems of *lex mercatoria*

It is widely accepted that the *lex mercatoria* exists in the business world. It is equally accepted that there are many advantages in the application of *lex mercatoria*. However, on the other side of the coin, it also imposes certain problems in current practice.

First, *lex mercatoria* "does not provide a sufficiently substantial and solid system. It cannot be called a legal order and it is therefore not fit as a basis for settlement of legal disputes."[1223] This leads to the conclusion that "arbitration by *lex mercatoria* or ... cannot provide a sufficient basis for community behaviour."[1224]

Secondly, as seen, *lex mercatoria* is unclear both in its source and content. What it needs is an arbitrator who has experience in dealing with it. The loss of predictability and certainty for the parties and for the community at large, the lack of precedent value created by the arbitrators makes *lex mercatoria* abstract and creates difficulties in interpreting equitability.[1225]

As a result, the parties "refer back to the principles and rules which may be appropriate in order to achieve an equitable result".[1226] The abstraction of *lex mercatoria* makes its application "perilously close to crap shoot".[1227]

Thirdly, there is also doubt whether *lex mercatoria* is for the benefit of the arbitrator or for the parties. What *lex mercatoria* needs is an experienced

---

[1223] Lando O, *op.cit.* footnote 1183, at p.752.

[1224] Weinberg K, *op.cit.* footnote 1191, at p.250.

[1225] Highet K, "The Enigma of the *Lex mercatoria*", 63 *Tul.L.Rev.* 613, 625 (1989).

[1226] *Ibid.*

[1227] Reismann M, "Book Review", 80 *Am.J.Int'l.L.* 268, 271 (1986).

arbitrator who is classified as "social engineer" to fill the gap. This mean that the arbitrator has a lot of freedom to deal with *lex mercatoria* and he may frequently applies his own standard of justice as a legal standard.

Thus, F Mann concludes that the "undefined and under definable standards of the *lex mercatoria* make the outcomes of proceedings where it is applied somewhat of a lottery".[1228] According to most systems, the losing party cannot appeal such an award to the state court. An award based on *lex mercatoria* will be final. The losing party therefore may have difficulties challenging such awards.[1229]

I recommend that, although parties have freedom to select *lex mercatoria* to be applied to their dispute, it is the duty of the parties to exercise this autonomy with care. They should be aware that *lex mercatoria* today is in a current state of development. Most legal systems are still silent on this matter. Once an award based on *lex mercatoria* is rendered, the remedies for an undesirable result is quite difficult or even impossible.

In this regard, H Berman and F Dasser properly accept that: "The customary law merchant is not a complete legal system: it was never meant to be complete. The merchants themselves count on the help of a national legal system in case of dispute. They know very well that custom and contractual agreement cannot regulate all questions to which a commercial transaction may give rise and they welcome the backing of a national law when the law merchant fails to give clear and satisfactory answers."[1230]

Although the PRC, Laos and Vietnam, as seen, do not recognise foreign law, it is doubtful whether they recognise the non-national law. However, all these system do recognise that the court will respect the terms of

---

[1228] Mann F, "Mann's Introduction to the *Lex mercatoria* and Arbitration", in Carbonneau T (ed), *Lex mercatoria and Arbitration* (New York: Transnational Jurist Publications, Inc., 1990), at p. xxi.

[1229] See Weinberg K, *op.cit.* footnote 1191, at p.251.

[1230] Berman H and Dasser F, "The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy" in T Carbonneay (ed) *Lex Mercatori and Arbitration* (New York: Transnational Jurist publications, Inc., 1990), 21, 32.

the contract, which may be a source of *lex mercatoria*. Thus, it can be concluded that they do recognise non-national law, such as *lex mercatoria*.

2. Implied choice

Sometimes parties do not expressly agree on what law should govern their contract. It is necessary to search for the intent of the parties as to ascertain what law should be applied. In some situations, the actions of the parties may show their intention to have their agreement regulated by a particular national law. This may be established based on the regular course of business the parties are involved in. The terms of contract may also show their intention to apply a particular national law.

Lord Wilberforce rightly stated that:

"An arbitration clause must be treated as an indications, to be considered together with the rest of the contract and relevant surroundings facts. Always, it will be a strong indicating; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication.

But in some cases, it must give way where other indications are clear."[1231] This applicable law is called the implied choice of law. Normally, when the express choice of law is absent, the implied choice of law should be applied. [1232] It depends on the surrounding circumstances. For this reason, the Rome Convention provides that: "... the choice must be expressed or demonstrated with reasonable certainty by the *terms of the contract or circumstances of the case*" (emphasis added).[1233] The implied choice of law is known in the Thai legal system. This can be seen in Article 13 of the Conflict of Law which provides that: "...If such intention, express or *implied*, cannot be ascertained, the law applicable is the law common to the parties..." (emphasis

---

[1231] *Compagnie d'Armement SA v Compagnie Tunisienne de Navigation SA*, [1971] AC 572.

[1232] Lew J, "Determination of Applicable Substantive Law", 25 *Int'l.Bus.Law*. 159 (1997).

[1233] Article 3(1).

added).

The question is how to determine an implied choice of law. There is no single established test and and in most cases will depend on the facts of the case in question.

3. Conclusion

The choices between applicable law and substantive law is the most important part of international commercial arbitration; it is used to determine. the rights and the duties of the parties. In this respect, the parties have the freedom to determine what law, national law or *lex mercatoria*, should govern their dispute. Each of these have both good and bad points. National law tends to be a more comprehensive set of principles than the *lex mercatoria*. Parties who are seeking more predictability and certainty are better advised to select a national law to govern their dispute. However, this is not decisive. Much depends on the circumstances of the case. In a state contract, for example, both parties may prefer the *lex mercatoria*.

Part 3

Limitation on Party Autonomy

Every international commercial arbitration case emerges from an arbitration agreement between two or more parties. One of the most important reasons why parties choose arbitration instead of litigation is that they have the freedom to agree on most aspects of the procedure. However, arbitration does not take place in vacuum, it is still governed by state law.

As a result, the party autonomy is not absolute. Although most states grant parties the freedom to fashion a remedial process tailored to their needs, such freedom is always subject to the considerations of public policy of the state concerned. However, the scope of public policy differs from state to state. One activity may be accepted in one jurisdiction, but it may be considered unacceptable in other jurisdictions because it is against the public policy of those states. This makes public policy an area of international commercial

arbitration which is most difficult and widely debated.

Apart from the public policy limitation, most states also have the mandatory rules which the parties cannot avoid. In this part, I will focus on the limitations on party autonomy. The first is the public policy. And the second is the mandatory rules.

1. Public policy

1.1. Meaning of public policy

The term "public policy" in the New York Convention's English text corresponds with "*ordre public*" in the French text, and with "*orden publico*" in the Spanish text. The term "*public order*" (*ordre public*) is a peculiarity of civil law systems. It is comparable to the concept of public policy.

The sections of the codified laws of a civil law system which represent the basic principles of the legal order are referred to as the "public order." In the statutes where these basic principles are found, there is an expressed underlying principle of public policy. Public order and public policy thus refers to the same structural element. For this reason, the term public policy is used here interchangeably with the term *ordre public*.[1234]

It is accepted that the concept of public policy is difficult to define.[1235] This is because its essential characteristics are uncertain and ambiguous.[1236] It has a dynamic and evaluative character and must be considered in concerto, in light of all the circumstances of a case. [1237]

However, it is understood that public policy reflects the fundamental economic, legal, moral, political, religious and social standards of a state or

---

[1234] Bockstiegel K, *op.cit.* footnote 506, at p.179.

[1235] See Aksen, W.P., "International Commercial Arbitration and International Public Policy", *81 Am. Soct'y. Int'l. L.* 375 (1987).

[1236] Lew J, *op.cit.* footnote 137, at p. 531.

[1237] Lalive P, *op.cit.* footnote 210, at p.295.

extra-national community.[1238] Accordingly, the concept of public policy is relative to place and time.[1239]

It is relative to place in that public policy is dependent on the judgement of the respective legal community. What is considered to be part of public policy in one country may not be seen as a fundamental standard in another state with a different economic, political, religious or social, and therefore, legal system.[1240] Gambling, for example, is legal in Las Vegas, but it is against the public policy of Thailand.

With respect to time, the values and standards of communities are not constant, they change and develop and thus affect public policy as it is derived from the same.[1241] For instance, trade between the Thais and communist countries during the last two decade was considered to be against Thai public policy. This is not the case today. This is because Thailand's policy with respect to communist countries has changed.

Dr Lew rightly explains that: "Public policy is not a constant concept. Not only is it continually changing and developing but it varies from State to State, and community to community. The wider the community, the larger the number of ingredients to be considered when determining the character of public policy. Hence the public policy of a sovereign State differs and is narrower from that of a multi-national community or the international community."[1242]

1.2. Role of public policy

Public policy plays two significant roles in every legal system: positive and negative. In a positive sense, it aims to impose the application of the law

---

[1238] Lew J, *op.cit.* footnote 137, at p. 532.

[1239] See Javier Garcia de Enterria, "The Role of Public Policy in International Commercial Arbitration", 21 *L.&Pol'y.Int'l.Bus.* (1989-90) 389, 402. See also Husserl, "Public Policy and Ordre Public", 25 *Va.L.Rev.* 37,38 (1938) and also Lalive P, *op.cit.* footnote 210, at pp. 262-3.

[1240] Bockstiegel K, *op.cit.* footnote 506, at p.179.

[1241] *Ibid.*, at p. 180.

[1242] Lew J, *op.cit.* footnote 137, at p. 533.

of the forum.[1243] In the negative sense, it is used as "the guardian of the "fundamental moral convictions or policies of the forum" the doctrine of public policy provides "a kind of barrier blocking the passage of the foreign law"" (footnotes omitted)[1244] Where the foreign law is "inconsistent with the fundamental public policy" or "outrages [the] sense of justice and decency" or "shocks the social or legal concepts" of the forum are they respectively refused application or recognition." (footnotes omitted)[1245]

In international commercial arbitration, public policy is also important. All international conventions, such as the New York Convention, and most arbitration laws recognise the role of public policy. Under the current legal framework, an award may be set aside in the country where the arbitration took place if such an award is against the public policy of the forum. As a result, it cannot be enforced in other countries.

On the other hand, although that award may not have been against the public policy of the forum, it may be against the public policy of the enforcing state. Thus, it is possible that two or more public policies may be applied to one case of international commercial arbitration.

The serious problem is that, as noted, public policy varies from state to state and from time to time. This has the effect of making international commercial arbitration less effective i.e., an enforceable award must comply with more than one standard of public policy. It must comply with the public policy of the country where the arbitration took place, and with that of the country where enforcement of the award is being sought. The seriousness of this problem depends entirely on the levels of public policy in each jurisdiction concerned. Of course, this depends on the attitude of the national court as well.

[1243] Lalive P, *op.cit.* footnote 210, at p.263.

[1244] Lew J, *op.cit.* footnote 137, at p. 532.

[1245] *Ibid.*

1.3. Levels of public policy

There is no single Convention on international commercial arbitration which stipulates the levels of public policy. The New York Convention, for example, only provides the term "public policy". However, the character of public policy, as noted, may be different from place to place and from time to time. To understand the term "public policy" in the field of arbitration, therefore, it is necessary to classify public policy. For this purpose, the term "public policy" can be divided into two levels[1246]: national and international public policy.

1.3.1. National public policy[1247]

In order to maintain a fundamental standard of justice and morality, national public policy, may concern either internal matters or external ones. In internal matters, national public policy comprises regulations which protect the interest of the state. Such regulations are customary law (e.g. to uphold moral standards, discourage gambling, facilitate unrestricted trade)[1248] and laws which regulate certain situations which cannot be avoided by the parties (e.g. contract formalities, credit legislation, the right to submit to arbitration).[1249]

On external matters, the national public policy of an individual state is the relevant private international law. In this respect, domestic public policy comprises legislation either of an imperative character (e.g. employment conditions, currency controls), or giving effect to fundamental policies and standards of the States (e.g. sexual equality, central economic planning).[1250]

[1246] Dr Lew has divided public policy into three levels: national public policy, community public policy and international public policy. (See Lew J, *op.cit.* footnote 137, at pp.533-534). In this research, community public policy is a part of international public policy.

[1247] National public policy and domestic are often seen interchangeable.

[1248] See Lew J, *op.cit.* footnote 137, at p. 533.

[1249] See *Ibid.*

[1250] See *Ibid.*, at pp.533-4.

1.3.2. International public policy

The most important questions here are: what is international public policy and where does it come from?

The terminology of "international public policy" often differs. The term "transnational public policy" and "supranational public policy" are often seen.

However, they mean a "really international public policy". International public policy differs from national public policy. The scope of the former is narrower than the latter.[1251] However, international public policy is common to all nations. In other words, international public policy is a part of national public policy, but the latter is not necessarily a part of the former.[1252] International public policy includes aid of piracy, terrorism, genocide, slavery, racial discrimination, human rights, the environment, and the basic standards of honesty and bona fides.

There is some argument as to the emergence of international public policy. Some authors[1253] suggest that the rules of international public policy have emerged with respect to the value of monetary obligations in international relationships, and in western countries at least, is based on the doctrine *pacta sunt servanda;* to refuse any recognition of the nationalisation or confiscation of property by a foreign state unless it is accompanied by fair and adequate compensation.[1254]

Dr Lew does not seem to be convinced of this purpose.[1255] Instead, he convincingly puts forward that "the truly international or "pluri-national" criteria are drawn from the fundamental rules of natural law, the principles of "universal justice", *ius cogens* in public international law and the general

---

[1251] See Perloff S, *op.cit.* footnote 1167, at p.333.

[1252] Javier Garcia de Enterria, *op.cit.* footnote 1239, at p.396.

[1253] See Lew J, *op.cit.* footnote 137, at p 540.

[1254] *Ibid.*

[1255] See *Ibid.*

principles of morality and public policy accepted by civilised countries". (footnotes omitted)[1256] I submit that the latter's approach is more reasonable in that it complies with the concept of international public policy which is used to protect "*bona fides*", "good moral", fundamental principles of contractual morality or of natural law.[1257] This is in the interest of the international trade community at large and not limited to western countries.

I am convinced, that there are few national laws which use the term "international public policy". Instead, most laws use the term "public policy". It is thus the duty of the state courts to interpret the term, whether it is a national public policy or international public policy.

1.4. Public policy in international commercial arbitration

At the heart of every case in arbitration is that the award made will be enforceable. The most important duty of an arbitrator therefore is to render an enforceable award. What makes an award unenforceable? In respect of international commercial arbitration, the New York Convention answers this question. Under the current legal system of the New York Convention, public policy plays three significant roles: setting aside award, refusal of enforcement of award.

According to the New York Convention, an award may be refused enforcement, if it has been set aside in the country where the arbitration took place, or if such an award is considered against the public policy of the country where enforcement of the award is being sought..

One of the important grounds on which an award may be set aside is public policy. Article 34 (2) of the Model law which provides exactly the same wording of the Article V (2)(b), for example, provides that the award may be set aside if the court finds that the award is in conflict with the public policy of the state where the arbitration took place. Certain jurisdictions, such

---

[1256] *Ibid.*, at p. 534.

[1257] Lalive P, *op.cit.* footnote 210, at p.290.

as Thailand, have no such provision. If an award is not set aside in the country where the arbitration took place, this does not mean that it can be enforced anywhere. It may again be considered against the public policy of the country where the award enforcement of the award is being sought.

This is a serious problem for an arbitrator who has a duty to render an enforceable award. How will he know which country will be the award-enforcing state? It is possible in some cases to have more than one country. An award rendered in Country A is sought to be enforced in Country A and Country B where the losing party has assets. What if the court in Country A enforced that award, but this cannot be done in State B on the grounds of public policy?

This problem can be reduced if the attitude of the enforcing state court is based on the pro-enforcement basis of the award. Do all states court follow such this basis? Is this a serious problem in practice? If so, how does international commercial arbitration work under such circumstances?

First of all, it should be noted that the grounds for refusal of award in Article V(1) of the New York Convention are based on public policy, namely Article V(1)(b) concerns proper notice of appointment of arbitrator of the arbitration proceedings, Article V(1)(d) concerns arbitral procedure, and Article V(1)(e) concerns the setting aside of awards which may be public policy. Furthermore, Article V(2)(a) concerns arbitrability which may also be considered a matter of public policy. The question is, why does the New York Convention provide the public policy defense in Article V(2)(b). The defenses in Article V(1)(b), (d), (e) and Article V(2)(a) are clear that they directly impact on the arbitration process. On the other hand, the public policy defense concerns the interest of the states concerned.

Some authors have thus claimed that the purpose of the public policy defense is to serve as a "residual escape clause"[1258] in cases where a specific

---

[1258] Perloff S, *op.cit.* footnote 1167, at p.333.

defense does not apply. Some authors characterise the public policy defense as the "enemy"[1259] of international commercial arbitration. This is simply because states can interfere in the international commercial arbitration by applying their own standards to set aside or refuse enforcement of an award.

As it is generally accepted, the main purpose of the New York Convention is "to encourage the recognition and enforcement of commercial agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[1260] To fulfil this goal, the term "public policy" in the New York Convention should be less restrictive, reflecting only the more absolute "hard core" standards of a given state.[1261]

Most states seem to accept such an approach. This can be seen from the reported cases that the public policy defense is less successful. As Holtzmann rightly concludes : "Faced, as we are, with the potential problems of public policy defenses in international arbitration cases, it is encouraging to be able to report that the defense is succeeding less and less in modern courts. Courts are increasingly recognising that narrow, nationalistic grounds of public policy that might be properly applicable in domestic cases are inappropriate in international cases."[1262]

2. Mandatory rules

Mandatory rules are used as a tool to manage any activity to comply with the state purpose. It is not really state public policy. However, the public policy itself are mandatory rules in that it is also the purpose of a state to keep society in order. In other words, the mandatory rules are not necessarily public policy, while all public policy are mandatory rules.

[1259] Javier Garcia de Enterria, *op.cit.* footnote 1239, at p.405.

[1260] *Scherk v Alberto-Culver Co.*, 419 U.S. 885 (1974).

[1261] Buchanan M, "Public Policy and International Commercial Arbitration", 26 *Am.Bus.L.J.* 514 (1988).

[1262] Holtzmann, "Commentary", in *60 Years of ICC Arbitration: A Look at the Future, ICC Court of Arbitration 60th Anniversary* (1984), 361, at p. 364 .

For example, the number of arbitrators required by law is a mandatory rule but not public policy. But, the issue of arbitrability is both a mandatory rule and a matter of public policy.

One of the most important roles of mandatory rules is that they limit the application of party autonomy. Many matters, according to the law of arbitration of most countries, are not agreeable. It is worth noting that the mandatory rules of one country are not necessarily the same as in others.

For example, the Thai Arbitration Act does not state the number of arbitrators while the Model law requires that the number of arbitrators shall be uneven. As a result, arbitration which takes place in a country which has adopted the Model law shall have one or three arbitrators. However, if that arbitration takes place in Thailand, the parties can agree on two arbitrators.

I would submit that, it is the duty of all the parties concerned in the arbitral process to know what mandatory rules are. What are classified as mandatory rules? As mentioned above, mandatory rules are not uniform. One must thus examine the arbitration law of the countries concerned.

PRC

An award may be set aside in the PRC "If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the CCPL, the People's Court shall, after examination and verification by a collegial panel formed by the People's Court, rule to set aside the award."[1263]. And an award may be refused enforcement in the PRC "If the party against whom the enforcement is sought presents evidence which proves that the foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the CCPL, the People's Court shall, after examination and verification by a collegial panel formed by the People's

[1263] Article 70.

Court, rule to disallow the enforcement"[1264].

And Article 260 of the Civil Procedure provides that:

"The people's court shall issue an order to refuse the enforcement of the award made by the external arbitration institution of the People's Republic of China if the party against whom the enforcement is sought has furnished the following proof to the people's court and the people's court has examined and verified through its collegial panel the proof that-

(1) the parties do not have an arbitration clause in their contract and have not subsequently concluded an arbitration agreement in writing; or

(2) the party against whom the enforcement is sought was not given due notice as to the appointment of arbitrators or the conduct of the arbitration proceedings, or was unable to present his case for reasons for which he is not responsible; or

(3) the formation of the arbitration tribunal or the arbitral procedure was not in conformity with the arbitration rules; or

(4) the matters dealt with by the award fall outside the scope of the arbitration agreement or outside the power of the arbitration tribunal.

Enforcement of an arbitral award shall be disallowed if the enforcement of it goes against social and public interest".

The social and public interest of the PRC constitutes a ground to set aside or to refuse enforcement of an award. It should be noted that these grounds completely differ from domestic cases which have more grounds. In an international case the grounds are more limited. It can thus be concluded that the term "social and public policy" should be narrowly interpreted.

[1264] Article 71.

Laos

An award rendered in Laos may be set aside "if the Court observes that ... the arbitral award has violated the provisions on settlement of disputes, and if there is an erroneous arbitral award for whatever reason.[1265] In respect of enforcement of award, the LSED provides that: "The Lao PDR recognises and implements agreements or the arbitral award of the arbitrators on foreign economic disputes under the following conditions:

(1) The agreement or the arbitral award has been made in member country of a convention to which the Lao PDR is also a party;

(2) These disputes may be accepted for consideration by the OSE of the Lao PDR;

(3) The agreement or the arbitral award does not violate the applicable provisions for settlement of disputes;

(4) The agreement or the arbitral award do not violate the law on *the security and the order of the Lao PDR*."[1266] (emphasis added)

Although the LSED does not use the term "public policy" as a ground for refusal of an award, the term "the law on the security and the order of the Lao PDR" gives the same meaning. However, the term used in Article 41 is wider than the term "public policy" discussed above. It clearly means Laos' public policy rather than international public policy.

Thailand

There is no provision concerning the setting aside of an award rendered in Thai territory. In respect to the enforcement of a foreign award, the TAA provides that: "The court may refuse recognition and enforcement of the award under Section 34 if it appears before the court that the subject matter of the dispute is not capable of settlement by arbitration under Thai law, or that the

---

[1265] LSED, Article 39 para.2.

[1266] LSED, Article 41.

recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of international reciprocity"[1267].

The attitude of the Thai courts concerning this matter is now clear. It narrowly interprets the term "public policy". Recently, the Thai Supreme Court rejected the public policy defense. [1268] On the facts, a plaintiff sought to enforce an award, rendered in England, in a Thai court. The defendant challenged the enforcement. He claimed that he had never entered into an agreement with the plaintiff, so the award did not bind him. Consequently, the First Instance Court denied enforcement. The plaintiff appealed the decision of the Fist Instance Court. The Appeal Court confirmed the decision of the lower court but on a different ground. It held that the arbitral procedure did not comply with the Rules of the Institution, so it was against the public policy. As a result, the award was not enforceable.

The Dika Court reversed the decisions both lower courts. It held that a court may deny the enforcement of a foreign award on the grounds provided in Article 34 and 35 of the Thai Arbitration Act of 2530.

The Dika Court then concluded that the defendant did not prove the grounds on which the court may deny the enforcement, neither did it appear that the dispute was not arbitrable under Thai law. The award was therefore, enforceable. In respect to the public policy ground, the Dika Court held that the award complied with the Rules without mentioning the issue of public policy. The award was thus enforceable. Although the Thai courts have not yet clarified the term "public policy" within the meaning under the New York Convention, it is hoped that the Thai courts will support international commercial arbitration by narrowly interpreting the term "public policy" in the same way as the courts in most other states do. This is not for the benefit of any society but for the whole international business community.

[1267] Article 35.

[1268] Thai Supreme Court (Dika) Decision No. 5513/2540 B.E. (Commented by T Suvanpanich). See also the Case No. 7128/2540 B.E. which the decision is also follow the same line.

Vietnam

The Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, Order No. 42-L/CTN of 27 September 1995, provides that:

"A foreign arbitral award is not recognised and enforced in Vietnam if the Court decides that:

(a) Under Vietnamese law the dispute shall not be resolved by way of arbitration;

(b) The recognition and enforcement of the foreign arbitral award in Vietnam are contrary to basic principles of Vietnamese law"[1269].

It is unclear what the "basic principles of Vietnamese Law" are. There is no reported case and or explanations on this matter. However, it is understood that it embraces those laws concerning economic and security matters of Vietnam. The term "international public policy" is not understood in Vietnamese legal system.

3. Conclusion

I believe that although it is well-accepted that party autonomy is fundamental to arbitration, the public policy limitation is also well-accepted. As international trade increases, the view of states should be more open. This is not only for the benefit of states but for the entire international community.

Once a state signs the New York Convention, it is expected that it shall support the enforcing of foreign awards. This means that it should make every effort to fulfil the goal of the New York Convention. Limitation on the enforcement of foreign awards should thus be exercised with care. In other words, the public policy defense should be narrowly interpreted, otherwise international commercial arbitration will fail.

[1269] Article 16(2).

CONCLUSION

The concept of party autonomy in the four jurisdictions studied is far less advanced than that of the more developed jurisdictions such as that of England. This is however not the case in the PRC and its administrative regions which have adopted the Model Law. What parties can do in these countries remains uncertain. I have presented the issues and made suggestions concerning problem areas to be avoided in drawing up arbitration agreement documents. A brief summary of the situation in each of these four countries are as follow.

PRC

The changes in Chinese arbitration are positive and the developments have been welcomed. The CIETAC Rules and CAL give the parties more freedom to agree what they need. This is particularly so as the application of the CIETAC Rules use the Model Law and Stockholm Rules as guidelines. This has served to make arbitration in the PRC more attractive and more modernised.[1270] For example, the qualifications of arbitrators prepared by the CIETAC are acceptable. In respect to the arbitral procedure, the parties have the freedom to choose what they want as long as it does not violate the public policy of the PRC. The parties also have the autonomy to choose the applicable law. Foreign law is not construed as a violation of Chinese public policy. Above all, the term "public policy" is narrowly interpreted by the court. Furthermore, as the Chinese policy has been changed to an "open door" one, this mechanism as a means to settle disputes have become more and more important. This is witnessed in the volume of international commercial arbitration which have dramatically increased over the last decade.

However, an inherent feature of international commercial arbitration, is that the parties come from different countries and cultures. This sometimes makes international commercial arbitration more difficult than it should be.

[1270] See Fishburne B and Lian C, *op.cit.* footnote 958, at p.327.

Although the Chinese arbitration system is not perfect, its development has been in the right direction. It provides a credible infrastructure for parties that opt for arbitration. In particular there is an indication of commitment of the Chinese authorities to ensure that they are in tune with general international norms. This phenomenon complies with the expectation that the PRC will have the largest economy in the world by the year 2020.[1271]

Although Chinese arbitration has developed, parties to arbitration should keep in mind that it is important to determine not only how the arbitration purports to work in the PRC, but also how it works in practice.

Laos

The arbitration system in Laos has only very recently been developed. Its system is considered and as is shown by this research to be the least developed. Its system is copied from the Thai system. Ad hoc arbitration is impossible in Laos. All arbitration in Laos is governed by the LSED, which is administered by the OSE, a branch of the Ministry of Justice.

This is a major setback in the Laos system. Parties cannot choose a foreign arbitrator, they must choose from those listed by OSE and who must all be Laotian. Nomination of the arbitral procedure and choice of foreign law is also impossible. Thus, party autonomy in Laos is very limited. Laos needs time to understand international commercial arbitration by educating those who have to deal with it. It is possible to have OSE attached to the Ministry of Justice, but the arbitration law does not only deal with OSE arbitration, but also out-of-OSE arbitration, such as ad hoc one.

Thailand

Although the Thai arbitration system only came into existence with the birth of the TAA 1987, the Thai people who deal with arbitration are beginning to understand it more and more . The Thai courts have changed their attitude towards arbitration. This has led to the necessity to have a new law

---

[1271] G Triggs, *op.cit.*, footnote 4, at p.551.

which adopts the Model Law. However, under the current application of the TAA 1987, party autonomy is more limited than it should be in that, although parties have the freedom to choose a foreign arbitrator in practice, it is still a theoretical question.

Furthermore, it appears that the list of arbitrators of the arbitration institutions has no foreigners included. This has resulted in foreigners having little confidence in this matter. Choice of arbitral procedure on the other hand, is quite open but the choice of foreign law is possible. The term "public policy" applied by Thai court is narrowly interpreted.

Vietnam

The Vietnamese arbitration system has developed since the establishment of the VIAC, particularly when it signed the New York Convention. However, in respect to the issue of party autonomy in current practice it is, like Laos, this is very limited. Ad hoc arbitration, although possible, is very difficult. The parties therefore have to choose VIAC instead of ad hoc.

The VIAC Rules do not have many provisions to deal with international commercial arbitration. It is possible to have a foreigner arbitrator but there is no foreign name on the list of VIAC arbitrators. The parties do not have much freedom to design their own arbitral procedure. Choice of foreign law is impossible because it is contrary to the mandatory rules of Vietnam. The scope of public policy is unclear, but it is understood that it would be widely interpreted by Vietnam courts.

Final Comparison and Conclusion

This study has shown that the degree of party autonomy in international commercial arbitration varies considerably in the jurisdictions examined. Nevertheless, the study has provided certain guidance leading to the paramount consideration, that there needs to be a bridge of the gap between developed and developing arbitration systems.

1. Guidance to legislators

The study indicates that the states still play a significant role in international commercial arbitration. State courts often rely exclusively on their role as bearers of state power rather than the modern idea of provider of services. [1272] Hence, the state courts maintain and exercise power to control all arbitration which takes place in their jurisdictions. In other words, the jurisdiction theory, as discussed in Chapter 1, holds sway in these countries. This is apparent in the case of Laos, Thailand and Vietnam. The arbitration laws of these countries give too much power to the courts to interfere in the arbitral process. The PRC 's case is different because it enacted legislation in the criterion set by the Model Law[1273] which limits the power of the court and gives more freedom to the parties.

Modern arbitration laws give freedom to parties. This is simply because party autonomy constitutes the hard core of international commercial arbitration. In fact, party autonomy is found behind the existence and success of international commercial arbitration. However, the degree of party autonomy depends on the national law. Thus, the national law should give the freedom to the parties to design the arbitral procedure.

Laos, Thailand and Vietnam have not adopted the Model Law. The development of these laws, should therefore follow and observer contemporary attitudes and approaches.

I recommend that the legislators in these three countries should adopt the Model Law or at least use it as a guideline in the same way the PRC did. This is to accommodate the parties (members of the business community) who participate in arbitration in these jurisdictions. International investors or merchants on a smaller scale know how to deal with international commercial arbitration under the Model Law system. Besides, it has been decided that the

---

[1272] Mistelis, *Charakterisierungen und Qualifikation im internationalen Privatrecht*, (Tübingen 1999), p. 250.

[1273] See Introduction on China part.

Model Law should work in conjunction with the New York Convention. Such a viewpoint should also guide and encourage Laos to ratify the New York Convention as soon as possible.

Besides, it is submitted, the four countries (except for the PRC) lack experience in dealing with arbitration. Although Thailand signed the New York Convention in 1959, it has had laconic provisions in the Civil Procedure Code, which appear to be insufficient to deal with international commercial arbitration. Although it has the TAA 1987, there are conceptual difficulties relating to international commercial arbitration. They can be summarised as; the lack of understanding and deficient development of a system which is complimentary and in competition with traditional civil litigation. Laos and Vietnam follow the same line as Thailand. They have arbitration laws, but lack experience of the arbitral process.

2. Guidance to State Courts

The attitude of the national courts is equally important to the effectiveness of an arbitration law. As arbitration law is in a process of modernisation, the attitude of the national court should also open. They should not have a parochial view on international commercial arbitration. The reason for this is that, as shown in this research[1274], arbitration is not "foreign" to any justice system. Instead, it is created to serve not only disputants but also the administration of justice a by shifting the burden from the courts to arbitration tribunals with regards to specialised cases in international commerce. It is well established that international commercial arbitration is an essential dispute resolution mechanism for international trade disputes. International commercial arbitration has been developed in order to effectively handle international disputes and to meet the needs of the international business community.

However, it is still unclear what the attitude of the related courts are.

[1274] See Chapter 2.

Although there are a few reported cases from these jurisdictions, these cannot be deemed enough evidence to show their attitude and commitment towards arbitration. An award may be set aside or be unenforceable in these jurisdictions simply on the grounds that it is against their public policy. The exception of public policy when applying the New York Convention, appears not to be well-defined.

In any event, there are two recently reported cases in Thailand which illustrate that the court supports the pro-enforcement bias towards award.[1275] It is submitted in this regard the state courts of Thailand and Vietnam should respect the spirit and decide the recognition and enforcement of awards in accordance with the New York Convention, to which both countries are signatories. In the alternative, the New York Convention will become meaningless or redundant in these countries. There is also an issue of public international law, whether the courts can interpret the law in way which constitutes a breach of public international obligations. In the case of Laos, I recommend that it should ratify the New York Convention as soon as possible in order to facilitate an international commercial arbitration culture by rendering awards internationally enforceable.

3. Guidance to Businessmen

The next problem is how parties to arbitration or the members of the business community in general exercise their freedom. In other words, what should the parties do to fulfil their goal in drafting arbitration clauses or submitting their disputes to arbitration? One should bear in mind that party autonomy is not on a universal basis, although it is universally accepted. It cannot guarantee that the parties will obtain the desirable result in every case.

Furthermore, many problems may arise from party autonomy, such as multi-party arbitration. Although the parties can have a great degree of discretion, it does not follow that party autonomy can always give them what

---

[1275] See page 388.

they want. What the parties do depends very much on their experiences as well as the constraints imposed by the relevant mandatory rules. There is no single criterion to apply to every case.

Arbitration among parties in the researched countries does not vary much as they have very similar cultures. Arbitration among them may possibly take place in any one of these countries. What they should take into consideration is the cost of arbitration. A party from Thailand and one from Laos may choose either Thailand or Laos as the place of arbitration. The neutrality of the place of arbitration, although important, is less important than the cost of arbitration; this is due to similar cultural background of Thailand and Laos.

On the other hand, arbitration between parties from these countries and those from developed system countries appears to be more problematic. They, of course, will see arbitration from different angles. Parties from developed countries need the freedom to tailor the arbitral procedure in order to get a desirable result, while parties from developing countries may not even know how to tailor it.

This problem, of course, is not linked with the arbitration itself. It is a conceptual and cultural problem arising from the lack of understanding of the purpose and function of arbitration or unfamiliarity with arbitral proceedings. Arbitration between them, therefore, could take place in a neutral country which has a developed system. If this is the case, the parties from the countries under review will feel that they have to pay too high a cost. This attitude is very important because it is possible for the parties from developing countries to try to avoid arbitration and recourse to other methods to resolve their disputes. The best compromise is for the arbitration between them to take place in a neutral-neighbouring country. Further the selection of the arbitrators is essential, as the right tribunal may inspire confidence in the proceedings.

For instance, arbitration between a Thai party and an English party may take place in the New York Convention countries such as Vietnam or the PRC

but not Laos. On the other hand, parties from developed countries may feel that they have to compromise with very low standard, as they are unfamiliar and uncertain of these systems. It should be borne in mind that the claimants in most cases are parties from developed countries.

It is unavoidable that claimants from developed countries must deal with developing countries and that arbitrations are heard in the latter countries. At any rate it is essential that the parties from developing countries do not have hostile feelings towards arbitration. This means that international commercial arbitration would be developed in this region, and this, it is submitted , is the wish of all those who are involved in arbitration. In the long run an arbitration culture will be developed in all countries researched in this study. However to achieve this, education of both the legal and the business community will be needed.

4. To bridge the gap between developed and developing arbitration systems

One of the major problems of the international commercial arbitration is the gap between developed and developing arbitration systems. This has led to the less effective use of arbitration between them. Parties to arbitration from developing countries are concerned about arbitration and think that the arbitration is a tool of developed countries in pursuing their financial interests. Thus party autonomy is an important tool to fill such this gap. Once the parties from developed and developing countries alike have freedom to design the mechanism to settle their disputes, they should be responsible for their decision.

Party autonomy will be useful only when arbitration laws are modernised and the attitude of the national courts becomes more favourable towards arbitration. In addition, the parties have to exercise their freedom with great care. Once all these conditions are met, arbitration will be more popular and powerful. Then there will be no gap between the developed and the developing arbitration systems.

In conclusion, this thesis is presented with the expectation that it will

be a valuable tool and guide for those preparing arbitration agreements in the PRC, Laos, Thailand or Vietnam, and to those appointed or selected to serve as arbitrators or counsel to parties who arbitrate in these countries. It is hoped that it will also assist legislators in these countries in ensuring that future law reforms will lead to the development of an arbitration culture. The thesis highlights many of the pitfalls which may be avoided with the introduction of new legislation. The paramount consideration is to bridge the gap between developed and developing arbitration systems.

APPENDIX 1

ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA

"CAA"

(Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on August 31, 1994, promulgated by Order No. 31 of the President of the People's Republic of China on August 31, 1994, and effective as of September 1, 1995)

Contents

Chapter General Provisions

Chapter II Arbitration Commissions and the Arbitration Association

Chapter III Arbitration Agreement

Chapter IV Arbitration Proceedings

Section 1 Application and Acceptance

Section 2 Formation of Arbitration Tribunal

Section 3 Hearing and Award

Chapter V Application for Setting Aside Arbitration Award

Chapter VI Enforcement

Chapter VII Special Provisions for Arbitration Involving Foreign Elements

Chapter VIII Supplementary Provisions

Chapter 1 General Provisions

ARTICLE 1

This Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes, to protect the legitimate rights and interests of the parties and to safeguard the sound development of the socialist market economy.

ARTICLE 2

Contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organisations that are equal subjects may be arbitrated.

ARTICLE 3

The following disputes may not be arbitrated:

(1) marital, adoption, guardianship, support and succession disputes;

(2) administrative disputes that shall be handled by administrative organs as prescribed by law.

ARTICLE 4

The parties' submission to arbitration to resolve their dispute shall be on the basis of both parties' free will and an arbitration agreement reached between them. If a party applies for arbitration in the absence of an arbitration agreement, the arbitration commission shall not accept the case.

ARTICLE 5

If the parties have concluded an arbitration agreement and one party institutes an action in a People's Court, the People's Court shall not accept the case, unless the arbitration agreement is null and void.

ARTICLE 6

The arbitration commission shall be selected by the parties through agreement.

In arbitration, there shall be no jurisdiction by level and no territorial jurisdiction.

ARTICLE 7

In arbitration, disputes shall be resolved on the basis of facts, in

compliance with the law and in an equitable and reasonable manner.

ARTICLE 8

Arbitration shall be carried out independently according to law and shall be free from interference of administrative organs, public organisations or individuals.

ARTICLE 9

A system of a single and final award shall be practised for arbitration. If a party applies for arbitration to an arbitration commission or institutes an action in a People's Court regarding the same dispute after an arbitration award has been made, the arbitration commission or the People's Court shall not accept the case.

If an arbitration award is set aside or its enforcement is disallowed by the People's Court in accordance with the law, a party may apply for arbitration on the basis of a new arbitration agreement reached between the parties, or institute an action in the People's Court, regarding the same dispute.

Chapter II

Arbitration Commissions and the Arbitration Association

ARTICLE 10

Arbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people's governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. Arbitration commissions shall not be established at each level of the administrative divisions.

People's governments of the cities referred to in the preceding paragraph shall arrange for the relevant departments and chambers of commerce to organise arbitration commissions in a unified manner.

The establishment of an arbitration commission shall be registered with

the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government.

ARTICLE 11

An arbitration commission shall meet the conditions set forth below:

(1) To have its own name, domicile and charter;

(2) To have the necessary property;

(3) To have the personnel that are to form the commission; and

(4) To have appointed arbitrators.

The chapter of an arbitration commission shall be formulated in accordance with this Law.

ARTICLE 12

An arbitration commission shall be composed of one chairman, two to four vice-chairmen and seven to eleven members.

The offices of chairman, vice-chairman and members of an arbitration commission shall be held by experts in the field of law, economics and trade and persons with practical working experience. Experts in the field of law, economics and trade shall account for at least two thirds of the people forming an arbitration commission.

ARTICLE 13

An arbitration commission shall appoint its arbitrators from among righteous and upright persons.

An arbitrator shall meet one of the conditions set forth below:

(1) To have been engaged in arbitration work for at least eight years;

(2) To have worked as a lawyer for at least eight years;

(3) To have served as a judge for at least eight years;

(4) To have been engaged in legal research or legal education, possessing a senior professional title; or

(5) To have acquired knowledge of law, engaged in professional work in the field of economics and trade, etc., possessing a senior professional title or having an equivalent professional level.

An arbitration commission shall have a register of arbitrators in different specialisation.

ARTICLE 14

Arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs. There shall also be no subordinate relationships between arbitration commissions.

ARTICLE 15

The China Arbitration Association is a social organisation with the status of a legal person.

Arbitration commissions are members of the China Arbitration Association. The charter of the China Arbitration Association shall be formulated by its national congress of members.

The China Arbitration Association is a self-regulated organisation of arbitration commissions. It shall, in accordance with its charter, supervise arbitration commissions and their members and arbitrators as to whether or not they breach discipline.

The China Arbitration Association shall formulate rules of arbitration in accordance with this Law and the relevant provisions of the Civil Procedure Law.

Chapter III

Arbitration Agreement

ARTICLE 16

An arbitration agreement shall include arbitration clauses stipulated in the contract and agreement of submission to arbitration that are concluded in other written forms before or after disputes arise.

An arbitration agreement shall contain the following particulars:

(1) an expression of intention to apply for arbitration;

(2) matters for arbitration; and

(3) a designated arbitration commission.

ARTICLE 17

An arbitration agreement shall be null and void under one of the following circumstances:

(1) The agreed matters for arbitration exceed the range of arbitrable matters as specified by law;

(2) One party that concluded the arbitration agreement has no capacity for civil conduct or has limited capacity for civil conduct; or

(3) One party coerced the other party into concluding the arbitration agreement.

ARTICLE 18

If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.

ARTICLE 19

An arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement.

The arbitration tribunal shall have the power to affirm the validity of a contract.

ARTICLE 20

If a party challenges the validity of the arbitration agreement, it may request the arbitration commission to make a decision or apply to the People's Court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the People's Court for a ruling, the People's Court shall give a ruling.

A party's challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing.

Chapter IV

Arbitration Proceedings

Section 1 Application and Acceptance

ARTICLE 21

A party's application for arbitration shall meet the following requirements:

(1) There is an arbitration agreement;

(2) There is a specific arbitration claim and there are facts and reasons therefor; and

(3) The application is within the scope of the arbitration commission's acceptance.

ARTICLE 22

To apply for arbitration, a party shall submit to the arbitration commission the written arbitration agreement and a written application for arbitration together with copies thereof.

ARTICLE 23

A written application for arbitration shall specify the following particulars:

(1) the name, sex, age, occupation, work unit and domicile of each party, or the name and domicile of legal persons or other organisations and the names and positions of their legal representatives or chief responsible persons;

(2) the arbitration claim and the facts and reasons on which it is based; and

(3) the evidence, the source of the evidence and the names and domiciles of witnesses.

ARTICLE 24

When an arbitration commission receives a written application for arbitration and considers that the application complies with the conditions for acceptance, it shall accept the application and notify the party within five days from the date of receipt. If the arbitration commission considers that the application does not comply with the conditions for acceptance, it shall inform the party in writing of its rejection of the application and explain the reasons for rejection within five days from the date of receipt.

ARTICLE 25

After an arbitration commission accepts an application for arbitration, it shall, within the time limit specified in the rules of arbitration, deliver a copy of the rules of arbitration and the register of arbitrators to the claimant, and serve one copy of the application for arbitration together with the rules of

arbitration and the register of arbitrators on the respondent.

After receiving the copy of the application for arbitration, the respondent shall submit a written defence to the arbitration commission within the time limit specified in the rules of arbitration. After receiving the written defence, the arbitration commission shall serve a copy thereof on the claimant within the time limit specified in the rules of arbitration. Failure on the part of the respondent to submit a written defence shall not affect the progress of the arbitration proceedings.

ARTICLE 26

If the parties have concluded an arbitration agreement and one party has instituted an action in a People's Court without declaring the existence of the arbitration agreement and, after the People's Court has accepted the case, the other party submits the arbitration agreement prior to the first hearing, the People's Court shall dismiss the case unless the arbitration agreement is null and void. If, prior to the first hearing, the other party has not raised an objection to the People's Court's acceptance of the case, it shall be deemed to have renounced the arbitration agreement and the People's Court shall continue to try the case.

ARTICLE 27

The claimant may renounce or alter its arbitration claim. The respondent may accept or refuse an arbitration claim and shall have the right to make a counter-claim.

ARTICLE 28

A party may apply for property preservation if it may become impossible or difficult for the party to execute the award due to an act of the other party or other causes.

If a party applies for property preservation, the arbitration commission shall submit the party's application to the People's Court in accordance with the relevant provisions of the Civil Procedure Law.

If an application for property preservation has been wrongfully made, the applicant shall compensate the person against whom the application has been made for any loss incurred from property preservation.

ARTICLE 29

A party or statutory agent may appoint a lawyer or other agent to carry out arbitration activities. To appoint a lawyer or other agent to carry out arbitration activities, a power of attorney shall be submitted to the arbitration commission.

Section 2 Formation of Arbitration Tribunal

ARTICLE 30

An arbitration tribunal may be composed of either three arbitrators or one arbitrator. An arbitration tribunal composed of three arbitrators shall have a presiding arbitrator.

ARTICLE 31

If the parties agree that the arbitration tribunal shall be composed of three arbitrators, they shall each appoint or entrust the chairman of the arbitration commission to appoint one arbitrator. The parties shall jointly select or jointly entrust the chairman of the arbitration commission to appoint the third arbitrator who shall be the presiding arbitrator.

If the parties agree that the arbitration tribunal shall be composed of one arbitrator, they shall jointly appoint or jointly entrust the chairman of the arbitration commission to appoint the arbitrator.

ARTICLE 32

If the parties fail to agree on the method of formation of the arbitration tribunal or to select the arbitrators within the time limit specified in the rules of arbitration, the arbitrators shall be appointed by the chairman of the arbitration commission.

ARTICLE 33

After the arbitration tribunal has been formed, the arbitration commission shall notify the parties in writing of the tribunal's formation.

ARTICLE 34

In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal:

(1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case;

(2) The arbitrator has a personal interest in the case;

(3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or

(4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent.

ARTICLE 35

If a party challenges an arbitrator, it shall submit its challenge, with a statement of the reasons therefor, prior to the first hearing. If the matter giving rise to the challenge becomes known after the first hearing, the challenge may be made before the conclusion of the final hearing of the case.

ARTICLE 36

The decision as to whether or not the arbitrator should withdraw shall be made by the chairman of the arbitration commission. If the chairman of the arbitration commission serves as an arbitrator, the decision shall be made collectively by the arbitration commission.

ARTICLE 37

If an arbitrator cannot perform his duties due to his withdrawal or for other reasons, a substitute arbitrator shall be selected or appointed in accordance with this Law.

After a substitute arbitrator has been selected or appointed on account of an arbitrator's withdrawal, a party may request that the arbitration proceedings already carried out should be carried out anew. The decision as to whether to approve it or not shall be made by the arbitration tribunal. The arbitration tribunal may also make a decision of its own Motion as to whether or not the arbitration proceedings already carried out should be carried out anew.

ARTICLE 38

If an arbitrator is involved in the circumstances described in item (4) of Article 34 of this Law and the circumstances are serious or involved in the circumstances described in item (6) of Article 58 of this Law, he shall assume legal liability according to law and the arbitration commission shall remove his name from the register of arbitrators.

Section 3 Hearing and Award

ARTICLE 39

Arbitration shall be conducted by means of oral hearings. If the parties agree to arbitration without oral hearings, the arbitration tribunal may render an arbitration award on the basis of the written application for arbitration, the written defence and other material.

ARTICLE 40

Arbitration shall be conducted in camera. If the parties agree to public arbitration, the arbitration may be public unless State secrets are involved.

ARTICLE 41

The arbitration commission shall notify the parties of the date of the

hearing within the time limit specified in the rules of arbitration. A party may, within the time limit specified in the rules of arbitration, request a postponement of the hearing if it has justified reasons therefor. The arbitration tribunal shall decide whether or not to postpone the hearing.

ARTICLE 42

If the claimant fails to appear before the arbitration tribunal without justified reasons after having been notified in writing or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, it may be deemed to have withdrawn its application for arbitration.

If the respondent fails to appear before the arbitration tribunal without justified reasons after having been notified in writing or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, a default award may be made.

ARTICLE 43

The parties shall provide evidence in support of their own arguments. The arbitration tribunal may, as it considers necessary, collect evidence on its own.

ARTICLE 44

If the arbitration tribunal considers that a special issue requires appraisal, it may refer the issue for appraisal to an appraisal department agreed on by the parties or to an appraisal department designated by the arbitration tribunal.

If requested by a party or required by the arbitration tribunal, the appraisal department shall send its appraiser to attend the hearing. Subject to the permission of the arbitration tribunal, the parties may question the appraiser.

ARTICLE 45

The evidence shall be presented during the hearings and may be

examined by the parties.

ARTICLE 46

Under circumstances where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence. If a party applies for preservation of the evidence, the arbitration commission shall submit its application to the basic People's Court in the place where the evidence is located.

ARTICLE 47

The parties shall have the right to carry on debate in the course of arbitration. At the end of the debate, the presiding arbitrator or the sole arbitrator shall solicit final opinions from the parties.

ARTICLE 48

The arbitration tribunal shall make records of the hearings in writing. The parties and other participants in the arbitration shall have the right to apply for supplementation or correction of the record of their own statements if they consider that such record contains omissions or errors. If no supplementation or corrections are to be made, their application therefor shall be recorded.

The record shall be signed or sealed by the arbitrators, the recordist, the parties and other participants in the arbitration.

ARTICLE 49

After an application for arbitration has been made, the parties may settle their dispute on their own. If the parties have reached a settlement agreement, they may request the arbitration tribunal to make an arbitration award in accordance with the settlement agreement; alternatively, they may withdraw their application for arbitration.

ARTICLE 50

If a party repudiates the settlement agreement after the application for arbitration has been withdrawn, it may apply for arbitration again in

accordance with the arbitration agreement.

ARTICLE 51

The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.

If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect.

ARTICLE 52

A written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and then served on both parties.

The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof.

If the written conciliation statement is repudiated by a party before it signs for receipt thereof, the arbitration tribunal shall promptly make an arbitration award.

ARTICLE 53

The arbitration award shall be made in accordance with the opinion of the majority of the arbitrators. The opinion of the minority of the arbitrators may be entered in the record. If the arbitration tribunal is unable to form a majority opinion, the arbitration award shall be made in accordance with the opinion of the presiding arbitrator.

ARTICLE 54

An arbitration award shall specify the arbitration claim, the facts of the

dispute, the reasons for the decision, the results of the award, the allocation of arbitration fees and the date of the award. If the parties agree that they do not wish the facts of the dispute and the reasons for the decision to be specified in the arbitration award, the same may be omitted. The arbitration award shall be signed by the arbitrators and sealed by the arbitration commission. An arbitrator with dissenting opinions as to the arbitration award may sign the award or choose not to sign it.

ARTICLE 55

In arbitration proceedings, if a part of the facts involved has already become clear, the arbitration tribunal may first make an award in respect of such part of the facts.

ARTICLE 56

If there are literal or calculation errors in the arbitration award, or if the matters which have been decided by the arbitration tribunal are omitted in the arbitration award, the arbitration tribunal shall make due corrections or supplementation. The parties may, within 30 days from the date of receipt of the award, request the arbitration tribunal to make such corrections or supplementation.

ARTICLE 57

The arbitration award shall be legally effective as of the date on which it is made.

Chapter V

Application for Setting Aside Arbitration Award

ARTICLE 58

A party may apply for setting aside an arbitration award to the intermediate People's Court in the place where the arbitration commission is located if it can produce evidence which proves that the arbitration award involves one of the following circumstances:

(1) There is no arbitration agreement;

(2) The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;

(3) The formation of the arbitration tribunal or the arbitration procedure is not in conformity with the statutory procedure;

(4) The evidence on which the award is based is forged;

(5) The other party has withheld evidence which is sufficient to affect the impartiality of the arbitration; or

(6) The arbitrators have committed embezzlement, accepted bribes or committed malpractice for personal benefit or perverted the law in the arbitration of the case.

The People's Court shall rule to set aside the arbitration award if a collegial panel formed by the People's Court verifies upon examination that the award involves one of the circumstances set forth in the preceding paragraph.

If the People's Court determines that the arbitration award violates the public interest, it shall rule to set aside the award.

ARTICLE 59

A party that wishes to apply for setting aside the arbitration award shall submit such application within six months from the date of receipt of the award.

ARTICLE 60

The People's Court shall, within two months from the date of accepting an application for setting aside an arbitration award, rule to set aside the award or to reject the application.

ARTICLE 61

If, after accepting an application for setting aside an arbitration award, the People's Court considers that the case may be re-arbitrated by the arbitration tribunal, it shall notify the tribunal that it shall re-arbitrate the case within a certain time limit and shall rule to stay the setting-aside procedure. If the arbitration tribunal refuses to re-arbitrate the case, the People's Court shall rule to resume the setting-aside procedure.

Chapter VI

Enforcement

ARTICLE 62

The parties shall perform the arbitration award. If a party fails to perform the arbitration award, the other party may apply to the People's Court for enforcement in accordance with the relevant provisions of the Civil Procedure Law. The People's Court to which the application has been made shall enforce the award.

ARTICLE 63

If the party against whom the enforcement is sought presents evidence which proves that the arbitration award involves one of the circumstances set forth in the second paragraph of Article 217 of the Civil Procedure Law, the People's Court shall, after examination and verification by a collegial panel formed by the People's Court, rule to disallow the award.

ARTICLE 64

If one party applies for enforcement of the arbitration award and the other party applies for setting aside the arbitration award, the People's Court shall rule to suspend the procedure of enforcement.

If the People's Court rules to set aside the arbitration award, it shall rule to terminate the enforcement procedure. If the People's Court rules to reject the application for setting aside the arbitration award, it shall rule to

resume the enforcement procedure.

Chapter VII

Special Provisions for Arbitration Involving Foreign Elements

ARTICLE 65

The provisions of this Chapter shall apply to the arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element. For matters not covered in this Chapter, the other relevant provisions of this Law shall apply.

ARTICLE 66

Foreign-related arbitration commissions may be organised and established by the China Chamber of International Commerce.

A foreign-related arbitration commission shall be composed of one chairman, a certain number of vice chairmen and members.

The chairman, vice chairmen and members of a foreign related arbitration commission may be appointed by the China Chamber of International Commerce.

ARTICLE 67

A foreign-related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economics and trade, science and technology, etc.

ARTICLE 68

If a party to a foreign-related arbitration applies for preservation of the evidence, the foreign-related arbitration commission shall submit its application to the intermediate People's Court in the place where the evidence is located.

ARTICLE 69

A foreign-related arbitration tribunal may enter the details of the hearings in written records or make written minutes thereof. The written minutes may be signed or sealed by the parties and other participants in the arbitration.

ARTICLE 70

If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the People's Court shall, after examination and verification by a collegial panel formed by the People's Court, rule to set aside the award.

ARTICLE 71

If the party against whom the enforcement is sought presents evidence which proves that the foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the People's Court shall, after examination and verification by a collegial panel formed by the People's Court, rule to disallow the enforcement.

ARTICLE 72

If a party applies for enforcement of a legally effective arbitration award made by a foreign-related arbitration commission and if the party against whom the enforcement is sought or such party's property is not within the territory of the People's Republic of China, it shall directly apply to a competent foreign court for recognition and enforcement of the award.

ARTICLE 73

Foreign-related arbitration rules may be formulated by the China Chamber of International Commerce in accordance with this Law and the relevant provisions of the Civil Procedure Law.

Chapter VIII

Supplementary Provisions

ARTICLE 74

If prescription for arbitration is provided by law, such provisions shall apply. In the absence of such provisions, the prescription for litigation shall apply to arbitration.

ARTICLE 75

Prior to the formulation of rules of arbitration by the China Arbitration Association, arbitration commissions may formulate provisional rules of arbitration in accordance with this Law and the relevant provisions of the Civil Procedure Law.

ARTICLE 76

Parties shall pay arbitration fees according to regulations.

Measures for charging arbitration fees shall be submitted to the price control authorities for examination and approval.

ARTICLE 77

Regulations concerning arbitration of labour disputes and agricultural contractor's contract disputes arising within agricultural collective economic organisations shall be formulated separately.

ARTICLE 78

If regulations governing arbitration promulgated prior to the implementation of this Law contravene the provisions of this Law, the provisions of this Law shall prevail.

ARTICLE 79

Arbitration institutions established prior to the implementation of this Law in the municipalities directly under the Central Government, in the cities

that are the seats of the people's governments of provinces or autonomous regions and in other cities divided into districts shall be reorganised in accordance with this Law. Those of such arbitration institutions that have not been reorganised shall terminate upon the end of one year from the date of the implementation of this Law. Other arbitration institutions established prior to the implementation of this Law that do not comply with the provisions of this Law shall terminate on the date of the implementation of this Law.

ARTICLE 80

This Law shall come into force as of September 1, 1995.

APPENDIX 2

DECREE NO.106/PM ON THE SETTLEMENT OF ECONOMIC DISPUTES "LSED"

- Based on the Article 57, point 4 of the Constitution of the Lao People's Democratic Republic ;
- Based on the law on the promotion of the foreign investments in Lao PDR;
- Based on the law on the contractual liabilities;
- On the proposal of the Minister of Justice.

The Prime Minister

Decrees :

Chapter 1

General Provisions

ARTICLE 1 : Objective of decree on the Settlement of Economic Disputes

The decree on the Settlement of Economic Disputes defines the organisation and the activities of the Office for Settlement of Economic, Business and Commercial Disputes in order to sensitize the entrepreneurs to observe the laws and regulations, to promote commercial activities and to contribute to the development of the national economy.

ARTICLE 2 : Definition of economic disputes

Economic disputes are disputes occuring during the exercise of commercial activities in the areas of agricultural and industrial production, trade, service and other economic activities.

ARTICLE 3 : The settlement of disputes

The economic and commercial disputes will be promptly considered by the Office for Settement of Economic Disputes, locally or internationally with

the consent of the contracting parties when the contract is made or after disputes has arised.

ARTICLE 4 : Autonomy in the settlement

In the settlement of economic disputes, conciliator and arbitrator must exercise their functions with complete autonomy, without outside intervention and ensure justice.

ARTICLE 5 : Equality between the parties

In the settlement of economic disputes the two parties have equal rights.

The parties can act on their own behalf or be represensed by their representative or lawyer.

ARTICLE 6 : References in the consideration of the settlement of economic disputes

The settlement of economic disputes must be done with reference to the provisions of the present decree unless otherwise agreed by the parties. It must also make reference to legislation, transactions between the two parties, business practices and principles of impartiality.

ARTICLE 7 : Confidentiality

In the settlement of economic disputes, conciliator, arbitrator, the parties and others involved must preserve confidentiality. The information and documents provided during the conciliation or the arbitration should not be revealed to the parties outside the case.

ARTICLE 8 : Challenge and withdrawal

Each party has the right to challenge a conciliator or an arbitrator. The conciliator or the arbitrator also have the right and the obligation to withdraw from the settlement of the disputes when he is a relative or has some interest or conflict of interest with either party.

ARTICLE 9 : Language used in the settlement of the disputes

The settlement of economic disputes in Lao PDR must use Lao as the principal language. If necessary, a foreign language can be used but it must be translated in Lao.

ARTICLE 10 : Time limit on appeals for settlement of disputes

The time limit on appeals for settlement of disputes must not exceed 3 years from the date when dispute occurs. The Office for Settlement of Economic Disputes will not consider cases beyond this time limit.

Chapter 2

The Office for Settlement of Economic Disputes

ARTICLE 11 : Position and purpose of the Office for Settlement of Economic Disputes

The Office for Settlement of Economic Disputes, abbreviated "OSE" is an organisation under the Ministry of Justice; its purpose is to settle the economic disputes which arise in the cause of business activities in agricultural and industrial production, trade, services, and others to promote local and foreign investment and develop the multisectoral commodities economy.

ARTICLE 12 : The advisory committee

To ensure the effective operation of the OSE in order to effectively develop, promote and diffuse its work, the Office for Settlement of Economic Disputes is endowed with one advisory committee composed of :

- The Minister of Justice as President of advisory committee;
- The Representative of the Ministry of Finance, Vice-President;
- The Representative of the Ministry of Commerce, members;
- The Representative of the Ministry of Agriculture and Forestry, member;

- The Representative of the Ministry of Communication Transports, Post and Construction, member;
- The Representative of the Committee on Planning and Co-operation, member;
- The Representative of Bank of the Lao PDR, member;
- The Representative of the Ministry of Industry and Handicraft, member;
- The Representative of the National Chamber of Commerce and Industry, member.

This advisory committee is involved with studying the orientation of the OSE's activities without involving in the details of settlement of economic disputes.

ARTICLE 13 : The structural organisation of the OSE

The Office for Settlement of the Economic Disputes is composed of:

- The Head Office;
- Oudomsay branch;
- Luangprabang branch;
- Savannakhet branch;
- Champassack branch.

If necessary and if conditions permit, additional branches of the Office for Settlement of Economic Disputes may be opened in Vientiane Municipality or in other provinces.

ARTICLE 14 : The structure of the OSE

The Office for Settlement of Economic Disputes is composed of :

- One Chief;

- One or two Assistant Chiefs.

The OSE also includes

- The Department of Administration and Secretariat;
- The Department of the Management of Disputes Settlement;
- The Department of Laws and Regulations.

The Chief of the central office is appointed or dismissed by the Prime Minister on the recommendation of the Minister of Justice and is responsible for supervision of the Office's activities.

The Assistant Chief is appointed or dismissed by the Minister of Justice, assists the Chief of the Office and replaces him when he is absent or unavailable.

The Chief of the office can assign to the Assistant Chief the responsibility for any duty.

The Head and the Assistant Head of every Department are appointed or dismissed by the Minister of Justice on the recommendation of the Chief of the office for Settlement of Economic Disputes.

ARTICLE 15 : Rights and duties of the Departments

The various Departments of the OSE have the following rights and duties:

1. The Department of Administration and Secretariat :

   a) Is in charge of the secretarial and administrative tasks in the office;

   b) Prepares for meetings concerning the settlement of economic disputes;

   c) Prepares and submits reports on the Office's activities to the Chief.

2. The Department of Management of Disputes Settlement :

   a) Receives the requests and opens the files;

b) Coordinates with the parties on the procedures of the settlement of economic disputes;

c) Establishes and manages its panel of conciliators and arbitrators composed of permanent and non-permanent members.

3. The Department of Regulations :

a) Studies and modifies legislation related to the settlement of economic disputes;

b) Educates the people and the enterprises to observe and obey laws and regulations;

c) Encourages the settlement of economic disputes through conciliation or arbitration;

d) Monitors and compiles regulations and studies of settlement of international economic disputes.

ARTICLE 16 : The organisation of OSE branches

Each branch of the Office for Settlement of Economic Disputes is composed of :

a) A Branch Chief and a deputy Chief, appointed or dismissed by the Minister of Justice on the recommendation of the Chief of the Office;

b) Technical staff;

c) A secretary.

The branch of the OSE has similar duties to those of the OSE.

The branch located in oudomsay is in charge of Oudomsay, Phongsaly, Bokeo and LuangNamtha provinces.

The branch located in Luangprabang is in charge of Luangprabang and Sayabouly provinces ,XiengHone and Hohgsa Special Zone.

The branch located in Savannakhet is. in charge of Savannakhet and Khammouane provinces.

The branch located in Pakse is in charge of Champassack, Saravane, Sekong and Attapeu provinces.

Vientiane Municipality and the provinces of Vientiane, Bolikhamsay, Xiengkhouang and Houaphan are directly under the central OSE.

ARTICLE 17 : Competence and duties of the branches of the OSE.

branch of the OSE is authorised to settle the economic disputes where the amount does not exceed twenty million kip and where both parties are Lao citizens residing in the jurisdiction of the same branch.

ARTICLE 18 : Competence and duties of the OSE.

The Office for Settlement of Economic Disputes is authorised to settle:

a) All disputes directly under the responsibility of the OSE;

b) Disputes whose amount doesnot exceed twenty million kip and where the parties are under the jurisdiction of different branches or where either party is a foreign citizen;

c) Disputes whose amount exceeds twenty million kip;

d) Particularly difficult or complex disputes which the branches are unable to settle by themselves.

In the case where a branch cannot be established according to the provisions of this decree, the disputes arisen in that area will be settled by the central OSE.

Chapter 3

The procedures for settlement of economic disputes

Section 1 Requests

ARTICLE 19 : Form of the request

The request must be formulated in writting and contain the follow informations :

1. Name and surname, age, profession and address of claimant or of his/her representative, address of the claimant's company;
2. Name and surname, profession, address of the other party;
3. Reason, purpose and amount of the request;
4. Evidence and addresses of witnesses;
5. The consent of the parties to submit the dispute for settlement by the OSE;
6. Statements concerning previous attempts, if any, to settle disputes before submitting the request;
7. Desired mode of settlement : conciliation or arbitration.

The request must be sent to the Office or to the appropriate branch.

ARTICLE 20 : Consideration of the request

After receipt of the request, the OSE must consider the admissibility of the request and inform the claimant within thirty days from the date of receipt. If the OSE rejects the request, the reasons for the rejection should be communicated to the claimant.

If the request is accepted, the agent of the OSE must register the request and send a copy to the other party immediately. The latter must send an answer in writing to the agent of the OSE within thirty days from the date of the request' s receipt. After the expiration of the time limit of thirty days, if no answer has been received, the agent of the OSE must remind the party concerned to give an answer within twenty days. After the expiration of this time limit, if no answer has been received, the agent of the OSE will proceed to the choice of a conciliator or an arbitrator according to the provisions in Article 22 of this decree to consider the settlement of the dispute on the basis

of the party's request, by the autonomy and the impartiality of this arbitrator.

Section II Conciliation

ARTICLE 21 : The conditions of the conciliation

The settlement of the economic disputes may be exercised by the form of conciliation. The settlement of the economic disputes can be conciliated at the OSE provided that there exist prior agreement between the parties in which it is specified that after the arising of the disputes, these disputes will make the object of the conciliation by the OSE.

ARTICLE 22 : The appointment of the conciliator

There may be one or several conciliators according to the agreement of the two parties.

When the parties agree to have a single conciliator, the OSE will send the same list of at least three conciliators to every party for selection and the order of preference within twenty days from the date of the receipt of the list. After receipt of the list of conciliators chosen by the parties, the OSE will appoint a conciliator based on the order of preference submitted by the parties.

If the parties choose three conciliators, each party will have to choose a conciliator from the list sent by the OSE and then the two conciliators will have to choose a third conciliator in order to choose the panel of conciliation.

If the two conciliators do not choose a third, are unable to choose or do not choose within the required fifteen days from the date of the appointment, the OSE will request the People's Court to do so.

If a party or the two parties fail to choose the conciliator or do not do so within the required time, the OSE will request the People's Court to do so within fifteen days for the independence and impartiality of the conciliator.

In all cases, the conciliator must agree in writing to his appointment.

After the appointment, the conciliator must inform the two parties as to his relationship with them.

The parties have the right to challenge the appointed conciliator. If the party who has been challenged accepts, a new conciliator must be appointed according to the same procedure. If he does not accept the challenge, the OSE will decide.

The conciliator has also the rights and duties to withdraw from the conciliation if he is related to either party, has some relationship with their interests or has a dispute with any party. The conciliator cannot be an arbitrator in the same dispute. If the conciliator has been challenged, has withdrawn or is unable to perform his functions, a new conciliator must be appointed according to the same procedure.

ARTICLE 23 : The procedure of conciliation

The conciliation must be conducted no later than fifteen days from the date of the appointment of the conciliator. The conciliation must be done in the presence of the parties.

During the conciliation of the dispute, the conciliator must encourage and find the means to achieve mutual understanding between the parties and agreement on the basis of the laws ,transactions, rights and liabilities of each party and of business practices. In order to achieve these objectives, the conciliator has the, right to make recommendations to one or both parties at any stage of the procedures of conciliation.

Every conciliation must be recorded in a report.

The conciliation must conform to the provisions of the present decree unless the parties agree otherwise.

ARTICLE 24 : The termination of the conciliation

The conciliation can be terminated in the following cases :

1. One or both parties fail to participate in the procedure of conciliation without valid grounds;
2. The parties fail to reach an agreement;

3. The parties reach an agreement.

ARTICLE 25 : Agreement of conciliation

If the conciliation results in an agreement, a written report must be drafted, mentioning the name and surname, the address and main location of the enterprise of the party or the party' s representative, the main evidence in dispute, the full text of the agreement, the responsibility for carrying out the agreement and the person responsible for expenses.

The agreement must be signed by the two parties and the conciliator; it must be dated and mentioned the place of the conciliation.

ARTICLE 26 : The implementation of the conciliation agreement

The agreement of conciliation agreed and signed between the parties must be implemented by the parties.

Neither party may cite the opinions or the propositions of the other party during the conciliation, the report, the recommendations of the conciliator to the panel of arbitration or to the People's Court except with the consent of the other party.

Section 3 The arbitration

ARTICLE 27 : The conditions of arbitration

The economic disputes can be arbitrated at the OSE only after prior agreement between the parties or if it is stipulated in advance that any dispute which may occur will be submitted for arbitration of the OSE.

ARTICLE 28 : The appointment of the arbitrator

The appointment of the arbitrator is to be made according to the same conditions as the appointment of the conciliator as per Article 22 above.

ARTICLE 29 : The time limit of arbitration

Arbitration of economic disputes must be carried out promptly. For the disputes of particular difficulty and complexity, it must be completed not later

than eighteen months from the date of the receipt of the request for arbitration.

ARTICLE 30 : The compilation of evidence

After the appointment of the arbitrator, the parties must present the causes, documents, and testimonies to the arbitrator.

If the arbitrator considers that the evidence provided by the parties remains insufficient, the arbitrator will carry out further investigation. If necessary data can be collected on the spot, or an expert, individual or organisation may be consulted for the clarification or the appropriate documents may be submitted to the arbitrator at the suggestion of the parties or on opinion of the arbitrator himself.

In the course of settlement of the dispute, the arbitrator can, if necessary, request the People's Court to order the seizure of properties, the objection or other measures to protect the parties' interests.

ARTICLE 31 : Hearing

After having compiled evidence, the panel of arbitrators arranges the date and the place of the hearing and informs the parties accordingly.

During the session, the panel of arbitrators holds an hearing for the parties to advance their arguments and present their complete testimonies.

At the end of the hearing, the panel of arbitrators will announce the award.

ARTICLE 32 : The agreement of the parties before the award

While the dispute is in settlement, the two parties may come to an agreement and end the dispute before an award is reached. In such a case the arbitrator will prepare a report confirming the agreement to be signed by the two parties and the arbitrator.

The agreement of the two parties will have the same binding force as an arbitral award.

ARTICLE 33 : The settlement of the disputes at the branch of the OSE .

The settlement of economic disputes at the branches of the OSE follows the same regulations as the OSE itself.

Chapter 4

The arbitral award

ARTICLE 34 : The time limit for the arbitral award

The arbitrator must reach an award at the latest thirty days after the end of the investigation.

ARTICLE 35 : Principles of the arbitration.

The arbitration must not go beyond the scope of the parties' request. If there are several arbitrators, the award must be reached by majority of vote.

The reading of the arbitral award is made in the presence of both parties, but if one of the parties does not respond to the summons to hear the arbitral award, the arbitrator will pronounce the award in that party's absence. Once pronounced , the arbitral award must be sent to the parties immediately and it comes into force for the parties from the date of its receipt.

ARTICLE 36 : Form of the arbitral award

The arbitral award must contain the following information :

1. Name, surname , address and main place of the enterprise of the parties or address of their representative;
2. Requests of the parties and reasons for the request;
3. Basis of the arbitral award;
4. Miscellaneous expenses.

The arbitral award must be signed by the arbitrator.

ARTICLE 37 : Rectification or addition

The arbitral award can be rectified or added at the suggestion of one of the parties if this award includes some errors in printing or calculation unrelated to the details of the dispute, or omissions in considering the problems suggested by one or both parties for the examination of the arbitrators. The request for rectification or addition of the arbitral award must be submitted within thirty days from the date of receipt of the arbitral award.

The consideration of the request for rectification or addition of the arbitral award must be made within thirty days from the date of receipt of the request.

The rectified or additional award must be sent to the two parties immediately.

ARTICLE 38 : Effects of the agreement and the arbitral award

The agreement of the parties before arbitration and the arbitral award take effect and is binding on for each party from the date of receipt of the copy of the agreement or of the arbitral award.

If one of the parties refuses to, follow the agreement of, the parties before arbitration or the arbitral award, the injured party has the right to appeal to the People 's Court of the province or of the Municipality within six months from the date of the receipt of the copy of the agreement or of the arbitral award so that the People's Court may promptly consider and pronounce a decision to enforce the agreement or the arbitral award.

ARTICLE 39 : Considerations of the agreement or the arbitral award

In the consideration of the agreement or the arbitral award, the Court will verify that the arbitral procedures are in conformity with the dispositions related to settlement of disputes and verify that regulations concerning security and order have been upheld. If satisfied that such is the case, the Court will confirm by decision.

If the Court observes that the agreement or the arbitral award has violated the provisions on settlement of disputes and if there is an erroneous arbitral award for whatever reason, the Court will pronounce a decision of non confirmity.

ARTICLE 40 : Appeal of the People's Court's decision

Appeal of the People's Court's decision on the agreement or the arbitral award is not possible, unless the decision :

1. Confirmed an erroneous agreement or arbitral award as stipulated in the provisions of Paragraph 2 Article 39 above or the decision of the People's Court does not correspond to the agreement of the parties before the arbitration or the arbitral award.

2. Furthermore, it is possible to request an annulment against the order or the decision of people's Court on the implementation of the temporary measures to protect the interests of the parties in the course of settlement of the economic disputes.

ARTICLE 41 : Implementation of the foreign agreement or arbitral award

The Lao PDR recognises and implements agreements or the arbitral award of the arbitrators on foreign economic disputes under the following conditions :

1. The agreement or the arbitral award has been made in a member country of a convention to which a Lao PDR is also a party;

2. These disputes may be accepted for conside-ration by OSE of the Lao PDR ;

3. The agreement or the arbitral award does not violate the applicable provisions for settlement of disputes ;

4. The agreement or the arbitral award do not violate the law on the security and the order of the Lao PDR.

Chapter 5

The costs of arbitration

ARTICLE 42 : The costs of arbitration

The costs include :

1. The costs occurred in the settlement of the disputes ;
2. The fees of the OSE and the liabilities towards the State .

Costs incurred in the settlement of the disputes include the expenses involved in conciliation or arbitration activities such as: the honorarium of appraisal expert, expenses for testimonies, on-site expenses, expenses of safeguarding evidence, the honorariums of conciliation or arbitrators according to specific regulation and other expenses.

The fees of the OSE and the liabilities towards the State include : fees for settlement of disputes by the OSE and the liabilities towards the State, calculated according to the following scale :

1. The disputes whose amount is ten million kip or less : 2% of the amount;
2. The disputes whose amount is more than ten million kip to fifty million kip :1% of the amount ;
3. The disputes whose amount is more than fifty million kip to one hundred million kip : 0.75 % of the amount ;
4. The disputes whose amount exceeds one hundred million kip : 0.50 % of the amount .

If the amount is in foreign currency the fees will be paid in kip according to the banking exchange rate prevailing on the day of the transaction . The net income deductible from administrative expenses of the OSE must be credited to the State Budget according to the regulations.

Lawyers' honorariums are not included in the above expenses.

In order to facilitate the settlement of the disputes , one or both of the parties can prepay part or all of the procedural and administrative expenses according to the requests (of the agents the) OSE . If the deposits remain insufficient, an additional deposit must be made and if there is a surplus, this must be refunded to the depositor.

The expenses of conciliation must be shared equally by the two parties unless otherwise agreed.

The expenses of arbitration for each party are to be determined by the arbitrator, unless otherwise agreed by the parties.

Chapter 6

Implementation

ARTICLE 43 : Implementation

The Ministry of Justice is responsible for coordination with the agencies concerned to issue specific regulations for implementation of the present decree.

Ministries and equivalents at the central and local level, shall implement [this decree] in accordance with their own role.

ARTICLE 44 : The effect

The decrees, regulations and orders previously in use which are contrary to the present decree are hereby abrogated.

The present decree takes effect within thirty days from the date of its publication in the Official Gazette.

APPENDIX 3

ARBITRATION ACT B.E. 2530 (1987)

"TAA"

BHUMIBOL ADULYADEJ, REX.,

Given on the 19th day of July B.E.2530 (1987)

Being the 42nd Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is deemed expedient to enact the law governing out-of-court arbitration.

Be it, therefore, enacted by the King, by and with the advice and consent of the House of Parliament as follows :

SECTION 1.

This Act shall be called the "Arbitration Act B.E. 2530".

SECTION 2.

This Act shall come into force as from the day following the date of its publication in the Government Gazette.*

SECTION 3.

Whenever a reference is made by any law to the provisions of the Civil Procedure Code relating to out-of-court arbitration, such reference shall be deemed to have been made to this Act.

SECTION 4.

The Minister of Justice shall take charge and control of the execution of this Act.

Chapter 1

Arbitration Agreement

SECTION 5.

Arbitration agreement means an agreement or an arbitration clause in a contract whereby the parties agree to submit present or future civil disputes to arbitration, irrespective of whether there being the designation of an arbitrator.

SECTION 6.

An arbitration agreement shall be binding upon the parties only when there is evidence thereof in writing, or there appears an agreement in an exchange of letters, telegrams, telexes, or other documents of the similar nature.

SECTION 7.

The validity of an arbitration agreement and the appointment of arbitrator shall not be affected even it appears thereafter that any party thereto is dead, against whose property a final receiving order has been made, has been adjudged incompetent or quasi-incompetent.

SECTION 8.

When there is a transfer of any claim or liability, the existing arbitration agreement concerning such claim or liability shall accordingly be vested in the transferee.

SECTION 9.

An arbitration agreement may stipulate that a dispute be submitted to arbitration within a period which is shorter than the period of prescription under the law. However, the violation of such stipulation shall only result in the forfeiture of the right to arbitration. It shall not preclude the right of the party concerned to bring an action in court.

When there is an extraordinary circumstance, the party concerned may

---

* Published in the Government Gazette Volume 104, Part 156, dated 12th August B.E.2530 (1978).

file an application requesting a competent court to extend the period of time under paragraph one. Such application shall be filed before the expiration of the said period of time, except in case of *force majeure.*

SECTION 10.

In case where any party commences any legal proceedings in court against any other party to the arbitration agreement in respect of any dispute agreed to be referred to arbitration, the party against whom the legal proceedings are commenced may file with the court a petition prior to the date of taking of evidence, or prior to the passing of the judgment in case where there is no taking of evidence, for an order to stay the legal proceedings, so that the parties may first proceed with the arbitration proceedings. Upon the court having completed the enquiry and it appears that there is nothing that causes the arbitration agreement to be null and void, inoperative or unenforceable by any other reasons or incapable of being performed, the court shall make an order staying the proceedings.

Chapter 2

Arbitrator and Umpire

SECTION 11.

There may be one or several arbitrators. In case where there are several arbitrators, each party shall appoint an equal number.

In case where the arbitration agreement does not specify the number of arbitrator, the parties shall each appoint one arbitrator, and the said arbitrators shall jointly appoint a third person as additional arbitrator.

SECTION 12.

Unless otherwise specified in the arbitration agreement, the appointment of arbitrator shall be carried out within a reasonable time with the consent of the person to be appointed. The appointment shall be made in writing, dated and signed by the person appointing the arbitrator.

SECTION 13.

In case where the person who is to appoint an arbitrator fails to do so within the time stipulated in the arbitration agreement, or within a reasonable time under Section 12, or there is a circumstance indicating that the said person is not willing to appoint an arbitrator, any party may then file a petition with a competent court for an order appointing an arbitrator.

SECTION 14.

No arbitrator who has been duly appointed may have his appointment revoked except with the consent of all the parties.

A duly appointed arbitrator may be challenged in a competent court. An arbitrator appointed by the court or by a third person may be challenged by any party. An arbitrator appointed by one of the parties may be challenged by the other party. No party shall challenge the arbitrator whom he has appointed or whom he has jointly appointed, except where the said party did not know of or could not have known of the grounds for challenge at the time of appointment.

The grounds for challenge under paragraph two shall be the same as for challenging a judge under the Civil Procedure Code or other grounds which are of such serious nature as may prejudice the impartiality of the hearing or the rendering of an award.

In case where an arbitrator is challenged under paragraph two, the provisions governing the challenge of a judge under the Civil Procedure Code shall apply *mutatis mutandis.* If the challenge is sustained, a new arbitrator shall be appointed to replace the challenged arbitrator by the same method of appointment as that of the challenged arbitrator.

SECTION 15.

In case where the arbitration agreement stipulates that there shall be one or more arbitrators, or that a third person shall appoint an arbitrator, and the said person refuses to accept the appointment, or is dead, against whose

property a final receiving order has been made, has been adjudged incompetent or quasi-incompetent prior to the acceptance of the appointment or prior to the appointment, as the case may be, it shall be deemed as if there were no designations of arbitrator or of the person to appoint such arbitrator.

If an arbitrator who has accepted the appointment dies, against whose property a final receiving order has been made, has been adjudged incompetent, or quasi-incompetent, a new arbitrator shall be appointed: in lieu thereof, by the same method of appointment as that of the said arbitrator.

In case where an arbitrator who has accepted the appointment is unable, unwilling or ignores to perform his duties within a reasonable time, any party may file with a competent court a petition for an order appointing a new arbitrator in lieu of the said arbitrator.

SECTION 16.

An arbitral award shall be rendered by a majority of votes. If it is not possible to obtain a majority, the arbitrators shall jointly appoint an umpire. In case where the arbitrators fail to appoint an umpire, any arbitrator or any party may petition a competent court for an order appointing an umpire, in which case section 14 and section 15 shall be applied *mutatis mutandis.*

Chapter 3

Arbitration Proceedings

SECTION 17.

Before rendering an award, the arbitrator shall hear the case presented by the parties and have the power to make an enquiry into the dispute submitted as he deems appropriate.

Unless otherwise provided by the arbitration agreement or law, an arbitrator shall have the power to conduct any procedure as he deems appropriate taking the principle of natural justice as prime consideration.

SECTION 18.

Where resort to the power of the court is required in regard to the summons of a witness, the administration of oath, the order for submission of any document or material, the application of provisional measures for the protection of interests of the party during arbitration proceedings, or the giving of a preliminary decision on any question of law, an arbitrator may file a petition requesting a competent court to conduct the said proceedings. If the court is of the opinion that such proceedings could have been carried out by the court if a legal action were brought, it shall proceed in compliance with the petition, provided that the provisions of the Civil Procedure Code in the part relating to such proceedings shall apply *mutatis mutandis.*

SECTION 19.

In the arbitration proceedings, a party may act on his own behalf or authorise a person or persons or appoint one or more attorneys to act on his behalf.

Chapter 4

Award and Enforcement of Award

SECTION 20.

An award shall be made in writing, signed by the arbitrator or the umpire, as the case may be, and shall clearly state the reasons for all decisions. However, it shall not prescribe or decide on any matters failing beyond the scope of the arbitration agreement or the relief sought by the party, except in fixing the fees, expenses or remunerations of the arbitrator or umpire under Section 27, or in case where the award is rendered in accordance with the agreement or the compromise between the parties.

SECTION 21.

Except where the parties have agreed otherwise, an award shall be rendered within one hundred and eighty days from the day on which the last

arbitrator or umpire was appointed.

The parties may agree to extend the period of one hundred and eighty days or the period otherwise agreed upon under paragraph one. If an agreement cannot be reached, either party, an arbitrator or umpire may file a petition with a competent court and the court shall have the power to order the extension of the said period as it deems appropriate.

No party may challenge the execution of an arbitral award on the that the arbitrator or the umpire has failed to render the award within the time prescribed under paragraph one or paragraph two unless he has protested such failure in writing to the arbitrator or the umpire within fifteen days from the expiration of the period under paragraph one or paragraph two and prior to the submission of a copy of the award to the said party.

Copies of the award so rendered shall be sent to all the parties concerned by the arbitrator or the umpire.

SECTION 22.

Subject to Section 23 and the arbitration agreement, the arbitral award shall be final and binding on the parties when a copy thereof has been sent to the parties under Section 21 paragraph four.

When an arbitral award contains an insignificant error or mistake, if the arbitrator or umpire thinks fit or upon the application of any party concerned, the arbitrator or umpire may correct such error or mistake.

SECTION 23.

In case where a party refuse to comply, the arbitral award may not be enforced unless the other party files a request with a competent court for a judgment confirming the award. The request shall be filed within one year from the date of sending the copy of the award to the parties under Section 21 paragraph four.

Upon receipt of the request under paragraph one, the court shall hold

an enquiry and give judgment without delay, provided that the party against whom the award is rendered had an opportunity to challenge the request.

SECTION 24.

In case where the court is of the opinion that an award is contrary to the law governing the dispute, is the result of any unjustified act or procedure or is outside the scope of the binding arbitration agreement or relief sought by the party, the court may deny the enforcement of the award.

In case where an award contains an insignificant error and may be corrected, such as erroneous calculation or erroneous reference to any person or property, the court may correct the error and give judgment for the enforcement of the corrected award.

SECTION 25.

Unless otherwise provided in the arbitration agreement, a corn under this Act is the court having jurisdiction over the place where the arbitration proceedings take place, having jurisdiction over the domicile of a party or the court which has jurisdiction over the dispute submitted for arbitration.

SECTION 26.

No appeal shall lie against the order or judgement of the court unless:

(1) There is an allegation that the arbitrator or umpire did not act in good faith or that fraud was committed by any party;

(2) The order or judgement is contrary to the provisions of law governing public order ;

(3) The order or judgement is not in accordance with the arbitral award;

(4) The judge who held the enquiry of the case has given a dissenting opinion or has certified that there are reasonable grounds for appeal; or

(5) It is an order concerning the provisional measures for the protection of interests of the party pending arbitration proceedings under Section 18.

Chapter 5

Fees Expenses and Remunerations

SECTION 27.

Unless otherwise agreed in the arbitration agreement, the fees and expenses incidental to arbitration proceedings and the remunerations for arbitrator or umpire, excluding attorney's fees and expenses, shall be in accordance with that stipulated in the award of the arbitrator or umpire, as the case may be. However regardless of what has been agreed in the arbitration agreement or stipulated in the arbitral award, the said fees, expenses or remunerations may be reviewed and adjusted by a competent court, should it deem appropriate, basing upon the principle of reasonableness.

In case where the said fees, expenses or remunerations have not been fixed in the award, any party, the arbitrator or umpire may petition a competent court for a ruling on the arbitration fees, expenses and remunerations for the arbitrator or umpire.

Chapter 6

Recognition and Enforcement of Foreign Arbitral Award

SECTION 28.

Foreign arbitration means an arbitration conducted wholly or mainly outside the Kingdom of Thailand and any party thereto is not of Thai national.

SECTION 29.

A foreign arbitral award shall be recognised and enforced in the Kingdom of Thailand only if it is covered by the treaty, convention or international agreement to which Thailand is a party, and it shall have effect only as far as Thailand accedes to be bound.

A foreign arbitral award which is covered by a treaty, convention or international agreement to which Thailand becomes a party after the date of entry into force of this Act may be recognised and, enforced in the Kingdom of Thailand under this Act, subject to the conditions prescribed by the Royal Decree.

SECTION 30.

A party seeking to execute a foreign arbitral award under Section 29 may file a request with a competent court within a period of one year from the date of the sending of a copy of the award to the parties under Section 21 paragraph four.

The provisions of Section 23 paragraph two shall apply *mutatis mutandis* to the court proceedings.

SECTION 31.

An applicant for a judgement on foreign arbitral award shall produce the following documents :

(1) Original copy of the award or a certified copy thereof ;

(2) Original copy of the arbitration agreement or a certified copy thereof ;

(3) Translation in Thai of the award and arbitration agreement which must be certified by a sworn translator, an officer of the Ministry of Foreign Affairs, a diplomatic delegate or a Thai consul.

SECTION 32.

An application for the execution of a foreign arbitral award under the auspices of the Convention for the Execution of Foreign Arbitral Awards, signed at Geneva, 26 September 1927, shall be sanctioned by the court if the party applying for the execution can prove that the award fulfills all the following conditions :

(1) The award has been made in a territory of one of the High Contracting Parties to which the Convention for the Execution of Foreign Arbitral Awards, signed at Geneva, 26 September 1927 applies, and between persons who are subject to the jurisdiction of one of the High Contracting Parties ;

(2) The award has been made by virtue of an arbitration agreement sanctioned by the Protocol on Arbitration Clauses, signed at Geneva, 24 September 1923 ;

(3) The award has been made in pursuance of an arbitration agreement which is valid under the law applicable thereto ;

(4) The award has been made by the Arbitral Tribunal provided for in the arbitration agreement or constituted in the manner agreed upon by the parties ;

(5) The award has been made in conformity with the law governing the arbitration procedure ;

(6) The subject matter of the award is capable of settlement by arbitration under Thai law;

(7) The award is binding and final in the country in which it has been made ;

(8) The recognition or enforcement of the award is not contrary to Thai law or public policy or good morals.

SECTION 33.

The court may refuse recognition and enforcement of the award under section 32 if it appears to the court that;

(1) The award has been annulled in the country in which it was made; or

(2) The party against whom it is sought to use the award was

not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that being under a legal incapacity, he was not properly represented ; or

(3) The award does not deal with all the differences submitted to arbitration by the parties or contains decisions on matters beyond the scope of the arbitration agreement.

SECTION 34.

An application for the execution of a foreign arbitral award under the auspices of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, may be denied by the court, if the party against whom the execution of the award is sought can prove that;

(1) Any party to the arbitration agreement was, under the law applicable to him, under some incapacity;

(2) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made ;

(3) 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;

(4) The award contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforce;

(5) The composition of the arbitral authority or the arbitral

procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(6) 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. If merely an application for the setting aside or suspension of the award has been made to a competent authority, the court where the enforcement of the award is sought may, if it deems appropriate, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

SECTION 35.

The court may refuse recognition and enforcement of the award under Section 34 if it appears before the court that the subject matter of the dispute is not capable of settlement by arbitration under Thai law, or that the recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of international reciprocity.

Transitional Provisions

SECTION 36.

The provisions of this Act shall not prejudice the validity of the arbitration agreements and arbitration proceedings which have been carried out prior to the date of entry into force of this Act.

APPENDIX 4

THE ARBITRATION ACT B.E. ...

(THE DRAFTED OF THAI ARBITRATION ACT)

.....

.....

Whereas, it is deemed appropriate to amend the laws regarding out-of-court arbitration.

.....

.....

SECTION 1

This Act shall be called the "Arbitration Act B.E. ..."

SECTION 2

This Act shall come into force and effect as from the day following the date of its publication in the Government Gazette.

SECTION 3

The Arbitration Act B.E. 2530 shall hereby be repealed and replaced.

SECTION 4

Whenever a reference is made by any law to the provisions of the Code of Civil Procedure relating to out-of-court arbitration, such reference shall be deemed to have been made to this Act.

SECTION 5

The Minister of Justice shall take charge and control of the execution of this Act.

Chapter 1

General Provisions

SECTION 6

For the purpose of this Act,

(1) "Arbitral Tribunal" means a sole arbitrator or a panel of arbitrators;

(2) where a provision of this Act, except Section 33, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party or agency to make that determination;

(3) where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(4) where a provision of this Act, other than in Section30(1) and 36 paragraph 2(1), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

SECTION 7

Unless otherwise agreed by the parties:

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

(2) The communication is deemed to have been received on the day it is so delivered.

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

SECTION 8

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

Chapter 2

Arbitration Agreement

SECTION 9

Arbitration agreement means an agreement, or an arbitration clause in a contract whereby the parties agreed to submit to arbitration all or certain civil disputes which have risen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

SECTION 10

The arbitration agreement shall be binding upon the parties only when it is evidenced in writing, or contained in an exchange of letters, telex, telegrams, telefax, or other kinds of documents of the similar nature, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another, or in a document which the parties agreed to make part of the contract between them.

SECTION 11

The validity of the arbitration agreement and the appointment of arbitrators shall not be affected even it appears thereafter that any party thereto

is dead or, in the case of juristic persons, terminated, against whose property a final receiving order has been issued, or has been adjudged incompetent or quasi-incompetent.

SECTION 12

Where there is a transfer of claim or liability, the transferee shall be bound by the existing arbitration agreement concerning such claim or liability.

SECTION 13

The arbitration agreement may stipulate that a dispute be submitted to arbitration within a period which is shorter than the period of prescription under the law. However, the violation of such stipulation shall only result in the forfeiture of the right to arbitrate. It shall not preclude the right of the party concerned to bring an action in court.

When there is an extraordinary circumstances, the party concerned may file a petition requesting a competent court to extend the period of time under paragraph one. Such petition shall be filed before the expiration of the said period of time, except in case of *force majeure*.

SECTION 14

In case where a party to the arbitration agreement commences any legal proceedings in court against any other party thereto in respect of any dispute agreed to be referred to arbitration, the party against whom the legal proceedings are commenced may file with the court a petition for an order staying the legal proceedings no later than the date of submission of his statement of defence to the court, so that the parties may first proceed with arbitration. Upon the court having completed the enquiry and found that the arbitration agreement is not null and void, inoperative or unenforceable by any other reasons or incapable of being performed, the court shall issue an order disposing of the proceedings.

While the petition filed in accordance with paragraph one is pending before the court, arbitral proceedings may nevertheless be commenced or

continue, and an award may be made.

SECTION 15

Notwithstanding the arbitration agreement, a party thereto may file a petition with a competent court, before the constitution of the arbitral tribunals, for a provisional measure of protection of the party. The provisions governing provisional measures of protection under the Civil Procedure Code shall apply *mutatis mutandis.*

The provisional measure granted under paragraph one shall be terminated once the award of the arbitral tribunal has been complied with or the court has, upon request of the arbitral tribunal, issued an order canceling the measure.

Chapter 3

Arbitral Tribunal

SECTION 16

The arbitral tribunal shall be composed of an uneven number of arbitrators.

If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal. The procedure of appointing the chairman shall be in accordance with Section 17 paragraph one (2).

If the parties fails to reach agreement on the number of arbitrators in an arbitral tribunal, the arbitral tribunal shall consist of a sole arbitrator.

SECTION 17

Unless otherwise agreed upon by the parties, the procedure of appointing arbitrator or arbitrators shall be as follows:

(1) fin an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed,

upon request of a party, by the competent court;

(2) in an arbitration in which the number of arbitrators is uneven, the parties shall equally appoint an arbitrator or arbitrators, and the arbitrators thus appointed shall appoint an additional arbitrator to be the chairman of the arbitral tribunal. If a party fails to appoint the arbitrator or arbitrators within thirty-days of receipt of a request to do so from the other party, or if the party-appointed arbitrators fail to agree on the additional arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the competent court.

Where, under an appointment procedure agreed upon by the parties,

(1) a party fails to act as required under such procedure,

(2) the parties, or party-appointed arbitrators, are unable to reach an agreement expected of them under such procedure, or

(3) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the competent court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

SECTION 18

The appointment of arbitrator shall be made with the consent of the appointee, in writing, dated, and signed by the person appointing the arbitrator.

SECTION 19

The arbitrators shall be impartial and independent, and possess every qualifications required by the arbitration agreement.

When a person is approached in connection with his possible

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

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. No party shall challenge the arbitrator whom he has appointed or in whose appointment he has participated, except where the said party did not become aware of or could not have become aware of the grounds for challenge at the time of appointment.

SECTION 20

Subject to the provisions of paragraph three of this Section, the parties are free to agree on a procedure for challenging an arbitrator.

Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in the last paragraph of Section 19, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators not challenged shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph two of this Section is not successful, or if there be no majority among the unchallenged arbitrators, or the arbitration is the one with a sole arbitrator, the challenging party may file a petition requesting the competent court to decide on the challenge, within thirty days after having received notice of the decision rejecting the challenge, or after having been informed of the constitution of the arbitral tribunal, or after being aware of any circumstance stipulated in the last paragraph of Section 19, as the case may be. After having made due enquiry, the court may sustain or reject the challenge.

While such petition is pending before the court, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render the award, unless the court otherwise orders.

SECTION 21

In case where the arbitration agreement designates a person or persons to be arbitrator, or entrusts a third party to appoint the arbitrator or arbitrators, and the said person refuses to accept the appointment, is dead, against whose property a final receiving order has been issued. has been adjudged incompetent or quasi-incompetent prior to the acceptance of the appointment or prior to the appointment, as the case may be, it shall be deemed as if there were no designations of arbitrator or of the person to appoint such arbitrator.

If an arbitrator dies, against whose property a final receiving order has been issued,' or has been adjudged incompetent or quasi-incompetent, his mandate as arbitrator shall accordingly be terminated.

In case where an arbitrator is unable, unwilling or ignores to perform his duties within a reasonable time, any party may file with the competent court a petition for an order terminating the arbitrator's mandate.

In case where the mandate of an arbitrator terminates under the provisions of paragraph two or three of this Section, or an arbitrator withdraws himself from his office, or the parties agree to the termination of mandate of an arbitrator, or the mandate terminates due to any other reason, a new arbitrator shall be appointed to replace the arbitrator whose mandate terminates, by the same procedure of appointment as that of the replaced arbitrator.

Chapter 4

Jurisdiction of Arbitral Tribunal

SECTION 22

The arbitral tribunal may rule on its own jurisdiction, including the validity of the arbitration agreement or of the constitution of the arbitral

tribunal, or the scope of the authority of the tribunal. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the main contract, and shall not become void or invalid merely because of the void or invalidity of the main contract.

A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the submission of the statement of defence. A party is not precluded from raising such plea by the fact that he has appointed or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal may rule on its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may file a petition requesting the competent court to decide the matter within thirty days after having received notice of that ruling. While such petition is pending before the competent court, the arbitral tribunal may continue the arbitral proceedings and an award.

Chapter 5

Arbitral Proceedings

SECTION 23

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

Unless otherwise provided by the arbitration agreement or law, the arbitral tribunal shall have the power to conduct any procedure as it deems appropriate taking the principle of justice as prime consideration.

SECTION 24

The parties are free to agree on the place of arbitration. Failing such

agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case and the convenience of the parties.

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

SECTION 25

In the arbitral proceeding, a party may act on his own behalf or authorise a person or persons to act on his behalf.

SECTION 26

In respect of a particular dispute, the submission of the claims to arbitration under Section 193/14(4) of the Civil and Commercial Code and the commencement of the arbitral proceeding shall be deemed to have occurred under the circumstances as follows:

(1) when one party receives from the other party a notice in writing requesting for that dispute to be referred to arbitration;

(2) when one party serves on the other party a written notice requiring him to appoint an arbitrator or to agree to the appointment of the arbitrator;

(3) if the arbitrator is designated in the arbitration agreement, when one party serves on the other party a written notice requiring him to submit the dispute to the person so designated; or

(4) a party refers the dispute to an institution established for the purpose of administering arbitration.

SECTION 27

The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to the statement of claim, defence, any written statement of a party, any hearing, award, decision or any other communication by or to the arbitral tribunals.

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

SECTION 28

Unless otherwise agreed by the parties, within the period of time agreed by the party or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state in his defence whether he accepts or refuses the allegations of the claimant. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit or adduce.

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

SECTION 29

Unless otherwise agreed by the parties, the arbitral tribunal shall determine the method of the hearing. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings.

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods,

other property or documents.

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

SECTION 30

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(1) the claimant fails to communicate his statement of claim in accordance with Section 28, the arbitral tribunal shall terminate the proceedings;

(2) the respondent fails to communicate his statement of defence in accordance with Section 28, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(3) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

SECTION 31

Unless otherwise agreed by the parties, the arbitral tribunal

(1) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(2) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

Unless otherwise agreed by the parties, if a party so requests or if the

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

SECTION 32

Where resort to the power of the court is required in regard to the summons of a witness, the administration of oath, the order for submission of any document or material, an arbitrator may file a petition requesting the competent court to conduct the said proceedings. The arbitral tribunal may file a petition with the competent court requesting for the provisional measures for protection of interest of a party, provided, however, that after having made due enquiry the tribunal considers such measures appropriate. If the court is of the opinion that such proceedings could have been carried out by the court had a legal action been brought, it shall proceed in compliance with the petition. The provisions of the Code of Civil Procedure relating to such proceedings shall apply to the petition in issue *mutatis mutandis.*

Chapter 6

Award and Termination of Proceedings

SECTION 33

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

Failing any designation by the parties, the arbitral tribunal shall apply the law which it considers applicable.

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

The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.

SECTION 34

The award, order or decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. In case where there is no majority, the award, order or decision may be solely rendered by the Chairman of the arbitral tribunal.

Questions of procedure may be decided by the Chairman of the arbitral tribunal, if so authorised by the parties or all members of the arbitral tribunal.

SECTION 35

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

Unless otherwise agreed by the parties, the award shall clearly state the reasons for all decisions. However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the party, except in fixing the fees, expenses or remuneration of the arbitrator or arbitrators under Section 45 or in case where the award is rendered in accordance with the agreement or the compromise between the parties.

The award shall state its date and the place of arbitration as determined in accordance with Section 24 paragraph one. The award shall be deemed to have been made at that place.

After the award is made, the arbitral tribunal shall have a copy of the award delivered to each party. The award shall be binding upon the parties and final once the parties have received the copy.

SECTION 36

The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph two of this Section.

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(1) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(2) the parties agree on the termination of the proceedings;

(3) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Section 37 and 38 paragraph two.

SECTION 37

Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(1) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature; or

(2) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of

the request. The interpretation shall form part of the award.

Within 30 days of the date of the award, the arbitral tribunal may correct any error of the type referred to in paragraph one on its own initiative.

Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to any substantial issue omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph one and three of this Section.

The provisions of Section 35 shall apply to a correction or interpretation of the award or to an additional award.

Chapter 7

Recourse against Award and Enforcement of Awards

SECTION 38

A party may file a petition for setting aside the award with the competent court within three months after receipt of a copy of the award, or, in case where a party requests the arbitral tribunal to correct or interpret the award or make an additional award, after the date on which the arbitral tribunal decides or makes the award relating thereto. The court shall set aside the award only if the petitioner furnishes proof that::

(1) a party to the arbitration agreement was under some incapacity under the law to which the party is subject;

(2) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of Thailand;

(3) the petitioner was not given proper notice of the

appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(4) the award contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable law; or

the court finds that:

(1) the subject matter of the dispute is not capable of settlement by arbitration under the law; or

(2) the recognition or enforcement of the award is in conflict with the public policy and good morals.

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

SECTION 39

A party who wishes the award, irrespective of the country in which it was made, to be recognised and enforced may file a petition for the recognition and enforcement thereof with the competent court within one year after receipt of a copy of the award under the last paragraph of Section 35.

Having received the petition under paragraph one, the court shall conduct an enquiry and make a decision as soon as possible.

SECTION 40

The party applying for the enforcement of the award shall supply the following documents:

(1) the duly authenticated original award or a duly certified thereof;

(2) the original arbitration agreement or a duly certified thereof; and

(3) the duly certified translation into Thai of the award and the arbitration agreement, in case where they were made in foreign language; if the award was made in other country, it shall be certified by a sworn translator attested by the officials of the Ministry of Foreign Affairs, diplomatic officials or a Thai consul.

SECTION 41

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only when the party against whom it is invoked furnishes proof that:

(1) a party to the arbitration agreement was under some incapacity under the law to which the party is subject to;

(2) the arbitration agreement is not binding under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(4) the award contains decisions on matters beyond the scope of

the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(5) the composition of the- arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the award was made; or

(6) the award has not yet become binding on the parties or has been set aside or suspended by a competent court or official, or under the law of the country where the award was made.

If a petition for setting aside or suspension of an award has been made to a competent court or official empowered to set aside or suspend the award, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

SECTION 42

The court may refuse recognition and enforcement of the award under Section 41, if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Thailand, or the recognition and enforcement of the award would be contrary to the public policy or good morals.

SECTION 43

Unless otherwise stipulated in the arbitration agreement, the competent court under this Act comprises the court in whose jurisdiction the arbitral proceeding has been conducted or a party has his domicile, or which has jurisdiction over the dispute submitted to the arbitration.

SECTION 44

The order or judgments of the court under this Act shall be subject to no appeal unless

(1) there is an allegation that the arbitrator did not act in good faith or that fraud was committed by a party;

(2) the order or judgment is contrary to the provisions of law governing public policy;

(3) the order or judgment is not in accordance with the award;

(4) the judge holding an enquiry of the case has given a dissenting opinion or has certified that there are reasonable grounds for appeal; or

(5) the order is about the provisional measures of protection of a party.

Chapter 8

Fees, Expenses and Remuneration

SECTION 45

Unless otherwise agreed in the arbitration agreement, the fees and expenses incidental to arbitration proceedings and the remunerations for arbitrators, excluding attorney's fees and expenses, shall be in accordance with that stipulated in the award. However, regardless of what has been agreed in the arbitration agreement or stipulated in the award, the fees, expenses and remuneration may be reviewed and adjusted by the competent court, if it deems appropriate.

In case where the fees, expenses or remunerations have not been fixed in the award, a party or the arbitrator may request the competent court to make an order on the fees, expenses and remuneration.

Chapter 9

Foreign Arbitration

SECTION 46

The provisions of Sections 14, 15, 32, 39, 40, 41, 42, 43 and 44 shall apply to arbitration conducted out of the territory of the Kingdom of Thailand.

Transition Provision

SECTION 47

The provision of this Act shall not prejudice the validity of the arbitration agreements and arbitral proceedings which have been carried out prior to the date of entry into force of this Act.

APPENDIX 5

STATUTES OF THE VIETNAM INTERNATIONAL ARBITRATION CENTRE "SVIAC"

(issued in conjunction with Decision No. 204/TTG dated 28 April, 1993, of the Prime Minister of the Government)

ARTICLE 1

The Vietnam International Arbitration Centre is a non-governmental institution established at the Chamber of Commerce and Industry of Vietnam.

ARTICLE 2

The Vietnam International Arbitration Centre shall have power of jurisdiction over disputes arising from international economic relations, such as foreign trade contracts and contracts in matters of investment, tourism, international transport and insurance, technology transfer, international credit and payment, etc.

ARTICLE 3

The Vietnam International Arbitration Centre shall exercise jurisdiction over any dispute:

1. Where one of the parties to the dispute is a foreign physical or juridical person or otherwise all the disputing parties are foreign physical or juridical persons, and

2. Where, before the dispute arises or after it has arisen, the parties agree to refer the matter to The Vietnam International Arbitration Centre or where, by virtue of and international treaty, they are bound to do so.

ARTICLE 4

The Vietnam International Arbitration Centre shall consist of arbitrators who shall be persons with required knowledge and experience in

the fields of law, foreign trade, investment, finance, banking, insurance, etc., selected by the Standing Committee of the Chamber of Commerce and Industry of Vietnam.

Foreign experts may be invited to act as arbitrators of the Vietnam International Arbitration Centre.

The term of office of the arbitrators shall be four years, after which they may be reselected.

ARTICLE 5

The Vietnam International Arbitration Centre shall have a President and two Vice-Presidents to be elected by the arbitrators for a four-year term of office.

The President of the Vietnam International Arbitration Centre shall appoint the Registrar of the Centre.

ARTICLE 6

When a dispute is referred to the Vietnam International Arbitration Centre, each of the disputing parties shall have the right to choose, or request the President of the Centre to choose on his behalf, an arbitrator from among the listed arbitrators of the Vietnam International Arbitration Centre. The two arbitrators thus chosen shall then choose a third arbitrator from among the listed arbitrators of the Centre. The three chosen arbitrators shall constitute the arbitrage tribunal responsible for resolving the dispute. The third arbitrator shall be the chairman of the arbitrage tribunal.

If the two arbitrators chosen by the parties fail to agree on the choice on the third arbitrator, the President of the Vietnam International Arbitration Centre shall appoint the third arbitrators from among the listed arbitrators of the Centre.

ARTICLE 7

The parties may be mutual consent, choose a single arbitrator, or

request the President of the Vietnam International Arbitration Centre to choose a single arbitrator, from among the listed arbitrators of the Centre. In such cases, the sole arbitrator thus chosen shall exercise his function as an arbitrage tribunal.

ARTICLE 8

The award rendered by the arbitrage tribunal shall be final, and as such, can not be appealed before any other court of law or institution.

ARTICLE 9

The arbitrators shall discharge their responsibilities in an independent, impartial and objective manner in the entire process of handling the dispute.

ARTICLE 10

In resolving the dispute, the Vietnam International Arbitration Centre shall be entitled to collect a fee called the arbitration fee. The arbitration fee shall be determined by the Executive Committee of the Chamber of Commerce and Industry of Vietnam in consideration of the prevailing practice in international arbitration institutions of other countries.

ARTICLE 11

The Executive Committee of the Chamber of Commerce and Industry of Vietnam shall formulate the Rules of Arbitration of the Vietnam International Arbitration Centre.

APPENDIX 6

ORDER NO. 42-L/CTN OF SEPTEMBER 27, 1995

ORDINANCE ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN VIETNAM

With a view to expanding and developing economic relations with foreign countries, and to protecting the interests of the State as well as the legitimate rights and interests of Vietnamese and foreign organisations and individuals;

Pursuant to Article 91 of the 1992 Constitution of the Socialist Republic of Vietnam; and

Pursuant to the Resolution of the Sixth Session of The Ninth National Assembly on the law-making activities for 1995;

This Ordinance prescribes the recognition and enforcement of foreign arbitral awards in Vietnam.

Chapter I

General Provisions

ARTICLE 1. - Foreign arbitral awards.

In this Ordinance, a "foreign arbitral award" is understood as the award which is made outside the territory of Vietnam by an arbitrator selected by the parties concerned to settle dispute arising from commercial law relations.

"Foreign arbitral awards" also include awards that are made in the territory of Vietnam but not by Vietnamese arbitrators.

ARTICLE 2. - Principles of recognition and enforcement.

1. Vietnamese Courts handle the recognition and enforcement of a foreign arbitral award in Vietnam in case the award is made in, or by an arbitrator of, a country which has together with the Socialist Republic of

Vietnam signed or acceded to an international agreement on this matter.

A foreign arbitral award can also be recognised and enforced in Vietnam by Vietnamese Courts on a reciprocal basis without either side having signed or acceded to an international agreement.

2. A foreign arbitral award shall be enforced in Vietnam after it is recognised and its enforcement is ordered by a Vietnamese Court. The enforcement must be carried out in conformity with this Ordinance and provisions of Vietnamese law on the enforcement of civil sentences.

ARTICLE 3. - Right to request recognition and to order enforcement.

The organisation and/or individual in fever of which/whom an award is enforced or their legitimate representatives have the right to request the Court to recognise and enforce a foreign arbitral award in Vietnam, if the organisation against which the award is enforced has its headquarters in Vietnam; or the individual against whom the award is enforced resides and/or works in Vietnam; or if the assets related to the enforcement are available in Vietnam at the moment the request is sent.

ARTICLE 4. - Competent Courts to handle request for recognition and enforcement.

The competent Courts to handle requests for the recognition and enforcement of foreign arbitral awards in Vietnam are the People's Courts of the provinces and cities directly under the Central Government, where the organisation against which the award is enforced has its headquarters, or where the individual against whom the award is enforced resides and/or works, or where the assets related to the enforcement are available.

ARTICLE 5. - Guarantee of the right to appeal or protest.

1. A Court decision recognizing or not recognizing a foreign arbitral award may be appealed by the organisation or person in question, or by the Procuracy.

2. If a Court decision is not appealed within the time limit provided for in Article 18 of this Ordinance, the decision shall take legal effect.

3. The Supreme People's Court handles appeals against decisions made by the People's Courts of the provinces and cities directly under the Central Government regarding the recognition and enforcement of foreign arbitral awards in Vietnam.

ARTICLE 6. - Guarantee of the legal effect of Court decisions on the recognition and enforcement of foreign arbitral awards in Vietnam.

1. Foreign arbitral awards recognised and enforced in Vietnam by Vietnamese Courts have the same legal effect as the already effective decisions made by Vietnamese Courts.

2. The Court decisions, which have taken legal effect concerning the recognition and enforcement of foreign arbitral awards in Vietnam, must be strictly implemented by the parties concerned, and respected by State authorities, economic and social organisations, the people's armed forces and all citizens.

In case the organisation or individual against which or whom the award is enforced is not willing to implement the effective Court decision, enforcement measures shall be applied in accordance with Vietnamese law.

ARTICLE 7. - Notification of Court decisions.

Immediately after the decision mentioned in Item 1 of Article 14, Item 5 of Article 15, and Item 3 of Article 19, of this Ordinance is made, the Court shall, through the Ministry of Justice, notify the organisation or individual requesting the recognition and enforcement of the decision.

ARTICLE 8. - Guarantee of the right to transfer money and properties related to the enforcement of foreign arbitral awards.

The State of the Socialist Republic of Vietnam guarantees the transfer of money and assets acquired from the enforcement of foreign arbitral awards

from Vietnam to foreign countries; the transfer of money and assets shall be carried out in accordance with Vietnamese law.

ARTICLE 9. - Fees.

The organisations/individuals sending the request as provided for in Article 10 of this Ordinance shall have to pay fees.

The Government shall stipulate in detail the level of the fees, procedures for their payment and for their management and utilization.

Chapter II

Handling of Request for Recognition and Enforcement of Foreign Arbitral Awards in Vietnam

ARTICLE 10. - Request for the recognition and enforcement of foreign arbitral awards in Vietnam.

1. Requests for the recognition and enforcement of foreign arbitral awards in Vietnam shall be sent to the Vietnamese Ministry of Justice.

2. The request mentioned in Item 1 of this Article must include the following:

(a) The full name and address of the headquarters of the organisation in favor of which the award is enforced; the full name and address of the individual in favor of whom the award is enforced; or the organization's or the individual's legal representatives in Vietnam, if available;

(b) The full name and address of the headquarters of the organisation against which the award is enforced; or the full name, place of residence and work of the individual against whom the award is enforced.

In case the organisation against which the award is enforced does not have its headquarters in Vietnam; or the individual against whom the award is

enforced does not reside and/or work in Vietnam, the name of the Vietnamese location where assets related to the enforcement are available must be clearly mentioned:

(c) The request of the organisation/individual in favor of which/ whom the award is enforced.

3. Request written in foreign languages must be translated into Vietnamese, and the translations must be duly certified in accordance with Vietnamese law.

ARTICLE 11. - Papers attached to the requests.

1. Attached to the requests provided for in Article 10 of this Ordinance shall be papers stipulated in international agreements which the Socialist Republic of Vietnam has signed or acceded to as mentioned in Item 1, Article 2 of this Ordinance.

In case the aforesaid international agreements do not mention the papers to be attached to the requests, or in case there is no relevant international agreement, the following papers must be attached to the request:

(a) The original foreign arbitral award, or its copy duly certified in accordance with Vietnamese law.

(b) The original agreement on arbitration or its copy duly certified in accordance with Vietnamese law.

The agreement on arbitration mentioned in Point b, Item 1 of this Article is a written document agreed upon by the parties on the resolution of their disputes which may arise or have already arisen according to the arbitration modalities prescribed by the laws of the countries concerned.

An agreement on arbitration can be an arbitral provision laid down in a contract, or a separate agreement on arbitration concluded by the parties after a dispute arises. The conclusion of this agreement can be done by way of correspondence.

2. The attached papers in foreign languages must be translated into Vietnamese; and the translations must be duly certified in conformity with Vietnamese law.

ARTICLE 12. - Transfer of files to the Court.

1. Within 7 days from the receipt of the request and other legal papers, the Ministry of Justice shall transfer the file(s) to the competent Court provided for ill Article 4 of this Ordinance.

2. In case the Ministry of Justice bills already transferred the file(s) to tile Court, but later received a notice from the competent body of the foreign country mentioned in Point c, Item 1, Article 16 of this Ordinance, saying that the foreign arbitral award is being handled, or has been overruled, or the implementation of the award has been suspended, the Ministry of Justice shall send a written notice to the Court, which shall make an appropriate decision in accordance with Points a and c of Item 1, Article 14, Item 3, Article 19, and Item 4, Article 20, of this Ordinance.

ARTICLE 13. - Receipt and study of file(s).

1. Upon receipt of the Files from the Ministry of Justice, the Court has to study them and notify the organisation/individual against which/whom the award is enforced, and the Procuracy of the same level.

2. The Court has the right to request the organisation/individual which/ who has sent the request to explain matters that are not clear in the

ARTICLE 14. - Preparation for the handling of the request.

1. Within two months from the receipt of the file(s), the Court, depending on each case, shall make one of the following decisions:

(a) Temporary suspension of the handling of the request in case the Court has received a written notice from the Ministry of Justice informing that the competent body of the foreign country was considering the possibility of overruling, or

suspending the implementation of, the foreign arbitral award.

(b) Suspension of the handling of the request if the requesting organisation/individual withdraws the request; or the organisation/individual against which/whom the award is enforced implements it of its own free will; or the organisation against which the award is enforced has been dissolved or gone bankrupt, whose rights and liabilities have been settled in accordance with Vietnamese law; or the individual against whom the award is enforced died, whose rights and obligations are not inherited,

(c) Suspension of the handling of the request in case a written notice is received from the Ministry of Justice informing that the competent body of the the foreign conuntry has canceled, or suspended the implementation of, the foreign arbitral award;

(d) Suspension of the handling of the request and returning the file(s) to the Ministry of Justice if they are beyond the Court's authority; if the organisation against which the award is enforced does not have its headquarters in Vietnam, if the individual against whom the award is enforced does not reside and/or work in Vietnam; or the location where assets related to the enforcement of the award are available cannot be found:

(e) Opening a Court session to handle the request.

In case a clarification of stipulation in Item 2, Article 13 of this Ordinance is requested, the time limit can be extended for two months.

2. The Court shall open a session to handle the request within 15 days from the date the decision mentioned in Point e, Item 1 of this Article is made. Within 7 days after the decision to open the Court session is issued, the Court

has to transfer the file(s) to the Procuracy of the same level.

ARTICLE 15 - Court session to handle the request.

1. A request shall be handled at a Court session by a panel of three judges, one of whom shall be in the chair.

2. A prosecutor from the Procuracy of the same level must participate in the session. In case the procurator is absent, the Court session must be postponed.

3. The Court session shall be held in the presence of the lawful representative of the organisation against which the award is enforced, the individual against whom the award is enforced, or of hielher lawful representative. These persons shall be summoned to the Court in accordance with Vietnamese law.

The handling of the request shall continue if the lawful representatives of the organisation against which the award is enforced, the individual against whom the award is enforced, or his/her lawful representative request the Court to hold the session in their absence; or if they are absent without plausible reasons after two official summons.

4. While handling the request, the panel does not retry the dispute already settled by the foreign arbitrator, but only examines and compares the foreign arbitral award and the attached papers with the provisions of this Ordinance, other provisions of Vietnamese law and international agreements which the Socialist Republic of Vietnam has signed or acceded to, in order to make decision.

5. After considering the request, the attached papers and evidence, if any, and hearing the persons summoned and the Procurator, the Panel shall discuss and decide the case by majority of votes.

The panel of judges has the right to make, a decision to recognise and enforce, or not to recognise and enforce, a foreign arbitral award.

ARTICLE 16. Cases in which a foreign arbitral award is not recognised.

1. A foreign arbitral award shall not be recognised and enforced in Vietnam if the organisation/individual against whic/whom the award is enforced has legitimate evidence for the Court to confirm that:

(a) The parties to the agreement on arbitration mentioned in Item 1, Article 11 of this Ordinance, are not legally capable of signing that agreement in accordance with the law applied to each party; the agreement on arbitration is not legally valid under the law of the country which was chosen by the parties, or under the law or the country where the award was made, in case the parties did not choose the law to be applied for that agreement;

(b) The organisation/individual against which/whom the award is enforced was not given timely and proper notice on the selection of the arbitrators and the procedures for resolving the dispute through arbitration; or for other legitimate reasons this organisation/individual cannot exercise its/his or her rights of proceedings.

(c) The foreign arbitral award is made over a dispute which was not requested for settlement by the parties or beyond the request of the parties to the agreement on arbitration. In case the decision on a requested issue can be separated from one not requested for settlement through arbitration, the decision on a requested issue can be recognised and enforced in Vietnam.

(d) The composition of the arbitral body and/or procedure for resolving the dispute through arbitration vary with the agreement on arbitration or with the law of the country where the award was made, in case the agreement on arbitration does not stipulate the matters;

(e) The arbitral award has not yet become binding on these parties.

The arbitral award has been overruled or suspended by the competent authority of the country where the award was made, or of the country the law of which applies to the rendering of awards,

2. A foreign arbitral award is not recognised and enforced in Vietnam if the Court decides that:

(a) Under Vietnamese law the dispute shall not be resolved by way of arbitration;

(b) The recognition and enforcement of the foreign arbitral award in Vietnam are contrary to basic principles of Vietnamese law.

ARTICLE 17. - Sending a copy of the Court decision to the Procuracy.

Immediately after the decision mentioned in Item 1, Article 14, and Item 6, Article 15, of this Ordinance, is made, the Court shall send a copy of that decision to the Procuracy of the same level.

ARTICLE 18. -Appeals.

1. Within 15 days from the date the Court made the decision mentioned in Points a, b, c and d of Item 1, Article 14, and Item 5, Article 15, of this Ordinance, the parties, or their lawful representatives, have the right to appeal the decision. The appeal must clearly state the reasons and the protest. In case the parties concerned are not present at the Court session to hear the appeal, the time limit for the appeal is counted from the date a copy of the decision is delivered to them; if the appeal has expired and there are justifiable reasons for this delay, the time limit for the appeal is counted from the date the obstacles causing the delay have been removed.

2. The Procuracy of the same level or the Supreme People's Procuracy has the right to appeal the Court decision mentioned in Points a, b, c and d of

Item 1, Article 14, and Item 5, Article 15, of this Ordinance.

The time limit for the appeal by the Procuracy of the same level is 15 days, and that by the Supreme People's Procuracy is 30 days, starting from the date of the Court's decision.

ARTICLE 19. - Hearing of Appeals.

1. The Supreme People's Court shall hear the appeal against a decision by the People's Court of the provinces or city under the Central Government within one month from the date the appeal is received; if explanations are necessary as stipulated in Item 2, Article 13, of this Ordinance, the time limit is extended for two more months.

2. The panel to hear the appeal shall be composed of three judges, one of whom being in the chair.

The procedure for hearing appeals is similar to that for hearing requests provided for in Article 15 of this Ordinance.

3. The panel has the right to keep intact, or to partly of fully change, the decision made by the People's Court of the province of city under the Central Government; to temporarily suspend or to suspend the appeal in cases the appellant withdraws the appeal; or the Procuracy withdraws the appeal, or there are reasons for doing so as provided for in Points a, b and c, Item 1, Article 14 of this Ordinance.

The decision by the Supreme People's Court is final and effective.

ARTICLE 20. - Enforcement of foreign arbitral awards.

1. Within 15 days from the date the decision on the recognition and enforcement of a foreign arbitral award in Vietnam becomes effective, the Court shall send a copy of that decision and a copy of the award to the enforcement agency in accordance with Vietnamese law on the execution of civil verdicts.

2. The enforcement of foreign arbitral awards in Vietnam must be

carried out in accordance with the Vietnamese law on civil verdicts enforcement,

3. In case a written notice is received from the Ministry of Justice to the effect that the foreign competent authority is considering the possibility of overruling or suspending the implementation of the foreign arbitral award that has already been recognised to be enforced in Vietnam, the Head of the civil verdicts enforcement agency shall make a decision to temporarily suspend the enforcement of the award, and send a copy of that decision to the Court which made the decision on the recognition and enforcement of the foreign arbitral award in Vietnam.

The Head of the civil verdicts enforcement agency may take necessary measures to ensure the continued enforcement of the foreign arbitral award if so requested by the organisation/individual in favor of which/whom the award is enforced.

4. Immediately after receiving the written notice from the Ministry of Justice saying that the competent foreign authority has already overruled or suspended the enforcement of the foreign arbitral award. the Court which made the decision on the recognition and enforcement of the award in Vietnam shall make a decision repealing its previous decision, and send a copy of this decision to the enforcement agency.

Immediately after receiving the decision of the Court, the Head of the civil verdicts enforcement agency shall issue a decision to suspend the enforcement of the foreign arbitral award.

Chapter III

Final Provisions

ARTICLE 21. - Application of international agreements.

In case an international agreement which the Socialist Republic of Vietnam has signed or acceded to, contains provisions contrary to the provisions of this Ordinance, the provisions of the international agreement

shall prevail.

ARTICLE 22. - Court's refusal to handle the recognition and enforcement of foreign arbitral awards.

In case a decision made by a Vietnamese arbitrator or a request by a Vietnamese organisation/individual on the recognition and enforcement of an arbitral award in a foreign country is rejected by the competent authorities of that country on the ground of discrimination, Vietnamese Courts have the right to apply corresponding retaliatory measures to the handling of requests for the recognition and enforcement of arbitral awards by that country in Vietnam, or to requests made by organisations/individuals of that country regarding this matter.

ARTICLE 23. - Effectiveness of Ordinance.

This Ordinance takes effect from January 1st, 1996.

ARTICLE 24. - Implementation provision.

The Government, the Supreme People's Court, and the Supreme People's Procuracy within their respective competence shall issue detailed regulations for the implementation of this Ordinance.

APPENDIX 7

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

"CIETAC"

(Revised and Adopted by China Chamber of International Commerce on May 6,1998. Effective as from May 10,1998.)

Chapter I General Provisions

Section 1 Jurisdiction

ARTICLE 1

These Rules are formulated in accordance with the Arbitration Law of the People's Republic of China and the provisions of the relevant laws and pursuant to the "Decision" of the former Government Administration Council of the Central People's Government and the "Notice" and "Official Reply" of the State Council.

ARTICLE 2

China International Economic and Trade Arbitration Commission (originally named Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, later renamed as Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, and presently called China International Economic and Trade Arbitration Commission, hereinafter referred to as the Arbitration Commission) independently and impartially resolves, by means of arbitration, disputes arising from economic and trade transactions, contractual or non-contractual.

The disputes stated in the preceding paragraph include:

1. international or foreign-related disputes;
2. disputes related to the Hong Kong SAR, Macao or Taiwan regions;

3. disputes between the enterprises with foreign investment and disputes between an enterprise with foreign investment and another Chinese legal person, physical person and/or economic organization;

4. disputes arising from project financing, invitation for tender, bidding, construction and other activities conducted by Chinese legal persons, physical persons and/or other economic organizations through utilizing the capital, technology or service from foreign countries, international organizations or from the Hong Kong SAR, Macao and Taiwan regions; and

5. disputes that may be taken cognizance of by the Arbitration Commission in accordance with special provisions of or upon special authorization from the law or administrative regulations of the People's Republic of China.

ARTICLE 3

The Arbitration Commission takes cognizance of cases in accordance with an arbitration agreement between the parties concluded before or after the occurrence of the dispute to refer their dispute to the Arbitration Commission for arbitration and upon the written application by one of the parties.

An arbitration agreement means an arbitration clause stipulated by the parties in their contract or a written agreement concluded by the parties in other forms to submit their dispute for arbitration.

ARTICLE 4

The Arbitration Commission has the power to decide on the existence and validity of an arbitration agreement and the jurisdiction over an arbitration case. If a party challenges the validity of the arbitration agreement and requests the Arbitration Commission to make a decision thereupon and the other party applies to the People's Court for a ruling, the Court's ruling shall

prevail.

ARTICLE 5

An arbitration clause contained in a contract shall be regarded as existing independently and separately from the other clauses of the contract, and an arbitration agreement attached to a contract shall be treated as a part of the contract existing independently and separately from the other parts of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by the modification, rescission, termination, invalidity, revocation or non-existence of the contract.

ARTICLE 6

Any objections to an arbitration agreement and/or jurisdiction over an arbitration case shall be raised before the first hearing conducted by the arbitration tribunal. Where a case is examined on the basis of documents only, the objections to jurisdiction should be raised before submission of the first substantive defense.

ARTICLE 7

Once the parties agree to submit their dispute to the Arbitration Commission for arbitration, it shall be deemed that they have agreed to conduct the arbitration under these Rules. In case the parties have agreed otherwise which is also agreed by the Arbitration Commission, the parties' agreement shall prevail.

Section 2 Organization

ARTICLE 8

The Arbitration Commission has one honorary Chairman and several advisers.

ARTICLE 9

The Arbitration Commission is composed of one Chairman, several Vice-Chairmen and a number of Commission members. The Chairman

performs the functions and duties vested in him by these Rules and the Vice-Chairmen may perform the Chairman's functions and duties with the Chairman's authorization.

The Arbitration Commission has a secretariat to handle its day-to-day work under the leadership of the Secretary-General of the Arbitration Commission.

ARTICLE 10

The Arbitration Commission maintains a Panel of Arbitrators. The arbitrators are selected and appointed by the Arbitration Commission from among Chinese and foreign personages with special knowledge and practical experience in the fields of law, economics and trade, science and technology, and other fields.

ARTICLE 11

The Arbitration Commission is located in Beijing. The Arbitration Commission has a Shenzhen Sub-Commission in Shenzhen Special Economic Zone and a Shanghai Sub-Commission in Shanghai. The Sub-Commissions are an integral part of the Arbitration Commission.

The Sub-Commissions have their own secretariats to handle their day-to-day work under the leadership of the Secretaries-General of the Sub-Commissions.

These Rules uniformly apply to the Arbitration Commission and its Sub-Commissions. When arbitration proceedings are conducted in the Sub-Commissions, the functions and duties under these Rules to be carried out by the Chairman, the secretariat and the Secretary-General of the Arbitration Commission shall be performed by the Vice-Chairmen authorized by the Chairman, the secretariats and the Secretaries-General of the Sub-Commissions respectively and accordingly.

ARTICLE 12

The Parties may agree to have their dispute submitted for arbitration conducted by the Arbitration Commission in Beijing or by its Shenzhen Sub-Commission in Shenzhen or by its Shanghai Sub-Commission in Shanghai.

In the absence of such an agreement, the Claimant may opt to have the arbitration conducted by the Arbitration Commission in Beijing or by its Shenzhen Sub-Commission in Shenzhen or by its Shanghai Sub-Commission in Shanghai.

When exercising such option, the option first made shall prevail. If a dispute arises over the option, it shall be decided by the Arbitration Commission.

Chapter II Arbitration Proceedings

Section 1 Application for Arbitration, Defense and Counter-claim

ARTICLE 13

The arbitration proceedings shall commence from the date on which the Notice of Arbitration is sent out by the Arbitration Commission or its Sub-Commissions.

ARTICLE 14

The Claimant shall satisfy the following requirements when submitting his Application for Arbitration:

(1) an Application for Arbitration in writing shall be submitted and the following shall be specified in the Application for Arbitration:

(a) the name and address of the Claimant and those of the Respondent, including the zip code, telephone number, telex number, fax number, cable number or other telecommunication means, if any;

(b) the arbitration agreement relied upon by the Claimant;

(c) the facts of the case and the main points of dispute;

(d) the Claimant's claim and the facts and reasons on which his claim is based.

The Application for Arbitration shall be signed and/or stamped by the Claimant and/or the attorney authorized by the Claimant.

(2) When an Application for Arbitration is submitted to the Arbitration Commission, the relevant documentary evidence on which the Claimant's claim is based shall accompany the Application for Arbitration.

(3) The Claimant shall pay an arbitration fee in advance to the Arbitration Commission according to the Arbitration Fee Schedule of the Arbitration Commission.

ARTICLE 15

After receipt of the Application for Arbitration and its attachments and when the secretariat of the Arbitration Commission, after examination, deems that the Claimant has not completed the formalities required for arbitration, the secretariat shall demand the Claimant to complete them, and when the secretariat deems that the Claimant has completed the formalities, the secretariat shall immediately send to the Respondent a Notice of Arbitration together with one copy each of the Claimant's Application for Arbitration and its attachments as well as the Arbitration Rules, the Panel of Arbitrators and the Arbitration Fee Schedule of the Arbitration Commission, and shall simultaneously send to the Claimant one copy each of the Notice of Arbitration, the Arbitration Rules, the Panel of Arbitrators and Arbitration Fee Schedule.

The secretariat of the Arbitration Commission, after sending the Notice of Arbitration to the Claimant and Respondent, shall appoint one of its staff-members to take charge of procedural administration of the case.

ARTICLE 16

The Claimant and the Respondent shall, within 20 days as from the date of receipt of the Notice of Arbitration, appoint an arbitrator from among the Panel of Arbitrators of the Arbitration Commission or authorize the Chairman of the Arbitration Commission to make such appointment.

ARTICLE 17

The Respondent shall, within 45 days from the date of receipt of the Notice of Arbitration, submit his written defense and relevant documentary evidence to the secretariat of the Arbitration Commission.

ARTICLE 18

The Respondent shall, at the latest within 60 days from the date of receipt of the Notice of Arbitration, lodge with the secretariat of the Arbitration Commission his counterclaim in writing, if any. The arbitration tribunal may extend that time limit if it deems that there are justified reasons.

When lodging a counterclaim, the Respondent must state in his written statement of counterclaim his specific claim, the facts and reasons upon which his claim is based, and attach to his written statement of counterclaim the relevant documentary evidence.

When lodging a counterclaim, the Respondent shall pay an arbitration fee in advance according to the Arbitration Fee Schedule of the Arbitration Commission.

ARTICLE 19

The Claimant may request to amend his claim and the Respondent may request to amend his counterclaim; but the arbitration tribunal may refuse such an amendment if it considers that it is too late to raise the request and the amendment may affect the arbitration proceedings.

ARTICLE 20

When submitting application for arbitration, written defense, statement of counterclaim, documentary evidence and other documents, the party/parties shall submit them in quintuplicate. If the number of the parties exceeds two, additional copies shall be submitted accordingly; if the number of arbitrator of the arbitration tribunal is one, two copies may be reduced.

ARTICLE 21

The arbitration proceedings shall not be affected in case the Respondent fails to file his defense in writing or the Claimant fails to submit his written defense against the Respondent's counterclaim.

ARTICLE 22

The parties may authorize arbitration agents to deal with the matters relating to arbitration; the authorized attorney must produce a Power of Attorney to the Arbitration Commission.

Chinese and foreign citizens can be authorized to act as arbitration agents.

ARTICLE 23

When a party applies for property preservative measures, the Arbitration Commission shall transmit the party's application for a ruling to the people's court in the place where the domicile of the party against whom the property preservative measures are sought is located or in the place where the property of the said party is located.

When a party applies for taking interim measures of protection of evidence, the Arbitration Commission shall transmit the party's application for a ruling to the people's court in the place where the evidence is located.

Section 2 Formation of Arbitration Tribunal

ARTICLE 24

Each of the parties shall appoint one arbitrator from among the Panel of Arbitrators of the Arbitration Commission or entrust the Chairman of the Arbitration Commission to make such appointment. The third arbitrator shall be jointly appointed by the parties or appointed by the Chairman of the Arbitration Commission upon the parties' joint authorization.

In case the parties fail to jointly entrust the Chairman of the Arbitration Commission to appoint the third arbitrator within 20 days from the date on which the Respondent receives the Notice of Arbitration, the third arbitrator shall be appointed by the Chairman of the Arbitration Commission. The third arbitrator shall act as the presiding arbitrator.

The presiding arbitrator and the two appointed arbitrators shall jointly form an arbitration tribunal to jointly hear the case.

ARTICLE 25

Both parties may jointly appoint or jointly authorize the Chairman of the Arbitration Commission to appoint a sole arbitrator to form an arbitration tribunal to hear the case alone.

If both parties have agreed on the appointment of a sole arbitrator to hear their case alone but have failed to agree on the choice of such a sole arbitrator within 20 days from the date on which the Respondent receives the Notice of Arbitration, the Chairman of the Arbitration Commission shall make such appointment.

ARTICLE 26

If the Claimant or the Respondent fails to appoint or authorize the Chairman of the Arbitration Commission to appoint an arbitrator according to Article 16 of these Rules, the Chairman of the Arbitration Commission shall appoint an arbitrator for the Claimant or the Respondent.

ARTICLE 27

When there are two or more Claimants and/or Respondents in an arbitration case, the Claimants' side and/or the Respondents' side each shall, through consultation, appoint or entrust the Chairman of the Arbitration Commission to appoint one arbitrator from among the Panel of Arbitrators of the Arbitration Commission.

If the Claimants' side or the Respondents' side fails to make such appointment or entrustment within 20 days as from the date on which the Respondents' side receives the Notice of Arbitration, the appointment shall be made by the Chairman of the Arbitration Commission.

ARTICLE 28

Any appointed arbitrator having a personal interest in the case shall himself disclose such circumstances to the Arbitration Commission and request a withdrawal from his office.

ARTICLE 29

A party may make a request in writing to the Arbitration Commission for the removal of an appointed arbitrator from his office, if the party has justified reasons to suspect the impartiality and independence of the appointed arbitrator. In the request, the facts and reasons on which the request is based and evidence thereof must be given.

A challenge against an arbitrator for a removal from his office must be put forward in writing no later than the first oral hearing. If the grounds for the challenge come out or are made known after the first oral hearing, the challenge may be raised after the first hearing but before the end of the last hearing.

ARTICLE 30

The Chairman of the Arbitration Commission shall decide on the challenge.

ARTICLE 31

If an arbitrator cannot perform his duty owing to withdrawal, demise, removal or other reasons, a substitute arbitrator shall be appointed in accordance with the procedure pursuant to which the original arbitrator was appointed.

After the appointment of the substitute arbitrator, the arbitration tribunal has discretion to decide whether the whole or part of the previous hearings shall be started again.

Section 3 Hearing

ARTICLE 32

The arbitration tribunal shall hold oral hearings when examining a case. At the request of the parties or with their consent, oral hearings may be omitted if the arbitration tribunal also deems that oral hearings are unnecessary, and then the arbitration tribunal may examine the case and make an award on the basis of documents only.

ARTICLE 33

The date of the first oral hearing shall be fixed by the arbitration tribunal in consultation with the secretariat of the Arbitration Commission.

The notice of the date of the hearing shall be communicated by the secretariat of the Arbitration Commission to the parties 30 days before the date of the hearing. A party having justified reasons may request a postponement of the date of the hearing. His request must be communicated to the secretariat of the Arbitration Commission 12 days before the date of the hearing and the arbitration tribunal shall decide whether to postpone the hearing or not.

ARTICLE 34

The notice of the date of hearing subsequent to the first hearing is not subject to the 30-day time limit.

ARTICLE 35

In case the parties have agreed the place of arbitration, the hearing of the case shall be conducted in the place of arbitration. Unless otherwise agreed by the parties, the cases taken cognizance of by the Arbitration Commission shall be heard in Beijing, or in other places with the approval of the Secretary-General of the Arbitration Commission. The cases taken cognizance of by a Sub-Commission of the Arbitration Commission shall be heard in the place where the Sub-Commission is located, or in other places with the approval of the Secretary-General of the Sub-Commission.

ARTICLE 36

The arbitration tribunal shall not hear cases in open session. If both parties request a hearing to be held in open session, the arbitration tribunal shall decide whether to hold the hearing in open session or not.

ARTICLE 37

When a case is heard in closed session, the parties, their attorneys, witnesses, arbitrators, experts consulted by the arbitration tribunal, appraisers appointed by the arbitration tribunal and the relevant staff-members of the secretariat of the Arbitration Commission shall not disclose to outsiders the substantive or procedural matters of the case.

ARTICLE 38

The parties shall produce evidence for the facts on which their claim, defense or counterclaim is based.

The arbitration tribunal may undertake investigations and collect evidence on its own initiative, if it deems it necessary. If the arbitration tribunal investigates and collects evidence on its own initiative, it shall timely inform the parties to be present on the spot if it deems it necessary. Should one party or both parties fail to appear on the spot, the investigation and collection of evidence shall by no means be affected.

ARTICLE 39

The arbitration tribunal may consult an expert or appoint an appraiser for the clarification of special questions relating to the case. Such an expert or appraiser can be an organization or a citizen, Chinese or foreign.

The arbitration tribunal has the power to order the parties and the parties are also obliged to submit or produce to the expert or appraiser any materials, documents, properties or goods related to the case for check-up, inspection and/or appraisal.

ARTICLE 40

The expert's report and the appraiser's report shall be copied to the parties so that the parties may have the opportunity to give their opinions thereon. At the request of any party to the case and with the approval of the arbitration tribunal, the expert and appraiser may be present at the hearing and give explanations of their reports when the arbitration tribunal deems it necessary and appropriate.

ARTICLE 41

The evidence submitted by the parties shall be examined and decided by the arbitration tribunal. The adoption of the expert's report and the appraiser's report shall be determined by the arbitration tribunal.

ARTICLE 42

Should one of the parties fail to appear at the hearing, the arbitration tribunal may proceed with the hearing and make an award by default.

ARTICLE 43

During the hearing, the arbitration tribunal may make a record in writing and/or by tape-recording. The arbitration tribunal may, when it deems it necessary, make a minute stating the main points of the hearing and ask the parties and/or their attorneys, witnesses and/or other persons involved to sign their names on it and/or affix their seals to it.

The record in writing or by tape-recording is only for the use and reference of the arbitration tribunal.

ARTICLE 44

If the parties reach an amicable settlement agreement by themselves, they may either request the arbitration tribunal to make an award in accordance with the contents of their amicable settlement agreement to end the case or request a dismissal of the case.

The Secretary-General of the Arbitration Commission shall decide on the dismissal of an arbitration case if the decision on dismissal is made before the formation of the arbitration tribunal, and the arbitration tribunal shall decide thereon if the decision on dismissal is made after the formation of the arbitration tribunal.

If the party or the parties refer the dismissed case again to the Arbitration Commission for arbitration, the Chairman of the Arbitration Commission shall decide whether to accept the reference or not.

ARTICLE 45

If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.

ARTICLE 46

The arbitration tribunal may conciliate cases in the manner it deems appropriate.

ARTICLE 47

The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further efforts to conciliate will be futile.

ARTICLE 48

If the parties have reached an amicable settlement outside the arbitration tribunal in the course of conciliation conducted by the arbitration tribunal, such settlement shall be deemed as one which has been reached through the arbitration tribunal's conciliation.

ARTICLE 49

The parties shall sign a settlement agreement in writing when an amicable settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal shall end the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties.

ARTICLE 50

Should conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

ARTICLE 51

A party who knows or should have known that any provision or requirement of these Rules has not been complied with and yet proceeds with the arbitration proceedings without explicitly raising in writing his objection to non-compliance in a timely manner shall be deemed to have waived his right to object.

Section 4 Award

ARTICLE 52

The arbitration tribunal shall render an arbitral award within 9 months as from the date on which the arbitration tribunal is formed. The Secretary-

General of the Arbitration Commission may extend this time limit at the request of the arbitration tribunal if the Secretary-General of the Arbitration Commission considers that it is really necessary and the reasons for extension are truly justified.

ARTICLE 53

The arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.

ARTICLE 54

Where a case is heard by an arbitration tribunal composed of three arbitrators, the arbitral award shall be decided by the majority of the arbitrators and the minority opinion may be written in the record and docketed into the file.

When the arbitration tribunal cannot attain a majority opinion, the arbitral award shall be decided in accordance with the presiding arbitrator's opinion.

ARTICLE 55

The arbitration tribunal shall state in the arbitral award the claims, the facts of the dispute, the reasons on which the arbitral award is based, the result of the arbitral award, the allocation of the arbitration costs, the date on which and the place at which the arbitral award is made. The facts of the dispute and the reasons on which the arbitral award is based may not be stated in the arbitral award if the parties have agreed not to state them in the arbitral award, or the arbitral award is made in accordance with the contents of the settlement agreement reached between the parties.

ARTICLE 56

Unless the arbitral award is made in accordance with the opinion of the

presiding arbitrator or the sole arbitrator, the arbitral award shall be signed by all the arbitrators or the majority arbitrators sitting on the arbitration tribunal. An arbitrator who has a dissenting opinion may sign or not sign his name on the arbitral award.

The arbitrator shall submit his draft arbitral award to the Arbitration Commission before signing the award. The Arbitration Commission may remind the arbitrator of any issue related to the form of the arbitral award on condition that the arbitrator's independence of decision is not affected.

The Arbitration Commission's stamp shall be affixed to the arbitral award.

The date on which the arbitral award is made is the date on which the arbitral award comes into legal effect.

ARTICLE 57

The arbitration tribunal may, if it deems it necessary or the parties so request and the arbitration tribunal agrees, make an interlocutory award or partial award on any issue of the case at any time in the course of arbitration before the final award is made. Either party's failure to perform the interlocutory award does not affect the continuation of the arbitration proceedings and the making of the final award by the arbitration tribunal.

ARTICLE 58

The arbitration tribunal has the power to determine in the arbitral award the arbitration fee and other expenses to be eventually paid by the parties to the Arbitration Commission.

ARTICLE 59

The arbitration tribunal has the power to decide in the arbitral award that the losing party shall pay the winning party as compensation a proportion of the expenses reasonably incurred by the winning party in dealing with the case. The amount of such compensation shall not in any case exceed 10% of

the total amount awarded to the winning party.

ARTICLE 60

The arbitral award is final and binding upon both disputing parties. Neither party may bring a suit before a law court or make a request to any other organization for revising the arbitral award.

ARTICLE 61

Either party may request in writing that a correction be made to the writing, typing, calculating and similar errors contained in the arbitral award within 30 days from the date of receipt of the arbitral award; if there is really an error in the arbitral award, the arbitration tribunal shall make a correction in writing within 30 days form the date on receipt of the written request for correction, and the arbitration tribunal may by itself make a correction in writing within 30 days from the date on which the arbitral award is issued. The correction in writing forms a part of the arbitral award.

ARTICLE 62

If anything that should be awarded has been omitted in the arbitral award, either of the parties may make a request in writing to the arbitration tribunal for an additional award within 30 days from the date on which the arbitral award is received.

If something which should be awarded is really omitted, the arbitration tribunal shall make an additional award within 30 days from the date of receipt of the request in writing for an additional award. The arbitration tribunal may also by itself make an additional award within 30 days from the date on which the arbitral award is issued. The additional award forms a part of the arbitral award which has been previously issued.

ARTICLE 63

The parties must automatically execute the arbitral award within the time limit specified in the arbitral award. If no time limit is specified in the

arbitral award, the parties shall carry out the arbitral award immediately.

In case one party fails to execute the arbitral award, the other party may apply to the Chinese court for enforcement of the arbitral award pursuant to Chinese law or apply to the competent foreign court for enforcement of the arbitral award according to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards or other international treaties that China has concluded or participated in.

Chapter III Summary Procedure

ARTICLE 64

Unless otherwise agreed by the parties, this Summary Procedure shall apply to any case in dispute where the amount of the claim totals not more than RMB 500, 000 yuan, and to any case in dispute where the amount of the claim totals more than RMB 500, 000 yuan provided that one party applies for arbitration under this Summary Procedure and the other party agrees in writing.

ARTICLE 65

When an application for arbitration is submitted to the Arbitration Commission after examination and the Summary Procedure is applicable, the secretariat of the Arbitration Commission shall immediately send a Notice of Arbitration to the parties.

Unless both parties have jointly appointed one sole arbitrator from among the Panel of Arbitrators of the Arbitration Commission, they shall jointly appoint or jointly entrust the Chairman of the Arbitration Commission to appoint one sole arbitrator within 15 days from the date on which the Notice of Arbitration is received by the Respondent. Should the parties fail to make such appointment or entrustment, the Chairman of the Arbitration Commission shall immediately appoint one sole arbitrator to form an arbitration tribunal to hear the case.

ARTICLE 66

The Respondent shall, within 30 days from the date of receipt of the Notice of Arbitration, submit his defense and relevant documentary evidence to the secretariat of the Arbitration Commission; a counterclaim, if any, shall be filed with documentary evidence within the said time limit.

ARTICLE 67

The arbitration tribunal may hear the case in the way it deems appropriate. The arbitration tribunal has discretion to hear the case only on the basis of the written materials and evidence submitted by the parties or to hold an oral hearing as well.

ARTICLE 68

The parties must hand in written materials and evidence needed for the arbitration in compliance with the requirements of the arbitration tribunal within the time limit given by the arbitration tribunal.

ARTICLE 69

For a case which needs an oral hearing, the secretariat of the Arbitration Commission shall, after the arbitration tribunal has fixed a date for hearing, inform the parties of the date of the hearing 15 days before the date of the hearing.

ARTICLE 70

If the arbitration tribunal decides to hear the case orally, only one oral hearing shall be held. However, the arbitration tribunal may hold two oral hearings if really necessary.

ARTICLE 71

Should one of the parties fail to act in compliance with this Summary Procedure during summary proceedings, such failure shall not affect the arbitration tribunal's conduct of the proceedings and the arbitration tribunal's power to render an arbitral award.

ARTICLE 72

The conduct of the summary proceedings shall not be affected by any amendment of the claim or by the lodging of a counterclaim, except that the disputed amount of the revised arbitration claim or counterclaim is in conflict with the provision of Article 64.

ARTICLE 73

Where a case is heard orally, the arbitration tribunal shall make an arbitral award within 30 days from the date of the oral hearing if one hearing is to be held, or from the date of the second oral hearing if two oral hearings are to be held. Where a case is examined on the basis of documents only, the arbitration tribunal shall render an arbitral award within 90 days from the date on which the arbitration tribunal is formed. The Secretary-General of the Arbitration Commission may extend the said time limit if such extension is necessary and justified.

ARTICLE 74

For matters not covered in this Chapter, the relevant provisions in the other Chapters of these Rules shall apply.

Chapter IV Supplementary Provisions

ARTICLE 75

The Chinese language is the official language of the Arbitration Commission. If the parties have agreed otherwise, their agreement shall prevail.

At the hearing, if the parties or their attorneys or witnesses require language interpretation, the secretariat of the Arbitration Commission may provide an interpreter for them or the parties may bring with them their own interpreter.

The arbitration tribunal and/or the secretariat of the Arbitration Commission may, if it deems it necessary, request the parties to hand in

corresponding translation copies in Chinese language or other languages of the documents and evidential materials submitted by the parties.

ARTICLE 76

All the arbitration documents, notices and materials may be sent to the parties and/or their attorneys in person, or by registered letter or express airmail, telefax, telex, cable or by any other means which are deemed proper by the secretariat of the Arbitration Commission.

ARTICLE 77

Any written communication to the parties is deemed to have been properly served if it is delivered to the addressee or delivered at his place of business, habitual residence or mailing address; or if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been properly served if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

ARTICLE 78

Apart from charging arbitration fees from the parties according to the Arbitration Fee Schedule of the Arbitration Commission, the Arbitration Commission may collect from the parties other extra, reasonable and actual expenses including arbitrators' special remuneration and their travel and boarding expenses for dealing with the case and the fees and expenses for experts, appraisers and interpreters appointed by the arbitration tribunal, etc.

If a case is withdrawn after the parties have reached between themselves an amicable settlement, the Arbitration Commission may charge a certain amount of fees from the parties in consideration of the quantity of work and the amount of the actual expenses incurred by the Arbitration Commission.

ARTICLE 79

Where an arbitration agreement or an arbitration clause contained in the contract provides for arbitration to be conducted by China International Economic and Trade Arbitration Commission or its Sub-Commissions or by the formerly named Foreign Trade Arbitration Commission or Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, it shall be deemed that the parties have unanimously agreed that the arbitration shall be conducted by China International Economic and Trade Arbitration Commission or by its Sub-Commissions.

Where an arbitration agreement or an arbitration clause contained in the contract provides for arbitration by China Council for the Promotion of International Trade/China Chamber of International Commerce or by the arbitration commission of China Council for the Promotion of International Trade/China Chamber of International Commerce, it shall be deemed that the parties have unanimously agreed that the arbitration shall be conducted by China International Economic and Trade Arbitration Commission.

ARTICLE 80

These Rules shall come into force as from May 10, 1998. For cases which have been taken cognizance of by the Arbitration Commission or by its Sub-Commissions before the date on which these Rules become effective, the Rules of Arbitration effective on the date when the cases were taken cognizance of shall apply. However, these Rules shall be applied if the parties so agree.

ARTICLE 81

The power to interpret these Rules is vested in the Arbitration Commission.

APPENDIX 8

ARBITRATION RULES THE ARBITRATION INSTITUTE MINISTRY OF JUSTICE

Whereas, the Ministry of Justice has established an arbitration institute under the Office of the Judicial Affairs to promote and develop conciliation and arbitration as alternative dispute resolution parallel to Judicial proceedings conducted by the Courts; It is, therefore, necessary to issue Arbitration Rules for the Arbitration Institute, Ministry of Justice as follows:

SECTION I DEFINITIONS

RULE 1

In these Rules:

(1) "Office" means the Arbitration Office, Ministry of Justice ;

(2) "Institute" means the Arbitration Institute of the Arbitration Office ;

(3) "Commission" means the Arbitration Commission of the Arbitration Office which is appointed by the cabinet;

(4) "Director" means the Director of the Arbitration Office;

(5) "Conciliator" means the conciliator registered with the office by the advice and consent of the Commission. It shall include *ad hoc* conciliator who is appointed by the parties and whose name does not appear in the list of the Office ;

(6) "Arbitrator" means the arbitrator registered with the Office by the advice and consent of the Commission. It shall include *ad hoc* arbitrator who is appointed by the parties and whose name does not appear in the list of the Office ;

(7) "Conciliation Rules" means the Conciliation Rules of the Institute;

(8) "Arbitration Rules" means the Arbitration Rules of the Institute.

SECTION II ARBITRATION PROCESS

Model Arbitration Clause

RULE 2

The parties to a dispute may stipulate the following arbitration clause in the contract so that the Institute may conduct the arbitration of the dispute arising and apply the Arbitration rules of the Institute to the dispute :

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Arbitration Institute."

Meeting of the Parties

RULE 3.

(1) Before submission of the dispute to arbitration, the Director shall convene the parties to bring about a settlement. If the Director deems appropriate and the parties agree, one or more conciliator shall be appointed.

(2) The person who is appointed conciliator in any dispute may not be arbitrator in the same dispute.

(3) The Conciliation Rules shall apply to the conciliation process.

Application of the Rules

RULE 4

(1) Except where the parties agree otherwise in writing with the consent of the Director, the Arbitration Rules shall apply to arbitration organised by the Arbitration Institute.

(2) Matters fallen outside the scope of the Arbitration Rules shall be dealt with by agreement between the parties or by the discretion of the

arbitrator or by the resolution of the Arbitration Commission respectively.

RULE 5

(1) For the purposes of these Rules, the service of pleadings, notices or other documents shall be valid when they are received by the other party, its representative or attorney, or they are delivered at the domicile or place of business of the addressee ; in case where the domicile or place of business cannot be found, the same may be delivered at his last-known residence or place of business.

(2) For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a pleading, notice or other communication is received. If the last day of such period is an official holiday, the period is extended until the first business day which follows. Official holidays occurring during the running of the period of time are included in calculating the period.

Pleadings and Service of Pleadings

RULE 6

The party initiating recourse to arbitration may submit a statement of claim in the form provided by the Institute to the Director. The statement shall consist of the following particulars:

(1) A request to settle the dispute by arbitration;

(2) Name and addresses of the parties;

(3) Applicable arbitration clause or arbitration agreement;

(4) The contract or legal relationship which gives rise to the dispute;

(5) The facts which form the basis of the claim and the amount claimed;

(6) The relief or remedy sought;

(7) The number of arbitrators, if the parties have not previously agreed upon.

RULE 7

When a statement of claims filed with the Institute and the Director is satisfied that the statement conforms with the requirements set forth, the Institute shall, without delay, serve the other party with the statement at his domicile or place of the business by return post or by any other means as it deems appropriate.

RULE 8

When the other party has been served with the statement of claim, he may file a defence or a counter-claim in writing with the Director within 15 days from the day on which the statement of claim is served on him.

RULE 9

The parties may appoint a representative or any other person to assist them in the arbitration process. The parties shall notify in writing the name and address of such person to the Director.

Appointment of Arbitrators

RULE 10

Unless otherwise agreed upon, there shall be one or three arbitrators.

RULE 11

If a sole arbitrator is to be appointed, the following procedure shall apply:

(1) The Institute shall dispatch, without delay, an identical list containing at least three names from the list of arbitrators to the parties ;

(2) Within 15 days from the date of the receipt of this list, each party may return the list to the Institute after having deleted

the name or names to which he objects and numbered the remaining names on the list in order of his preference ;

(3) After the expiration of the above period of time the Director shall appoint the sole arbitrator from among the names approved on the lists returned to him and in accordance with the order of preference indicated by the parties ;

(4) If any party fails to perform his duly under (2), the Director may exercise his discretion in appointing the sole arbitrator. In making the appointment, the Director shall have regard to the independence and impartiality of the arbitrator ;

(5) The parties may, by consensus, appoint a person not registered with the Institute to be the sole arbitrator.

RULE 12

If three arbitrators are to be appointed, the following procedure shall apply:

(1) Each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal ;

(2) Rule 11 shall apply to the appointment of the presiding arbitrator *mutatis mutandis*;

(3) The presiding arbitrator and arbitrators shall have equal vote;

(4) The arbitral award shall be rendered on the majority basis.

RULE 13

(1) The appointment of arbitrator shall be made in writing, signed by the party who appoints him, indicating the address, nationality, occupation and other qualifications of the arbitrator.

(2) The arbitrator must consent to the appointment.

(3) The Director shall notify the names and addresses of the arbitrators to all parties concerned without delay.

Challenge of Arbitrators

RULE 14

Upon appointment, the arbitrator shall disclose to the Director any circumstances likely to give rise to justifiable doubts as to his impartiality and independence.

RULE 15

(1) A party may challenge the arbitrator appointed by another party if circumstances exist that give rise to justifiable doubts as to the impartiality and independence of the arbitrator.

(2) The challenge shall be made in writing notifying the grounds for challenge and submit to the Director within 15 days from the date of the notification of the name and particulars of the arbitrator.

RULE 16

(1) If the other party agrees with the grounds for challenge of arbitrator submitted by one party or the arbitrator withdraws after the challenge ; the procedure provided in Rule 11 and 12 shall apply for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

(2) The facts that the other party agrees with the grounds for challenge of arbitrator or that the arbitrator withdraws from the appointment shall not be construed to indicate the validity of the grounds for challenge.

RULE 17

In case where the other party does not agree with the grounds for

challenge and the arbitrator does not withdraw from the appointment, the Director shall submit the matter with advice to the Commission without delay. If the Commission satisfies that the grounds for challenge can be substantiated and orders a replacement of arbitrator, Rule 16(1) shall apply *mutatis mutandis*.

RULE 18

In the event of the resignation, death, being placed under a final receiving order or being unable to perform a duty for any other reasons of an arbitrator during the course of the arbitral proceedings ; a new arbitrator shall be appointed to replace him in the same manner as the replaced arbitrator was appointed.

RULE 19

In case where the new arbitrator under Rule 16, Rule 17 and Rule 18 is a sole arbitrator or is the presiding arbitrator of the tribunal, the arbitral proceedings will commence anew. If the new arbitrator is not a arbitrator, the arbitral tribunal shall decide whether to commence the proceedings anew.

Arbitral Proceedings

RULE 20

The parties may agree upon the language or languages to be used in the arbitral proceedings.

RULE 21

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

RULE 22

Unless otherwise agreed upon, the hearings of evidence shall be in the

following manner:

(1) The parties shall submit all the documents in support of their claim or defence to the arbitral tribunal on the first day of the hearings. In case where the arbitral tribunal deems appropriate, the tribunal may order the parties to submit to it all the relevant documents.

(2) The taking of evidence shall be conducted by the arbitral tribunal. The tribunal shall note down the testimony of the witnesses in the memorandum and read it to the witnesses, the witnesses will then sign the memorandum. The memorandum thus signed shall be kept in the dossier of the case.

(3) The arbitral tribunal may assign an officer designated by the Institute to record the testimony in the memorandum.

(4) The hearings shall be held in camera.

RULE 23

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

RULE 24

The arbitral tribunal may appoint one or more experts to report to it in writing. In such case, the parties shall disclose the facts demanded to the expert.

The Institute shall communicate the report to the parties. If requested, the office shall send a copy of the report to the parties.

The parties may file a request to question the expert witness. If the request is granted the rules of the hearings of evidence under Rule 22 shall apply *mutatis mutandis*.

RULE 25

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

SECTION III

THE AWARD

RULE 26

Unless otherwise agreed upon, the award shall be made within 180 days from the day on which the last arbitrator was appointed.

RULE 27

The award shall be made by a majority of the arbitrators. The award must not exceed the scope of the arbitration agreement or the relief sought except in the matters concerning costs, expenses In the arbitral proceedings, the arbitrator's fee or that the award is made in accordance with an agreement or a compromise between the parties.

RULE 28

The arbitral tribunal shall decide in accordance with legal principle and the rule of justice.

In the interpretation of contract, the tribunal shall take into account its enforceability and the usages of trade applicable to the transaction.

RULE 29

The award shall be made in writing and signed by the arbitrators. It shall contain the date on which and the place where the award was made. In case where an arbitrator fails to sign his name in the award, the tribunal or the Director shall state the reason for such absence.

The award shall state clearly the reasons upon which it is based.

The arbitrator, Director, Institute and the Office shall not disclose the award to the public, unless with the consent of the parties.

When the award is made, the Institute shall without delay, deliver a copy of the award to the parties concerned. The award shall be final and binding upon the parties from the day on which it reaches the party.

RULE 30

Within 30 days from the day on which a copy of the award reaches the party, if any reasonable doubt arises concerning the contents of the award, a party may request the arbitral tribunal to interpret such contents. The interpretation shall constitute a part of the award and shall be adhered to in the same manner as the award.

RULE 31

When an award contains an insignificant error or mistake and if the arbitral tribunal itself deems appropriate or upon the application by either party, the arbitral tribunal may correct such error or mistake.

RULE 32

Within 30 days from the day on which a copy of the award reaches the party, either party may request the arbitral tribunal to make an additional award as to any material issue which in the opinion of that party, was not covered in the original award.

If the arbitral tribunal considers the request for an additional award to be justified, it shall complete its additional award within 30 days from the day on which the request has been filed.

If the arbitral tribunal is of the opinion that the additional award cannot be made without any further hearings or evidence, it may request further hearings or evidence from the parties. In such case, the arbitral tribunal shall complete its additional award within 60 days from the days which the request has been filed.

RULE 33

The arbitral tribunal shall deliver the dossier as well as the documents submitted in the case to the Institute within 40 days from the day on which the award is made. In case where there is an interpretation, correction of insignificant error or mistake, or additional award, the arbitral tribunal shall submit the dossier as well as the documents to the Institute when the same is made.

SECTION IV

COSTS EXPENSES AND FEES

RULE 34

Unless otherwise stated in the arbitration agreement, costs and expenses in the arbitral process as well as fees of the arbitrators but not including fees and expenses of legal representation, shall be fixed by the arbitral tribunal in its award.

RULE 35

Before commencing any arbitral proceedings, if the Director deems appropriate, he may request the party concerned to deposit any expenses incurred. In special circumstances, the Director may request the security of costs and fees from the parties.

In case where the parties fail to pay the required expenses, costs or fees within the period specified by the Director, the Director shall report the same to the arbitral tribunal to consider the suspension or termination of the arbitral proceedings.

APPENDIX 9

THAI COMMERCIAL ARBITRATION RULES

Chapter 1

Definitions

ARTICLE 1

In these Rules

(1) The "Thai Commercial Arbitration Committee" means the body of persons appointed by the Thai Chamber of Commerce and foreign chambers of commerce for the purpose of laying down rules, regulations and procedure for the conduct of arbitration, propagating the work of arbitration and acting as intermediary to provide facilities to the parties to the dispute.

(2) The "Office of the Arbitration Tribunal" means the place where the arbitrators sit to settle commercial or business disputes between the contending parties.

(3) The "Arbitration Tribunal" means either a sole arbitrator or two arbitrators appointed by the parties concerned to settle commercial or other business disputes between them and in the event of there being two arbitrators so appointed shall also include, as Chairman, a third person appointed by the Arbitration Tribunal or by the Thai Commercial Arbitration Committee.

(4) The "Parties" means the parties to the dispute who may be natural persons, companies, juristic partnerships, government bodies, government organisations or state enterprises, situated in Thailand or abroad.

(5) "Award" means the decision of the arbitrators which is binding upon both parties.

(6) "Costs" means fees and other expenses, which one or both parties are bound to pay in accordance with the award of the arbitrators.

(7) The "Registrar" means the Secretary of the Thai Chamber of

Commerce or the Secretary of the Board of Trade of Thailand, duly assigned to that position for the time being, or any person appointed by the Thai Commercial Arbitration Committee to act as the Registrar of the Office of the Arbitration Tribunal, including any person assigned to act on behalf of the Registrar.

Chapter 2

Thai Commercial Arbitration Committee

ARTICLE 2.

The Thai Commercial Arbitration Committee consist of fifteen members, seven of whom shall be appointed by the Thai Chamber of Commerce, seven by the foreign Chambers of Commerce situated in Bangkok and Thonburi, and the President of the Board of Trade of Thailand who shall, by virtue of his office, also be Chairman of the Thai Commercial Arbitration Committee.

Committee members shall hold office for two years, on expiration of which term they shall become eligible for re-election.

ARTICLE 3.

The Thai Commercial Arbitration Committee is empowered to determine the location of the Office of the Arbitration Tribunal, to lay down arbitration rules and regulations, to list the names of persons willing to serve on the Panel of Arbitrators and to display the names of such persons at the Office of the Arbitration Tribunal. The said Panel of Arbitrators shall be subject to such changes from time to time as the Thai Commercial Arbitration Committee shall deem expedient.

The Registrar shall, in the discharge of his duties, be under the supervision of the Thai Commercial Arbitration Committee, who will give advice on any problem which may arise.

ARTICLE 4.

The Thai Commercial Arbitration Committee shall acquaint business and industrial circles with its activities, draw their attention to the settlement of disputes by arbitration, and recommend that a clause providing for settlement of disputes by arbitration be included in their contracts.

ARTICLE 5.

A quorum of the meeting of the Thai Commercial Arbitration Committee shall consist of not less than eight members. Resolutions put to the vote at a meeting shall be decided by a simple majority.

Chapter 3

Conciliation of Disputes

ARTICLE 6.

Prior to submitting a dispute to arbitration under these Rules, the parties to the dispute may first endeavour to compose their differences by jointly appointing a conciliator. If agreement is not reached, then each party shall appoint a conciliator; the two conciliators thus appointed shall jointly appoint a third conciliator and together they shall seek an amicable settlement of the dispute. After the conciliators have heard the statements of both parties and examined the facts bearing on the case, they shall sum up and submit the conditions of conciliation to the parties in the dispute within 30 days of the acceptance of the case for hearing.

ARTICLE 7.

If either party does not wish to submit the dispute for settlement by conciliation as provided in Article 6, or either party considers the conciliatory conditions unacceptable, the party concerned shall have the right to refer the dispute to the Arbitration Tribunal for decision.

Chapter 4

Appointment of Arbitrators

ARTICLE 8.

The parties may jointly appoint a sole arbitrator, or they may appoint one arbitrator each from among the persons whose names are listed on the panel provided under Chapter 2, Article 3, or they may appoint any other person. In the case of there being two arbitrators, both of them shall jointly appoint as Chairman a third arbitrator to complete the Arbitration Tribunal. If they are unable to agree to appoint a third arbitrator within 30 days, the matter shall be referred to the Thai Commercial Arbitration Committee who shall make the appointment.

ARTICLE 9.

It shall be the duty of the Arbitration Tribunal to hear the dispute between the parties and to make its award, according to the documentary and any other evidence available.

ARTICLE 10.

Those appointed to serve as arbitrators, shall not be any of the following persons:

(1) a bankrupt.

(2) a person who has been convicted and sentenced to imprisonment except for petty offences or negligence.

(3) an incompetent or quasi-competent person, legally or technically speaking.

(4) a person, who because of ill-health cannot take part in the proceedings of the arbitration Tribunal or who, for any other reason, is unable to perform the functions of an arbitrator.

(5) an interested person, or one whose behaviour bespeaks partiality to

either party.

(6) a person who has previously been appointed and served as conciliator in the same dispute.

ARTICLE 11.

Any challenge arising by virtue of Article 10 shall be made in the manner prescribed below:

(1) The party challenging an arbitrator must notify the Arbitration Tribunal thereof as soon as the challenger shall be aware of the existence of any of the impediments listed in Article 10. A copy of such challenge must be sent to the other party. In any case the challenge must be made before an award is given.

The Chairman of the Arbitration Tribunal shall decide whether such a challenge is justified or not.

(2) The party concerned may appeal against the decision of the Chairman to the Thai Commercial Arbitration Committee.

The appeal shall be submitted within 30 days after the party concerned has been informed of the decision of the Chairman. The decision of the Thai Commercial Arbitration Committee shall be final.

(3) In the event of a challenge to the sole arbitrator or the Chairman, the party concerned shall submit the challenge to the Thai Commercial Arbitration Committee and shall send a copy of the challenge to the other party. The Thai Commercial Arbitration Committee shall decide whether the challenge is justified or not and its decision shall be final.

(4) A party is not entitled to challenge an arbitrator whom it has appointed, except in the case where grounds for disqualification exist under Article 10 and that party proves that it was not aware of the facts at the time of the appointment.

(5) If a challenge is sustained, the party or parties concerned or the

Thai Commercial Arbitration Committee, as the case may be, shall appoint a new arbitrator in replacement and shall where appropriate notify the appointment in writing to the other two arbitrators and the other party within 30 days of the decision on the challenge being made.

(6) Where an arbitrator has accepted to serve and then neglects or delays the discharge of his duties, the parties to the disputes may ask the Thai Commercial Arbitration Committee to remove that person from the office of arbitrator.

ARTICLE 12.

The Office of the Arbitration Tribunal shall be located at the Thai Chamber of Commerce or at any other place as shall be notified by the Thai Commercial Arbitration Committee, from time to time.

ARTICLE 13.

The Registrar is the administrative officer of the Office of the Arbitration Tribunal. His duties are to accept applications from the parties to the disputes; to receive fees, compensation payments and other expenses; to extend facilities to the parties regarding the appointment of arbitrators; to act as co-ordinator between the parties regarding appointments and awards made by the Arbitration Tribunal; to receive and transmit to the Arbitration Tribunal and to either party, any evidence and other documents bearing on the arbitration and to use his best endeavours to ensure that the parties comply freely with the award made by the Arbitration Tribunal. If it is deemed expedient, the Registrar may appoint a representative or any other official to take over certain specific duties.

Chapter 5

Procedure

ARTICLE 14.

In the event of a dispute and of the party or parties desiring to refer it to

the Arbitration Tribunal for decision, the party or parties shall submit to the Registrar a petition together with particulars as specified in Article 17.

ARTICLE 15.

Upon receipt of the aforsesaid petition and particulars under Article 14, the Registrar shall without delay, make arrangements for the Arbitration Tribunal to consider the dispute and make an award in accordance with the procedure specified in these Rules.

ARTICLE 16.

The Registrar shall notify the parties in writing to appoint arbitrators in accordance with the provisions of Chapter 4, Article 8. The Registrar's notice should specify a time limit for compliance of not less than 30 days from the date the notice is served. If either party refuses or fails to appoint an arbitrator, the Registrar shall propose that the Thai Commercial Arbitration Committee appoint an arbitrator on behalf of that party. On receipt of the names of the arbitrators appointed by the parties to the dispute and or the Thai Commercial Arbitration Committee, the Registrar shall inform both parties of such appointments.

ARTICLE 17.

Six sets of the petition under this Chapter should be filed together with the following particulars:

(1) Full names and addresses of the parties

(2) Relevant details of the dispute

(3) Originals or copies of pertinent documents and evidence of any related facts that a party desires to submit.

ARTICLE 18.

On receipt of the petition and the particulars specified in Article 17, the Registrar shall send a copy to the respondent so that the respondent may prepare and submit his statement of defence. This must be submitted in 6 sets,

together with all the documents or facts supporting his statement, within 30 days of the date of receiving the copy of the petition.

ARTICLE 19.

When the Registrar has received the statement of defence from the respondent, he shall send a copy to the petitioner. If it appears that the defence is in the nature of a counter-claim based on the same dispute, the petitioner shall, within 30 days of receipt of the copy of the statement of defence, submit a statement in reply, together with relative documents and any other evidence, in 6 sets.

ARTICLE 20.

The Registrar shall transmit the file of the dispute, including all pertinent documents, received from both parties, to the Arbitration Tribunal appointed by the parties under these Rules and the Arbitration Tribunal proceedings shall be regarded as having been instituted forthwith.

ARTICLE 21.

When any notice is delivered to, or sent by registered post to the addressee at his address, as notified to the Registrar, it shall be regarded as having been served and received.

ARTICLE 22.

After the parties have specifically agreed that the dispute be referred to arbitration for an award under these Rules, the parties are bound to comply accordingly. If either party at a later date should refuse or not desire to submit the dispute to arbitration , the Arbitration Tribunal shall proceed with the arbitration regardless of such refusal or desire of that party.

After the Arbitration Tribunal has reached a decision on the merits of the dispute, compliance with that decision shall be binding on both parties.

ARTICLE 23.

All relevant matters or evidence submitted by the Parties to the dispute

to the Arbitration Tribunal, or notices sent to the parties before or during the arbitration proceedings, shall only be submitted and sent through the Registrar.

ARTICLE 24.

The parties to the dispute shall do all that is necessary to enable the Arbitration Tribunal to hear and decide the case fairly and equitably, and shall refrain from taking any action with the intention of delaying or preventing the Arbitration Tribunal from deciding the dispute. If it becomes manifest that any party has acted in this manner, such party will be responsible for damage to the other, as may be deemed appropriate by the Arbitration Tribunal.

ARTICLE 25.

The Arbitration Tribunal shall judge and decide the arbitration on the basis of written and other evidence bearing on the dispute.

ARTICLE 26.

The Arbitration Tribunal shall be empowered to call for the testimony of witnesses; also for documentary and other tangible evidence as may be deemed appropriate and necessary for the purpose of the proceedings; further, to specify the time and place for the conduct of the proceedings and for the hearing of testimony from witnesses and the verbal statements of the parties to the dispute.

As it may deem necessary, the Arbitration Tribunal may question the parties to the dispute and/or the witnesses and may demand them to give testimony on oath, or by affirmation.

ARTICLE 27.

In such arbitration proceedings, the parties to the dispute are entitled to appoint legal advisers, attorneys, or representatives to be present at such proceedings and to make statements on any fact or question, on their behalf.

ARTICLE 28.

Should the Arbitration Tribunal deem it expedient, it may require the

parties to make a summarised statement of the points at issue, both legal and factual, within a time limit to be laid down by the Arbitration Tribunal.

If the problems are technical in nature, the Arbitration Tribunal may invite the services and advice of experts in deciding the dispute.

ARTICLE 29.

The Arbitration Tribunal may, as it considers fit, issue any instruction or order, while the arbitration proceedings are in progress and such instruction or order must be complied with by the parties to the dispute.

ARTICLE 30.

The Arbitration Tribunal is entitled to retain all documents and tangible evidence used in the proceedings until the conclusion of the arbitration, and may issue any order in regard to such documents and tangible evidence as it may deem fit.

Chapter 6

Award

ARTICLE 31.

If the Arbitration Tribunal is composed of more than one arbitrator, the award of the Arbitration Tribunal shall be made on the basis of the majority of votes.

ARTICLE 32.

The award shall be made in writing within 120 days of the joint appointment of a sole arbitrator by the parties to the dispute, or the appointment of the Chairman, or within such extension of time as has been mutually agreed upon by both parties.

ARTICLE 33.

Awards or orders should specify the name of the place and the date they were made or issued. They should bear the signature (s) of the arbitrator

or arbitrators conducting the arbitration proceedings and be counter-signed by the Registrar of the Office of the Arbitration Tribunal.

ARTICLE 34.

The award should clearly specify the obligation, costs and other expenses, which either one or both parties shall perform or undertake, to whom such performance is due and in what manner it is to be performed.

ARTICLE 35.

After an award has been made or an order issued, the Registrar shall send such order or award to all parties concerned within 3 days thereof.

Chapter 7

Fees, etc.

ARTICLE 36.

Fees, remuneration, transport expenses and other expenses shall be in accordance with the following rates and conditions:

(1) The fees of the Office of the Arbitration Tribunal shall be one per cent of the amount claimed or of the total value of the dispute, but shall be not less than Baht 1,000.00 and not more than Baht 20,000.00 and shall be paid by the petitioner to the Registrar upon filing his petition.

(2) The rates of remuneration and travelling expenses for the Arbitration Tribunal shall be fixed by the Thai Commercial Arbitration Committee, from time to time.

(3) Remuneration and travelling expenses of witnesses shall be determined by the Arbitration Tribunal.

(4) The fee for issuing a certified copy of the arbitration award shall be Baht 100.00.

(5) The cost of duty stamps affixed on the arbitration award shall be in accordance with the provisions of the Revenue Code.

(6) Expenses other than those specified in (1) to (5) shall be fixed by the Thai Commercial Arbitration Committee as it deems suitable.

ARTICLE 37.

If both parties agree to withdraw the case before an arbitration award is made, the Arbitration Tribunal may, at its discretion, refund all or part of the costs to the parties to the dispute.

Chapter 8

Miscellaneous

ARTICLE 38.

Where the parties have submitted their dispute for arbitration and award under these Rules, none of the parties shall take any action at law against the Thai Commercial Arbitration Committee, the Arbitration Tribunal or the Registrar with a view to claiming damages arising from the performance of their work or from the arbitration of the dispute assigned to them.

ARTICLE 39.

In the event of the parties to the contract agreeing to settle disputes under the Thai Commercial Arbitration Rules, they should incorporate such agreement in their contracts in clear and explicit terms, such as the following:

"Both parties agree to accept the Thai Commercial Arbitration Rules to govern settlement of disputes. In the event of any disagreement or dispute concerning or arising from this contract where the parties are unable to reach agreement, settlement shall be made by arbitration under the Thai Commercial Arbitration Rules in force at the time the disagreement or dispute arose".

Chapter 9

Amendments and Additions to the Thai Commercial, Arbitration Rules

ARTICLE 40.

Amendments and additions to the Thai Commercial Arbitration Rules

may be made as and when the Thai Commercial Arbitration Committee shall deem necessary. but subject to at least one-third of the total number of members subscribing their names to a request for the summoning of a meeting for this purpose and submitting the request to the Chairman of the Thai Commercial Arbitration Committee.

Within 14 days after receipt of the request for such a meeting, the Chairman of the Thai Commercial Arbitration Committee shall convene the meeting by giving at least 7 days' notice.

At any meeting of the Thai Commercial Arbitration Committee convened for the purpose of making amendments and additions to these Rules as stated above, the quorum shall consist of at least four-fifths of the total number of members and any resolution there on shall be carried only if it shall be adopted by a majority of at least three-quarters of the members present. If a quorum is not present at the first meeting, another meeting shall be called within 14 days by giving at least 7 days' notice thereof and the Committee shall proceed to business even if a quorum is not present as stipulated above. A resolution put to the vote at the latter meetings shall be decided by a simple majority.

ARTICLE 41.

The Thai Commercial Arbitration Rules shall be available for all to see at the Office of the Arbitration Tribunal and shall be published, from time to time, in the journal of the Thai Chamber of Commerce and/or in other regularly published periodicals.

PROCEDURE NO. 1/2511

Re: Petition for Arbitration

So that filing of petitions for settlement of disputes by arbitration may comply In all respects with the Thai Commercial Arbitration Rules, it has been found expedient to lay down rules to regulate such procedure, with which those interested in seeking settlement of disputes by arbitration should comply,

as follows:-

Clause 1. The petitioner shall file his petition in sextuplicate with the Registrar at the Office of the Arbitration Tribunal located at the Board of Trade, 150 Rajbopit Road, Bangkok. The petition shall contain the following particulars:

(1) Clearly state the name, (i.e. the name of the person, partnership, company, state enterprise or other juristic person) and the address of the petitioner.

(2) Clearly state the name (i.e. the name of the person or firm, company, state enterprise or other juristic person) and address of the respondent, who is a party to the contract..

(3) The points at issue, including documents and evidence supporting the facts of the charge. The reasons and necessity for submitting the dispute for arbitration should also be stated.

(4) In the event of the petitioner demanding pecuniary compensation the basis of calculation and the total amount of compensation involved should be clearly specified. If the petitioner only requires the other party to perform or refrain from performing any act in accordance with the petitioner's rights under the contract, or according to the terms of agreement therein, then it must be clearly stated as to when and how such act should be performed, or should not be performed.

Clause 2. The petitioner should attach in sextuplicate, the contract or copies of the documents or references relevant to the petition.

Clause 3. If the petitioner desires the dispute to be settled by conciliation prior to its being subject to arbitration, such intention should be so stated in the petition.

Clause 4. The petitioner shall reaffirm at the end of the petition that he is aware of and is prepared to comply with the instructions, rules and regulations of the Thai Commercial Arbitration Rules in every respect.

Clause 5. The party affixing his signature to the petition for arbitration of dispute by the Thai Commercial Arbitration Tribunal should clearly specify the status and/or position he holds in relation to the person or juristic person concerned and should affix the seal of that particular juristic person as evidence. Only such petitions shall be regarded as valid and complete in accordance with the Thai Commercial Arbitration Rules.

This Procedure shall become effective as from 1st July, 1968 onwards.

APPENDIX 10

ARBITRATION RULES OF THE VIETNAM INTERNATIONAL ARBITRATION CENTRE AT THE CHAMBER OF COMMERCE AND INDUSTRY OF VIETNAM

(adopted to take effect on Aug. 20, 1993)

ARTICLE 1

The present Rules of Arbitration are formulated in accordance with Article II of the Statutes of the Vietnam International Arbitration Centre issued in conjunction with Decision No.204/TTg dated April 28, 1993 of the Prime Minister of the Government of the Socialist Republic of Vietnam.

Jurisdiction

ARTICLE 2

The Vietnam International Arbitration Centre (hereinafter referred to as the Centre) shall be responsible for the hearing of the disputes arising from international economic relations, such as foreign trade contracts and those concerning investment, tourism, international transport and insurance, transfer of technology, services, international credits and payments, etc.

ARTICLE 3

The Centre shall have power of jurisdiction over any dispute:

(1) Where one of the parties to the dispute is a foreign physical or juridical person or all the parties are foreign physical or juridical persons, as the case may be.

(2) Where, prior to or after the occurrence of the dispute, the parties agree to refer it to the Centre or where, by virtue of an international treaty, they are bound to do so.

Request for arbitration

ARTICLE 4

The arbitration proceedings shall be instituted with a Request for arbitration submitted by the plaintiff to the Centre.

The date of submission of the Request for arbitration shall be the date of handing it to the Registrar of the Centre or if the Request for arbitration is sent by post, the date of dispatch stamped on the envelope by the local post office.

ARTICLE 5

The Request for arbitration shall contain the following particulars:

(1) The names and addresses of the plaintiff and the defendant respectively;

(2) The specific request(s) of the plaintiff, with a statement of relevant facts supported by evidence;

(3) The legal ground(s) on which the plaintiff proceeds with his Request for arbitration;

(4) The amount of the claim;

(5) The name of the arbitrator whom the plaintiff has chosen from among the listed arbitrators of the Centre or the request made by the plaintiff that an arbitrator be appointed by the President of the Centre on his behalf.

The Request for arbitration must be written in the Vietnamese language or in a foreign language widely used in international transactions (English, French, Russian).

ARTICLE 6

The Request for arbitration and accompanying documents shall be submitted, each in one original, with a sufficient number of copies to be sent to

the arbitrators hearing the case and the defendant.

ARTICLE 7

On filing the Request for arbitration, the plaintiff shall make an advance of the total amount of the arbitration fees payable under the relevant "Schedule of Arbitration Fees and Costs of the Vietnam International Arbitration Centre and expenses of the parties" annexed to the present Rules.

The above advance payment shall be credited to the account of the Chamber of Commerce and Industry of Vietnam at the Bank for Foreign Trade of Vietnam.

The document evidencing the remittance of the advance shall be filed together with the Request for arbitration.

Should the plaintiff fail to make the whole advance payment, the case shall not be yet accepted for hearing.

Choice and appointment of arbitrators

ARTICLE 8

After receipt of the Request for arbitration, the Registrar of the Centre shall notify the defendant thereof and send to the latter a copy of such Request and those of the accompanying documents together with the List of arbitrators.

The Registrar of the Centre shall, at the same time, request the defendant to submit to the Centre his statement of defence, supported by pieces of evidence, within thirty days from the date of receipt of the copy of the Request for arbitration. At the request of defendant, this time-limit may be extended but shall not, however, exceed two months.

The defendant shall, within the said time-limit, proceed with the choice of his arbitrator and notify the Centre thereof or, alternatively, request the President of the Centre to appoint an arbitrator on his behalf. Should the defendant fail to make such choice or request, the President of the Centre shall then appoint the arbitrator for him.

ARTICLE 9

The arbitrators either chosen by the parties or appointed in accordance with Article 5 and Article 8 above shall jointly elect a third arbitrator from among the listed arbitrators of the Centre to act as Chairman of the arbitral tribunal responsible for the settlement of the dispute.

Should again the arbitrators fail in the choice of the third arbitrator to constitute the arbitral tribunal the President of the Centre shall, within fifteen days from the date on which the second arbitrator is chosen, appoint the Chairman of the arbitral tribunal.

Where two or more plaintiffs or defendants are involved, the same plaintiffs or defendant shall have to agree on the choice of a single arbitrator, failing which the President of the Centre shall appoint an arbitrator for them.

ARTICLE 10

In the event the parties to the dispute appoint a single arbitrator or, by mutual consent, request the President of the Centre to appoint such an arbitrator on their behalf or otherwise fail to reach an agreement so that the President of the Centre has, instead, to appoint the arbitrator for them, the case shall then be heard by a sole arbitrator. In this case, the sole arbitrator shall act as the arbitral tribunal.

ARTICLE 11

Either of the parties shall have the right to challenge an arbitrator or the Chairman of the arbitral tribunal or the sole arbitrator, as the case may be, if the challenging party has doubt about his impartiality, particularly if the latter contends that he is directly or indirectly related to the dispute. Likewise, an arbitrator or the Chairman of the arbitral tribunal or the sole arbitrator shall have the right of self-recusation. The challenge must be sent to the arbitral tribunal for examination. Each party shall be able to challenge only the arbitrator appointed by it, on the grounds which become known after making the appointment.

Any challenge shall be subject to examination and decision by the other members of the arbitral tribunal. Should the latter fail to reach a mutual agreement or should the two arbitrators or the sole arbitrator be challenged, as the case may be, the matter shall ultimately be examined and decided by the President of the Centre.

If the challenge is sustained, the new arbitrators or a new Chairman of the arbitral tribunal or a new sole arbitrator shall be chosen or appointed in accordance with the present Rules.

ARTICLE 12

If, during the proceedings, the Chairman of the arbitral tribunal or the sole arbitrator or an arbitrator is no longer in a position to take part in the hearing of the case, a new Chairman of the arbitral tribunal or a new sole arbitrator or a new arbitrator shall be chosen or appointed in accordance with the present Rules.

Where necessary, the arbitral tribunal may, after consultation with the parties, proceed with the reexamination of any matter put forward in previous sittings.

Counterclaim

ARTICLE 13

Before the sitting of the arbitral tribunal, the defendant may lodge a counter claim. The counter claim shall have to be made in accordance with the formalities laid down in Article 5, Article 6, and Article 7 of the present Rules.

Within thirty days of receipt of the notification of the counter claim, the plaintiff shall have to submit a statement in reply to the arbitral tribunal which hears the original Request for arbitration.

The counter claim shall be heard together with the original Request for arbitration.

Pre-hearing inquiry

ARTICLE 14

After being duly chosen or appointed, the arbitrators shall proceed with a study of the file of the dispute and conduct an inquiry by all appropriate means.

The arbitrators shall have the right to personally meet the parties for their verbal statements whether at the request of either or both of them or on their own initiative. Moreover, the arbitrators may decide to acquaint themselves with the matter from other persons either in the presence of the parties or after notifying the latter thereof.

The arbitrators may seek the help of one or more experts, assign them specific duties, receive their written reports and/or personally listen to their verbal statements.

ARTICLE 15

The arbitral tribunal shall supervise the preparations for the hearing of the dispute and, where necessary, take such measures as requesting the parties to provide written explanations, pieces of evidence and related documents. Where the additional measures are taken to complete the preparations, the arbitral tribunal shall fix a time-period for their execution.

The Chairman of the arbitral tribunal may assign to the Registrar of the Centre certain duties in connection with the preparations for the hearing, the summoning of the parties to the hearing, etc.

Hearing procedure

ARTICLE 16

The date of hearing shall be decided by the Chairman of the arbitral tribunal.

ARTICLE 17

The parties to the dispute shall be called to the hearing by summons, with clear indications as to the time and place of hearing. The summons shall be served thirty days prior to the date of hearing. Subject to agreement between the parties, this time-limit may be reduced or reasonably extended by decision of the Chairman of the arbitral tribunal.

ARTICLE 18

The hearing shall take place in Hanoi.

At the request of the parties or where it is deemed necessary, the Chairman of the arbitral tribunal may decide another location on the territory of Vietnam for the hearing.

ARTICLE 19

The parties may attend the hearing either personally or through their authorised representatives with power of attorney issued in due form. Such representatives may be Vietnamese citizens or foreigners.

The parties may have solicitors to defend their respective interests.

ARTICLE 20

In the absence of one or all the parties without legitimate reason, the arbitral tribunal or the sole arbitrator, as the case may be, may proceed with the hearing on the basis of available documents and pieces of evidence.

ARTICLE 21

If the parties so request or accept, the arbitral tribunal or the sole arbitrator may, on the basis of the file of the dispute, make a decision in their absence.

ARTICLE 22

The arbitral tribunal shall conduct the hearing in the Vietnamese language.

The parties may request the Centre to provide interpreters at their own expenses.

ARTICLE 23

The arbitral tribunal or the sole arbitrator, as the case may be, shall settle the dispute on the strength of the terms and conditions of the original contract, if the dispute arises from relations thereunder, in accordance with the law applicable to it and with any related international treaty, taking into account the trade usages and international practice.

In the hearing process, the arbitrators shall judge the matter in their own interpretation, objectively and honestly.

ARTICLE 24

All disputes shall be heard in private. With the consent of the parties, the arbitral tribunal may allow persons not involved in a dispute to attend the hearing.

ARTICLE 25

Any decision of the arbitral tribunal shall be taken by a majority vote. The minority opinion shall however be duly recorded. When there is no majority, the Chairman of the arbitral tribunal shall issue the decision as the sole arbitrator.

ARTICLE 26

The record of the proceedings shall be made by the secretary appointed to the hearing and shall bear the signature of the Chairman of the arbitral tribunal or the sole arbitrator, as the case may be.

The record shall contain the following particulars:

(1) The number of the file of the dispute;

(2) The place and date of hearing;

(3) The name of the parties to the dispute and their

representatives;

(4) The names of the arbitrators, the secretary, the experts, the witnesses, if any, and the other persons attending the hearing;

(5) A summary of the proceedings; and

(6) The requests made by the parties and a summary of their statements.

The parties have the right to acquaint themselves with the contents of the record. Any amendment or addition to the record as may be requested by one or all the parties shall be subject to decision of the arbitral tribunal.

Conclusion of the proceedings

ARTICLE 27

The arbitration proceedings shall end with an award or decision made by the arbitral tribunal.

ARTICLE 28

The award shall contain the following particulars:

(1) The name of Vietnam International Arbitration Centre;

(2) The place and date of issuance of the award;

(3) The names of the arbitrators or the name of the sole arbitrator, as the case may be;

(4) The object of the dispute and a summary of how the matter evolves;

(5) The decision made on the dispute and on the arbitration fees and other costs involved;

(6) The ground on which the decision is made; and

(7) The signatures of the arbitrators or the signature of the sole

arbitrator, as the case may be, and that of the secretary appointed to the hearing of the dispute.

Should any of the arbitrators fail to sign his name on the award, the Chairman of the arbitral tribunal shall confirm the case, with his own signature and a mention as to the cause of his action.

ARTICLE 29

The award of the arbitral tribunal shall be announced immediately after its last sitting, or may be announced later.

The full text of the award shall be communicated to the parties at least within 30 days from the date of the last sitting of the arbitral tribunal.

In special cases, the arbitral tribunal may decide to communicate the award later than tile thirty-day period.

ARTICLE 30

The arbitral tribunal may make an additional decision if it is found that certain points in the original award are yet to be further clarified and fully settled.

Likewise, the arbitral tribunal may, at the request of the parties or on its own initiative, make a decision for the correction of some misprint or error of calculation or in the use of technical terminology without affecting the substance of the award or the nature of the dispute.

The decision for any such correction of amendment shall form part of the original award without involving payment of any fee by the parties.

ARTICLE 31

Any award made by the arbitral tribunal shall be final and, therefore, cannot be appealed before any other law court or organisation. The parties involved shall carry out the award within the specified period.

If the award is not voluntarily executed within the specified period,

effective measures of enforcement shall be applied, in accordance with the law of the country where enforcement of the award is sought and with international treaties applicable to the case.

ARTICLE 32

The arbitral tribunal may issue a decision to end the arbitration proceedings. Any such decision shall be applicable to the following cases:

(1) Where the plaintiff withdraws his Request for arbitration;

(2) Where the parties reach a direct agreement, without involving a hearing by the arbitral tribunal;

(3) Where the necessary conditions for consideration and decision on the case are absent, including the inactivity of the plaintiff within the first six months.

Arbitration fees and other costs

ARTICLE 33

The calculation and distribution of arbitration fees and costs as well as the refund of such fees and costs shall be made in accordance with the attached "Schedule of Arbitration Fees and Costs of the Vietnam International Arbitration Centre and expenses of the parties"

ARTICLE 34

The arbitration fees and other costs shall be paid immediately after the receipt of the arbitration award by the parties.

Direct conciliation between the parties

ARTICLE 35

If, in the course of proceedings at the Centre, the parties reach a direct mutual conciliation, the arbitral tribunal shall cease the proceedings thereafter. The parties may, however, request the President of the Centre to confirm such a conciliation in writing. Any such confirmation shall be valid as an arbitral

decision.

The President of the Centre shall fix the arbitration fees and costs to be borne by the parties respectively.

Final provisions

ARTICLE 36

Document sent out by the Centre shall be addressed to the interested parties by way of registered mail or by any other safe means.

The hearing time-table may be communicated by way of telegraph, telex, fax.... with followed letters of confirmation.

Any such documents may be directly delivered to the parties with due acknowledgement.

Any documents sent out by the Centre shall be considered as delivered even in cases of refusal by the addressee or the latter's failure to come to the local post-office to receive them.

ARTICLE 37

The arbitrators and other personnel of the Centre shall be responsible for the secrecy and confidentiality of the matters involved in a dispute.

ARTICLE 38

The files of the dispute and the arbitral awards or decisions shall be deposited with the Registrar of the Centre.

The Registrar may send certified copies of arbitral awards or decisions to the parties concerned, at the latter's request.

APPENDIX 11

AGREEMENT ON JUDICIAL ASSISTANCE IN CIVIL AND COMMERCIAL MATTERS AND CO-OPERATION IN ARBITRATION BETWEEN THE KINGDOM OF THAILAND AND THE PEOPLE'S REPUBLIC OF CHINA

The Kingdom of Thailand and the People's Republic of China (hereinafter referred to as "the two Contracting Parties"),

Desiring to strengthen the historical bonds of friendship between the two countries, realizing the advantage of promoting the co-operation in judicial and arbitration fields on the basis of mutual respect for sovereignty, equality and mutual benefit of the two countries,

Have agreed as follows :

Title I

Judicial Assistance

Chapter I

General Provisions

ARTICLE 1

Scope of Judicial Assistance

The two Contracting Parties agree to co-operate with each other in serving judicial documents and obtaining evidence in civil and commercial matters.

ARTICLE 2

Judicial Protection

1. Nationals of either Contracting Party shall enjoy the same judicial protection that the other Contracting Party grants to its nationals, and shall have free access in the territory of the other Contracting Party to the courts and may appear before them under the same conditions as nationals of the other

Contracting Party.

2. The provisions of this Agreement referring to nationals of each Contracting Party, except Article 3, shall also apply to juristic persons constituted under the law of each Contracting Party and domiciled in its territory.

ARTICLE 3

Legal Aid and the Exemption of the Costs of Proceedings

1. Nationals of either Contracting Party shall enjoy in the territory of the other Contracting Party legal aid under the same conditions and within the same scope as provided for nationals of the other Contracting Party.

2. Nationals of either Contracting Party may enjoy in the territory of the other Contracting Party reduction or exemption of the costs of proceedings under the same conditions and within the same scope as provided for nationals of the other Contracting Party.

ARTICLE 4

Channels of judicial Assistance

1. The Judicial assistance shall be requested and rendered through the Central Authorities of the two Contracting Party unless provided otherwise in this Agreement.

2. The Central Authority for the Kingdom of Thailand in the Ministry of Justice (Office of the Judicial Affairs) and the Central Authority for the People' Republic of China is the Ministry of Justice (Bureau of International Judicial Assistance).

ARTICLE 5

Language

1. The request and the Letter of Request shall be written in English. A translation into English or the official language of the requested Party of the accompanying documents must also be transmitted, together with the request or the Letter of Request to the Central Authority of the requested Party.

2. Such translation must be duly certified in accordance with the law

and practice of the requesting Party. No legalization or other formality is required.

ARTICLE 6

Fees and Expenses of Judicial Assistance

The execution of The request and the Letter of Request shall be free of charge except for the expert fees and expenses for the for the translation done in accordance with paragraph 2 of Article 17, if such translation is requested.

Chapter II

Services of Judicial of Documents

ARTICLE 7

Making of Request

1. The Central Authority of the Contracting Party from which the documents originate shall forward the request to the Central Authority of the other Contracting Party without any requirement of legalization or other like formality.

2. The documents to be served or a copy thereof shall be attached to the request.

3. The request and the documents shall both be furnished in duplicate.

ARTICLE 8

Particulars of Request

The request shall be accompanied by related documents and shall specify the following particulars :

(a) The title and address of the Court making the request ;

(b) The nature of the proceedings in which the service is required ;

(c) The name and addresses of the parties to the proceedings and there representatives, if any ;

(d) The name and address of the addressee ;

(e) Such information as may be necessary concerning the nature of the documents to be served and any requirement or specific form to be used.

ARTICLE 9

Execution of Request

1. The request duly made in accordance with the provision of this Agreement shall be executed unless :

(a) The execution is impossible on account of absence of the people upon whom service is requested or on account of inability to located such person or for any similar reason ;

(b) The requested Party considers the execution of the request would be contrary to its public policy or prejudicial to its sovereignty or security.

2. If the request is not executed, the Central Authority of the requested Party shall as soon as possible inform the Central Authority of the requesting Party of the reason for failure to execute it.

3. The execution of the request for service of judicial documents shall be effected expeditiously in the manner prescribed by the law of the requested Party or in the manner specifically requested, provided that such manner is not incompatible with the law of the requested Party

4. Proof of services of judicial documents shall be given by a certificate of the Central Authority of the requested Party stating that the documents have been served and specifying the manner and date of service together with a dated and signed receipt from the addressee, if any.

ARTICLE 10

Service of Documents by Diplomatic or Consular Agencies

Each Contracting Party shall have the right to serve judicial documents on its own nationals resident in the territory of the other Contracting Party through its diplomatic or consular agencies provided that the law of the other of the other Contracting Party will not be violated and no compulsory measures of any kind will be taken.

Chapter III

Taking of evidence

ARTICLE 11

Scope of Taking of Evidence

1. In civil or commercial matters, accord of either Contracting Party may, in accordance with the provisions of the law of that Party, request the competent authority of the other Contracting Party, by means of a Letter of Request through obtain evidence.

2. The Letter of Request shall not be used to obtain evidence which is not intended for used in judicial proceedings.

ARTICLE 12

Particulars of Letter of Request

The Letter of Request shall be accompanied by related documents and shall specify the followings particulars :

(a) The title and address of the Court making the Letter of Request ;

(b) The nature of the proceedings in which the evidence is required ;

(c) The names and addresses of the parties to the proceeding and their representatives, if any ;

(d) The names and addresses of witnesses or addressee ;

(e) The documents or properties to be inspected ;

(f) Such information as may be necessary concerning the circumstances as to which evidence is to be taken, the questions to be put to the persons to be examined, and any requirement that the evidence is to be given on oath or affirmation or in any other specific manner.

ARTICLE 13

Notice and Right to be Present

1. In the execution of the Letter of Request, the Court or the Central Authority of the required Party, shall, if so required, give reasonable notice of the time and place of its intended taking of evidence to any person designated to this end by the Court issuing the request and to the Central Authority of the requesting Party.

2. In the taking of evidence the parties to the proceedings or their representatives may be allowed to be present. Those parties and their representatives shall comply with the law of the requested Party when participating in the activities herein referred to.

ARTICLE 14

Execution of Letter of Request

The Execution of the Letter of Request shall be effected expeditiously in the manner prescribed by the law of the requested Party or in the manner specifically requested provided that such manner is not in compatible with the law of the requested Party.

ARTICLE 15

Privileges and Immunities of Witnesses

In the execution of the Letter of Request, the person concerned may refuse to give evidence in so far as he has privileges and immunities or duties to refuse to give evidence :

(a) Under the law of the requested Party ; or

(b) Under the law of the requesting Party, and the privileges and immunities or duties have been specified in the Letter of Request, or, at the instance of the requested Central Authority, have been otherwise confirmed to that Authority by the requesting Central Authority.

ARTICLE 16

Refusal to Execute

The Letter of Request made in accordance with the provisions of this agreement shall be executed unless:

(a) The execution of The Letter of Request does not fall within the competence of the judiciary of the requested Party ; or

(b) The execution is impossible on account of absent of the person whose testimony is to be taken, or on account of inability to locates such person or for any similar reason ; or

(c) The requested Party considers the execution of the Letter of Request would be contrary to its public policy prejudicial to its sovereignty or security.

2. The execution may not be refused, solely on the ground that under its internal law the requested Party claims exclusive jurisdiction over the subject – matter of the action or that its internal law does not admit a right of action on it.

ARTICLE 17

Certificate of execution and Translation

1. The Central of Authority of the requested Party shall transmit a certificate in English of the fact specifying the date and manner of the execution of the Letter of Request, together with any evidence obtained, to the Central of Authority of the requesting Party.

2. The Central of Authority of the requested Party shall, upon request, cost such record of testimony taken or documents obtained to be translated into English or the official language of the requesting Party.

3. Such translation must be duly certified. No legalization or other like formality is required.

ARTICLE 18

Exchange of Judicial Information

The two Contracting Party shall transmit to each other on request, in accordance with the law of the requested Party, extracts from judicial records and registration concerning the case in which the nationals of the requesting Party are involved.

Title II

Co-operation in Arbitration

ARTICLE 19

Scope of Co-operation

1. The two Contracting Parties agree to promote arbitration as a means for the settlement of commercial and maritime disputes.

2. For the purpose of the first paragraph, the two Contracting Parties shall encourage the arbitration organizations in their respective territories to provide each other, on request, with information, list of arbitrators, facilities and convenience for proceedings.

ARTICLE 20

Recognition and Enforcement of Awards

Each Contracting Party shall, in accordance with the convention on the recognition and enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958, recognize and enforce arbitral awards made in the territory of the other Contracting Party.

Title III

Interpretation, enforcement and revocation

ARTICLE 21

Settlement of Disputes

Any dispute arising out of the interpretation and execution of this Agreement shall be settled by consultation or negotiation through diplomatic channels.

ARTICLE 22

Ratification and Entry into Force

This Agreement is subject to ratification and the instruments of ratification shall be exchanged in Bangkok.

This Agreement shall enter into force 30 days after the exchange of instrument of ratification.

ARTICLE 23

Termination

1. This Agreement shall remain in force until terminated by either Contraction Party giving one year prior written notice of its intention to the other Contracting Party through diplomatic channels.

2. The termination of this Agreement shall not prejudice any proceedings commenced prior to the dated of such termination.

IN WITNESS WHEREOF, the undersigned, being duly authorized have signed this Agreement.

Done in duplicate at Beijing on the sixteenth day of March, One Thousand Nine Hundred and Ninety Four in the Thai, Chinese and English languages, all the three texts being equally authentic. In case of divergence, the English text shall prevail.

APPENDIX 12

DIKA 5513/2540[1]

By Thawatchai Suvanpanich[2]

Plaintiff sought to enforce the award, rendered in England, in the Thai Court. The defendant challenged the enforcement. He claimed that he had never entered into agreement with the plaintiff, so the award did not bind him. Consequently, the First Instance Court denied the enforcement. The plaintiff appealed the decision of the Fist Instance Court. The Appeal Court confirmed the decision of the low court but on the different ground. It held that the arbitral procedure was not comply with the Rules of the Institution, so it was against the public policy. As a result, the award was not enforceable.

The Dika Court reversed the decisions of the both low courts. It held that the court may deny the enforcement of foreign award on the grounds provided in Article 34 and 35 of the Thai Arbitration Act of 2530. The Article 34 provides that:

"An application for the execution of a foreign arbitral award under the auspices of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, may be denied by the court, if the party against whom the execution of the award is sought can prove that;

(1) Any party to the arbitration agreement was, under the law applicable to him, under some incapacity;

(2) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made ;

(3) The party against whom the award is invoked was not given proper notice

---

[1] Published in "The Intellectual Property and International Trade Law Forum : Special Issue 1998", pp. 297.

[2] Lecturer of Law at the STOU, Thailand. The writer would like to thank Jonathan Pyne, Herbert Smith (Thailand), for his value comment.

of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(4) The award contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforce;

(5) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(6) 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. If merely an application for the setting aside or suspension of the award has been made to a competent authority, the court where the enforcement of the award is sought may, if it deems appropriate, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Besides, the Court may deny the award if it falls within the provision of the Article 35, which provides that:

"The court may refuse recognition and enforcement of the award under Section 34 if it appears before the court that the subject matter of the dispute is not capable of settlement by arbitration under Thai law, or that the recognition or enforcement of the award would be contrary to the public policy or good morals or the principle of international reciprocity."

The Dika Court then concluded that the defendant did not prove the grounds, which the court may deny the enforcement. Neither did it appear that the dispute was not arbitrable under Thai laws. The award therefore was enforceable.

In respect of the public policy ground, the Dika Court held that the award complied with the Rules without saying the public policy issue. The award thus was enforceable.

There are two interesting questions on this Dika's decision. The first is why the non-binding arbitration agreement is enforceable. The second is what is the concept of public policy under Thai law.

According to the First Instance Court, the Court believed that the agreement was not binding the defendant. The award therefore can not be enforceable. The Dika Court, although held that the arbitration agreement was not binding, reversed and held that the award was enforceable. According to the Dika Court, the defendant did not prove the grounds, which provide in Article 34 and 35, for the court to refuse the enforcement. One may be doubt why the award, which came from the non-binding arbitration agreement, can be enforced. The Article 34 clearly provides that the enforcement of the foreign award may be refused, "if the party against whom the execution of the award is sought can prove that: (2) The arbitration agreement is not valid *under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*;". (emphasis added)

In this respect, the Dika's decision, although not clearly stated the reasons, is right. Although the defendant could prove that the arbitration agreement was not binding him, he proved under the Thai law, which was wrong. He is obliged to prove under the law to which the parties have subject it, which in fact they have not agreed so. Otherwise, he must prove under the law of the country where the award was made, which in fact is the English law, not the Thai law. Thus, as the Dika said, the defendant did not prove the grounds for the court to refuse the enforcement.

The other interesting question is the concept of the public policy. Whether is the arbitral procedure, which does not comply with the Institution Rules, against the public policy? The appeal court held that such procedure is

against the public policy. However, the Dika Court held that such procedure complied with the Rules. It is regrettable that the Dika was silent on the public policy issue.

The question here is what if it appears that such procedure is considered not comply with the Rules. Is it deemed against the public policy, like the Appeal Court's decision?

The public policy is the major problem in application of the New York Convention. This is simply because the term "public policy" is various from place to place and time to time. A situation deemed against the public policy of State A may not be so in State B. Dr. Julian Lew rightly stated that "The uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy".(Dr Lew, Applicable Law in International Commercial Arbitration, at p. 531)

Although the term "public policy" is difficult to defy, it plays the significant role in the New York Convention and the Model Law. Briefly, the award may be set aside if it is against the public policy of the State which the arbitration took place. As a result, such award can not be enforced in other states, which are the parties of the New York Convention. Although the award was survived from setting aside in the State which the arbitration took place, its enforcement is still uncertain. The court of the award-enforcing State may deny enforcing such award if it is against the public policy of that State.

Thus, the effectiveness of the enforcement of the award under the New York Convention depends on something that is very abstract and unpredictable. This is, of course, not the purpose of the business community, which needs the certainty and predictability. To reduce such problem, it is universally accepted that the term "public policy" should be narrowly interpreted.

Although the Thai courts has not yet cleared the term "public policy" under the New York Convention, it is hoped that the Thai courts shall support the international commercial arbitration by narrowly interpreting the term

"public policy" as those court in most States do. This is not for the benefit of any society but for the whole world of business community.

APPENDIX 13

DISPUTE RESOLUTION IN ASIA

THAILAND[1]

By Thawatchai Suvanpanich

10.1. Litigation and Mediation

10.1.1. RULES ON JURISDICTION/COMPETENCE

The general rules of jurisdiction of Thai court are contained in Civil Procedure Code.[2] Before 1991, these rules apply domestically and intra-nationally to determine which Thai court has power to hear a particular case but their application to international case is unclear. In 1991 the provisions concerning jurisdiction of court have been revised and now grants courts far-reaching jurisdiction even over parties not domiciled in Thailand.

The CPC[3] provides that no plaint may be submitted to a Court unless:

(a) having regard to the nature of the plaint and the grade of the Court, it appears that such Court is competent to try and adjudicate the case under the provision of law governing the organization of Courts of Justice, and

(b) having regard to the plaint, it appears that the case is within the territorial jurisdiction of such Court under the provisions of the Civil Procedure Code governing venue and also under the provisions of law fixing the limits of the territorial jurisdiction of Courts.

This section summarizes the importance laws concerning the jurisdiction of Thai Court. Such laws are the Organization of Courts of Justice,[4] Civil Procedure Code,[5] and law fixing the limits of the territorial

---

[1] Published in M Pryles, "Dispute Resolution in Asia" (Kluwer Law International 1997) at p.261.

[2] Hereinafter "CPC".

[3] Section 2.

[4] Hereinafter "LOCJ".

[5] "LOCJ" section 2.

jurisdiction which may form part of law creating certain courts, such as a law creating provincial courts.

According to the Section 2 of CPC, a court may assume its jurisdiction provided that:

1) it is competent to try and adjudicate the case (called "general jurisdiction"), and

2) it has territorial jurisdiction over the case (called "territorial jurisdiction").

This means that the jurisdiction of Thai court is composed of two essential elements, namely general jurisdiction and territorial jurisdiction. The detail will be analyzed immediately followings.

A. Jurisdiction

Thai Courts are divided into three levels, namely:

- Courts of First Instance,
- Appeal Court, and
- Supreme Court (Dika Court).[6]

(a) Supreme Court (Dika Court)

There is only one Supreme Court, the highest and the final court of the realm.[7] It has general jurisdiction over cases where there are appeals against judgment or orders of the Appeal Court in accordance with the CPC section 223 and 247-252. Apart from this, the Dika Court shall be competent to give decisions in cases which the Dika Court is competent to decide by virtue of other laws.[8]

---

[6] "LOCJ" section 2.

[7] "LOCJ" section 20 para.2.

[8] "LOCJ" section 20 para.1.

(b) Appeal Court

There are one Appeal Court and three Region Appeal Courts set up only to alleviate the caseload of the Appeal Court. Each has territorial jurisdiction determined by the law fixing the limits of the territorial jurisdiction. The Appeal Court has territorial cover central region. The Appeal Court Region I has territorial cover north-eastern and eastern region. The Appeal Court Region II has territorial cover northern region. The Appeal Court Region III has territorial cover southern region. However, all are competent to try and adjudicate cases where there are appeals against judgments or orders of the Courts of First Instance, within its territorial jurisdiction, accordance with the CPC section 223-246.

(c) Courts of First Instance

As regards the courts of first instance, classification is to be made in accordance with the nature of the competence to try and adjudicate. They are three in number.

The first category of the courts of first instance consists of the Civil Court, the Thonburi Civil Court and the Southern Bangkok Civil Court, all of which are situated in Bangkok.[9] Their territorial jurisdiction determined by the Act of their establishment.[10] All have general jurisdiction over all civil cases.[11]

The second category is the Provincial Court. Each province outside Bangkok has at least one Provincial Court which has general jurisdiction over both civil and criminal case.[12] The territorial jurisdiction of Provincial Courts is determined by the Act creating them.[13]

The third category is the District Court (the Kwaeng Courts). District

---

[9] "LOCJ" section 3(1).

[10] "LOCJ" section 14(3)(4)(5).

[11] "LOCJ" section 17.

[12] "LOCJ" section 3(2) and section 16.

[13] "LOCJ" section 14(2).

Courts of which are situated in both Bangkok and certain provinces[14] have general jurisdiction over small cases, i.e. civil cases in which the value of the claims does not exceed 40,000 baht, criminal cases in which the offense charged carries the minimum punishment of not more than three years imprisonment and/or fine not exceeding 60,000 baht.[15] Their territorial jurisdictions are determined by the Act □of their establishment.[16]

B. Bases of territorial jurisdiction

Although courts may have general jurisdiction over a case, it does not mean that all of such courts can assume jurisdiction over the case. Which court can do so is determined by the connection between its territorial jurisdiction and nature of the case.[17] In this regard, the CPC distinguishes two types of disputed action as discussed below.

(a) Actions not involving immovable property or right or interests relating thereto.

The rule is that such a plaint shall submit to the Court within territorial jurisdiction of which the defendant is domiciled or to the Court within territorial jurisdiction of which the cause of action arose. These will be considered as following.

(a) Domicile of defendant

General principle of domicile

The meaning of the term domicile is defined by the Civil and Commercial Code[18]. The domicile of natural person is defined as the place where he has his principal residence.[19] Such domicile can be changed by

---

[14] "LOCJ" section 3(1)(2).

[15] "LOCJ" section 15 coped with 22(4)(5).

[16] "LOCJ" section 14(1).

[17] Supreme Court Decision No. 307/2495 B.E. (1952).

[18] Hereinafter "CCC".

[19] CCC section 37.

transferring the residence with manifest intention of changing it.[20]

With respect to the domicile of a juristic person, it is defined as the place where it has its principal office or establishment, or which has been selected as a special domicile in its regulation or constitutive act.[21] In the case where a juristic person has several establishments or has its branch office, the place of its establishment or of its branch office may also be considered its domicile as to the acts there performed.[22]

The deemed domicile of defendant

It is interesting to note that the Thai Court may entertain the case where the defendant is not domiciled in Thailand but carries or used to carry his business in Thailand. The following places are deemed the domiciles of the defendant if such places are found in Thailand. Thus, the courts within territorial jurisdiction of which such place are have jurisdiction over such cases.[23] Those places include:

a) where the defendant carries or used to carry his business.

b) where the defendant employs or used to employ as a liaison office for his business.

c) which are the residences of the defendant's agent.

These places must remain the places where the businesses are carried on the day of the filing of the plaint or two years prior thereto.

(b) A cause of action.

Although the defendant's domicile is not in Thailand, the Thai Court within jurisdiction of which the cause of action arose may assume jurisdiction over the case. However, there is a situation which a cause of action did not

---

[20] CCC section 41.

[21] CCC section 68.

[22] CCC section 69.

[23] CPC section 3(2).

arise in Thailand but it is deemed, for the sake of filing suit, to be subject to jurisdiction of Thai Courts. Such situation is a cause of action arose in ships or aircraft of Thai nationality[24] which is outside the Thai territory. Due to such a situation is not within any court's territorial jurisdiction, the CPC[25] determines the Civil Court, in Bangkok, has jurisdiction over such case.

Where defendant has no domicile in Thailand or cause of action is not in Thailand

Apart from the domicile connection and the cause of action connection stated above, the CPC further provides in a case of which neither a domicile of defendant nor a place which a cause of action arose is not in Thailand. In such a case, Thai courts may assume jurisdiction over the case if it appears:

(a) that the plaintiff has his domicile in Thailand. Note that the CPC does not provide the deemed domicile of the plaintiff as the same in a case of the defendant's domicile discussed above. Thus, the domicile of plaintiff shall solely be determined accordance with general rule previously discussed. In this case, a plaint shall be summit to the court within territorial jurisdiction of which the plaintiff is domiciled.[26]

(b) that the plaintiff is a Thai national. A Thai nationality of natural person is determined by the Nationality Act of 2508 B.E. Thai nationality of natural person may be acquired by birth, marriage or naturalization. With respect to juristic person, there is no specific law applied to the acquisition of its Thai nationality. Thus, the general principle of the Conflict of Laws Act of 2481 B.E. shall be applied; namely, in case of conflict as to the nationality of a juristic person, the nationality of such person is that of the country where is

---

[24] See the Thai ship Act of 2481 B.E. (1938) and the Thai Aircraft Act of 2497 B.E.(1954).

[25] CPC section 3(1).

[26] CPC section 4 ter paragraph 1.

has its principal office or establishment.[27] In this case the Civil Court has jurisdiction over the case.[28]

(c) that there is property of defendant liable to execute[29] if he loses the case is located, whether temporally or permanently, in Thailand. Such property may be movable or immovable. In such a case a plaint shall be submitted to a court within territorial jurisdiction of which the property is located.[30]

Action concerning immovable property[31] or right or any other interests relating to immovable property.

For this purpose immovable property is defined as land and things fixed permanently to land or forming a body therewith. It includes real rights connected with land or things fixed to or forming a body with land.[32] The rule in this case is that a plaint shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled or to the Court within the territorial jurisdiction of which such immovable property is situated.[33]

10.1.2. EXCLUSION OF JURISDICTION

A. Sovereign immunity, diplomatic and consular immunity

(a) Sovereign immunity

There is no single Thai legislation concerning the sovereign immunity of foreign state. Nor is there any case reported. This problem is uncertain in Thailand. However, it is interesting to note that the CPC section 1(11) provides that "party means any person by or against whom a plaint is submitted to the

---

[27] Conflict of Law Section 7.

[28] CPC section 4 ter paragraph 1.

[29] CPC section 286.

[30] CPC section 4 ter paragraph 2.

[31] Definition of immovable property; see CCC section 139.

[32] CCC section 139.

[33] CPC section 4 bis.

Court, including, for the purpose of carrying out any proceeding, any person entitled to represent him by law or to represent him as his lawyer". That means the both a plaintiff and a defendant shall be person[34] who may be a natural person or juristic person.[35] A juristic person can come into existence only by virtue of the CCC or of another law.[36] At the present, there is no law defines foreign state as a juristic person. Therefore, it can be concluded that the foreign state can not be a party in Thai Court, regardless its immunity sovereign.

(b) Diplomatic immunity

The Vienna Convention on Diplomatic Relations of 1961 (hereinafter "Convention") was ratified by Thailand on April 18, 1961 and implemented in 1984 by the Diplomatic Immunity Act.

According to article 31 of the Convention, a diplomatic agent enjoys immunity from the criminal, civil and administrative jurisdiction of the Thai Court in respect both of his official and private acts except in three cases:

(a) real actions relating to private immovable property in the territory of Thailand, unless held for the purposes of the mission;

(b) actions relating to succession in which the diplomatic agent is involved as a private person; and

(c) actions relating to any professional or commercial activity in a private capacity.

Apart from the diplomatic agent, the following persons may enjoy immunity from a Thai court as well. Such persons are:

(i) the members of the family of a diplomatic agent forming part of

---

[34] Supreme Court (Dika) Decision No. 724/2490 B.E.(1947).

[35] CCC section 15 and section 65.

[36] CCC section 65.

his household, if they are not Thai national,[37]

(ii) Members of the administrative and technical staff of the mission, along with members of their families in their household, if they are not Thai national or permanently resident in Thailand and their acts perform within the course of their duties.[38]

B. Foreign land

The jurisdiction of Thai court is determined by CPC, discussed above. Apart from this, it can not exercise its jurisdiction otherwise. In case of land, immovable property, Thai court has jurisdiction over only land situated in Thailand. Thus, a plain concerning enforcement a foreign land is not within jurisdiction of Thai Court.[39]

C. Forum agreements

Before 1991 parties may agree, with some restrictions, upon the forum. The CPC revised in 1991 repealed the provisions which allow the parties to have forum agreement in their contract. Thus, the parties can no longer choose a forum as they wish.

10.1.3. NON-EXERCISE OF JURISDICTION

A. *Lis alibil pendens*

From the time of the entry of the plaint, the case is pending trial, in consequence thereof, the plaintiff is not allowed to enter the same plaint in the same Court or in another Court.[40] This applies only in domestic case. Thus, a plaint pending trial in foreign court may be submitted to Thai court which has jurisdiction over it.

---

[37] Convention 37(1).

[38] Convention 37(2).

[39] Supreme Court (Dika) Decision No. 307/1952.

[40] CPC section 173 para.2.

B. *Forum non conveniences*

The concept of forum non conveniences is strange to the Thai legal system because each jurisdiction of courts is precisely determined by the CPC. There is no single provision in the CPC which entitled the court to deny the case which is subject to its jurisdiction. Therefore, there is no any reason to suppose the court to deny the case because of forum non convenient.

10.1.4. CHOICE OF LAW IN INTERNATIONAL LITIGATION

A. Substance/procedure

The Conflict of Law provides only the choice of substance law. With regard to choice of procedure law, the conflict of law is silent on it. It is clear that the judge shall apply the CPC as a procedure law to the case, whether domestic or international, before him.

B. Choice of law

The Conflict of Laws Act[41] provides:

"The question as to what is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties thereto."

By virtue of section 13 paragraph1, a contract is to be governed by the law chosen by the parties, provided that the choice is express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[42] Thus, parties are given the freedom to pick and choose the applicable law. Moreover, they can choose different laws to govern different parts of the contract.[43] This clearly allows depecage, *i.e.*, the act of severing the contract between different legal systems.

C. The absence of a choice

If parties have failed to choose a law applied to their contract, then the

---

[41] Section 13 paragraph 1.

[42] Kamol, 299.

[43] Kamol, 298.

applicable law will be determined by the Conflict of Law[44] which provides:

"...If such intention, express or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

When the contract is made between persons at a distance, the place where the contract is deemed to have been made is the place where notice of acceptance reaches the officer. If such place cannot be ascertained the law of the place where the contract is to be performed shall govern."

This means that the following laws shall be applied in order, if the parties have failed to choose law applied to their contract;

1. The law of country where the parties have common nationality, or
2. The law of country where the contract was made, or
3. The law of country where the contract is to be performed.

Although parties have freedom to choose a law applied to their contract, the following issues the parties cannot agree otherwise.

(a) Form

The Conflict of Law Act[45] provides:

Unless otherwise provided by the Conflict of Law or other laws of Thailand, the formal validity of a juristic act shall be governed by the law of the country where the act is made. However, the law of the country where a property is situated governs the form required for the validity of a contract, document or other juristic acts relating to immovable property.

(b) Capacity

The Conflict of Law[46] provides:

---

[44] Section 13.

The capacity or incapacity of a person is governed by the law of nationality of such person. But if an alien does a juristic act in Siam for which he would have no capacity or limited capacity under the law of his nationality, he is deemed to have capacity for it in so far as he would be capable under Siamese law. This provision does not apply to juristic act under the Family law and the law of Succession. In case of juristic act relating to immovable property, the capacity of a person to enter into such juristic act is governed by the law of the place where the immovable property is situated.

(c) The role of public policy

The Conflict of Law[47] provides:

Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals or Thailand.

10.1.5. CONSERVATION AND PROCEDURE QUESTIONS

A. The court will restrain a defendant from removing assets.

According to CPC, in a case other than a petty case,[48] the plaintiff is entitled to file with the court, together with his plaint or at any time before judgment, an ex parte application requesting the Court to order a temporary injunction restraining the defendant from removal of any property in dispute, until the case becomes final or until the Court has otherwise ordered.[49]

---

[45] Section 9.

[46] Section 10.

[47] Section 5.

[48] CPC section 189 defines petty cases are the following:

cases of relief applied for can be computed in terms of money of an amount not exceeding 40,000 baht, or

cases for the eviction of any person from an immovable property of a monthly rental value not exceeding 4,000 baht at the time of entering the case.

[49] CPC section 254(2).

B. In General there are not facilities for obtaining evidence abroad.

The CPC[50] provides that where any proceedings is to be carried out wholly or in part through the medium of or by request to the authorities in any foreign country, the Court shall, in the absence of any international agreement or provision of law governing the matter, comply with the general principles of International law.

At the present time, there is no other law governing such a matter. However, there are some bilateral agreement between Thailand and other nation. Such countries are China, Indonesia, Spain.

C. The Court will not Restrain the Institution of Proceedings in Other Countries.

10.1.6. MEDIATION

In Thailand, mediation is supported by a number of fundamental factors which exist in Thai society, i.e. the idea of pure and merciful mind influenced from Buddhism, the characteristic of Thai people concerning compromise and respecting the elders, and the effect of the social hierarchy. All of this combine with the attitude that the procedure in courts is complex and expensive. Consequently, mediation is favourite procedure in handling the dispute, rather than litigation.

In the olden day, disputing parties always submit their dispute to an elder person whom both parties respect to decide. The parties, whether win or lose, will accept that decision without any arguments. The losing party will carry out that decision smoothly and cheerily. This is because he knows that if he fails to follow that decision, the society will sanction him. Besides, he feels that he does not lose his face. The relationship between them are not damaged. The community is peaceful.

The method which an elder person uses to resolve a dispute is very

---

[50] Section 34.

simple. Talking and making clear the points which parties do not agree are always an effective method. If the parties can not solve their problem, the elder person will make decision. Although such a decision is not binding the parties, there is no case reported that a winning party in such case bring sue against a losing party. This method is very much the same as current concept of mediation, as discuss below.

At the present time, although Thai society is dramatically changed, such a method of dissolving dispute has still been prevalent. However, there is no law or statute which deals exclusively with mediation.

Mediation is generally understood to be a private, informal method by which parties are assisted by one or more neutral third parties to settle a dispute. The mediation, by definition, differs from arbitration in that they do not result in a binding or enforceable award. The mediator's role, unlike that of arbitrator, is not to compel the parties to reach a settlement but is to manage the negotiations between them so that they work together to solve their problem. As a result, a mediation can be a very efficient dispute resolution method when the both parties are willing to compromise.

However, such a non binding decision may become a binding compromise agreement under the CCC[51] if the agreed terms are made in writing and signed by the parties to the dispute. As such, the rights and obligations of the parties are newly established under the compromise agreement.

The interesting mediation in Thailand is the mediation in the judicial system which can be categorized into two types. The first is mediation by judges in general courts throughout the country. The second is the specific scheme introduced by the Civil Court.

A. Mediation in Courts

The CPC[52] provides that the Court shall, at any stage of the trial, have power to try to bring about an agreement or a compromise as to the matters in dispute. This means that a judge can mediate between parties at every step of a trial. In general practice, the judge attempts to mediate at the commencement of the trial, especially in the date of settlement of issues.[53] If the parties reach compromise agreements, the judge will write the compromise agreement and give judgment accordingly.

B. Mediation Scheme of the Civil Court

The mediation scheme has been established by the Civil Court in 1994 in order to alleviate the caseload of the Civil Court. This scheme which runs under the slogan "convenient, quick, economical and fair"[54] provides the role for judges in joining both parties to find a mutually acceptable integrative solution. In other words, this scheme emphasized the role of a judge in settling dispute, especially in a pretrial conference rather than in making decision.[55]

The principle of this scheme under the Regulation of the Civil Court Concerning Mediation is that both parties have to voluntarily bring their case to the mediation scheme. This scheme is separated from a normal division of the Civil Court and judges who voluntarily participate in this scheme will play mediator's role throughout the specific day in order that they can concentrate on mediation work. Nevertheless, they still work as adjudicators.

Therefore, after an unsuccessful settlement, the judge who took part in

---

[51] Section 850.

[52] Section 20.

[53] A settlement of issues is similar to a pre-trial conference, that is, the judge will examine the pleading filed by the parties; compare allegations, contentions; ask the parties for admission the issues raised by the opposing party. The fact admitted by the parties is over; and the issues, whether of fact or of law, which is raised by one party and not admitted by the other party are the points in disputes. See CPC, section 183.

[54] The Civil Court, The First Anniversary of the Mediation Scheme of the Civil Court, Bangkok: The Civil Court, 1995 p.40.

[55] See Wichi Ariyanantaka, The Chief Justice Clifford Wallace's Lecture (unreported).

the mediation process cannot be the judge in that case in order to prevent that judge from knowing facts outside the trail which appear during mediation process and from being prejudiced against the party who did not cooperate in mediation. Furthermore, the files and documents will be destroyed and the facts received during the mediation process are deemed to be confidential and neither party can rely on such facts in normal trial. The reason for this practice is to encourage the parties to discuss and negotiate freely without any fear of harming their case.

The Civil Court attempts to create an informal atmosphere by holding the settlement conference in a specific room, not in a court room, with facilities such as telephone, photocopy machine, facsimile machine including serving drink; and by regulating that a judge and lawyers do not gowns during mediation sessions.[56]

Every kind of case can be taken into the mediation scheme provided that both parties voluntarily subscribe to use this scheme. The judge will encourage parties to disclose their information and express their emotions; and he will search for the underlying needs of the parties, with a view to help them to come up with inventive solutions which meet both their needs. If the parties reach an agreed outcome, the plaintiff may withdraw a suit or the judge may give judgment according to that agreement. If the mediation fails, that case will be brought back to a normal trial.

The Civil Court has a guideline for judges who act as mediators. For example, they have to read a case accurately and seek what are the real needs of both parties and what is a satisfactory point which may lead the parties to end their case. They have to create an informal circumstance in the meeting by reducing the parties' tension and make them feel free to exchange their feelings. The judges have to be neutral, although, with respect to the facts of the case, one party is right and they have to listen to the trouble of both parties

---

[56] The Civil Court, The First Anniversary of the Mediation Scheme of the Civil Court, Bangkok: The Civil Court, 1995 p.26.

with sympathy.[57]

One of the successes of this scheme is to settle The Maboonkrong Case in 1994. The facts of that case involve the fight between shareholders to get majority in Maboonkrong Company which is the owner of a huge department store in Bangkok. The first litigation started in 1989 and had still been in trail. There were also sixty relevant cases in the Civil Court, the Court of Appeal and the Supreme Court. The Civil Court spent four months with five mediation conferences to settle this case and, finally, the parties reached satisfactory outcome and withdrew all the case from the courts.

10.2. Recognition and Enforcement of Foreign Judgments

10.2.1. LEGAL BASIS OF RECOGNITION AND ENFORCEMENT

Thailand has no legislative enactment which deals specifically with the recognition and enforcement of foreign judgments. Nor has Thailand entered into any relationships, bilateral or otherwise, for the reciprocal enforcement of judgments. Although Thailand has no legislative enactment concerning recognition and enforcement of foreign judgment, there is a reported case[58] which dealing with enforcement of foreign judgment in Thailand. This case is considered as the only authority available on the subject of enforcement of foreign judgments.[59]

However, it should be born in mind that Thailand is a civil law country which the Supreme Court decision is not the law. Thus, the discussion of the following case is only guidance to understand how the Thai court deals with the problem of the recognition and enforcement of a foreign judgment without law underlined it. The following discussion will based on the Supreme Court Decision No. 585/2461 B.E. and the jurist's opinion.

---

[57] The Civil Court, The First Anniversary of the Mediation Scheme of the Civil Court, Bangkok: The Civil Court. 1995 p.31.

[58] Supreme Court (Dika) Decision No. 585/2461(1918).

[59] Jaran Pukditanakul and Vichai Ariyanuntaka, Aspects of Enforcement of Foreign Judgments and Arbitral Awards in Thailand, in Cases and Materials on Arbitration, Ministry of Justice ed. 1992, p.217.

The case was between the buyer plaintiff and the seller defendant who failed to deliver the goods. The plaintiff sued the defendant in Saigon Civil Court. The Court gave judgment for the plaintiff. The defendant then fled to Bangkok where the plaintiff sought enforcement of Saigon Civil Court Judgment. The Supreme Court (Dika), reversing both the Bangkok Civil Court and the Court of Appeal, held that "the principle underlying recognition and enforcement of foreign judgments is one of mutual respect among nations. The Court of Siam will recognize and enforce judgment rendered by a foreign court provided that the judgment was given by the court of competent jurisdiction. The judgment must also be final and conclusive on the merits of the case. In this case, the plaintiff and the defendant were both Vietnam citizens and thus, the Saigon Civil Court Enjoyed competent jurisdiction over the case.

However, the judgment of the Saigon Civil Court was given in default. The plaintiff failed to prove the Vietnamese Civil procedural law concerning the finality and conclusiveness of the judgment given in default. Under the Civil Procedural Act B.E. 2452 (1909) of Thailand, the defendant who has been declared by the court to be in default of appearance and against whom a judgment has been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive." The plaintiff's claims were dismissed.

10.2.2. REQUIREMENT FOR RECOGNITION AND ENFORCEMENT

The Supreme Court No. 585/2461 B.E. (1918) underlined the principle of recognition and enforcement of foreign award as follows.

A. International Jurisdiction

The Supreme Court said that "...the plaintiff and the defendant were both Vietnam citizens and thus, the Saigon Civil Court Enjoyed competent jurisdiction over the case." This mean that the jurisdiction of a foreign court, whose judgment is sought to be recognized and enforced in Thailand, must be examined by the Thai Court. It is noted that the Supreme Court applied the

principle of nationality of the parties to determine the jurisdiction of the Vietnam Court.

B. Finality

The judgment must be final and conclusive. If the case can be re-opened in the same court, or if there remains some issues to be dealt with, then the Thai court will not enforce the judgment.

The Supreme Court further required that "The judgment must also be final and conclusive on the merits of the case." In this case the plaintiff failed to prove Vietnamese Law upon the issue of finality of judgment, so the Supreme Court applied the Thai Law by further stated that "Under the Civil Procedural Act B.E. 2452 (1909) of Thailand, the defendant who has been declared by the court to be in default of appearance and against whom a judgment has been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive." It is doubt whether a judgment given in default is not final and conclusive.

Under the CPC there are two types of default, namely default of answer and default of appearance.[60] In the latter case the default party may apply for a new trial within fifteen days from the date of judgment.[61] And the judgment given in default of appearance which application for a new trial may be made, shall, if no application for a new trial is made within the prescribed time, be deemed to be final as from the date of the expiration of such period of time.[62] Thus, the judgment given in default of appearance can be final if the period of time to make application for a new trial, fifteen days, is expired. The fact in that case is not clear whether such period is expired.

---

[60] CPC section 197.

[61] CPC section 208.

[62] CPC section 147 paragraph 2.

C. Reciprocity

As a majority of commentators reciprocity is not requirement for the recognition and enforcement of foreign judgments. A judgment of a foreign court which met the other requirements is recognized and enforced whether the foreign country is prepared to recognize and enforce the forum's judgments.[63]

D. Fraud

This issue is still unclear. In the case of a domestic judgment, a judgment obtained by fraud can only be appealed to the higher court by the reason of public policy.[64] It can not be attacked in the same court. Under the CPC, the new trial is permitted only in the case of default of appearance,[65] but not for fraud case. However, in case of foreign judgment obtained by fraud may be different. It shall be considered as against Thai public policy. Thus, fraud is available as a defense to the recognition and enforcement of foreign judgment under public policy.

E. Natural Justice

A foreign judgment may be refused recognition or enforcement if the proceeding were opposed to natural justice.[66] Although the Supreme Court did not mention this issue, the principle of natural justice is the minimum standard of international justice which Thai court shall follow.[67] However, the limits of this defense are not clear. Basically, it concerns alleged irregularities in the procedure by which the foreign court reached its judgment and does not extend to the merits of the case.

---

[63] Satit Leingtisong, Explanation of the Organization of Courts of Justice Act, Bangkok: Dumrongtham, at p.125.

[64] CPC section 225 paragraph 2.

[65] CPC section 207.

[66] Satit Leingtisong, Explanation of the Organization of Courts of Justice Act, Bangkok: Dumrongtham, at p.127.

[67] Satit Leingtisong, Explanation of the Organization of Courts of Justice Act, Bangkok: Dumrongtham, at p.127.

F. Public Policy

According to the Conflict of Law[68], section 5, which provides that whenever the law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand. This provision is applied by analogy, that is to say, a foreign judgment will not be recognized nor enforced in Thailand if it is contrary to the Thai fundamental principles of public policy.

G. Nature of Relief

Under the Supreme Court Decision stated earlier, it is no doubt that foreign money judgments can be enforceable in Thailand. However, the unclear situation is the enforcement of foreign judgment awarding other types of relief provided that the remedy is one which exists in Thai law.

10.2.3. EFFECT OF A FOREIGN JUDGMENT

A. Applicable Law

Most of commentators are of opinion that an unsatisfied foreign judgment for a plaintiff does not prevent him suing again in Thailand on the original cause of action. He can do so, although such a litigation is prohibited in foreign court. This is understandable that the Thai law shall apply to the effect of foreign judgment.

B. Conclusive and Estoppel

It is not clear on this point. The CPC[69] provides that where a judgment or order has become final, no further proceedings may be taken as between the same parties and on the same grounds, in reference to the issues so decided. However, this section, according to most commentators, is applied only to the domestic judgment. Thus, the question of conclusive and estoppel of foreign judgment is uncertain situation in Thailand.

---

[68] Section 5.

[69] Section 148.

C. Mode of Enforcement

Most of commentators are of opinion that a plaintiff successful in the foreign court has the choice of either bringing an action in Thailand against the defendant based on the foreign judgment or commencing litigation afresh before the Thai court on the original cause of action.

10.3. Arbitration

10.3.1. SOURCES OF LAW

A. International Agreements

(a) Protocol on Arbitration Clause League of Nations, Geneva, 1923.

(b) Convention for the Execution of Foreign Arbitral Awards, League of Nations, Geneva, 1927.

(c) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

(d) Convention on The Settlement of Investment Disputes Between States and Nationals of Other States.

Legislation

(a) Thai Arbitration Act 2530 B.E.(1987)

(b) Thai Civil Procedure Code

(c) Thai Conflict of Law B.E. 2481(1938)

10.3.2. CHOICE OF LAW

A. Arbitration Agreement

An arbitration agreement here is limited to issues of validity, interpretation, effect, and scope of arbitration agreement. According to the Act, the law applicable to arbitration agreement comes to play its role in two stages, namely at the stage of enforcement of arbitration agreement and at the stage of enforcement of award.

At the stage of enforcement of arbitration agreement, the Act is silent on this matter. Thus, the Thai conflict of laws rule shall be applied. According to the Conflict of Law Act,[70] parties have freedom to choose law applied to arbitration agreement. In the absence of an express or implied choice of law, the law common to the parties when they are of the same nationality shall be applied. If they are not of the same nationality, the law of the place where the contract has been made shall be applied. However, if such place cannot be ascertained the law of the place of arbitration will be applied.

At the stage of enforcement of award, the Act adopts uniform rule of conflict of laws by providing, which follows closely the wording of the New York Convention Article 5(1)(a), that "an application for the execution of a foreign arbitral award under the auspices of the Convention on the recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, may be denied by the court, if the party against whom the execution of the award is sought can prove that ... (2) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; ..." Thus, the law applied to arbitration agreement in this case is depended on parties' choice. If they failed to agree so, the law of the place where the award was made shall be applied.

B. Arbitration procedure

The Act section 17 paragraph 2 provides that "Unless otherwise provided by the arbitration agreement or law, an arbitrator shall have the power to conduct any procedure as he deems appropriate taking the principle of natural justice as prime consideration."

This Act follows the principle of party autonomy which enables the parties to an arbitration to design their arbitral proceedings to suit their particular needs. With regard to the law governing arbitral procedure, this principle grants the parties the power to select suitable procedural rules.

---

[70] Section 13 paragraph 1.

However, this rule is subject to certain limitations, namely public policy and mandatory rules.

C. Substantive Liability

The Act is silent on the substantive law applicable to a dispute. Thus, the Conflict of Laws would be applied. That is parties are free to agree upon a law applied to their dispute. However, in the absence of such agreement in contract, the law common to both parties or the law of the place where the contract has been made, as the case may be, shall be applied.

D. Lex mercatoria

Parties may provide in their contract that their contract is subjected to *lex mercatoria.*

E. Amiable Composition

Although an award is subject to judicial review upon the law governing the dispute, the majority of commentators are of opinion that parties can agree to authorize an arbitrator to decides as *amiables compositeurs* according to equity. Otherwise, the arbitrator cannot do so.

10.3.3. ENFORCEMENT OF ARBITRATION AGREEMENTS

A. Legislative Provision

Thailand has acceded to the New York Convention and has implemented it by passing the Arbitration Act 1987. The Act section 10 provides that in case where any party commences any legal proceedings in court against any other party to the arbitration agreement in respect of any dispute agreed to be referred to arbitration, the party against whom the legal proceedings are commenced may file with the court a petition prior to the date of taking of evidence, or prior to the passing of the judgment in case where is no taking of evidence, for and order to stay the legal proceedings, so that the party may first proceed with the arbitration proceedings. Upon the court having completed the enquiry and it appears that there is nothing that causes

the arbitration agreement to be null and void, inoperative or unenforceable by any other reasons or incapable of being performed, the court shall make an order staying the proceeding.

It is noted that this provision is set up in Chapter 1 of the Act which applies to both domestic and international case.

B. Definition of Arbitration Agreement

An arbitration agreement is defined as the agreement or an arbitration clause in a contract whereby the parties agree to submit present or future civil dispute to arbitration, irrespective of whether there being the designation of arbitrator.[71]

According to above definition, it is clear that both agreement to submit an existing dispute to arbitration and an agreement to settle future disputes by arbitration are considered as arbitration agreement. It is less clear that what is the scope of civil dispute. This concerns the subject-matter arbitrability. There is no case reported on this matter. It is interesting to note that the Act uses the wide term of "civil" instead of commercial. Basically, any dispute arise out of CCC can be settled by means of arbitration mechanism. However, there are certain disputes which by its nature shall be settled by the court.

For example, the CCC[72] provides that a legal representative may permit a minor to carry on a commercial business or other business, or to enter into a hire of service contract as an employee. In case of refusal by the former without reasonable ground, the minor may apply to the Court for granting permission. An arbitrator has no power to do so. Thus, such a dispute, although being civil dispute, can not be submitted to arbitration.

Besides, an arbitration agreement is not necessary to designate an arbitrator. If the agreement does not specify the number of arbitrator, the three arbitrators are required. In such a case, the parties shall each appoint one

---

[71] Section 5.

[72] Section 27.

arbitrator, and the said arbitrators shall jointly appoint a third arbitrator.[73]

c) Conditions for enforcement of arbitration agreement

To enforce an arbitration agreement, the following requirements must be met.

(a) An arbitration agreement be in writing, or in exchange of letters, telexes, or other documents of the similar nature.[74]

(b) Under the arbitration agreement the parties undertake to submit to arbitration all or any differences which have arise or which may arise between them.[75]

(c) The arbitration agreement concerns a subject matter capable of settlement by arbitration.[76]

D. Power of court

In the past, the Thai Supreme Court interpreted an arbitration clause as a choice of parties.[77] Although there is an arbitration agreement between them, any party may bring the case to the court when dispute arises. The reasons for this is that the CPC applied to an arbitration was silent upon the enforcement of an arbitration agreement. Furthermore, the CPC[78] provides that any person, whose rights or duties under the civil law are involved in a dispute, is entitled to submit his case to a civil court. Thus, when the dispute arose out of contract incorporated arbitration clause, the court would not enforce the arbitration agreement.

After passing the Arbitration Act in 1987, although there has not been any case reported, the attitude of a Thai court would be changed. The main

---

[73] Section 11 paragraph 2.

[74] Section 6.

[75] Section 10.

[76] Section 10.

[77] Supreme Court Decision No. 2690/2522 (1979); No.3352/2529 (1986).

[78] Section 55.

reason of this is that the Act clearly provides how the court will deal with this problem. It requires the court to stay proceedings instituted in breach of an arbitration agreement. This follows from the wording of section 10 which provides that the court "shall" not "may" stay proceedings and refer the parties to arbitration.

However, the court may not enforce the arbitration agreement provided that the arbitration agreement is null and void or inoperative or unenforceable by any other reasons or incapable of being performed.[79]

It is noted that the party who wants to arbitrate must file a petition for an order to stay the legal proceedings prior to the date of taking of evidence, or prior to the passing of the judgment in case there is no taking of evidence.[80]

E. Separatability of Arbitration Agreement

There is neither a provision in the Act nor a case reported dealing with this problems. It is clear that separatability is applied if parties expressly show that they want the arbitration clause is separated from the main contract. However, if they do not so, the CCC section 173, general principle of contract, shall be applied by analogy.

The CCC[81] provides that if any part of an act is void the whole part is void, unless it may be assumed under the circumstances of the case that the parties intended the valid part of the act to be severable from the invalid part. When parties make a contract containing an arbitration agreement, they intend the arbitrators to have jurisdiction to determine question as to the initial validity of the main contract. This gives rise to presume that the parties intend the arbitration clause (valid part) separate from the main contract (invalid part).

---

[79] Section 10.

[80] Section 10.

[81] Section 173.

10.3.4. ESTABLISHMENT OF THE ARBITRATION

A. Arbitrators

The Act gives Parties have freedom to agree on the number of arbitrators,[82] the time limit for appointing the arbitrators[83] and the person or an appointing authority who is to appoint the arbitrators.[84] However, if the parties do not agree on such matters, their arbitration agreement is not void.[85]

B. Qualification of Arbitrators

The Act does not require the qualification of a person who will be choose to act as arbitrator. The only problem is whether foreigner can be appointed to act as arbitrator in Thailand. This is because the Alien Occupation Act of 1978 completely prohibits foreign nationals from engaging in providing legal services or services in connection with court disputes. This problem is relaxed in practice for many reasons.

Firstly, the Alien Occupation Act of 1978 is the law which limits freedom of people so it should be strictly construed. It should not construe the duty of arbitrator as a legal service. Many high quality arbitrators in the world, even in Thailand, are not the lawyers.

The purpose of the Alien Occupation Act of 1978 is to prohibit foreign lawyer to practice in the Thai court. This approach is supposed by the Lawyer's Act of 1985. According to latter Act, a lawyer is defined as a person who is licensed by the Law Society of Thailand. Such person must be a member of the Law Society, the membership of which is confined to Thai nationals. The Act only prohibits an unlicensed person from pleading cases in court, draft complaints, answers or other pleadings for other persons. In other words, lawyer who practice in court must be Thai nationals.

---

[82] Section 11.

[83] Section 12.

[84] Section 13.

[85] Section 5.

Secondly, all of officers, such as lecture in law in government university, are not permit to become the lawyers practicing in the court. Nevertheless, in practice, they still can be chosen to act as arbitrator.

Finally, as a general rule, an arbitration is a private method to settle dispute between disputing parties, who may be foreigners. They choose arbitration instead of state court because, among other thing, they can choose an arbitrator who is fit to their dispute. The Arbitration Act is designed to be based on the principle of natural justice which requires equal right to both parties. There is no reason why the foreign parties can not choose foreigner to act as their arbitrator.

C. Number of Arbitrators

The Act does not require the number of the arbitrators. The Act leaves this point to parties who know best how many arbitrators they need and who should be fit to their case.

However, where the agreement does not specify and the parties cannot agree on the number, three arbitrators are required.[86]

D. Appointing arbitrators

Under the Act, the appointing arbitrators is based upon the principle of natural justice. It means that parties have equal right to appoint arbitrators. The parties cannot agree otherwise because it would be contrary to Thai public policy.[87]

In case of one arbitrator required parties shall jointly appoint him. In case of more than one arbitrators required each party shall appoint an equal number of arbitrators.[88]

Where the arbitration agreement is silent on the number of arbitrators

---

[86] Section 11.

[87] See Jaran Pukditanakul, Seminar on Alternative Dispute Resolution: US and Thai Experience, 15 May 1991 at Judicial Training Institution Affair.

[88] Section 11 paragraph 1.

or where the three arbitrators required, each party shall appoint one arbitrator, then the two appointed arbitrators shall jointly appoint the third arbitrator.[89]

Consequence of appointing arbitrator

Once parties have validly appointed their arbitrator, such appointing can not be unilaterally revoked.[90] However, the arbitrator may be challenged in a competent court. An arbitrator appointed by the court or by a third person may be challenged by any party. An arbitrator appointed by one of the parties may be challenged by another party. No party shall challenge the arbitrator whom he was appointed or whom he has jointly appointed, except where the said party did not know of or could not known of the grounds for challenge at the time of appointment.[91]

F. Grounds for Challenge Arbitrators

The grounds for challenging arbitrators are:[92]

1. that he has an interest in such case;
2. that he is related to any of the parties, either as an ascendant or descendant to any degree, or as a collateral within the third degree, or by affinity within the second degree;
3. that he has been cited as a witness on account of his knowledge of the facts or as an expert on account of his having expert knowledge in connection with such case;
4. that he has been or is the legal representative or representative, or that he has been the lawyer, of any of the parties;
5. that in the same case he has sat as a judge of another Court or has acted as an arbitrator;

---

[89] Section 11 paragraph 2.

[90] Section 14 paragraph 1.

[91] Section 14 paragraph 2.

[92] Section 14 paragraph 3 coped with CPC section 11.

6. that there is another case pending between him, his wife or his relative in direct ascending or descending line on the one part, and any or the parties, the wife or any relative in direct ascending or descending line of such party on the other party;

7. that he is a creditor or debtor or employer of any of the parties;

8. that other grounds which are of such serious nature as may prejudice the impartiality of the hearing or the rendering of an award.

G. Time Limits

The Act does not fix a time for appointing an arbitrator. It only requires that the appointment be made within a "reasonable time".[93] Although this term is quite vague, parties can avoid it by specifying in the arbitration agreement.

However, if the parties fail to appoint arbitrators in such reasonable time, or in such specific period of time, any party may file a petition with a competent court for an order appointing an arbitrator.[94]

H. Fees

The arbitrator is to fix the fees and expense incidental to arbitration proceedings and the remunerations for arbitrators, but not the attorney's fees and expenses, unless the parties have agreed otherwise. Although a specific agreement is reached on the remunerations and fees to be paid, such as is contained in many costs and fees schedules of arbitration institutions, the "competent court" can review those and adjust them based on what it deems reasonable.[95]

10.3.5. PROCEDURE OF THE ARBITRATION

The Act does not detail about how the arbitral procedure will be

---

[93] Section12.

[94] Section13.

[95] Section27.

managed. It leaves this matter to the will of parties. The parties are the master of the arbitral procedure. They can agree what they think it is fit to their case. In the institutional arbitration, if the parties are fail to agree otherwise, the rules of such institution, such as the Arbitration Institute Ministry of Justice Rules, will be applied. In the case of ad hoc arbitration, if the parties fail to do so, the arbitrator will have power to conduct any procedure as he deems appropriate. However, the arbitrator must follow the rule of natural justice.[96] He must treat both parties equally, namely give them a chance to present their evidence.

A. Pleadings and Submission

The Act is silent on this point. It depends on the agreement of parties, that is to say, in institutional arbitration the rule of such institution shall be applied. In ad hoc arbitration the arbitrator has power to determine such a matter.

B. Evidence

The Arbitration Act provides that before rendering an award, the arbitrator shall hear the case presented by the parties and have the power to make an enquiry into the dispute submitted as he deemed appropriate.[97] This means that the Arbitration Act leave matters concerning the presentation of evidence to the discretion of the arbitrator, subject to the arbitration agreement. The arbitrator may examine documents presented to him and testimony of witness or of experts who voluntarily appearing to give such testimony before him or he may examine only documents if both parties so agree. However, in the case of assistance of the court necessary, such as summoning a witness, administering an oath, ordering for submission of any document or material, he may ask the court for such assistance.[98]

---

[96] Section 17 paragraph 2.

[97] The Arbitration Act, Section 17.

[98] The Arbitration Act, Section 18.

C. Hearing

At the hearing stage, again, the Arbitration Act gives a wide discretion to an arbitrator to make enquiry the case before him as he deems appropriate. However, he cannot render an award without hearing the case.[99]

10.3.6. THE AWARD

A. Form of Award

An award rendered in Thailand is considered valid provided that it meets the following three requirements.[100]

(a) The award must be within the scope of arbitration agreement except in fixing the fees, expenses or remunerations of the arbitrator or umpire.

(b) It must be in writing and signed by arbitrator or umpire, as the case may be.

(c) It must clearly state the reasons for all decisions. The reason for this is that the Thai arbitration system under the Arbitration Act is under court's control. The reasons in award can indicate whether or not such award is contrary to the law governing the dispute. If the court, after scrutinizing the award, is of opinion that it is contrary to the law governing the dispute, the court may deny the enforcement of the award. However, this requirement is not applied to a foreign award. Under Section 35, the Thai court may deny enforcement foreign award, among other things, if it is contrary to public policy. Most of commentators are of opinion that the non-reason award is not contrary to Thai public policy.

---

[99] The Arbitration Act, section 17 paragraph 1.

B. Time Limit for Rendering Award

The Arbitration Act[101] provides that except where the parties have agreed otherwise, the award shall be rendered within 180 days from the day on which the last arbitrator or umpire was appointed. However, such period, whether the period of 180 days or the period otherwise agreed upon, may be extended by an agreement of the parties. If such an agreement cannot be reached, either party, an arbitrator or umpire may file a petition with a competent court and the court shall have the power to order the extension of the said period as it deems appropriate. Although the award can not be rendered within such period, it is still enforceable except the losing party has protested such failure in writing to the arbitrator or the umpire within fifteen days from the expiration of such period and prior to the submission of a copy of the award to the said party. Copies of the award shall be sent to all the parties concerned by the arbitrator or the umpire.

C. Status of Award

The Arbitration Act states nothing about the interim award. It only provides that the arbitral award shall be final and binding upon the parties when a copy thereof has been sent to the parties.[102] This means that the losing party can not appeal to the court. It is interesting to note that there is no provision of setting aside award. Thus, the award rendered in Thailand cannot be attacked in the Thai court, regardless how defective or faulty the arbitral proceedings might have been.

10.3.7. JUDICIAL INTERVENTION

The jurisdiction of court competent to intervene the arbitration proceedings is specially provided. With regard to the Act, such competent court is exceptional to general principle of competent court provided in CPC.

---

[100] Section20.

[101] Section 21.

[102] Section 22.

According to the Act section 25, a competent court under the Act is the following court:

(a) the court has jurisdiction over the place where the arbitration proceedings take place, or

(b) the court has jurisdiction over the domicile of a party, or

(c) the court which has jurisdiction over the dispute submitted for arbitration.

The highlight of this section is that parties has freedom to agree upon the competent court. However, as discussed earlier,[103] the competence of court composed of two elements, namely the competence to try and adjudicate and the territorial jurisdiction. The competent court upon which the parties enable to agree means only the "territorial jurisdiction" of court. The competence of the court to try and adjudicate shall follow the general principle in CPC.

A. Supportive rule

(a) Relating to Third Person

An arbitrator has no power over person who are not parties to the arbitration agreement. Accordingly, when the arbitral process requires the participation of third parties for the efficient conduct of the proceedings, reliance must be placed upon the support of the courts. In regard to this situation, the Act provides that an arbitrator may file a petition requesting a competent court to conduct the following proceedings:

(i) the summons of a witness,

(ii) the administration of oath,

(iii) the order for submission of any document or material.

[103] See detail in 1.1 Rules of Jurisdiction

(b) Relating to the Applicable Law

An award rendering in Thailand may be denied to enforce if such an award is contrary to the law governing the dispute.[104] Thus, when an arbitrator face the difficulty of law applied to dispute, he may file a petition requesting a competent court to give the preliminary decision on any question of law.[105]

(c) Relating to Measures of Protection

The Act does not contain any provision concerning the power of an arbitrator to protect an interest of the party during arbitration proceedings. However, the arbitrator may file a petition requesting a competent court to apply of provisional measures for such protection.[106]

B. The Order or Judgment of the Court is Final

Basically, no appeal shall lie against the order or judgment of the court unless:[107]

(a) There is an allegation that the arbitrator or umpire did not act in good faith or that fraud was committed by any party;

(b) The order or judgment is contrary to the provisions of the law governing public order;

(c) The order or judgment is not in accordance with the arbitral award;

(d) The judge who held the enquiry of the case has given a dissenting opinion or has certified that there are reasonable grounds for appeal; or

(e) It is an order concerning the provisional measures for the protection of interests of the party pending arbitration proceedings under Section 18.

---

[104] Section 24.

[105] Section 18.

[106] Section 18.

10.3.8. RECOGNITION AND ENFORCEMENT AND OF FOREIGN AWARDS

A. Thailand and International Convention

Foreign award shall be recognised and enforced in Thailand only if it is covered by the treaty, convention or international agreement to which Thailand is a party, and it shall have effect only as far as Thailand accedes to be bound.[108] On this regard, Thailand signed and ratified the Geneva Protocol on Arbitration Clauses of 1923 in 1930 and the Geneva Convention on the Execution of Foreign Arbitration Awards of 1927 in 1931. Besides, in 1959 Thailand also acceded without making any reservation the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.[109] Therefore, Thailand is obliged to apply the New York Convention to foreign awards which is sought to enforce in Thailand without regarding where such awards was made.

B. Definition of Foreign Award

An award can be considered to be foreign award if it meets two requirements:[110]

1. a party in an arbitration is not of Thai national, and
2. such arbitration must conduct wholly or mainly outside Thailand.

C. Procedure of Enforcement

A party seeking to enforce foreign award may file a request with a competent court[111] by producing the following documents:[112]

---

[107] Section 26.

[108] The Arbitration Act, section 29 para.1.

[109] Hereafter "New York Convention".

[110] The Arbitration Act, section 28.

[111] The Arbitration Act, section 30.

[112] The Arbitration Act, section 31.

1. Original copy of the award or a certified copy thereof;
2. Original copy of the arbitration agreement or a certified copy thereof;
3. Translation in Thai of the award and arbitration agreement which must be certified by a sworn translator, an officer of the Ministry of Foreign Affairs, a diplomatic delegate or a Thai Consul.

Upon receipt such a request, the court shall hold an enquiry and give judgement without delay, provided that the party against whom the award is rendered had an opportunity to challenge the request.[113] This means that, by analogy with emergency case in CPC[114] the court must give judgement immediately.[115]

D. Time Limit to Enforcement Foreign Award

A party seeking to enforce a foreign award may file a request with a competent court within a period of one year from the date of the sending of a copy of the award to the parties.[116] This is criticised that such provision is impractical. The award, for example, says that the losing party shall pay money to the winning party within 18 months. What if the losing party fail to do so after such period? This problem is very similar to the CPC[117] which provides that where a judgment or order of a Court has not been complied with in whole or in part by the party or person against whom it has been pronounced (the judgment debtor), the party or person in whose favour it has been pronounced (the judgment creditor) is entitled, within ten years *from the date of pronouncement of the judgment or order*, to apply for execution thereof

---

[113] The Arbitration Act, section 30 paragraph 2, coped with The Arbitration Act, section 23 paragraph 2.

[114] Section 267 which provide that "The court shall examine the application without delay. If satisfied with the statement of the plaintiff or the evidence adduced by him or called by the Court itself that the cases is one of emergency and that the application is well-grounded, the Court shall immediately issue the order..."

[115] Praya-Nitiganprasom, "Explanation of Civil Procedure Code", at 786.

[116] The Arbitration Act, section 23.

[117] Section 271.

by virtue of, and in accordance with, the decree issued thereunder.

However, the Supreme Court interpreted the term "from the date of pronouncement of the judgment or order" as from the date of the judgment debtor fail to comply with the judgment.[118] Thus, the term "from the date of the sending of a copy of the award to the parties" should be interpreted, by analogy, as "from the date of the losing party fail to comply with the award." Most of commentators agree with this approach.

[118] The Supreme Court Decision No. 2700/2524 (1981).

BIBLIOGRAPHY

1. Aksen G: Ad Hoc Versus Institutional Arbitration, (The ICC international Court of Arbitration).
2. Aksen G, "The Need to Utilize International Arbitration", 17 *Vand.J.Transnat'l.L.* 11 (1984).
3. Aksen W, "International Commercial Arbitration and International Public Policy", 81 Am.Society Int'l.L. 375 (1987).
4. The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *Arbitrations of China,* (Asia, Sweet&Maxwell 1997).
5. Ariyanantaka W, *The Chief Justice Clifford Wallace's Lecture* (unreported).
6. Atiyah P, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press 1979).
7. Atiyah P, *Law and Modern Society,* (Oxford: Oxford University Press 1983).
8. Auerbach J, *Justice Without Law?,* (New York: Oxford University Press 1984).
9. Bagwell J, "Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena -*Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991)", 22 *Ga.J.Int'l.&Comp.L.* 487 (1992).
10. Ball, "Just Do It -Drafting the Arbitration Clause in An International Agreement", 10 *J.Int'l.Arb.* 29 (1993).
11. Bernardini P., "The Arbitration Clause an International Contract", 9 *J.Int'l.Arb.* 46 (1992).
12. Beaumont B, Marcus H, Choi D and Au R, *Chinese International Commercial Arbitration* (London: Simmonds&Hill Publishing Ltd, 1994).
13. Bedjaoui, "Challenge of Arbitrators, in International Arbitration", in A. Berg, (ed.) *International Arbitration in a Changing World,* 85.
14. van den Berg, "Saudi Arabia", IX *Yearbook Comm.Arb.* 7 (1984).
15. van den Berg, *The New York Arbitration Convention of 1958* (Deventer, the Netherlands: Kluwer Law and Taxation Publishers, 1985).
16. Berman H and Dasser F, "The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy" in Carbonneay T (ed) *Lex Mercatori and Arbitration* (New York: Transnational Jurist publications, Inc., 1990) 21.
17. Bernardini P., "The Arbitration Clause an International Contract", 9 *J.Int'l.Arb.* 4 (1992).

18. Bernstein R, "Arbitration and the Courts" 59 *Arb.* 5 (1993).

19. "Black's Law Dictionary" (Fifth Edition).

20. Blessing, "The New International Arbitration Law in Switzerland", 5 *J.Int'l.Arb.*, 339 (1988).

21. Blessing M, "A comparison of the Rules" 6 *J.Int'l.Arb.* 24 (1989).

22. Bockstiegel K, "Public Policy and Arbitrability", in Sanders (ed.) *Comparative Arbitration Practice and Public Policy in Arbitration*, 177 (ICCA No.3).

23. Bond, "The International Arbitrator", 12 *J.Int'l.L.Bus.* 4 (1992).

24. Born G, *International Commercial Arbitration in the United States* (Kluwer 1994).

25. Bouyssonie J, "Commentary on Commercial Disputes and Their Settlement, a factor in Business Planning", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future.*

26. Brown & Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell 1993).

27. Buchanan M, "Public Policy and International Commercial Arbitration", 26 *Am.Bus.L.J.* 514 (1988).

28. Bucher & Tschanz, *International Arbitration in Switzerland* (Frankfurt: Helbing & Lichtenhahn, 1989).

29. J. Bunnag, "Arbitration Law in Thailand" in *Cases and Materials on Arbitration* (Justice Department, Thailand) 234.

30. Carbonneau, "The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Libeal Civilian Judicial Creativity", 55 *Tul.L.Rev.* 1 (1980).

31. Carbonneau T (ed), *Lex Mercatoria and Arbitration* (New York: Transnational Jurist publications, Inc., 1990).

32. Carbonneau T, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce", 12 *Tex.Int'l.L.J.* 33 (1984).

33. Carter J, "Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice", *The American Review of International Arbitration: Essays in Honor of Hans Smit*, (Columbia University: 1993).

34. Chau L, Legal Writings on Contracts and Disputes Over Contracts involving A Foreign Party in Vietnam, (Hochiminh City: Hochiminh City Publishing House, 1993).

35. Chukwumerije, *Choice of Law in International Commercial Arbitration* (London: Quarum Books, 1994).

36. Chukwumerije, "Applicable Substantive Law in International Commercial Arbitration" 23 *Anglo-Am.L.Rev.* 274 (1994).

37. Chunha-ouri P, *Private International Law*, (Bangkok:

Nitibunnakarn 1977).

38. Cohn, "The Fifth Report of the Private International Law Committee", 25 *Mod.L.Rev.* 449 (1962).

39. Coulson, *Business Arbitration - What you need to know*, (AAA, 2nd ed.1982).

40. Coulson, "An American Critique of the IBA's Ethics for International Arbitrators", 4 *J.Int'l.Arb.*, 104 (1987).

41. Craig W and Polkinghorne M, *Dispute Resolution in Vietnam* (unpublished).

42. Craig, Partk and Paulsson, *International Chamber of Commerce Arbitration*, (Oceana Group Publishers: 2nd ed, 1990).

43. Croff C, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", 16 *Int'l.Law.* 623 (1982).

44. Curzon, L. "Dictionary of Law".

45. Danilowicz, V., "The Choice of Applicable Law in International Arbitration" 9 *Hastings Int'l.&Comp.L.Rev.* 250 (1986).

46. David R, *Arbitration in International Trade* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1985).

47. Deen B, "Arbitration Improves the Justice System", 50 *Dis.Res.J.* 57 (1995).

48. Dezalay Y and Garth B, *Dealing in Virture* [Chicago: University of Chicago Press 1996].

49. Delvolve, "Note: Multipartism", 9 *Arb.Int'l.* 198 (1993).

50. Delvolve, "France as a forum for international arbitration - the decree of May 12, 1981 (Articles 1492 to 1507 of the French Code of Civil Procedure)", 2 *Int'l.Contract-L.&Fin.Rev.* 422.

51. Domke, *Commercial Arbitration* (Prentice Hall, Princeton 1965).

52. Domke, New Aspects of East-West Trade Arbitration, in Commercial Arbitration (1974).

53. M. Domke (ed.), *International Trade Arbitration* (Connecticut: Greenwood Press 1958).

54. Donahey, The Independence and Neutrality of Arbitrators, 9 *J.Int'l.Arb.* 31(1992).

55. de Enterria J, "The Role of Public Policy in International Commercial Arbitration, 21 *L.&Pol'y.Int'l.Bus.* 402 (1989-90).

56. Fletcher L, "Unrealised Expectations -The Root of Procedural Confusion in International Arbitrations", 2 *J.Int'l.Arb.* 8 (1985).

57. Foustoucos, Conditions required for the validity of an arbitration agreement, 5 *J.Int'l.Arb.* 120 (1988).

58. Gagnon P, "The Constitution of the Arbitration Tribunal" 22 *Revue*

Generale de Droit, 447 (1991).

59. Gaillard E (ed), *Transnational Rules in International Commercial Arbitration*, (Paris: ICC Publishing S.A., 1993).

60. Gardner, The Doctrine of Separability, 28 *Colum.J.Transn'l.L.* 307 (1990).

61. Gebrehana T, *Arbitration* (Almqvist&Wiksell International, Stockholm, 1984).

62. Glossner, "Sociological aspects of international commercial arbitration," in in J. Schultsz and A. Van Berg (eds.), *The Art of Arbitration* (Liber Amicorum for Pieter Sanders) (1982).

63. Goekian G, "The Conduct of International Arbitration" 11 *Lawyers of the Americas* 418 (1979).

64. Goldman, "The Complementary Roles of Judges and Arbitrators in Ensuing that International Commercial Arbitration is Effective", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future,* 255.

65. Goldstajn, "Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects", in P. Sarcevic (ed.), *Essays on International Commercial Arbitration*, (London: Graham & Trotman, 1989) 27.

66. Hejailan S, The Pre-arbitral Phase: Matters Affecting the Arbitral Award, in A. Berg, (ed.) *International Arbitration in a Changing World*, 51.

67. Herrmann, G., The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts, in International Arbitration in A. Berg, (ed.) *International Arbitration in a Changing World* (Kluwer 1993) 41.

68. Higgins, Brown & Roach, "Pitfalls in International Commercial Arbitration", 35 *Bus.Law.* 1035 (1980).

69. Highet K, "The Enigma of the *Lex mercatoria*", 63 *Tul.L.Rev.* 613 (1989).

70. Hirsch A, "The Place of Arbitration and the *Lex arbitri*", 34 *Arb.J.* 43 (1979).

71. Hoellering, *Pre-hearing Conference*, in *Sanders Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 63.

72. Holtzmann, "Commentary", in *60 Years on, A Look at the Future*, 364 (1984).

73. Holtzmann H and Neuhaus J, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary* (Netherlands, Kluwer, 1989).

74. Holtzmann, "Arbitration in East-West Trade", 9 *Int'l.Law.* 77 (1975).

75. Holtzmann, "Arbitration and the Courts: Partners in a System of International Jurisdiction", 1978 *Revue de l'arbitrage.*

76. Horn (ed) *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer, 1980).

77. Houzhi T, "Is there an expanding culture that favours combining arbitration with conciliation (mediation) or other ADR procedure?", *30th Anniversary and its Ceremonial International Arbitration Symposium*, (Korea, Oct.10, 1996) 1.

78. van den Hoven H, "Commercial Disputes and Their Settlement, a factor in Business Planning", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future,* 35.

79. Hsiao, "Communist China's Foreign Trade Contracts and Means of Settling Disputes", 22 *Vand.L.Rev.* 503 (1969).

80. Hunter, *Pre-hearing Conference*, in Sanders ed. *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 64.

81. Husserl, "Public Policy and Ordre Public", 25 *Va.L.Rev.* 37 (1938).

82. *The International Solution to International Business Disputes - ICC Arbitration* (ICC Publication No.301, 1977).

83. *60 Years of ICC Arbitration: A Look at the Future, ICC Court of Arbitration 60th Anniversary* (1984).

84. Jackson P, *Natural Justice* (London: Sweet & Maxwell 1979).

85. Jarvin S, "The sources and limits of the arbitrator's powers", in J. Lew (ed.), *Contemporary Problems in International Arbitration*, (Queen Mary College, University of London, 1986).

86. Jessup, *"Transnational Law" Storrs Lectures on Jurisprudence* (Yale Law School, 1956).

87. Jarvin S, "The sources and limits of the arbitrator's powers", in J. Lew (ed.), *Contemporary Problems in International Arbitration* (Queen Mary College, University of London, 1986) 50.

88. Katzenbach N, "Business Executives and Lawyers in International Trade", in *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future,* 67.

89. Kerr M, "International Arbitration v. Litigation", *J.Bus.L.*164 (1980).

90. Kerr, "Equity" Arbitration in England, 2 *Am.Rev.Int'l.Arb.* 377 (1991).

91. Kitagawa T, "Contractual Autonomy in International Commercial Arbitration", in in P. Sanders, *International Arbitrationl Liber Amicorum for Martin Domke* (The Hague, Netherlands: Martinus Nijhoff 1967) 133.

92. Lalive P, "Transnational (or Truly International) Public Policy and International Arbitration" in Sanders (ed.) *Comparative Arbitration*

Practice and Public Policy in Arbitration (Kluwer 1986) 257.

93. Lando, "The Law Applicable to the Merits of the Dispute" in P Sarcevic (ed), *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989) 129.

94. Lando, "The *Lex mercatoria* in International Commercial Arbitration", 34 *Int'l.&Comp.L.Q.* 747 (1985).

95. Lew J (ed.), *Contemporary Problems in International Arbitration* (Queen Mary College, University of London, 1986).

96. Lew J (ed), *The Immunity of Arbitrators* (London, Lloyd's of London Press Ltd. 1990).

97. Lew J, "The Case for the Publication of Arbitration Awards" in J. Schultsz and A. Van Berg (eds.), *Art of Arbitration*, 223.

98. Lew J, *Applicable Law in International Commercial Arbitration* (New York: Oceana Sijthoff, 1978).

99. Lew J, "Arbitration Agreements: Form and Character", in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989) 51.

100. Lew J, "Determination of arbitrators' jurisdiction and the public policy limitation on that jurisdiction", in J. Lew, *Contemporary Problems in International Arbitration*, (Queen Mary College, University of London, 1986) 73.

101. Lew J, "Determination of Applicable Substantive Law", 25 *Int'l.Bus.Law*. 159 (1997).

102. Lew J, "Applicable procedure law in the English common law", in Storme M & Ly F (eds.) *The Place of Arbitration* (Mys&Breesch, 1992) 77.

103. Lloyd D, *The Idea of Law* (London: Penguin 1991).

104. Lowenfeld A, *International Private Trade* (2d ed.1981).

105. Lowenfeld A, "The two-way Mirror: International Arbitration as Comparative Procedure", 7 *Mich.Y.B.Int'l.Leg. Stu.* 166 (1985).

106. Lowenfeld A, "*Lex mercatoria*: an Arbitrator's View", in Carbonneau T (ed) *Lex mercatoria and Arbitration: A Discussion of the New Law Merchant* 56 (1990).

107. Lynch M, "Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries", 11 *Ga.J.Int'l.&Comp.L* 670 (1981).

108. Mann, "The Theoretical Approach towards the Law Governing Contracts between States and Private Persons", XI *Rev belge*, 562 (1975).

109. Mann F, "*Lex Facit Arbitrum*", in P. Sanders, *International Arbitrationl Liber Amicorum for Martin Domke* 157.

110. Mann F, "State Contracts and International Arbitration", 42 *B.Y.I.L.* 1 (1967).

111. Mann, "Where is an award made?", 1 *Arb.Int'l.* 187 (1985).

112. F A Mann, "Mann's Introduction to the *Lex mercatoria* and Arbitration", in Carbonneau T (ed) *Lex mercatoria and Arbitration: A Discussion of the New Law Merchant* xxi (1990).

113. Meason J and Smith A, "Non-Lawyer in International Commercial Arbitration: Splinters on the Bench" 12 *Nw.J.Int'l.L.Bus.*, 26 (1991).

114. Merlis, "Comment", *30th Anniversary and its Ceremonial International Arbitration Symposium*, (Korea, Oct.10, 1996) 119.

115. Mustill M and Boyd S, *Commercial Arbitration* (London: Butterworths 2nd ed. 1992).

116. Mustill M, "Arbitration : History and Background", 6 *J.Int'l.Arb. 43* (1989).

117. Orban, "The Challenge to the Enforcement of Socialist Arbitral Awards", 17 *Ga.J.Int'l.&Comp.L.* 375 (1977).

118. Park W, "Eason-Weinmann Centre for Comparative Law Colloquilim: The Internationalization of Law and Legal Practice: National Law and Commercial Justice: Safeguarding Procedural Intergrity in International Arbitration", 63 *Tul.L.Rev.* 647, 686 (1989).

119. Park, The Lex Loci Arbitri and International Commercial Arbitration, 32 *Int'l.&Comp.L.Q.* 51. (1983).

120. Park W, "Control Mechnisms in the Development of a Modern *Lex mercatoria*", in Carbonneau T (ed) *Lex mercatoria and Arbitration: A Discussion of the New Law Merchant* (1990).

121. Paulsson J, "The Extent of Independence of International Arbitration from the Law of the *Situs*", in J. Lew (ed.), *Contemporary Problems in International Arbitration* (Queen Mary College, Centre for Commercial Law Studies: University of London, 1986) 141.

122. Paulsson J, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", 30 *Int'l.Comp.L.Q.* 358 (1981).

123. Paulsson J, "Delocalization of International Commercial Arbitration: When and Why it Matters" 32 *Int'l.Comp.L.Q.* 53 (1983).

124. Pearson N, "Arbitration and Business Man" in Sanders ed., *International Liber Amicorum for Martin Domke.*

125. Pellonp M and Caron D, *The UNCITRAL Arbitration Rules As Interpreted Applied*, (Helsinki: Finnish Lawyers' Publishing 1994).

126. Perloff S, The Ties That Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration, 13 *U.Pa.J.Int'l.Bus.L.* 342 (1992-3).

127. Peter W, *Arbitration and Renegotiation of International Investment Agreements*, (The Hague: Kluwer Law International

1995).

128. Phillips, J. "*Arbitration Law, practice and precedents*".

129. Pollock F, "Introduction to the Commercial Law of Great Britain and Ireland" in W. Bowstead and Sir Thomas Scriitton (eds) *Commercial Laws of the World*, vol.XIII, 11.

130. Poncet, "Challenges to the Jurisdiction of International Arbitrators: an Important Decision of the Swiss Supreme Court", 50 *Arb.* 156 (1984).

131. Promoj S, *Contract and Obligation*, (Aksornsarn: Bangkok, 2nd ed. 1962).

132. Pryles M, *Choice of Law Issues in International Arbitration*, (unpublished).

133. Pukditanakul J and Ariyanuntaka V, "Aspects of Enforcement of Foreign Judgments and Arbitral Awards in Thailand", in *Cases and Materials on Arbitration*, (Bangkok: Ministry of Justice 1992).

134. Pukditanakul J, *Alternative Dispute Resolution : US and Thai Experience*, (Seminar on May 15, 1991 at Judicial Institution).

135. Rabel, *Comparative Conflicts*, Vol.1, 1st ed.

136. Redfern, "The Jurisdiction of an International Commercial Arbitrator", 3 *J.Int'l.Arb.* 23 (1986).

137. Redfern & Hunter, *International Commercial Arbitration* (London: Sweet & Maxwell 3rd. Ed. 1999).

138. Reismann M, "Book Review", 80 *Am.J.Int'l.L.* 268 (1986).

139. Robert J and Carbonneau T, *The French Law of Arbitration* (Matthew Bender, 1983).

140. Rosen, "Separability and Competence", 17 *Fordham Int'l.L.J.* 608 (1994).

141. Rosenthal M, "A Businessman Looks at Arbitration", in M. Domke (ed.), *International Trade Arbitration* (Connecticut: Greenwood Press 1958) 27.

142. Rubino-Sammartano M, *International Arbitration Law* (Kluwer 1990).

143. Samuel, *Jurisdiction Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law* (Zurich: Schulthess Polygraphischer Verlag Zurich 1989).

144. Samuel, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate" in Storme and F. Ly (eds.) *The Place of Arbitration* (Mys&Breech 1992).

145. Samuel, Separability in English Law, 3 *J.Int'l.Arb.* 100 (1986).

146. Sanders, "International Commercial Arbitration", 20 *Neth.Int'l.L.&Rev.* 37 (1973).

147. Sanders, Trends in the Field of International Commercial Arbitration, 145 *Recueil Des Cours* 1975(2), 220.

148. Sanders P, "The birth of the School of International Arbitration" in J. Lew (ed.) *Contemporary Problems in International Arbitration*, (Queen Mary College, University of London, 1986)9.

149. Sanders P and van den Berg (eds) , *International Handbook on Commercial Arbitration*, 4 Vols. (Kluwer 1984).

150. Sang-outhai Y, Private International Law, (Bangkok: Thammasat University 1981).

151. Sarcevic P (ed), *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989).

152. Schmitthoff C, "The Law of International Trade, Its Growth, Formulation and Operation" in Schmitthoff C (ed) *The Sources of the Law of International Trade*, 16 (New York 1964).

153. Schmitthoff C, *Export Trade*, XXXV (London 7th ed. 1980).

154. Schmitthoff C, *Commercial Law in Changing Economic Climate*, 2nd ed (London: Sweet & Maxwell, 1981).

155. Schmitthoff, "The Jurisdiction of the Arbitrator", in J. Schultsz and A. Van Berg (eds.), *The Art of Arbitration* (Deventer, The Netherlands, Kluwer, 1982).

156. Schmitthoff, "Extrajudicial Dispute Settlement", *Forum Internationale* No.6.

157. Schmittoff, *The English Conflict of Laws*, at p. 109.

158. Schmittoff, *International Commercial Arbitration: Documents and Reports*, 2 Vols. (Oceana and BIILC, Dobbs Ferry, N.Y. and London 1974).

159. Schot A, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, (The Hague: Kluwer Law International, 1996).

160. Schultsz J and van Berg A (eds.), *The Art of Arbitration* (Deventer, The Netherlands, Kluwer, 1982).

161. Schwebel S, *International Arbitration: Three Salient Problems* (Grotius Publications 1987) pp.21-22.

162. Shihata, *The Power of the International Court to Determine Its Jurisdiction*, (Martinus Nijhoff 1965).

163. Smedresman P, "Conflict of Laws in International Commercial Arbitration," California Western International Law Journal 7 (1977).

164. Smit & Galston & Levitsky (eds.) International Contracts (Matthew Bender, 1981).

165. Smith R (ed), Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s, (London: Legal Action Group 1996).

166. Sonthikasatarin K, *Private International Law* (Nitinunnakan: Bangkok 1992).

167. Steyn, "England", in 1 *Int'l.Handbook on Comm.Arb.*, 9 (1984).

168. Storme and F. Ly (eds.) *The Place of Arbitration* (Mys&Breech 1992).

169. Svernliv, "The Evolution of the Doctrine of Separability in England: Now virtually complete?", 9 *J.Int'l.Arb.*,121 (1992).

170. Szasz, I, "Introduction to the Model Law of UNCITRAL on International Commercial Arbitration", in (Sanders ed.) *UNCITRAL's Project for a Model Law on International Commcial Arbitration*, (Deventer: Netherlands, 1984) 31.

171. Szurski, "Arbitration Agreement and Competence of the Arbitral Tribunal", in *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, 53.

172. Thomas D, "The curial law of arbitration proceedings", *Lloyd's Maritime and Commercial Law* 491 (1984).

173. Toope S, *Mixed International Arbitration*, (Cambridge: Grotius Publications 1990).

174. Triantafyllides, "Prima Facie Agreement to Arbitrate - Examination by the ICC Court of Arbitration", 42-43 *Revue Hell? nique de Droit International* 251 (1989-1990).

175. Triebel, "An Outline of the Swiss/Germann Rules of Civil Procedure and Practice Relating to Evidence", 47 *Arb.* 222 (1982).

176. Tupman, "Challenge and Disqualification", 38 *Int'l.&Comp.L.Q.* 32 (1989).

177. Uff F and Jones E (eds), *International and ICC Arbitration*, (Centre of Construction Law and Management, King's College London, 1990).

178. Voskuil and Freedberg-Swartzburg, "Composition of the Arbitral Tribunal", in Sarcevic (ed.), *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989) 64.

179. de Vries H, "International Commercial Arbitration: A Contractual Substitute for National Courts", 57 *Tul.L.Rev.* 45 (1982).

180. Weinberg K, "Equity in International Arbitration: How Fair is "Fair"? A Study of *Lex mercatoria* and Amiable Composition, 12 *B.U.Int'l.L.J.* 238 (1994).

181. Weinrib E, *The Idea of Private Law*, (Massachusetts: Harvard University Press, 1995).

182. Wetter, *The International Arbitral Process: Public and Private*, (New York, Oceana Publications, Inc., 1979) Vol. IV.

183. Wetter J, "The Legal Framework of International Arbitral Tribunal -Five Tentative Markings", in Smit & Galston &Levitsky

(eds.) *International Contracts* (Matthew Bender, 1981).

184. Wetter J, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal" 1 *Am.Rev.Int'l.Arb.* 91 (1990).

185. Wetter J, Overview of the Issues of Multi-party Arbitration, in *Multi-party: View for international arbitration specialists*, ICC Publication N? 480/1 (1992).

186. Wetter, "Salient Features of Swedish Arbitration Clauses", in *1983 Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce* 34.

187. Wetter, "The Conduct of Arbitration", 2 *J.Int'l.Arb.* 12 (1985).

188. Wilner (ed), *Domke on Commercial Arbitration*, Vol.I-II (Clark Boardman Callaghan 1985) at 89.

189. Yanming, H., "The Ethics of Arbitrators in CIETAC Arbitration", 12(2) *J.Int'l.Arb.* 10, (1995).

190. *Yearbook Commercial Arbitration*, Vol.1-21.

191. S Blay, "Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments", 8 *Am.Rev.Int'l.Arb.* 331 (1997).

192. Yan R & Kuner C, "The New Arbitration Rules of the China International Economic Trade and Arbitration Commission", 11 *Arb.Int'l.* 183 (1995).

193. Brown F and Rogers C, "The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China", 15 *Berkeley J.Int'l.L.* 329 (1997).

194. Supreme People's Court, "Application of the Civil Procedure Law Several Questions, Opinion", reprinted and translated in *China L.&Prac.*, (Jan. 14,1992) 40.

195. D Lewis, "Editor's Note: China Arbitration", 8 *China L.& Practice* 35 (1994).

196. Huacheng Guo, "Arbitration in the People's Republic of China", 14 *Comp.Y.Int'l.Bus.* 187 (1992).

197. R Peerenboom, "China's New Contract Law Fails to Address Concerns Of Foreign Technology Providers; A Missed Opportunity?", *East Asian Executive Reports*, 9 (Sep.15, 1999).

198. Stanley Lubman, "Setback for China-Wide Rule of Law", *Far East Economic Review* 38 (Nov.7, 1996).

199. Zhu Jianlin, "Institutional Arbitration of CIETAC", 1(4) *Int'l.Arb.L.Rev.* G19 (1998).

200. Zhu Jianlin, "CIETAC: Changes", 1(5) *Int'l.Arb.L.Rev.* N77 (1998).

201. Hong-Lin Yu, "Some Thoughts on the Legal Status of A-national Principles in China, 1(6)*Int'l.Arb.L.Rev.* 185 (1998).

202. Zhu Jianlin, "Supreme People's Court Pronounces on Validity of Arbitration Agreements", 2(3) *Int'l.Arb.L.Rev.* N32 (1999).

203. Michael Moser "China: A Special Report Prepared by Michael J Moser", *Int'l.Fin.L.Rev.* (Special Supplement September 1991).

204. Firth M, "International Commercial Arbitration in China", 14 (4) *Int'l.Fin.L.Rev.* (Supp.Int'l. 9-13) 1995.

205. Bin Xue Sang, "China's Civil Procedure Law: A New Guide for Dispute Resolution in China", 26 *Int'l.Law.* 413 (1992).

206. S Harpole, "How China Organizes Arbitral Tribunals: Arbitration in China", 52 *Jan Disp.Resol.J.* 72 (1997).

207. Wang Sheng Chang, "A Comparative Survey of the Rules of the Arbitration Institute of the Stockhom Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission", 9 *J.Int'l.Arb.* 93 (1992).

208. Huang S, "Several Problems in Need of Resolution in China by Legislation on Foreign Affairs Arbitration", 10(3) *J.Int'l.Arb.* 95 (1993).

209. Guo Xiaowen, "The Validity and Performance of Arbitration Agreement in China", 11(1) *J.Int'l.Arb.* 47 (1994).

210. Moser M, "China's New International Arbitration Rules" 11(3) *J.Int'l.Arb.* 5 (1994).

211. Zhang Yulin, "Towards the UNCITRAL Model Law", 11 *J.Int'l.Arb.* 87 (1994).

212. Huang Yanming, "Some Remarks About the 1994 Rules of CIETAC and China's New International Arbitration Rules", 11(4) *J.Int'l.Arb.* 105 (1994).

213. Huang Yanming, "The Ethics of Arbitrators in CIETAC Arbitrations", 12(2) *J.Int'l.Arb.* 5 (1995).

214. Chen Min, "The Arbitration Act of the People's Republic of China - A Great Leap Forward" 12(4) *J.Int'l.Arb.* 29 (1995).

215. Peck, "Playing by a New Set of Rules -Will China's New Arbitration Laws and Recent Membership in the ICC Improve Trade with China?", 12(4) *J.Int'l.Arb.* 51 (1995).

216. Moser M & Yulin Z, "The New Arbitration Rules of the China International Economic and Trade Arbitration Commission", 13(1) *J.Int'l.Arb.* 15 (1996).

217. Guiguo Wang, "The Unification of the Dispute Resolution System in China: Cultural, Economic and Legal Contributions", 13 (2) *J.Int'l.Arb.* 5 (1996).

218. Chen L, "Some Reflections on International Commercial Arbitration in China", 13(2) *J.Int'l.Arb.* 121 (1996).

219. Wang G, "One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China", 14

(1) *J.Int'l.Arb.* 5 (1997).

220. Ge Liu, Alexander Lourie "International Commercial Arbitration in China: History, New Developments, and Current Practice" 28 *J. Marshall L. Rev.* 540 (1995).

221. G Triggs, "Is There An 'Asian' Style of Dispute Resolution?", 23 *Melb.U.L.Rev.* 550 (1999).

222. Charles J. Conroy, "Recent Chinese Legal Developments", 221 (78) *N.Y.L.J.* (1999) S3.

223. Vivienne M. Ashman, "New York Convention and China's 'One Country, Two Systems", *N.Y.L.J.*, (July 2, 1998).

224. C Harer , "Arbitration Fails to Reduce Foreign Investors' Risk in China, 8 *Pac. Rim L. & Pol'y J.* 393 (1999).

225. Tang Houzhi, "Lecture, Arbitration--A Method Used by China to Settle Foreign Trade and Economic Disputes", 4 *Pace L. Rev.* 519 (1984).

226. Chen C, "The Legal Status of Transnational Commercial Arbitration in the Republic of China of Taiwan, 1992 *Private Investors Abroad*, 13.1.

227. Klitgaard T, "Arbitration Laws and Disputes Resolution in the People's Republic of China: Recent Development", 1992 *Private Investors Abroad*, 14.1.

228. Jun Ge,"Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China", 15 *UCLA Pac. Basin L.J.* (1996) 122.

229. Hua Chen, "China and Its Arbitration System in Foreign Trade" 68 *U. Det. L. Rev.* 457 (1991).

230. Fishburne B and Lian C, "Commercial Arbitration in Hong Kong and China: A Comparative Analysis, 18 *U. Pa. J. Int'l Econ. L.* (1997) 297.

231. 2/16/98 *China Daily* via *1998 WL 7594192.*

232. "CIETAC leads world in international arbitration cases", *China Bus. Info. Network*, (Thursday, Jan. 15, 1998) via *1998 WL 7560224.*

233. Harpole S, "Following Through on Arbitration", *China Bus.Rev.*, Sept.1, 1998, via *1998 WL 10921747.*

234. 5/1/99 "China Britain Trade Rev.", via *1999 WL 19539317.*

235. Dr Huang Jin, "Comparative Studies of Arbitration Laws in Mainland China, Hong Kong and Macao, via http://www.ieemacau.com/arbitrat.html.

236. B Beaumont, *Chinese International Commercial Arbitration* (London: Simmonds & Hill Publishing Ltd. 1994).

237. B Beaumont, D Choi, and John Luk, *Commentary on the Chinese Arbitration Act* (London: Simmonds and Hill Publishing

Ltd, 1995).

238. W Chenguang & Z Xianchu, *Introduction to Chinese Law* (Sweet & Maxwell Asia: 1997).

239. Cheng Dejun, Michael J. Moser and Wang Shengchang, *International Arbitration in the People's Republic of China: Commentary, Cases and Materials*, (Butterworths, 2nd 2000).

240. Tang Houzhi, "The People's Republic of China" in Professor P Sanders and Albert Jan van den Berg (eds) *International Handbook on Commercial Arbitration* (Kluwer: 1996).

241. Tang Houzhi , "Is there an expanding culture that favours combining arbitration with conciliation (mediation) or other ADR procedure?", *30th Anniversary and its Ceremonial International Arbitration Symposium*, Korea, Oct.10, 1996.

242. Tang Houzhi, "The People's Republic of China", in Sanders and Berg (eds), *International Handbook on Commercial Arbitration*, (Kluwer, 1996) Vol.1. p.2.

243. Kaplan, Spruce & Moser (eds.), *Hong Kong and China Arbitration Cases and Materials*, (Hong Kong: Butterworths Asia: 1994).

244. M Moser, "People's Republic of China" in M Pryles (ed) *Dispute Resolution in Asia* (Kluwer: 1997).

245. Zhao Yuhong, "Contract Law", in W Chenguang and Z Xianchu (eds), *Introduction to Chinese Law*, (Hong Kong: Sweet&Maxwell Asia: 1997), 235.

246. Lin Feng, "Labour Law", in W Chenguang and Z Xianchu (eds), Introduction to Chinese Law, (Hong Kong: Sweet&Maxwell Asia: 1997), 457.

247. The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *Arbitration Laws of China*, (Hong Kong: Sweet&Maxwell Asia: 1997) at p.45.

BIBL. LONDIN. UNIV.