

Institute of Advanced Legal Studies
School of Advanced Study
University of London

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Arbitration and Dispute Settlement in Foreign Indirect
Investment

The increasing significance and use of arbitration in
international loan agreements, syndicated loans and
international bond issues

LLM 2011-2012
**International Corporate Governance, Financial Regulation and
Economic Law (ICGFREL)**

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I. Introduction

International business relations have been undergoing dramatic changes in the past few decades. Innovative advances in technology and the adoption of the market economy model by national economies have resulted in the globalization of the world economy. It has been recognized that the interconnectedness and integration of national economies towards society's growth and prosperity can be best served through the constant liberalization of international trade and investment flows.

In this environment, there has been an enormous increase in the volume and complexity of particular international business relations, which are financed through sophisticated and complex multi-party financial transactions, such as international syndicated lending agreements or international bond issues. Parties to these contemporary cross-border business transactions are often exposed to cultural, economic, political and legal risks, which provide fertile grounds for the occurrence of important conflicts that can threaten the viability and the effectiveness of the contractual relationship.

The modern business environment's inherent uncertainty forces the parties to treat their contracts as a risk allocation device that provides for legal and non-legal mechanisms for the reinforcement and regulation of their economic exchanges. The appropriateness and effectiveness of the conflict management process that will be entrusted with the resolution of

any arising disputes should be evaluated against those inherent particularities of the international business relations.

The effective resolution of international disputes arising out of international business transactions by means of litigation in national courts can be undermined due to the multiplicity of the national legal systems involved. Jurisdictional conflicts, procedural discrepancies, different national laws applicable to the merits of the dispute, and challenges at the level of the recognition and enforcement of a court judgment, are risks that can lead to significant delays and pose tremendous costs. The shortcomings and deficiencies of international litigation, related to the aforementioned risks, have contributed to the emergence and development of arbitration, as the preferred mechanism for the resolution of international business disputes.

There has been an overwhelming growth of the popularity of international arbitration in the last 50 years. This trend has been showcased in studies and collected data on empirical research, which have identified the arbitration's advantages in comparison to the public adjudicatory system. Parties to international business transactions regard arbitration as a flexible, party-controlled, cost-effective and speedy process, whereby experienced and expertized decision-makers grant final and extensively enforceable awards.

The gradual awareness that arbitration can be an effective means of dispute resolution for international disputes has been reflected in the efforts of the international community to establish a predictable and durable framework for the arbitral process. Through the conclusion of various international conventions and the convergence of national laws, a sophisticated and facilitative international legal framework has been developed for the arbitral process with the long-term aim of supporting and promoting the international trade and investment flows.

Despite longstanding reservations, especially within the banking sector, on the appropriateness and effectiveness of international arbitration, as an alternative method for resolving disputes arising from the international banking and finance business operations, market participants have enough incentives to re-evaluate their reluctance to include arbitration clauses in their contracts and benefit from the existence of a robust international legal and institutional framework in order to protect more adequately their economic interests.

II. Particularities of international business transactions and the problems of litigating international disputes in national courts

1. Particularities of international business transactions

International business relations have been undergoing dramatic changes in the past few decades. From an economic point of view, State protectionism has been gradually eroded since national borders have lost

their economic significance; national economies have become interconnected and interdependent due to the operation of transnational enterprises and the establishment of international and regional organizations that promote free trade and investment, e.g. the World Trade Organization, the European Union and the North American Free Trade Association. The rapid technological innovation and the adoption of a liberal attitude towards trade and investment, facilitated by the proliferation of market economies, have led to the gradual globalization of the world economy.

In the context of a globalized world economy, there has been an enormous increase in the volume and complexity of cross-border transactions. Apart from the traditional bilateral relationships that involve the exchange of products, through the conclusion of sale and purchase contracts within time limitations, international business relations are being increasingly formed on sophisticated and complex multi-party financial transactions, such as international syndicated lending agreements or international bond issues, which last for expanded periods of time and significantly influence the relationship between the contracting parties.

The complexity and sophistication of contemporary cross-border business transactions of this kind reveal the particular nature of business relations exposing them to often-unexpected risks which provide fertile grounds for the occurrence of important conflicts that can threaten the

viability and the effectiveness of the contractual relationship. The inherent uncertainty in the modern business environment may lead to unanticipated changes, which, in turn, are likely to cause disputes between contracting parties. This phenomenon can be attributed to various risk factors of cultural, economic and legal nature¹.

International business relationships, being the outcome of a cross-cultural process of communication and cooperation, can be influenced by different approaches, behaviors and determinations, which are derived by cultural discrepancies. The use of different language can undermine the effectiveness of communication and result in disputes, especially with regard to the understanding of material legal terms and issues. Cultural differences, reflected in the specific organizational structure and the decision-making process of each business partner, may also create tension and distort the efficient cooperation between them.

In addition, international business transactions are affected by the parties' economic and financial situation. The availability and cost of capital, the potential fluctuations in exchange rates, the smooth operation of the world's financial markets, and the economic conditions in their home countries represent for international parties risk factors which can

¹ Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd ed., Alphen aan den Rijn, Kluwer Law International, the Netherlands, 2006) at p.6.

adversely and decisively impact on their contractual relationships and cause serious controversies².

Furthermore, due to the fact that they involve more than one country, cross-border transactions are prone to be adversely influenced by political changes that occurred at the intra- or inter-state level. War and civil disturbances, a government change or a mere shift to its policies and priorities, expressed in the adoption of new legislative instruments or regulations, can negatively impact business exchanges, provoke severe conflicts and, in the event of a State being a contracting party, possibly create insurmountable barriers for the private counterparty to an effective remedy.

Finally, the international nature of the transaction renders the parties and their contractual relationship subject to more than one jurisdiction; in that case, it is possible that one of the contracting parties, being subject to several jurisdictions, will have to deal with mutually exclusive obligations. The multiplicity of the applicable legal regimes represents a legal risk factor, which may lead to significant jurisdictional disputes and adversely impact the viability and the effectiveness of the contractual relationship³.

Thus, it is evident that, in order to deal with their business environment's inherent uncertainty and secure their effective cooperation,

² Ibid at p.7.

³ Ibid.

parties to international transactions need to reinforce their business relationships and regulate their economic exchanges through contracts, which will function both as a risk allocation device and as a mechanism for adjustability to unforeseen changes; it is important, therefore, that the agreement on the dispute resolution mechanism will manage to accommodate the contradicting motivations for ongoing business cooperation and effective contractual control. The appropriateness and efficiency of the process, which will be entrusted with the resolution of any arising disputes, should be evaluated against those inherent particularities of international business relations. The latter impinge on the effectiveness of the legal control mechanisms; induce business parties to opportunistic tactics in order to satisfy their interests, not infrequently to the detriment of the viability of the contract and the continuance of the business relationship and reveal the problems and deficiencies of resorting to national courts for the litigation of international disputes.

2. The problems of litigating international disputes in national courts

International transactions, as said above, can be subjected to several jurisdictions. The multiplicity of jurisdictions is explained by the variation of the legal grounds, on which the assertion of jurisdiction is reasoned in each country. Therefore, international disputes may be legitimately subjected to multiple jurisdictions, and in this case the claimant is provided with the opportunity to proceed to the so-called '*forum-*

shopping' so as to ensure that his/her case will be heard by a biased judiciary or adjudicated through the application of a favorable set of laws and regulations. Moreover, should its counterparty follow the same tactics, it is highly probable that parallel proceedings will result in enormous costs, uncertainty, and possibly conflicting judgments on the same matter.

In addition, the foreign nature of the process of litigation of international disputes in national courts raises automatically the issue of impartiality and neutrality of the forum judiciary towards the foreign party. Notwithstanding the extensive institutional and personal guarantees of impartiality provided for in every advanced judicial system, the local party will be usually perceived to be in a more favorable position as against its foreign counterparty. As far as the conduct of the procedure is concerned, the foreign party and its counsel will have to be familiarized with completely different judicial proceedings and evidence gathering methods, which will be conducted in a foreign language, and, consequently, will surely have to bear extreme transaction and administrative costs.

Moreover, an international dispute may have connection with more than one national legal system. If the parties have failed to contractually agree on the applicable substantive law, the national court seized of the dispute will apply its own choice-of-law provisions in order to determine the applicable law. Given the multiplicity of foreign laws and the court's normal unfamiliarity with them, this is a difficult, complex and burdensome part of

international litigation with unpredictable outcomes for the parties' interests.

Finally, the effectiveness of litigating an international dispute in a national court is practically challenged at the level of the recognition and enforcement of a judgment by the competent authorities of a foreign jurisdiction. Usually, in the context of cross-border business transactions, the party that prevailed in a trial will need to seek the recognition of the final and binding nature of the court decision and its enforcement on its counterparty's assets within the territory of a foreign jurisdiction. Absent treaty regulation, the process of the recognition and enforcement of a foreign judgment is conducted through the local competent authorities and is justified on the subjective and ambiguously construed notions of State comity and reciprocity. Therefore, the relative nature of a judgment's enforceability in a foreign jurisdiction may undermine the feasibility and the effectiveness of international litigation as a mechanism for the resolution of international business disputes.

In the globalized world economy, there has been an enormous increase in the volume and complexity of cross-border transactions. The appropriateness and effectiveness of the process for the resolution of the relevant disputes, is measured against the particularities of the business relations and the inherent uncertainty that comes with them. In this regard, the aforementioned pitfalls of international litigation have contributed to the

emergence and development of arbitration, as the preferred mechanism for the resolution of international business disputes, and have illustrated the arbitration's comparative advantages in comparison to the respective public adjudicatory system.

III. The increasing significance of international arbitration

1. The importance and impact of arbitration on society

When it comes to dispute resolution, people require authority and objectivity. Over time, the State has been perceived to be the appropriate provider of conflict resolution services in terms of employing authoritative and unbiased mechanisms to implement justice.

However, whereas the State has monopolistically exercised its adjudicatory powers over controversies, related to notions such as public interest or public order and policy, i.e. criminal matters, in the context of private contractual relationships, its intervention has been deliberately relaxed leaving space for alternative means of dispute resolution over conflicting interests of the involved parties. More specifically, and with the view that our modern society requires the legal and judicial system to be socially effective and to facilitate international trade and investment flows, business and market participants are increasingly willing to resort to alternative non-judicial frameworks for the settlement of disputes arising in the context of international business transactions, so much so that the State has gradually limited the exclusiveness of its adjudicatory authority.

Various developments in the international trade and investment field were a proof of the emergence of a trend towards international arbitration. One of the characteristic consequences of sovereign debt crisis of the seventies and eighties in Latin America was the rejection of the Calvo Clause doctrine, according to which foreign creditors' claims against sovereign debtors were excluded from being raised before arbitral tribunals or any national courts other than the debtor's domestic courts. Additionally, the sovereign immunity principle, which prevented creditors to sue States in courts for their debts, has been limited to States' political activities (*ius imperii*) and is no longer applicable to their commercial activities (*ius gestionis*), claims arising of which can be submitted to national courts or arbitral tribunals⁴. Finally, the signing and ratification of the New York Convention⁵ has facilitated arbitration, as effective dispute resolution mechanism by means of establishing a robust international framework for the recognition and enforcement of arbitral awards in the jurisdiction of the Contracting parties⁶.

However, arbitration is not an appropriate resolution system for all kinds of conflicting interests. It presupposes a valid agreement from all involved parties to submit their dispute to arbitration, which is not always

⁴ Norbert Horn and Joseph Norton (eds.), *Non-Judicial Dispute Settlement in International Financial Transactions* (Kluwer Law International, London; Boston, 2000) at p. 19.

⁵ Infra note 20.

⁶ See Chapter IV.

the case. Sometimes it cannot provide the necessary coercive mechanisms that national courts have in their armory. Thus, arbitration is not aiming to supersede national courts in the adjudication of international commercial and financial disputes. It is likely, though, that the assessment and decision-making process for differences, which derive from investments in complex and sophisticated financial instruments and raise technical issues that characterize the underlying, often multilateral and interconnected, contractual relationships, will be much more effectively dealt with by well-trained professionals with expertise in the relevant field. Thus, when contractual parties have failed to contractually submit their potential conflicts to a specific jurisdiction⁷, submission to arbitration constitutes evidently an effective means of ensuring that their case will be properly examined and fairly adjudicated.

International arbitration has been gradually recognized as a more efficient mechanism for resolving international commercial disputes, compared to the various national judicial dispute settlement systems, as it offers to market participants a flexible and confidential scheme that provides for the adequate and balanced restoration of conflicting interests and ensures the efficient function of the international financial and capital

⁷ In terms of choosing a national legal and judicial system with high expertise of the judges and lawyers therein, and good reputation in the financial markets and their participants. For example, in syndicated loans, banks either compel borrowers to submit to the jurisdiction of the lending banks or to courts of international financial centers, such as New York or London, where judges and law firms are perceived to be well trained and experienced in difficult and complex technical matters.

markets through an immediate response to tackle disturbances and impediments to the international trade and investment flows. International arbitration has gained pace as its advantages have provided answers to the deficiencies of litigating international cross-border disputes in national courts.

Arbitration is perceived to have introduced positive impacts on our society. Firstly, it is considered to be less costly than national court adjudication. Notwithstanding the fact that this is not always the case, as there were and, obviously, always will be cases where parties suffer huge costs due to legal expenses and administrative fees, arbitration mainly constitutes an advantage to wider macroeconomic parameters, as it showcases the benefit for the society in relieving state budgets from litigation costs, which are suffered by parties in commercial transactions, in what it appears to be a beneficial privatization of justice.

In addition, arbitration contributes to the establishment and maintenance of the spirit of collectivity and cooperation in international business relations, particularly during their conflict management process. From the very beginning of a contractual relationship, parties have to reach an agreement to submit to arbitration and later on, in the case that a dispute arises, they must continue to coordinate their efforts to ensure that their claims will be heard before a mutually-appointed impartial arbitral panel. This voluntary participation of financial community's members is a

pre-requisite for arbitration; the expansion of its application in business disputes fosters the operability and effectiveness of international finance and offers convenience, certainty and security.

Furthermore, certain deficiencies and shortcomings of the various national judicial systems that derive from institutional and procedural bureaucratic methods can be mitigated through arbitration. Instead of resorting to national courts where millions of pending cases obstruct their need for effective dispute resolution, international business relations are benefiting from a less time-consuming system that provides them with the certainty that their case will be timely and promptly dealt with. Along with widely appraised confidentiality, parties to arbitration are afforded with transparency and they are protected from corruption and abuses of power. Likewise, the arbitral proceedings, through parties' consensus as to the applicable law thereto, can be insulated from procedural inflexibilities, inherent to national judicial systems, which are predominantly comprised of mandatory procedural laws and regulations, and promote a cost-effective mechanism for fair and timely resolution of conflicting interests.

2. The advantages of arbitration in international business transactions

Parties to international business transactions, and disputes thereof, regard arbitration as a flexible, party-controlled, cost-effective and speedy process, whereby experienced and expertized decision-makers grant final and extensively enforceable awards. Its advantages provide the

opportunity to international business transactions parties to resort to an alternative mechanism for resolving their disputes, which is more effective than litigating in national courts.

Neutrality

Arbitration is not considered to be the most propitious mechanism for dispute resolution in international business transactions. In fact, as far as international lending operations are concerned, there is a long-standing tradition for lenders to choose to litigate disputes in State courts, and especially in their own home courts, as these disputes are perceived to constitute simplistic allegations over debtors' defaults and considered to be efficiently resolvable with forum clauses⁸. In reality, arbitration offers the least unfavorable forum to which a party can agree to submit its claims in the context of a bargain where it is natural that counterparties do not fully trust each other. Arbitration clauses aim to preclude the respective national courts, which are held to be biased, and to provide for a neutral forum whose neutrality is ensured by mutual agreement on the appointment of impartial and independent arbitrators and the application of internationally recognized unbiased rules and procedures.

Cost, speed and convenience

⁸ Norbert Horn and Joseph Norton (n 4) at p. 6.

Compared to national court proceedings, arbitration is regarded as a more cost-effective and less time-consuming mechanism for dispute resolution of international business disputes.

Even though it may entail significant legal and administrative costs, related to fees for arbitrators, arbitral institutions and expertized counsel, expenses for discovery and evidentiary procedures, and expenditure for travel and accommodation needs, and despite the fact that complex factual and legal issues may occasionally result in lengthy and delayed arbitral proceedings, arbitration enables commercial parties to avoid the inherent inflexibilities and deficiencies of national court proceedings. The latter's bureaucratic and formalistic legal and regulatory framework actually compels the conduct of costly and delayed procedures and leads to the issuance of judgments that are vulnerable to relitigation through appellate review on procedural and/or substantive grounds.

Arbitration, as a centralized forum, enables business parties to evade concurrent and expensive dispute resolution litigation that may result in conflicting and inconsistent judicial decisions and encourages them to engage in the international lending, investment and trade business as they can avoid the risks and uncertainties of litigating international disputes in national courts.

Tribunal's expertise

One of the most important advantages of settling business disputes through arbitration is the ability of the involved parties to present their claims before experienced and expertized persons, who are in the position to comprehend and resolve disagreements over sophisticated financial transactions in the context of complex business relations.

It is understood that national judges lack the necessary capacity and specialization in order to properly understand the particularities of the contemporary business disputes and provide for a fair adjudication.

Arbitration can offer business parties the possibility to deliberately select and appoint independent and well-experienced persons, with expertise and acknowledged authority in their field, to resolve their dispute, refraining from submitting their claims to national courts that are often perceived to be comprised by biased and incompetent decision-makers.

Finality of Decision

Closely connected with speed, another element of arbitration, which is appealing to market participants, is that arbitral awards are not usually subject to appellate review; when an award is granted, parties can rely on the final settlement of their dispute and benefit from the certainty and predictability that characterizes a dispute resolution mechanism, guarantying the finality of its outcomes.

In most national legal systems, arbitral awards can be challenged only for lack of jurisdiction, procedural fairness and due process, and for

non-compliance with public policy principles; national courts refrain from reviewing arbitrators' decisions on the merits of a dispute.

Although, there is always a possibility that a simply wrong award cannot be contested and corrected, parties to arbitration are willing to bear this risk and benefit from the opportunity to timely acquire a final award in order to protect their rights.

International and national enforceability

The international community's "pro-arbitration" incentives have been encapsulated in the international legal framework for commercial dispute resolution. The parties' consensual agreement to a neutral alternative dispute resolution is granted substantial value since international arbitration agreements and awards are widely recognized and enforced within national jurisdictions.

The favorable provisions of the New York Convention⁹ and the national arbitration legislation of the overwhelming majority of the developed countries have established a robust and effective framework that facilitates the enforceability of arbitration agreements and awards¹⁰.

⁹ See Chapter IV.

¹⁰ On the contrary, the recognition and enforcement of forum selection clauses and national judicial decisions is not so facilitated. National courts recognize forum selection clauses included in contracts with "reasonable relation" with their jurisdiction or deny enforcement of foreign judgments on the grounds of applicable national mandatory laws or for public policy reasons.

3. Collected empirical research evidence the increasing use and popularity of international arbitration

There has been an overwhelming growth of the popularity of international arbitration in the last 20 years. This is apparent from a quick view of the relevant statistics, concerning caseloads at major arbitration institutions, such as the International Chamber of Commerce's International Court of Arbitration (ICC Court) and the American Arbitration Association (AAA), that reveal a multiple-fold increase of requests for arbitration proceedings initiation¹¹. The substantial growth of international arbitration can be attributed to the strengthening of the international trade relations coupled with the establishment of a robust arbitration-friendly legal framework, both at the national and international level¹².

Studies in the field and collected data on empirical research show that international arbitration has emerged as the preferable dispute resolution mechanism among market participants as it can provide parties to cross-border transactions with the efficient means to settle disputes arising thereof, avoiding in the same time the inherent deficiencies and problems of transnational litigation in national courts.

A study by Christian Burhring-Uhle on the perceptions and expectations of important participants in the field of international

¹¹ Christopher R. Drahozal & Richard W. Naimark (eds.), *Towards a science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International, 2005) Appendix 1 341.

¹² Loukas Mistelis, 'International Arbitration-Corporate Attitudes and Practices-12 Perceptions tested: Myths, Data and Analysis Research Report' (2004) 15 Am. Rev. Int'l Arb. 525, 527.

arbitration, such as arbitrators, attorneys and corporate counsels, identified the most significant advantages of international arbitration to be the neutrality of the forum and the international enforceability of arbitral awards; the respondents valued substantially the possibility of contractually opting for a dispute resolution process, which is regarded more appropriate for the settlement of international issues, avoiding the shortcomings of transnational litigation in national courts¹³.

Richard Naimark and Stephanie Kerr found in their survey that the majority of the questioned participants in AAA proceedings responded that the most significant attribution of international arbitration is the opportunity of parties to be granted a fair and just result. In ranking the “fair and just result” above other important factors and widely acknowledged advantages of arbitration, such as “cost”, “speed” and “arbitrator expertise”, participants seem to care about fairness and justice that arbitration can establish in international relations and regard arbitration as the most efficient manner of resolving international disputes, valuing the neutrality of its process, and the integrity associated with it¹⁴.

¹³ Christian Buhring-Ulhe, *A Survey on Arbitration and Settlement in International Business Disputes-Advantages of Arbitration* in Christopher R. Drahozal & Richard W. Naimark (eds.), *Towards a Science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International, 2005) at p. 36.

¹⁴ Richard W. Naimark & Stephanie E. Kerr, *International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People: A Forced-Rank Analysis* in Christopher R. Drahozal & Richard W. Naimark (eds.), *Towards a Science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International, 2005) at pp. 44-53.

Furthermore, the independence of the arbitrators, the impartiality of the process and the consideration that arbitration can ensure a more sufficient level playing field for the disputants are incentives for corporations to include arbitration clauses into their contracts.

A study conducted by the School of International Arbitration at the Center for Commercial Law Studies, Queen Mary University of London, funded by PricewaterhouseCoopers LLP London, concerning the perceptions and attitudes of multinational corporations towards the resolution of international disputes through arbitration, showed that corporations are not *a priori* averse against court litigation, as long as they can ensure that their case will be heard before an impartial and knowledgeable judiciary; arbitration is simply deemed to be a more preferable method for dispute resolution that can protect corporations from their unfamiliarity with legal, political and cultural particularities of a foreign jurisdiction.

The study also contains findings that confirmed the widely accepted importance of including arbitration clauses in international contracts. Whether using standard form clauses or tailor-made ones, drafted to meet their particular business needs, two-thirds of the questioned corporations confirmed that they had included international arbitration clauses in their contracts and recognized the importance of incorporating a well-drafted pre-dispute resolution clause as an incentive towards settlement of future

disputes, regardless of whether a prescribed dispute-resolution policy was in place or not¹⁵.

However, the study provided an interesting finding in relation to international lending transactions. In particular, transnational litigation is not precluded from corporations' dispute resolution policies and, in fact, certain specialized corporations, such as banks, which are parties to sophisticated financial transactions, such as syndicated loans or international bond issues, tend to resort to litigation in jurisdictions, either domestic or of a third State, where the judiciary is perceived to have the necessary legal expertise and specialization to adequately understand and fairly resolve complex legal and technical issues¹⁶.

The trend of globalization has transformed the international landscape from the existence of fragmented self-contained national economies to the emergence of an interdependent and integrated world economy within which private participants take advantage of the technological developments and the increasing internationalization of the financial markets and they engage in transactions that can be connected to more than one national legal system. The predominance of a liberal perception of economic activity has strengthened the private parties' willingness to exercise, to the greater extent possible, their autonomy in

¹⁵ Mistelis (n 12) at pp. 556-559.

¹⁶ Ibid at pp. 536-541.

choosing the most efficient means of resolving possible disputes in connection with their international contracts. International arbitration has gained pace and popularity in the international investment and trade field as a private justice system which can meet the parties' pre-contractual arrangements for adequate risk-allocation and post-contractual expectations for fairness and justice.

Notwithstanding the essential contribution of the globalization's ideological and cultural effects to the international arbitration's significant development, by way of enhancing the private parties' autonomy to consensually agree on various jurisdictional and substantive aspects of their international contracts' dispute resolution process, it is the very same features of the globalization and internationalization of the international economic relations that have affected the approach of sovereign States towards the adjudication of cross-border disputes.

In the context of commercial affairs, the international agenda has been dominated by initiatives to co-ordinate the co-operation of States towards the creation of a more favorable environment for the development of international arbitration. Thus, the recognition of the prominence and effectiveness of the private adjudicative process of arbitration, as a dispute resolution mechanism for international contracts, can be also attributed to public interest considerations that arbitration can be valuable for the resolution of disputes between parties from different political, legal and

cultural backgrounds. This awareness has been reflected in the internationalization of arbitration through the conclusion of various international conventions and the convergence of national laws¹⁷.

IV. The legal framework for international arbitration

International arbitration constitutes a private process to which parties to international cross-border transactions consensually agree to resort for the resolution of their disputes. In addition, the contracting parties also agree to be bound by the outcome of this process, the arbitral award, and recognize its binding effect in the public sphere.

The validity and the binding effect of the arbitration agreement as well as the recognition and enforceability of the arbitral award are ensured by virtue of a complex legal framework within which an interaction of national legal systems with international conventions takes place. The arbitral process is governed by three legal regimes: the arbitration agreement between contracting parties, the national legal systems and the international conventions between States¹⁸.

Throughout the 20th century, a sophisticated and facilitative international legal framework has been established and developed for the arbitral process with the long-term aim of the support and promotion of international trade and investment; significant international arbitration

¹⁷ Mahmood Bagheri, *International Contracts and national Economic Regulation-Dispute Resolution Through International Commercial Arbitration* (The Hague: Kluwer Law International, 2000) at pp. 113-114.

¹⁸ Bühring-Uhle, Kirchhoff and Scherer (n 1) at p. 42.

conventions have been entered into force and modern arbitration legislations have been enacted by the majority of the trading countries. Within this arbitration-friendly regime, the validity of the arbitration agreement and the recognition and enforceability of the arbitral award are safeguarded, the parties' autonomy and the arbitral tribunal's procedural freedom are protected, and the arbitral process can be insulated from interference by national courts¹⁹.

1. International arbitration conventions-The New York Convention

The harmonization of the legal framework for international arbitration has been mainly achieved by the conclusion of international conventions, whether bilateral or multilateral. Through the establishment of uniform standards for the treatment of the arbitral process, their goal is to strengthen the enforceability of arbitration agreements and awards and facilitate the arbitral process, which, emerging as an effective dispute resolution mechanism, will consequently function towards the promotion of international trade and investment. The most significant international convention in the field of international arbitration is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards²⁰.

¹⁹ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business; Alphen Aan Den Rijn, Kluwer Law International, Austin, Texas, 2009) at p. 91.

²⁰ *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3; also available at

The New York Convention was the international community's response to the need for the establishment of a comprehensive legal framework for the arbitral process and its main objective was the uniformity of the legal standards for the recognition and enforcement of the foreign arbitration agreements and arbitral awards. Thus, the Convention's provisions focused on the recognition and enforcement of the foreign arbitration agreements and foreign arbitral awards, rather than on the regulation of the conduct of the arbitral process, and stipulated minimum standards for their treatment by the national courts.

Specifically, the New York Convention's provisions provide legal standards for the enforcement of the arbitration agreements and require national courts to recognize the validity of pre-dispute or post-dispute arbitration agreements²¹ and refer parties to arbitration upon determination of the existence of a valid agreement²². They also provide legal standards for the recognition and enforcement of the arbitral awards²³, subject to Article V's specific exceptions that exclude any review on the substantive merits of the foreign award and limit the grounds for refusal of an award's recognition and enforcement to issues of jurisdiction, procedural fairness, compliance with the arbitration agreement (§ 1) and public policy (§ 2).

<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed on September 2, 2012 [hereinafter the New York Convention].

²¹ Article II (1).

²² Article II (3).

²³ Articles III and IV.

The success of the New York Convention's harmonization process depends on the contracting States' willingness to adequately implement the Convention's standards through national legislation and on the application and interpretation by the national courts of both the Convention's and the national legislation's provisions.

In the context of an international business community which has progressively shifted to arbitration-friendly orientations, the majority of the contracting States have enacted legislation with a view to give practical effects to the Convention and national courts have adopted interpretations of its provisions in order to implement its objectives for uniformity and harmonization²⁴. Given the aforementioned, the New York Convention has been so far the most significant step towards the harmonization of the legal standards for the treatment of the most important parts of the international arbitral process, the arbitration agreement and the arbitral award. It has established a comprehensive legal framework on a truly global scale²⁵ and nowadays is acknowledged as the constitutional charter for international arbitration²⁶.

²⁴ Gary Born (n 19) at pp. 100-101.

²⁵ For the status of the Convention and a list of the States that are parties thereto visit <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed on September 2, 2012.

²⁶ Gary Born (n 19) at p. 99.

2. National legal systems-The UNCITRAL Model Law

As mentioned above, the arbitral process is governed by three legal regimes: the arbitration agreement between contracting parties, the national legal systems and the international conventions between States. However, the effectiveness of the framework for international arbitration is primarily dependent on the national legal systems. Practically, the integrated implementation of the international arbitration conventions' provisions by the national legislature and the favorable application and interpretation of the arbitration legislation by the national courts can give effect to the parties' autonomy and can ensure the efficient functioning of the arbitral process.

In the context of a growing realization that arbitration, as a neutral dispute resolution mechanism, can serve to reduce or eliminate the inherent uncertainties and risks of international business relations, and under the influence of the New York Convention's provisions that have established a facilitative framework for the international arbitral process, several countries²⁷ have adopted modern arbitration legislation in order to implement the Convention's objectives towards the promotion of international arbitration through the enhancement of the applicable legal framework.

²⁷ Until 2011, sixty-five countries have adopted legislation based on the UNCITRAL Model Law as well as the U.S. States of California, Connecticut, Florida, Illinois, Louisiana, Oregon and Texas; for a list of the countries that have enacted legislation based on the Model Law visit <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed on September 2, 2012.

A great part of these modern arbitration statutes, that support and promote arbitration as an effective means for resolving transnational disputes, has been modeled on the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration²⁸. Reflecting the growing trend of strengthening the autonomy of the arbitral procedure and aiming to further enhancing the harmonization process that had been initiated by the New York Convention, the UNCITRAL Model Law provides thorough and detailed provisions that cover all the aspects of arbitration (arbitration agreement, arbitral proceedings and arbitral awards) and are directly applicable by the national legislatures and courts.

The UNCITRAL Model Law contains provisions for the definition and formation of the foreign arbitration agreement²⁹, the composition³⁰ and the jurisdiction³¹ of the arbitral tribunal, interim measures and preliminary orders³², the conduct of the arbitral proceedings and the evidence-taking

²⁸ The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration is available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed on September 2, 2012 [hereinafter the UNCITRAL Model Law].

²⁹ Articles 7-9.

³⁰ Articles 10-15.

³¹ Article 16; the UNCITRAL Model Law establishes a framework that promotes arbitration's autonomy and operates to eliminate obstacles derived from court interference by combining the *Competence-Competence* principle with the *separability* doctrine. According to the *Competence-Competence* principle the arbitral tribunal can rule over its own jurisdiction and, in the event of a jurisdictional objection before a court, parties should be referred to arbitration for the definitive resolution of the issue. In addition, the *separability* doctrine, whereby the invalidity of the contract does not render the arbitration clause, contained therein, also invalid, preserves the jurisdiction of the arbitrator to decide on the merits of the case when the contract is terminated or void.

³² Article 17.

procedure³³, the applicable law on the substantive merits of the dispute³⁴, the rendering of the arbitral award³⁵, the recourse for setting aside the foreign arbitral award³⁶, and the recognition and enforcement of the foreign arbitral award³⁷.

The UNCITRAL Model Law, as amended in 2006, signified a notable achievement in providing the proper basis for further improving the harmonization of the international arbitral procedure. It contained detailed and elaborated provisions that took the New York Convention's framework a step further towards the enhancement and integration of a durable, predictable and truly facilitative legal framework for the international arbitration.

V. Arbitration in international banking and finance

The advantages of arbitration as an alternative method for resolving disputes arising out of transactions in the international context have been widely acknowledged and traditionally embraced by participants in several business sectors, i.e. in the international trade and commerce field, the maritime industry and the insurance business. Notwithstanding its

³³ Articles 18-27.

³⁴ Article 28.

³⁵ Articles 29-33.

³⁶ Article 34.

³⁷ Articles 35-36; subject to exceptions that, like the New York Convention, exclude any review on the substantive merits of the foreign award and limit the grounds for refusal of an award's recognition and enforcement to issues of jurisdiction, procedural fairness, compliance with the arbitration agreement and public policy.

profound reputation and extensive use, arbitration historically did not appeal to the financial market's interests, and in particular to the banking institutions' preferences and priorities in the strategic formation of their operations; over time, when a dispute with the borrower arose, bankers and financiers tended to rely on national court litigation for the resolution of what appeared to be a simple matter of determination of the validity of their allegation that the debtor is unable or unwilling to fulfill his/her obligation to repay the advanced loan.

During the last decades, banking and financial institutions have gradually changed their reluctant attitude towards arbitration and they are increasingly resorting to the arbitral process, deeming it to be a more appropriate method for settling financial disputes; this favorable inclination is the result of the combination of a gradual awareness of the deficiencies of litigating international financial disputes in national courts and of a proper evaluation and understanding of the advantages of international arbitration, which can ensure effective dispute resolution for complex and sophisticated legal and technical controversial issues of sophisticated financial contracts.

1. International bilateral and syndicated loans

There has been a constant and intense debate in the international banking community with regard to the appropriate forum for the resolution of disputes arising out of international loan agreements; the issue at

question is whether loan contracts should include a jurisdictional clause (*forum-selection clause*), which will provide for the submission of a dispute to the jurisdiction of a national court³⁸, or they should contain an arbitration clause that will stipulate international arbitration (whether institutional or *ad hoc*) as the appropriate forum for the resolution of any disputes arising thereof³⁹.

Various reservations have led to the financial and banking community's reluctance to choose arbitration for the resolution of international loan disputes and amplified their inherent tendency to choose hometown court jurisdiction.

Banking industry's traditional preference to judges is attributable to its participants' herd mentality and instinctive conservatism that have induced them to rely on mechanisms that have been customarily proved to be working effectively in favour of their interests.

Moreover, arbitration has been treated with equitable considerations, as it has been perceived to constitute fertile ground for the granting of "split the difference" awards⁴⁰; contrary to courts, where public adjudicatory decision-making process is conducted by judges who are compelled to make rigorous and principled decisions by strictly applying the law,

³⁸ Whether of the country of the lender's place of business, or of the borrower's domicile or even of a neutral State.

³⁹ Otto Sandrock, 'Is International Arbitration Inept to Solve Disputes Arising out of International Loan Agreements' (1994), 11(3) J. Int'l. Arb. 33, 34.

⁴⁰ William W. Park, 'Arbitration in Banking and Finance' (1998), 17 Ann. Rev. Banking L. 213, 215-216.

arbitrators, even when they are not expressly authorized to render an award *ex aequo et bono* or as *amiables compositeurs*, are considered susceptible to pressures from the parties, that appointed them, and inclined to issue Solomontian awards in order to balance the remedial impact of the award on both disputant parties⁴¹.

In addition, bankers have been firm proponents of the “simplicity theory”; loan agreements, after disbursement, are considered to be transactions that provide for unilateral obligations on the borrower’s part to repay the interest and the principal and, in the event of default, resorting to a specialized arbitral panel to make considerations and determinations on the simple issue of the borrower’s inability or unwillingness to repay is deemed cumbersome and unnecessary⁴².

Furthermore, in close relation to the aforementioned argument, the arbitral process has been perceived unsuitable for international lending disputes as it can not benefit from cost-effective and less time-consuming summary proceedings, which the vast majority of the national procedural laws provide to the users of national judicial systems, offering to the litigants an attractive framework to effectively preserve their rights⁴³.

⁴¹ Sandroock (n 39) at p. 36

⁴² Sandroock (n 39) at p.35.

⁴³ Stefano Cirielli, ‘Arbitration, Financial Markets and Banking Disputes’ (2003) 14 Am. Rev. Int’l Arbitration 243, 268.

Finally, the possibility of enforcing a court judgment against the borrower's assets, which are located in the country where the judgment was issued, has been significantly appreciated by bankers; the fact that the enforcement of an arbitral award may face considerable obstacles, in comparison to the respective enforcement of court decision, gives to litigation an advantageous position in the banking industry's choice for the settlement of international financial disputes⁴⁴.

However, the aforementioned reservations and considerations, that have traditionally influenced bankers to envisage national courts as the most appropriate forum for the resolution of international lending disputes, are increasingly losing their significance as international arbitration is gradually gaining pace in the financial marketplace. It is noteworthy that, in the course of eighty years of its history, the ICC International Court of Arbitration has handled an enormous amount of cases, the majority of which were directly or indirectly related to financial and banking transactions "...[affecting]... *financial or credit-related issues*"⁴⁵.

Bankers' traditional tendency to resist the inclusion of arbitration clauses in their loan agreements is being recently re-evaluated in the context of a favorable legal and institutional environment, which introduced

⁴⁴ Ibid.

⁴⁵ Horacio A. Grigera Naon, "ICC Dispute Resolution and International Finance" in N. Horn and J.J. Norton (eds.), "Non-Judicial Dispute Settlement in International Financial Transactions" (London; Boston: Kluwer Law International, 2000) at p. 73.

facilitative measures as alternatives to court litigation, responded effectively to historically profound objections against arbitration⁴⁶ and promoted the constant development of the arbitral process through the harmonization and uniformity of the legal standards adopted by national legal systems⁴⁷.

The possibility of submitting a financial dispute to a neutral tribunal, consisted of expertized arbitrators, is of the essence for borrowers who, compared to their counterparties (the lenders) at the time of the conclusion of the agreement, do not possess equal bargaining power and seek to ensure a “level playing field” at the level of settlement of a future dispute. This particularly concerns sovereign borrowers and public sector debtors who wish to have their debt obligations rescheduled or adjudicated in a neutral arbitral tribunal, rather than in the national courts of the lender’s jurisdiction⁴⁸.

On the other hand, lenders are increasingly relying on to use of arbitration clauses with the view to tackle the borrower’s possible defences to loan recovery claims on the grounds of exchange control restrictions or other public policy regulations, imposed by the borrower’s country, or to avoid borrower’s potential counter-claim in court that the lender did not act

⁴⁶ Marcus Boeglin, ‘The use of arbitration clauses in the field of banking and finance’, (1998) 15(3) J. Arb. Int’l 19, 27-30.

⁴⁷ Cirielli, (n 43) at p. 271.

⁴⁸ William W. Park, ‘Making Sense of Financial Arbitration’ (2000) ICC Int’l Ct. Arb. Bull. [Arbitration, Finance and Insurance-Special Supplement] 7, 8.

“in good faith” (lender liability), which could result in an award for punitive damages by a sympathizing jury. Arbitration can strengthen lenders’ loan recovery possibilities as, unlikely court judges, arbitrators are not compelled to defer to national foreign policy considerations, and they are in position to hear a case and make a decision with composure and absolute impartiality towards disputant parties’ arguments⁴⁹.

Moreover, arbitration can more effectively assist the lender in seeking enforcement against the borrower’s assets in a country other than the country where the decision was issued. There is an inadequate international treaty network among countries for the recognition and enforcement of court judgments⁵⁰; indicatively, the USA is not a contracting party to any treaty whatsoever for the recognition and enforcement of American court judgments abroad⁵¹. However, with regard to the recognition and enforcement of arbitral agreements and awards, the New York Convention has established an extensive and efficient framework, within the territory of its one hundred and forty six participant countries, that upholds, almost worldwide, the validity of arbitration agreements and

⁴⁹ Ibid. at pp. 10-11.

⁵⁰ The European countries have established a robust treaty framework for the mutual enforcement of national court decisions, which is based on the Brussels Convention (*Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, O.J. 1990 C 189/2) and the Lugano Convention (*Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 16 September 1988, O.J. 1988 L 319/9).

⁵¹ Park (n 48) at p. 9.

the enforceability of arbitral awards⁵². It is evident that parties to international lending disputes, especially lenders, are benefiting from this international pro-arbitration environment⁵³.

Furthermore, disputes arising out of international lending transactions not infrequently contain very sophisticated legal, factual and technical issues, which, rather than being a simplistic matter of determining the existence or non-existence of the borrower's obligation to repay the loan, they merit consideration and determination by a specialised and experienced arbitral tribunal. Considerations on the exercise of the lender's right to condition the loan disbursements on the soundness of the financial situation and the business operations of the borrower, on the lender's determination of the occurrence of an adverse material change that could legitimize the termination of the loan facility and on the consequences of events of default provisions, contemplated in the loan agreement and invoked by the lender, merit close and careful legal analysis⁵⁴. Additionally, international loan agreements may generate intense disputes over complex financial issues, such as variation in the mode of payment⁵⁵,

⁵² Supra note 20.

⁵³ Cirielli (n 43) at pp. 270-271.

⁵⁴ Naon (n 45) at pp. 77-79.

⁵⁵ *Zim Israel Navigation Co. Ltd. v Effy Shipping Corporation*, Queen's Bench Division (QB), [1972] 1 Lloyd's Rep. 18, Nov. 1971.

currency fluctuations and exchange provisions⁵⁶, and exchange rate fluctuations⁵⁷.

Consequently, it is evident that international loan agreements, even though they are outcomes of a negotiation process between parties with unbalanced bargaining powers, after disbursement they do not just function as evidence of the irrevocable and unilateral obligation on the part of the borrower to repay the loan. On the contrary, their provisions that regulate the parties' duties and obligations can equally render the lender liable for breaches of his/her duty to advance the loan product or for mistakenly declaring an event of default that leads to the acceleration of the loan and to an unduly request for its repayment.

The international private lending industry and its participants continue in principal to support the aforementioned well-established perceptions on the feasibility and appropriateness of including arbitration clauses in their international credit contracts. Backing their traditional suspicion against arbitration, their primary choice for resolution of disputes in international bilateral and syndicated loans remains litigation in national courts; in case that a dispute between syndicate members arises, jurisdiction for its settlement will naturally conferred to the leading agent's

⁵⁶ *Pattison v Marine Midland*, House of Lords (HL), [1984] 2 W.L.R. 11, Dec. 1983.

⁵⁷ *Lively Ltd. and another v City of Munich*, Queen's Bench Division (QB), [1976] 1 W.L.R. 1004, Jun. 1976.

court⁵⁸; as far as disputes between the borrower and the bank in a bilateral loan agreement or between the borrower and the bank syndicate in a syndicated loan facility are concerned, forum selection clauses, that designate that either the agent's national courts or the courts of the borrower's country have jurisdiction for their settlement, are usually agreed upon⁵⁹. Notwithstanding the traditional approach of dispute resolution in international credit contracts, the use of arbitration clauses can be highly productive by accommodating the parties' conflicting interests with regards to the forum selection; it can enhance the legal protection of the contractual relationship by insulating it from unfamiliar and underdeveloped legal systems; and, should the borrower default on its obligations, it can grant the lender the benefits of the international framework for the recognition and enforcement of arbitral awards by providing him/her with an award enforceable on a worldwide basis, which would be proven critically useful if the borrower owns assets outside its country⁶⁰.

⁵⁸ However, arbitration has an important role to play in the event that inter-bank disputes with relation to complicated matters occur; the appropriate determination and just adjudication on issues, such as claims for breaches of fiduciary duty, the agent bank's liability, controversies over the *pari passu* clause or the sharing clause can be ensured by experienced and expertized arbitrators, whereas the likelihood of the risk that these kind of disputes could pose serious adverse effects on the reputation of the banks and undermine the continuance of their smooth cooperation can be mitigated within a confidential and speedy arbitral procedure.

⁵⁹ Boeglin (n 46) at pp.23-24.

⁶⁰ Ibid.

The business practice in the international public sector lending is more favorable to dispute resolution through arbitration⁶¹. The major multilateral financial institutions include arbitration clauses into their lending agreements⁶². The European Bank for Reconstruction and Development opts for arbitration under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules⁶³ and the World Bank's *General Conditions for Loans*, applicable to the Loan Agreements, state that any controversy between the parties will be submitted to an *ad hoc* arbitral tribunal⁶⁴.

2. International bond issues

One of the principal and widely appreciated means of raising finance in the capital markets is by issuing bonds. Bonds are debt instruments, which bear interest at a fixed rate and are issued by a sovereign entity, an international institution or a private commercial corporation for a period of more than five years. A bond issuance can be a simple lending arrangement or it can be combined with other special financial transactions, such as project finance or merger and acquisition (M&A); in

⁶¹ Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press, Cambridge, 2011) at p. 162

⁶² Boeglin (n 46) at pp. 25-26.

⁶³ Park (n 48) at p. 9; See European Bank for Reconstruction and Development, Standard Terms and Conditions, February 1999, section 8.04.

⁶⁴ International Bank for Reconstruction and Development, General Conditions for Loans, March 2012, section 8.04, <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/IBRD_GC_English_12.pdf> accessed on September 2, 2012.

any case, it is usually preferred for the raising of large aggregate amounts⁶⁵.

A bond issue resembles borrowing money through a loan agreement with a bank or a syndication of banks, but it also has its own specific characteristics. Compared to the private and confidential nature of loan facilities, where parties are interactively determinants of the conditions and the consequences of every aspect of the transaction and they remain substantially restricted to transfer their rights, bond issues are more of a public nature, subject to rigid mandatory regulatory provisions, e.g. for the issuer's capital adequacy standards, the requirements of the prospectus and the disclosure of material information, and addressed to the interest of anonymous investors (bondholders), who can easily transfer and negotiate them in the secondary markets⁶⁶; in that way, bondholders can expect fairly higher returns on their investment and borrowers can raise finance more cheaply⁶⁷.

As far as the choice of the appropriate forum for dispute resolution is concerned, arbitration clauses, stipulated over time in the terms and conditions of the bond documentation, had been proved inadequate to

⁶⁵ Andrew McKnight, *The law of International Finance* (Oxford University Press, Oxford, 2008) at pp. 488-490.

⁶⁶ The negotiability of bond instruments renders the transferee, upon delivery, a holder in due course, having acquired a *bona fide* title to the security, free from any defects in title of a prior holder or any defences of the issuer against the previous holder.

⁶⁷ McKnight (n 65) at pp. 491-492.

offer protection to the bondholders, and, until now, their use has been exceptional⁶⁸; parties usually agree to a clause that confers jurisdiction to the courts of the place that is related to the financial market where the foreign borrower had its bonds issued and listed or of its place of business (*exclusive jurisdiction clause*), sometimes combining it with an alternative stipulation conferring jurisdiction to the courts of the situs of the borrower's property that has been pledged as a security for the loan repayment (*multiple jurisdiction clauses*)⁶⁹.

On the other hand, the inclusion of arbitration clauses in sovereign debt instruments has been relatively more preferable than in private loan contracts; however, like in private bond issues, arbitration has not been established as the ordinary settlement mechanism for disputes arising out of sovereign lending agreements. Rather, sovereign creditors and bondholders prefer to litigate disputes in national courts.

The contemporary legal framework of international financial markets treats sovereign and state-owned entities, when they are raising money in the capital markets, as commercial parties, who enter into lending agreements *iure gestionis* and not *iure imperii*; in this sense, sovereign borrowers' participation in international financial transactions renders them unable to plea immunity from enforcement against their assets in case they

⁶⁸ Norbert Horn and Joseph Norton (n 4) at p. 6.

⁶⁹ George Delaume, 'Jurisdiction of Courts and International Loans' (1957) 6 Am. Rev. Int'l Arbitration 189, 194-200.

have breached their contractual obligations. Unlike the older times, when the use of arbitration clauses was prevalent in an effort by creditors to circumvent the obstacles raised by the absolute immunity plea⁷⁰, throughout the modern times⁷¹, due to the significant loss of the practical importance of the doctrine of the absolute sovereign immunity in international financial transactions, international sovereign bonds include forum clauses, which usually provide for the submission of potential disputes to the jurisdiction of the courts of an important financial center, such as London, New York or Hong Kong, to the listing of the stock markets whereof, these bonds may have been additionally admitted to be traded.

Similarly to loan agreements, the reasons behind creditors' preference of court litigation to arbitration, as a dispute resolution mechanism, can be traced to their perception of the greater legal certainty, predictability and protection that national judicial systems' formal procedures and provisions for summary proceedings and interim relief measures can offer to their rights, and their considerations on the potentially equitable nature of an arbitral award.

Even though, arbitration clauses can adversely influence the marketability of the bonds, and in this respect the cost of capital raising, for

⁷⁰ Waibel (n 61) at p. 163.

⁷¹ Particularly in the post-World War II era.

they can be interpreted by financial market participants as an implied inclination of the sovereign borrower to undermine its repayment obligations⁷², they may be effectively used to mitigate the creditor's greater bargaining power for dispute settlement forum determination, which normally leads to the contractual submission of the disputes to the jurisdiction of the creditor's national courts. In the context of a plausible compromise, counterparties in sovereign loan agreements can avoid the adjudication of future disputes over their contractual obligations by an unknown, unfriendly and potentially partial foreign court⁷³ and ensure that their claims will be decided before a "*comparatively neutral alternative*"⁷⁴ dispute resolution body. Likewise, arbitration clauses can comfort jurisdictional concerns over the restructuring and rescheduling process of a sovereign borrower's external debts, whereby the debtor country may succeed to preclude creditor countries' court jurisdiction but it would evidently lack the necessary political and economic status to influence the negotiation in favour of its own courts' jurisdiction⁷⁵.

Consequently, it is apparent that borrowers and lenders have certainly enough incentives to re-evaluate their reluctance to include arbitration clauses in their contracts, bearing in mind the advantages of

⁷² Waibel (n 61) at p. 167.

⁷³ Horn (n 4) at p. 9.

⁷⁴ Park (n 48), p. 8

⁷⁵ Ibid; Horn (n 4) at p. 10.

arbitration, from which contracting parties in international lending arrangements, be it simple or syndicated loan agreements or bond issues, could benefit. Despite bankers' longstanding reservations on the appropriateness and effectiveness of arbitration, as an alternative method for resolving disputes arising from the international banking and finance business operations, it is legitimate to state that the contemporary growth of the use of arbitration clauses in international credit agreements, supported by an enhanced international legal and institutional framework that facilitates the smooth operation of the arbitral process and strengthens the enforceability of the arbitral decision-making, will be fairly maintained and it is likely to face further upward trend in the foreseeable future.

VI. Arbitrability of disputes arising from international lending agreements and bond issues

1. The non-arbitrability doctrine and public policy concerns

Notwithstanding the global appraisal of international arbitration as an effective mechanism for the resolution of disputes in the context of international business transactions, particularly in the banking and financial sector, there exist limitations as to which issues can be subjected to arbitration. International and regional arbitration conventions, as well as various national arbitration laws provide that specific matters remain non-arbitrable and, therefore, the relevant arbitration agreements and arbitral awards thereon are not recognizable and need not be enforced. The

rationale behind the application of the non-arbitrability doctrine reflects public policy concerns and the concept of the State's exclusive purview to adjudicate disputes, which are related to public rights considerations, possess a strong public element, and may have a wider impact on third parties' interests and the society at large, such as criminal offenses, consumer and employment claims.

The New York Convention prescribes the conditions under which a defense against the recognition and enforcement of an arbitration agreement or an arbitral award can be effective by virtue of the application of the non-arbitrability doctrine. Article II(1) states that: "*Each Contracting State shall recognize an agreement ... [of] the parties ... to submit to arbitration all or any differences ... concerning a subject matter capable of settlement by arbitration*"; Article V(2)(a) provides that an arbitral award may be denied recognition and enforcement by the courts of the country, where recognition and enforcement are sought, if: "*...The subject matter of the difference is not capable of settlement by arbitration under the law of that country*". Under the New York Convention provisions, the recognition and enforcement of arbitration agreements and arbitral awards require that the subject matter of the dispute is capable of settlement by arbitration.

As far as the national legal systems are concerned, national laws and the interpretation of their provisions by national judiciaries have decisively delineated the scope of arbitrability. The appropriateness and

efficiency of the arbitral process as a dispute resolution mechanism have gradually gained recognition internationally, and, consequently, this recognition has been transposed in the national context through arbitration-friendly legislative instruments. Currently, States generally favor dispute resolution through arbitration and apply the non-arbitrability doctrine, though very narrowly, through the adoption of exclusive statutory provisions; additionally, national judiciaries have contributed to the determination of the scope of the application of the non-arbitrability doctrine through the interpretation of these statutory provisions and the exclusion of specific contractual relationships and transactions from the ambit of arbitration⁷⁶.

Furthermore, Article V(2)(b) of the New York Convention⁷⁷ provides for an additional exceptional defense against the recognition and enforcement of an arbitration agreement or an arbitral award on grounds of public policy considerations, which are generally embodied in national mandatory laws and regulations. The mandatory application of these rules cannot be circumvented by the parties' autonomy to choose arbitration for the resolution of their contractual disputes and designate by agreement the

⁷⁶ The UNCITRAL Model Law has provided States with the opportunity to statutorily prescribe that certain contractual relationships remain incapable of settlement by arbitration. Article 1(5) states that: "*This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law*".

⁷⁷ Article V(2)(b) provides that an arbitral award may be denied recognition and enforcement by the courts of the country, where recognition and enforcement are sought, if: "*...The recognition or enforcement of the award would be contrary to the public policy of that country*".

applicable substantive law on their contract and the procedural law on the arbitral proceeding; in this sense, party autonomy is subordinated to public law regulations, which aim to benefit the society and safeguard its welfare, and the resolution of regulatory disputes is entrusted to socially sensitive adjudicators, the judges, through a decision-making procedure, which is democratically legitimized. Thus, similarly to the results of the application of the non-arbitrability doctrine, an otherwise valid arbitration agreement or an arbitral award can be denied recognition and enforcement by a national court due to their intense contradiction to fundamental public policy norms and mandatory laws of the forum⁷⁸. Nonetheless, and contrary to the non-arbitrability doctrine, the view that has gradually prevailed with regard to the arbitrability of disputes related to public policy and mandatory law issues is that, within the process of the private adjudication of regulatory disputes, arbitrators can effectively comprehend the regulatory objectives and adequately safeguard the enforcement of the respective legal instruments, especially in the international context⁷⁹.

In light of the increasingly favorable approach towards arbitration and the perception that it can be an important vehicle for the effective resolution of international contractual disputes and the promotion of the

⁷⁸ *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953); *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985); see also Hans Smit, 'Manifest Disregard of the Law in the New York Court of Appeals' (2004) 15 *Am. Rev. Int'l Arbitration* 315, 315-318.

⁷⁹ International competition and securities disputes are two of the most characteristic and often cited examples of the debate on the compatibility of private contractual arrangements with public law regulatory restrictions and the arbitrability of the claims arising out of these contracts.

international trade and investment, the non-arbitrability doctrine and public policy concerns have been substantially eroded over the years. Arbitration is perceived to be a risk-allocation mechanism, which is designed by the parties to contribute to the prevention of the contractual failure due to an allegation of a substantial breach of the contract's terms; its foundation, the arbitration clause, aims to shield the stability of the contract and needs to maintain its functionality. The non-arbitrability plea, which contests the validity of the arbitration agreement and the jurisdictional competence of the arbitrator to decide on the merits of the dispute, as well as the appellate attack on the arbitral award, which seeks to vacate it on grounds of public policy principles⁸⁰, can undermine the functionality of arbitration at the early procedural level which in turn multiplies the possibility of a final contractual failure⁸¹.

Therefore, with a view to the extensive acknowledgment of arbitration as an alternative dispute resolution mechanism that can offer adequate protection to the stability of international contracts and, consequently, can contribute to the establishment of an efficient and liberal international trade system, the perception that the public interest is best served by the compulsory application of national economic regulations in international contractual relationships and that international regulatory

⁸⁰ Principles incorporated in mandatory national laws and regulations that are deemed applicable, even extraterritorially, or expressly recognized and formulated in judicial decisions

⁸¹ Bagheri (n 17) at p. 123.

disputes must remain out of the ambit of arbitration has been proved parochial and has been superseded by the adoption of arbitration-friendly legal arrangements which, by promoting the national regulatory policies' subjection to the need of international commerce and investment and by narrowing substantially the limits of the non-arbitrability doctrine, are considered to serve the interests and the welfare of society at large⁸².

2. Arbitrability of lending and bond disputes

International bilateral and syndicated loans

Banks and financial institutions are corporations with unique characteristics and particular differences from generic firms. They hold a fundamental position within the financial system by providing access to retail and corporate financing, ensuring the smooth function of payment systems and participating in a wide variety of financial services. Financial stability heavily depends on sustainable and well-governed banks and potential deficiencies in their safety and soundness are certain to have multiple negative effects on the wider economy⁸³. Due to their importance for the wider economic stability, banks attract intense and intensive regulatory and supervisory intervention. Every bank functions within a detailed regulatory framework that prescribes minimum capital

⁸² Ibid. at pp. 137-138.

⁸³ Alexander Kern & Dhumale Rahul, *Enhancing Corporate Governance for Financial Institutions: The role of International Standards* in Kern Alexander, Dhumale Rahul and Eatwell John, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press, Oxford, 2006) at p. 242.

requirements depending on its exposure to risk factors, compels ongoing practices of cooperation with and accountability to the competent supervisory authorities and ensures disclosure and transparency.

In light of the above, on the one hand, States, in recognition of the banking sector's bidirectional influence on the viability and stability of the financial system and its inherent incapability to ensure a level playing field for its participants, have an interest to intervene and impose public law regulations in pursuance of public policy objectives for the society's welfare and the protection of depositors and consumers. On the other hand, parties to lending agreements have a strong incentive to consensually agree on the dispute resolution mechanism and may conclude that the private adjudication of their contractual claims by an arbitral tribunal fits better to their needs. Thus, it is possible that a regulatory claim be brought before an arbitral proceeding seeking the recognition of the conflict between public policy concerns and the private parties' contractual arrangement and raising the issue whether the dispute is arbitrable; the arrangement's compatibility with specific regulatory prescriptions may be disputed and the arbitrator may be deemed incapable for properly evaluating the underlying welfare considerations so as to enforce the implementation of the relevant public law rules.

However, disputes arising out of international bilateral and syndicated loan agreements are generally arbitrable. Should the

counterparties contractually opt for arbitration, as the proper dispute settlement mechanism, and one of them initiate arbitral proceedings due to an alleged breach of a contractual term thereafter, the counterparty neither can question the validity of the relevant arbitration clause, denying the competence of the arbitrator to make a final and binding decision on the merits of the case, nor can attack the enforceability of the award on grounds that the subject matter of the dispute was not capable of settlement by arbitration. Being the outcome of the convergence of the interests of the negotiating parties, international lending operations, incorporated in private contractual arrangements, manifest the parties' autonomy and freedom in establishing the terms of the contract and constitute typical examples of activities that exist in the private sphere of the law without impinging on State's public interest concerns⁸⁴.

Notwithstanding the considerations mentioned before with regard to the debate on the appropriateness of arbitration as a resolution mechanism of international lending disputes⁸⁵, a general consensus has been established on the arbitrability of those banking activities, especially when they are connected with large-scale project financing or involve the financial support of major investment operations, like M&As, where parties can interactively determine the contractual terms through negotiations and

⁸⁴ Ilias Bantekas, *Arbitrability in Finance and Banking* in L. Mistelis & S. Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (The Netherlands, Kluwer Law International, 2009) at p. 305.

⁸⁵ See Chapter III.

mutual compromises, and they have strong incentives to choose arbitration as a safeguard for the continuance of their business relationship, protecting at the same time their economic interests and their commercial reputation.

As said above, the contemporary international arbitration framework, which aim to strengthen the unimpeded functioning of a liberal trade system by soothing the complexities of litigating international disputes in national courts, favors the arbitrability of disputes that have a close relation to economic interests of this kind; correspondingly, the majority of the national arbitration legislations, which implement the international conventions' provisions in the domestic legal system, encourage a broad construction of their provisions by national courts with regard to the subject-matter of an arbitration agreement⁸⁶. Within the modern arbitration-friendly legal environment, it is legitimate to state that the national arbitration statutes generally favor the arbitrability of disputes that involve economic interests; otherwise, specific laws (*lex specialis derogat lex generali*) may provide for the exclusion of particular matters from the scope of arbitration, following the arbitration act's entry into force (*lex posterior derogat priori*), when the implementation of special legislative objectives

⁸⁶ Article 177(1) of the Swiss Law on Private International Law provides that "Any dispute involving an economic interest may be the subject of an arbitration"; Section 1030(1) of the German Arbitration Law stipulates: "Any claim involving an economic interest can be the subject of an arbitration agreement"; Article 1(1) of the UNCITRAL Model Law limits its application to international commercial arbitration, with a footnote thereto which provides that "The term 'commercial' should be given wide interpretation so as to cover matters arising out of all relationships of a commercial nature...[which] include, but are not limited to, ...financing; banking..."

based on public policy concerns is deemed necessary⁸⁷.

Bond disputes as arbitrable securities claims

Bonds are negotiable and tradable financial assets that are issued by the borrower and evidence his/her debt and respective promise to repay the lender or the subsequent transferee/holder of the bond. Therefore, the issue of the arbitrability of disputes arising out of international bond transactions falls under the general matter of the arbitrability of disputes from cross-border securities transactions.

Securities disputes may arise at two distinct levels. On the one hand, claims for disciplinary breaches of the exchange rules and controversies over the purchase, delivery or payment of securities may arise between the members of a stock exchange; given that arbitration, as the proper dispute resolution mechanism, is usually provided for in the exchange institutions' rules, to which members have already subscribed, the validity and enforceability of arbitration clauses are unquestionable⁸⁸.

On the other hand, disputes may arise between brokers and their customers, i.e. the investors, based on allegations for misrepresentation, fraud, unsuitable investment activities, churning, improper execution of trades and negligence, and can be more complex when they are related to

⁸⁷ Bantekas (n 84) at p. 295.

⁸⁸ Hans Van Houtte, 'Arbitration Involving Securities Transactions', (1996) 12(4) *Arbitration Int.* 405.

cross-border transactions⁸⁹. The question of whether these kind of disputes are susceptible to arbitration must be answered with due consideration to the particular environment in which the disputant parties have transacted. The unbalanced bargaining power and the intrinsic information asymmetry that exist between contracting parties (issuers or brokers *vis a vis* investors), the need for adequate protection of the investor, especially the non-sophisticated one, and the systemic risks that securities markets can potentially pose to the safety and soundness of the financial system and the wider economy, have promulgated extensive regulatory action on the part of the State; public policy concerns are embodied in securities regulations that prescribe compliance with information disclosure provisions, civil and criminal remedial actions, and capital and structural requirements⁹⁰. Notwithstanding a pre-dispute contractual agreement on dispute resolution through arbitration combined with the designation of the applicable law (which might be other than the law of the investor's place of domicile), the investor is yet likely to invoke the non-arbitrability of the dispute due to the application of mandatory provisions of the law of its place of domicile and litigate in its national

⁸⁹ Ibid at p. 412.

⁹⁰ Chizu Nakajima & Mahmood Bagheri, 'The Private International Law of Securities Transactions: a Socio-economic Analysis' (2002) 23(1) Comp. Law 14, 15-16.

courts⁹¹. It is evident that, in this context, the arbitrability of securities regulatory claims is at issue.

The issue on the appropriateness of the arbitration for the settlement of disputes arising out of securities transactions has long been debated within the highly regulated financial markets of the United States. In its 1953 *Wilko v. Swan* decision⁹², the Supreme Court held that arbitration was not suitable for the resolution of claims under the Securities Act of 1933⁹³ and that arbitration agreements containing pre-dispute waivers of the federal and state courts' exclusive jurisdiction on securities claims were to be unenforceable when invoked as a defense against an investor's suit in a court⁹⁴. The Supreme Court found that the Federal Arbitration Act's⁹⁵ objective for a speedy and cost-effective private adjudication of a statutory claim⁹⁶ was in conflict with and, thus, implicitly repealed by the Securities Act's provisions⁹⁷ that reflect a superior public policy for the strengthening of the protection of investors with unbalanced bargaining power by

⁹¹ Bagheri (n 17) at pp. 138-139.

⁹² *Wilko v. Swan*, 346 US 427 (1953).

⁹³ 15 U.S.C. §§ 77a *et seq.*

⁹⁴ However, The *Wilko* restriction was not applicable on an arbitration clause to which brokers-dealers and knowledgeable sophisticated investors, as parties to an arm's length transaction, have mutually consented. See Constantine Katsoris, 'The Arbitration of a Public Securities Dispute' (1984-1985) 53 Fordham L.Rev. 279, 292-295.

⁹⁵ 9 U.S.C.

⁹⁶ *Wilko v. Swan*, 346 US at 432.

⁹⁷ *Ibid* at 431.

prohibiting the waiver of their right⁹⁸ to seek private remedy for fraudulent misrepresentations⁹⁹ in national courts¹⁰⁰.

Two decades later, the Court in *Scherk v. Alberto Culver Co.*¹⁰¹ reconsidered the above-mentioned conflicts of the laws' objectives, departed from its *Wilko* judgment, and recognized the validity of arbitration clauses included in cross-border securities transactions. The Court was induced to rule in favor of the arbitrability of the dispute by the international nature of the contract and stressed the need to uphold the validity of the international arbitration agreements in order to promote international commerce within the facilitative framework of the New York Convention's objective¹⁰².

The gradual liberalization of securities arbitration continued to be reflected in the Supreme Court's jurisprudence. In 1987, the Court in its *Shearson and American Express, Inc. v. McMahon* decision¹⁰³ accepted the arbitrability of securities disputes, even in the domestic context, expressing confidence in arbitration's suitability to resolve securities regulatory disputes; two years later, it completely overruled *Wilko* when it handed down its decision in *Rodriguez de Quijas v. Shearson/American*

⁹⁸ U.S. Securities Act of 1933 §14, 15 U.S.C. § 77n.

⁹⁹ U.S. Securities Act of 1933 §12(2), 15 U.S.C. § 77l.

¹⁰⁰ U.S. Securities Act of 1933 §22, 15 U.S.C. § 77v.

¹⁰¹ *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).

¹⁰² *Ibid* at pp. 516-517.

¹⁰³ *Shearson and American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

*Express Inc.*¹⁰⁴, in which it recognized the enforceability of pre-dispute agreements to arbitrate disputes under the Securities Act of 1933 and acknowledged that “... *it would be undesirable for the decisions in Wilko and McMahon to continue to exist side by side*”¹⁰⁵.

The arbitrability of securities disputes has gradually gained wide acknowledgement in the United States and nowadays arbitration constitutes the favorable, if not the only, dispute resolution mechanism in securities industry; brokers-dealers routinely require that investors agree to an arbitration clause in their consumer accounts agreements and that any dispute arising thereof be settled in proceedings, which are normally administered and supervised by self-regulatory industry organizations, such as NASD or NYSE, to the effect that arbitration has practically become a compulsory process¹⁰⁶.

The arbitrability of securities disputes has been generally recognized in the United Kingdom¹⁰⁷; its financial markets’ regulator, the Financial Services Authority, has broadly permitted the arbitration of securities-related claims within institutions and under procedural rules that are supervised by self-regulatory organizations¹⁰⁸. The acceptance of

¹⁰⁴ *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989)

¹⁰⁵ *Ibid* at p. 484.

¹⁰⁶ Cirielli (n 43) at p. 278.

¹⁰⁷ E.g. *Phillip Alexander Securities v. Bamberger* [1977] ILPr 73 (1996).

¹⁰⁸ JJ Kerr, ‘Arbitrability of Securities Law Claims in Common Law Nations’ (1996) 12(2) *Arbitration International*, 171, 175.

arbitration's suitability for the resolution of securities regulatory claims, which had long been consolidated in the common-law countries, have also prevailed in civil law countries and it can be asserted that, almost globally, there exists no statutory provision that prohibits the resolution of securities disputes through arbitration¹⁰⁹.

VII. Conclusion

During the last decades, the banking and financial sector has gradually smoothed its inherent and insistent prejudice towards international arbitration. The financial and banking community's reluctance to choose arbitration for the resolution of international loan disputes was premised to their inherent tendency to adhere to mechanisms that, until then, had been proved to be effectively working in favour of their interests. Equitable considerations, simplistic approaches of the parties' rights and obligations in the context of a lending agreement, and the need for summary proceedings that could result in a court judgment, recognizable by and enforceable in a foreign jurisdiction, induced bankers and financiers to rely on litigation in national courts.

However, the aforementioned reservations and considerations have gradually lost their significance and they have been properly dealt with through the establishment of an arbitration-friendly legal and institutional

¹⁰⁹ Bantekas (n 84) at pp. 299-300.

framework that has supported the development and increasing use of international arbitration in the financial marketplace. Notwithstanding the traditional approach of dispute resolution in international credit contracts, where the primary choice for resolution of disputes in international bilateral and syndicated loans remains litigation in national courts, the use of arbitration clauses is being increasingly accepted as an effective means of accommodating the parties' conflicting interests with regard to the forum selection and strengthening the protection of their interests, as is particularly reflected in the business practice in the official lending sector.

Similarly, arbitration clauses, stipulated over time in the terms and conditions of a bond lending agreement had been proved inadequate to offer protection to the bondholders, and, until now, their use has been exceptional. The legal certainty, predictability and protection, that national judicial systems' formal procedures and provisions for summary proceedings and interim relief measures can offer to their rights, are reasons for creditors and borrowers in private and sovereign bond issues to prefer to litigate disputes in national courts. Nevertheless, as far as the sovereign loan agreements are concerned, arbitration can be utilised to mitigate the effects of the bargaining power imbalance between the counterparties in providing dispute resolution through a "*comparatively neutral alternative*" body.

Furthermore, during the past fifty years, in light of the increasingly favorable approach towards arbitration as an effective mechanism for the resolution of disputes arising from international business transactions, particularly in the banking and financial sector, and as an important vehicle for the promotion of the international trade and investment, the ambit of international arbitration has been widely expanded to cover a great part of the economic exchanges within the international business community. Limitations posed by the non-arbitrability doctrine and public policy concerns have been eroded; the global appraisal of the appropriateness and efficiency of the arbitral process as a dispute resolution mechanism have been transposed in the national context through the adoption of arbitration-friendly legislative instruments and its favorable interpretation by the national judiciaries.

On one hand, disputes arising out of international bilateral and syndicated loan agreements are generally considered to be arbitrable. On the other hand, international bond disputes are often derived from the controversies over the application of mandatory national laws and the compliance with securities regulation provisions; the arbitrability of international bond disputes depends on the acceptance of the arbitrability of securities regulatory claims. Influenced by the objectives of the international and national framework for international arbitration as a vehicle to achieve efficiency in international trade and investment, the

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jurisprudence of the national courts of the major financial markets (USA, UK, EU) has gradually recognized the arbitrability of securities regulatory claims. The acceptance of arbitration's suitability for the resolution of securities regulatory claims has long been consolidated almost globally and, nowadays, international arbitration constitutes the favorable, if not the only, dispute resolution mechanism in securities industry.

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