

AN INTRODUCTION TO JUDICIAL REVIEW OF INTERNATIONAL ARBITRATION AWARDS¹

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I. JUDICIAL REVIEW OF INTERNATIONAL ARBITRATION AWARDS

A. Introduction and Outline

In his thoughtful keynote address to the ICCA Congress in June of this year,³ then Attorney-General (now Chief Justice of Singapore) Sundaresh Menon, SC identified, as one of the fundamentals of the new age of international arbitration, the importance of the degree of judicial deference accorded to arbitration, noting:

In Tjong Very Sumito v. Antig Investments, the Singapore Court of Appeal observed that 'an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore,' and it went on to say –

Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitrations... In short, the role of the court is now to support, and not to displace, the arbitral process. [footnote omitted]

Mr. Menon emphasized that minimal curial intervention was a relatively recent phenomenon, recognizing, and giving examples of, the underlying tension between courts and arbitrators, but went on to identify a number of reasons for "suggesting a modest return to greater judicial oversight of arbitration."⁴

But with any judicial oversight of arbitration, it is important to focus on the type of oversight appropriately employed. As I observe below, arbitral-related legislation often provides an express boundary for judicial review, and that review should be consistently applied. Indeed, properly understood, the roles of courts and arbitrators are complementary and appropriate judicial review can play a vital role in strengthening and reaffirming the arbitration process. Respect, of course, is not earned automatically, but is earned through a process of arbitral decision-making that is fair and results in justifiable

³ Keynote Address, ICCA Congress 2012, Opening Plenary Session (Written Remarks) "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", at 1. Available online at: <http://www.siac.org.sg/images/stories/AGs%20Opening%20Speech%20-%20ICCA%20Congress%202012.pdf>.

⁴ *Ibid.*, at 19.

(albeit not necessarily agreeable, to the Court) awards. A culture of respect between arbitrators and courts should be encouraged and cultivated.

This paper will attempt to introduce generally the topic of judicial review of international arbitration awards.

I am a practitioner, a barrister, who has challenged and defended arbitral awards in judicial review proceedings. I have also acted as counsel in NAFTA investor-State arbitrations. My courtroom experience has come in Canada, in various federal and provincial common law jurisdictions that have enacted the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law")⁵ in one form or another.⁶

As a practitioner, I am obliged to explain to generalist judges, none of which has been a former practitioner in international arbitration, the principles governing judicial review of international arbitral awards. I try and look at the issues, then, from the perspective of a judge who is not an expert in arbitration matters.

There are three matters of fundamental concern to a judge faced with an application to set aside, recognize, or enforce an award:⁷

- (1) identifying relevant national legislation;
- (2) interpreting the arbitration agreement itself; and
- (3) identifying the relevant facts giving rise to the application for judicial assistance.

⁵ UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985), with amendments adopted on 7 July 2006. The text is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

⁶ Canadian jurisdictions were early adopters of the Model Law and the recent *UNCITRAL 2012 Digest of Case Law on The Model Law on International Commercial Arbitration* ["2012 Digest"], cites more cases from Canada than from any other jurisdiction. The text is available at: http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html.

⁷ For the views of American and English judges, see Justice Stephen G. Breyer, "The Review of Arbitral Awards by Domestic Courts – United States"; and, Lord Mance "The Review of Arbitral Awards by Domestic Courts - England", both in Emmanuel Gaillard Ed., *The Review of International Arbitral Awards*, International Arbitration Institute Series No. 6 (Huntington, N.Y.: Juris Publications, 2010).

I review each of these matters in turn briefly here, and in more detail further below.

First, the judge will want to identify the relevant national legislation that governs the Court's jurisdiction. The applicable national legislation may or may not be different depending on whether the arbitration is domestic, "international", "commercial", or otherwise. The applicable national legislation may incorporate the United Nation's *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("the New York Convention")⁸ or the Model Law, in whole or in part, may borrow concepts from those building blocks, or may be unique.⁹ The national legislation may be recent, drafted in precise terms, following on a Law Reform Committee Report or other recommendation, and expressly indicating an intention to overcome perceived judicial hostility to arbitration and "make a fresh start", or it may be of long standing, drafted in general terms, and overlaid by an historic and extensive body of case law that binds the first instance judge who is obliged to apply the local law.

Where there is more than one national law that might apply and the matter is one of first impression, there may also be some dispute as to which national law is applicable.¹⁰

Whatever the case, in a common law jurisdiction, the starting point for counsel is to identify for the judge the national legislation that confers jurisdiction and guides the judge in the application before the court.

Where that legislation has been the subject of interpretation by higher courts in the jurisdiction, counsel will be required to identify the appropriate authorities to assist the court. Depending on the jurisdiction, caution may be required in respect of older authorities. For example, the *English Arbitration Act*, enacted in 1996, was intended to be and has been treated as giving "English Arbitration Law an entirely new face, and

⁸ 10 June 1958, 330 U.N.T.S. 38.

⁹ Many of the leading traditional international arbitration centres have not adopted the Model Law, including France, Switzerland, United States, Netherlands, Belgium, and Sweden.

¹⁰ *United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, Canada, 2 May 2001, 2001 BCSC 664 [*Metalclad*].

new policy and new foundation."¹¹ Earlier authorities are unlikely to be as persuasive, and may even be wholly inapplicable.

The applicable legislation and governing authorities will define the grounds and scope of judicial review that are available, including the relevance of foreign and international methods and concepts, the prerequisites to judicial review, and, ultimately, the available remedies. The importance of a proper understanding of the applicable national legislation cannot be overstated.

In addition to the governing statute, there may be other laws that are relevant to the judicial review.

These can include the law governing the conduct of the arbitration, the law governing the arbitration agreement, the law governing the substance of the dispute between the parties, and the applicable conflict of law rules. Identifying the law applicable to the substance of the dispute is not for the purpose of reviewing the correctness of the arbitrator's application of that law, but rather for the purposes of jurisdictional review. If the arbitrators applied, correctly or incorrectly, a law that the parties did not agree was applicable, they will have exceeded their jurisdiction.¹² Identifying the rules governing the conduct of the arbitration may also be necessary to determine whether the process has been conducted in a manner consistent with the parties' agreement and with the applicable standards of procedural fairness.

The second matter of fundamental concern to the reviewing judge is closely related to the enquiry into the applicable laws; this second concern is the arbitration agreement itself. The parties' freedom to consent to resolve their disputes by arbitration is the "cornerstone" of international arbitration. That agreement may identify the substantive law governing the dispute, the law governing the arbitration agreement, and the law governing the conduct of the arbitration, including internal procedural matters

¹¹ *Lesotho Highlands Development Authority v. Impreglio S.p.A.*, House of Lords, United Kingdom, 30 June 2005, [2005] UKHL 43 at para. 17.

¹² For a good discussion on the difference between an arbitrators interpretation of the choice of law clause in the parties argument to arbitrate, on the one hand, and an arbitrators failure to apply the rules of law agreed upon by the parties, on the other, see *Quarella SpA v. Scelta Marble Australia Pty Ltd.*, High Court, Singapore, 27 June 2012, [2012] SGHC 116.

and relations with national courts, which are usually governed by the arbitration statute of the seat or place of the arbitration. The judge may be required to assess the existence, validity, and scope of the arbitration agreement and, thereafter, must give effect to the terms of that agreement, unless doing so would result in a violation of "public policy".

When dealing with well-drafted commercial contracts, determining the existence, validity, and scope of the arbitration agreement, including applicable laws and rules, should be a straightforward exercise.

Not surprisingly, poorly or partially drafted agreements can cause difficulties to arise.

In investor-State disputes, where the agreement to arbitrate is formed when a State's standing (conditional or unconditional) offer to arbitrate (more or less) specifically defined disputes¹³ is accepted by a qualified "investor" in respect of a protected "investment", who may (depending upon the applicable investment treaty) be given a number of choices as to arbitral rules, the enquiry can be more complex, as discussed below.

But, in all these cases, the arbitration agreement and the principle of party autonomy are of central importance.

The third matter of fundamental concern to the reviewing judge concerns the facts giving rise to the application for judicial assistance. Various national laws provide expressly for judicial assistance with disputes that arise prior to the final award, including selections of arbitrators (appointing, challenging, and removing arbitrators), assisting arbitrators with respect to evidence taking and discovery, granting provisional measures of protection in aid of arbitration, and staying domestic legal proceedings

¹³ Much depends upon the precise text of the investment treaty that confers jurisdiction on the Tribunal. Some treaties permit arbitration of "any dispute relating to an investment", a broad grant of jurisdiction, while others permit arbitration of alleged breaches of specific obligations set out in the treaty. In addition, some treaties expressly provide for States' consent in unconditional terms, while others set out conditions precedent that must be met before the consent is perfected.

pending arbitration.¹⁴ I will restrict my remarks to disputes that arise following the final award (the definition of which can itself be an issue).

After an award, there are a number of avenues available for review:

- (a) correction and interpretation by the Tribunal under Article 33 of the Model Law;
- (b) proceedings in the national court of the place of arbitration to recognize the award, leading to the entry of a judgment of the national court to be enforced in that jurisdiction or to be taken to another jurisdiction for recognition and enforcement under that State's national legislation;
- (c) seeking to have the award recognized in a national court in the same manner as a foreign judgment; and
- (d) proceedings in the national court of the place of arbitration to set aside the award in whole or in part.¹⁵

Before addressing these topics in more detail, I would like to make some general comments about the much debated relationship between national courts and arbitrators, which is sometimes alleged to give rise to a greater or lesser degree of "jealousy" or judicial hostility to arbitration.

B. The Proper Scope of Judicial Review in the Arbitration Process

There is much debate about the extent to which intervention by national courts impedes or enhances the usefulness of arbitration. When parties reach an amicable settlement of a commercial dispute, the law generally does not interfere with the autonomy of the parties in resolving the dispute as they wish.

¹⁴ A recent example of innovative judicial assistance is found *West Tankers Inc. v. Allianz S.p.A.*, Court of Appeal (Civil Division), England and Wales, 24 January 2012, [2012] EWCA Civ 27 ["*West Tankers*"], a decision of the English Court of Appeal holding that a declaratory arbitral award could be enforced as a judgment of the English Court under the *Arbitration Act 1996*, c. 23 (UK). The intended effect was to allow the applicant to establish the primacy of the declaratory award over any subsequent inconsistent judgement of the national courts.

¹⁵ Gary B. Born, *International Commercial Arbitration*, 3d ed. (The Netherlands: Kluwer Law International) at 1000-1002.

When parties agree to settle a dispute by reference to arbitration, the laws of most countries similarly respect the parties' autonomy regarding the selection of an institutional or *ad hoc* arbitral Tribunal, the appointment of the arbitrators, and the choice of law. The arbitral process itself, however, is generally subject in whole or in part to the mandatory provisions of the applicable national law, usually the law of the place of the arbitration, or the law of the place where recognition or enforcement of the award is sought. The fact that arbitration is not free from judicial review by national courts gives rise to a tension between the goals of finality and correctness.

In the eyes of some commentators, the need for certainty in international commerce dictates that the correctness of a result is not as important as its finality. Unsurprisingly, arbitrators are often among those arguing that great deference ought to be accorded to themselves. When given the choice as to the place of arbitration, arbitrators also appear to show a preference for jurisdictions that are less likely to engage in extensive review.¹⁶

Other commentators, myself among them, view the principled application of judicial review as essential to protecting the integrity of the parties' arbitration agreement. They argue that the goals of fairness and effectiveness cannot be achieved without some degree of supervision of the arbitral process. The challenge is ensuring that the level of judicial review that does occur is appropriate, and is neither unduly abstentious, nor interventionist.

Some level of judicial review is simply inevitable. Awards are neither self-executing nor self-destroying. As recently noted by Lord Justice Toulson:

Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system...¹⁷

As William Park explains:

¹⁶ See the discussion in *United Parcel Service of America, Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on the Place of Arbitration, 17 October 2011, at paras. 6-11, where the Tribunal found Canada's submissions on the scope of judicial review made as an intervenor in a prior Canadian judicial review of a NAFTA award made against Mexico and reviewed in the Supreme Court of British Columbia "troubling".

¹⁷ *West Tankers*, at para. 36.

Judges reserve to themselves the job of delineating an arbitrator's power, for the simple reason that the parties' grant of arbitral jurisdiction on any given issue is the basic ingredient of valid waiver of a day in court. As long as one side calls upon government power to support the arbitral process, arbitrators (or alleged arbitrators) can never have the final word on their jurisdiction, since the extent of their authority is the very issue presented to courts asked to enforce arbitration agreements and awards.¹⁸

Absent voluntary compliance, all forms of arbitration ultimately depend for their efficacy upon the coercive power of national courts, which are entitled to seize assets and grant *res judicata* effect to arbitral awards.¹⁹ National courts, and indeed governments, are unlikely to permit these powers to be called upon without at least some opportunity to oversee the process by which they are invoked.

It is a mistake to equate all judicial intervention with hostility to arbitration. Judicial intervention to annul an award or a portion of an award that is outside the scope of the parties' arbitration agreement is properly seen as enforcement of the principle of party autonomy, and should be seen as "pro-arbitration."

In this regard, Yves Fortier, a senior and well-respected member of the Canadian arbitration community, has written:

... judicial review of arbitral awards, limited in scope, is arguably one of the essential conditions for the development of an effective system of arbitral justice. It is the availability of subsequent court control which makes it acceptable for arbitrators to rule on their own jurisdiction, for example, or for national laws to admit the arbitrability of disputes involving issues of public policy, such as anti-trust or securities claims. Similarly, it is *because* the courts have a role to play in enforcing arbitral awards that judges can, and do, refrain from interfering in arbitral proceedings during the conduct of the arbitration. Viewed in this

¹⁸ William W. Park, "Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators" (1997) 8 Am. Rev. Int'l Arb. 133 ["Park"] at 144.

¹⁹ This is even true of arbitration under the ICSID Convention, although the role of national courts in that system is restricted to recognition and enforcement of arbitral awards rendered on the basis of the Convention. See Mosche Hirsh, *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes* (The Netherlands: Kluwer-Nijhoff, 1993).

manner, the availability of judicial recourse in limited circumstances is far from antithetical, but is, rather, essential to the well-being of what is otherwise a purely private process.²⁰

[emphasis in original]

Under the general rules of international arbitration, after an award, judicial intervention may take place at the seat of the arbitration, as well as at the place or places of recognition or enforcement of the arbitral award.²¹ There is a consensus that judicial review should not extend to the merits of the underlying dispute.²² At the same time, review to give effect to the principle of party autonomy that properly engages the existence, validity, and scope of an arbitration agreement or of the procedure that was followed to reach an arbitral award is regarded as appropriate. A narrow "public policy" exception to acceptance of an arbitral award by a national court is also recognized.

The proper role of judicial review is longstanding, exemplified in the following passage from the 1966 Report of the Secretary-General of the United Nations on international commercial arbitration:

It would be an over-simplification, however, to conclude that any intervention of the law impedes the usefulness of arbitration. In some cases the opposite is true. For example, normally a party may apply to the courts to plead that the arbitral tribunal had no proper jurisdiction or exceeded its powers. This kind of intervention of the law tends to promote confidence in arbitration. The same may be said where the intervention of the courts is necessary to enforce an arbitral award.

²⁰ Yves Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, my Lord, of Jealousy'" (2001) 80 Can. Bar Rev. 143 at 147.

²¹ For a discussion of the international consequences in the investment treaty context of the assertion of jurisdictions to set aside an award by a court that is not the seat of the arbitration, see *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007. For a recent development, see *Bharat Aluminum v. Kaiser Aluminum*, Supreme Court, India, 6 September 2012, CA No. 7019/2005, where India's Supreme Court held that Indian courts would no longer exercise authority to annul awards, or remove and appoint arbitrators, in arbitrations seated outside India.

²² The rationale for "minimal curial intervention" which respects the finality of the arbitral process is that it "acknowledges the primacy that ought to be given to dispute resolution mechanisms that the parties have expressly chosen": 2012 Digest, at 135, citing *CRW Joint Operation v. PT Perusahaana Gas Negara (Persero) TBK*, Court of Appeal, Singapore, 13 July 2011, [2011] SGCA 3, at para. 25.

On the other hand, no control by the courts seems necessary or desirable over the merits of the arbitral award. Persons engaged in international trade often prefer to settle their disputes by arbitration rather than by judicial proceedings owing primarily to the greater speed of the arbitration process. This advantage is wiped out where the losing party is allowed to appeal to the courts against the merits of an arbitral award or where the courts are entitled to review the award *ex-officio*. In such cases the intervention of the courts, in addition to delaying the settlement of a dispute, impedes arbitration by depriving the arbitrators, whose judgement was trusted by the parties, of the power to render a final and binding award.

For these reasons the international instruments examined in this report generally provide that arbitral awards should be final and have binding force, except where an award is contrary to the *ordre public* of the court of the country concerned...²³

The fundamental role of judicial review by national courts is to give effect to agreements to arbitrate. The consent of the parties is central to the arbitration process. That consent must comprehend not only the fact of arbitration, but also the specific issues to be resolved by arbitration and the governing law. An arbitration Tribunal only has jurisdiction over those specific issues that the parties have agreed to submit and any award that goes beyond those issues will be susceptible to challenge.

As Alan Redfern and Martin Hunter put it, in *Law and Practice of International Commercial Arbitration*:

An arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate. It is also a basic source of the powers of the arbitral tribunal. ...

Finally, it is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal. The agreement of the

²³ "Steps to be Taken for Promoting the Harmonisation and Unification of the Law of International Commercial Arbitration: Report of the Secretary-General" (U.N. Doc. A/CN.9/21) in *UNCITRAL Yearbook*, vol. 1 (New York: United Nations, 1971) at 282.

parties is the only source from which this jurisdiction can come. ...²⁴

The centrality of consent is reflected in many arbitral conventions and decisions. For example, consent is expressly required by Article 25 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the "ICSID Convention")²⁵ and was described as the "cornerstone of the jurisdiction of the Centre" in the Report of the Executive Directors that accompanied the Convention when it was submitted to the governments of member States of the World Bank.²⁶

Similarly, in a proceeding conducted under the ICSID (Additional Facility) Rules, the Tribunal noted that:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.²⁷

The requirement of consent to arbitral jurisdiction from a sovereign State was commented on in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*.²⁸ The Tribunal said:

...there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has

²⁴ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed. (London: Sweet & Maxwell, 1999) at 1-13.

²⁵ 18 March 1965, 575 U.N.T.S. 159.

²⁶ "Report of the Executive Directors on the Convention on Settlement of Investment Disputes Between State and Nationals of Other States," 18 March 1965, reproduced in (1993) 1 ICSID Rep. 23. Available online at: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>.

²⁷ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 26 May 2000, at para.16 ["*Waste Management I*"].

²⁸ ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988 ["*Southern Pacific*"].

been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively. Judicial and arbitral bodies have repeatedly pronounced in favor of their own competence where the force of the arguments militating in favor of jurisdiction is preponderant ... Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.²⁹

Although the agreement to arbitrate is fundamental to all international arbitration, it is important to recognize that there are many different types of arbitral proceedings and that each must be considered individually. Michael Mustill and Stewart Boyd state:

Furthermore, when considering a reported case it is necessary always to bear in mind the type of arbitration with which it was concerned. Decisions and statements of principle which were perfectly valid at the time, and remain good law today, may nevertheless yield completely false results if applied in a different context. A commodity arbitration on quality and a formal reference pursuant to statutory powers are both examples of arbitration, but they are barely recognizable as the same process, and attempts to transfer principles from one to the other will inevitably lead to error.³⁰

This caution is particularly important when comparing international commercial arbitration and investment treaty arbitration, which are very different undertakings. In investment treaty arbitration, the signatory States' consent to arbitrate has been entered into on a reciprocal basis by the two States party to the treaty, rather than given directly to a private party. The private party must also consent to the State's offer expressed in the treaty. The general view is that the two consents, given at different points in time, must match in order for an arbitration agreement to be formed, since one of the parties to

²⁹ *Ibid.*, at 143-144.

³⁰ Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 54.

the arbitration is a State and the arbitration by definition engages international legal obligations.

Conventional international commercial arbitration based on an existing one-off contract of relevance only to the parties raises very different issues than investment treaty arbitration where the same, or similar, obligations are repeatedly considered by successive Tribunals. The risk of contradictory decisions in cases arising between different parties based on similar facts is inherent in any arbitration system, but is more troubling in investment treaty arbitration.³¹

It has to be recognized that national courts can abuse their jurisdiction. If such abuse adversely affects an "investor" that is entitled to access to an arbitral Tribunal that applies international law, relief may be available against the State whose courts have acted contrary to international law or the States' international treaty obligations.³²

II. NATIONAL LEGISLATION

A. The Fundamental Building Blocks of International Arbitration Underlying Most National Legislation

As noted above, the judge's first enquiry relates to the applicable national legislation. National legislation is necessary to:

- (1) affirm the capacity and freedom of parties to enter into valid binding agreements to arbitrate existing or future disputes;
- (2) provide mechanisms for enforcement of arbitral agreements by national courts, including orders to stay litigation or compel arbitration;
- (3) provide procedures for confirming or setting aside arbitral awards; and
- (4) provide procedures for recognition and enforcement of foreign arbitral awards.

³¹ Compare *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; *Archer Daniels Midland Company v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007; and see discussion of the role of previous awards in *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009.

³² See *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Award, 30 November 2011.

The form of national legislation in many jurisdictions is based upon a number of fundamental building blocks of international arbitration - international conventions, model laws, arbitral institutions, and institutional and *ad hoc* arbitral rules. The practical effects of these conventions and model laws is dependant upon the precise content of the national legislation implementing them and the interpretation ultimately given by national courts to the national implementing legislation. The two most important building blocks are:

- (1) the New York Convention; and
- (2) the Model Law.

Singapore is a party to the New York Convention and the Model Law is the cornerstone of Singapore's legislation on international commercial arbitration. As noted below, Singapore regularly updates its legislation to incorporate updates to the Model Law.

B. The New York Convention

The New York Convention was adopted in 1958 by States participating in the United Nation's Conference on Commercial Arbitration.³³ The New York Convention superseded the Geneva Convention of 1927. The New York Convention was intended to liberalize procedures for enforcing foreign arbitral awards by, among other things, shifting the burden of proof to the party opposing recognition and enforcement and limiting the grounds for opposition to those listed in the Convention. UNCITRAL's website notes:

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the

³³ The New York Convention's full name is the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", and is also sometimes referred to as the "New York Arbitration Convention".

parties access to court in contravention of their agreement to refer the matter to an arbitral Tribunal.

The New York Convention provides for two reservations: the "reciprocity reservation" and the "commercial reservation". A State implementing the New York Convention on the basis of the reciprocity reservation will apply the Convention only to awards made in States that are also parties to the Convention. The commercial reservation limits the New York Convention to arbitrations of "commercial disputes". The grounds for challenging recognition and enforcement listed in the New York Convention are discussed below.

The New York Convention focuses on the enforcement of arbitral awards; it does not affect the setting aside power of the national courts in the place of the arbitration.³⁴ As noted by Albert Jan van den Berg:

The Convention is limited to the recognition and enforcement of a foreign award. It does not apply in the country in which, or under the law of which, that award was made (the "country of origin").

... the Convention is not applicable in the action for setting aside the award. This has been unanimously affirmed by the courts.³⁵

The difference between the grounds for refusal to enforce under the New York Convention and the grounds for setting aside an award under national legislation was emphasized by the authors of *International Chamber of Commerce Arbitration*, as follows:

It is important to remember, however, that the New York Arbitration Convention establishes no criteria for proper or improper vacatur at the arbitral situs. Judicial review of an award at the place where made will be governed by the local arbitration law there in force, which may provide for

³⁴ See Articles V(1)(e) and VI of the New York Convention, which make the fact that an award has been set aside by a competent authority of the country in which, or under the law of which, that award was made a ground for non-recognition or non-enforcement.

³⁵ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Netherlands: Kluwer Law, 1981) at 19-20.

an award vacatur on any ground it sees fit, or for no vacatur at all.³⁶

This point was also recognized by the U.S. Court of Appeals for the Second Circuit in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*:

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.³⁷

C. The Model Law³⁸

The UNCITRAL website notes:

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

The Model Law deals comprehensively with arbitral issues that can arise in national courts, including:

³⁶ W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3d ed. (Dobbs Ferry: Oceana Publications, Inc., 2000) at 685; see also H. Smit, "Annulment and Enforcement of International Arbitral Awards: A Practical Perspective" in Lawrence Newman & Richard Hill, eds., *The Leading Arbitrators' Guide to International Arbitration* (Huntington, N.Y.: Juris, 2008).

³⁷ United States Court of Appeals, Second Circuit, United States of America, 10 September 1997, 126 F. 3d 15 at 23.

³⁸ For an authoritative guide to the Model Law, see the 2012 Digest, *supra*.

- (1) enforcement of arbitral agreements;
- (2) appointment and challenges to arbitrators;
- (3) jurisdiction of arbitrators;
- (4) provisional measures;
- (5) conduct of arbitral proceedings, including language and reference to the "place" or "seat" of arbitration;
- (6) evidence taking and discovery
- (7) applicable substantive law;
- (8) the form of awards;
- (9) correcting an interpretation of awards;
- (10) setting aside or vacating awards; and
- (11) recognition and enforcement of awards, replicating the grounds for non-recognition found in the New York Convention.³⁹

The grounds for setting aside an award under the Model Law are derived from Article V of the New York Convention.⁴⁰ The Model Law thus supplements, without conflicting with, the New York Convention's requirements for recognition and enforcement of arbitral awards. Interpretations of the parallel provisions of the New York Convention may be considered when determining applications to set aside awards under the Model Law.⁴¹

The legislation enacting the Model Law in the Province of British Columbia, Canada, the *International Commercial Arbitration Act*, is typical of many statutes that implement the Model Law in providing, out of an abundance of caution, that:

³⁹ See Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law in International Commercial Arbitration: Legislative History and Commentary* (The Netherlands: Kluwer Law and Taxation Publishers, 1989).

⁴⁰ The first ground was modified "since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule": 2012 Digest, *supra*, at 173.

⁴¹ *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.*, Ontario Superior Court of Justice, Canada, 22 September 1999, 45 O.R. (3d) 183 at 190, *aff'd* 15 September 2000, 49 O.R. (3d) 414 (C.A.), application for leave dismissed 14 November 2000, [2000] S.C.C.A. No. 581 (S.C.C.) [*"Corporacion Transnacional"*].

In construing a provision of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law and must give those documents the weight that is appropriate in the circumstances.⁴²

III. ASPECTS OF THE MODEL LAW THAT ARE RELEVANT TO JUDICIAL REVIEW

Readers who are familiar with the Model Law should skip this section which is included primarily for ease of reference. A reviewing judge unfamiliar with international arbitration should welcome this extent of detail, but should be careful to determine whether the country at issue has adopted each of (or any of) the following Articles. As well, a judge must be careful to review the currency of the Article adopted, as subsequent amendment to the Model Law Articles may have occurred since adoption.

A reviewing judge should begin with Article 1 of the Model Law, which sets out the scope of application of the Model Law. Article 1 is reproduced in the Appendix to this paper.

Article 1 limits the application of the Model Law to "international commercial arbitration", as defined. The Model Law permits parties to agree to submit a dispute to the Model Law regime. The underlying dispute between an investor and a State may be regulatory while the arbitral dispute is considered commercial.⁴³

The Model Law does not dictate which matters may or may not be subject to arbitration.⁴⁴

In the topic sections set out below, I review the most important aspects of the Model Law with which a reviewing judge should familiarize him or herself. The full text

⁴² R.S.B.C. 1996, c. 233, at s. 6.

⁴³ For an example of the interpretation of these definitions in the investor-State context, see *Metalclad*, *supra*.

⁴⁴ In *Desputeaux v. Editions Chouette (1987) Inc.*, Supreme Court of Canada, 21 March 2003, [2003] SCC 17, the Court held that a statutory provision assigning exclusive regulatory jurisdiction over copyright did not prohibit or exclude arbitration.

of the sections discussed below are reproduced, for convenience, in the Appendix to this paper.

A. Definitions and Rules of Interpretation

Article 2 sets out the general definitions and rules of interpretation that a reviewing judge should review to understand the Model Law.

It is important to note that the most often used arbitration rules have been amended from time to time. Where the incorporating words in the arbitration agreement refer to rules "for the time being in force", this has been held to mean the rules applicable at the time the arbitration commences.⁴⁵ The incorporation of arbitration rules may also be made by naming an arbitral institution.⁴⁶

In today's rapidly changing environment, the leading centres for international arbitration continue to refine their national laws to respond to the demands of the consumers of the arbitral process.

For example, Singapore, on April 9, 2012, passed the *International Arbitration (Amendment) Bill*,⁴⁷ which:

- (a) relaxes the writing requirement for arbitration agreements;
- (b) grants Singapore courts the express power to review, at any stage of the arbitral proceedings, not only positive but also negative, jurisdictional rulings by arbitral Tribunals;
- (c) empowers Tribunals to award interest; and
- (d) provides support for "emergency arbitrator" procedures.

The permission to review negative jurisdictional rulings departs from the 2006 amendments to the Model Law, but is in line with other arbitration hubs such as England, France, and Switzerland.

⁴⁵ 2012 Digest, *supra*, at fnnt. 55.

⁴⁶ *Ibid*, at fnnt. 56.

⁴⁷ Bill No. 10/2012.

B. Waiver of Right to Object

Article 4 prevents a party who is aware of a procedural defect in the arbitral process from keeping silent and later, when the result is made known, resisting enforcement of an adverse award made against it.⁴⁸

C. Extent of Court Intervention

Article 5 provides that all instances of possible court intervention are defined in the Model Law, except for matters not regulated by it.⁴⁹

D. Court or other Authorities For Certain Functions of Arbitral Assistance and Supervision

For those States enacting the Model Law, the State will specify the court (or other authority) that will be competent to perform functions in respect of the Model Law in Article 6.

E. Definition and Form of Arbitration Agreement

As noted above, the importance of identifying the existence, validity and scope of the arbitration agreement is essential to any judicial review application. Article 7 outlines the formal requirements in this regard, including that the arbitration agreement must be in writing.

F. Competence of Arbitral Tribunal to Rule on its Jurisdiction

Under Article 16, the arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. As with Article 4, Article 16 emphasises the importance of promptly bringing any objections to the arbitral process, in this case, to a lack of jurisdiction. In most cases, a party's failure to raise a jurisdictional objection in a timely way precludes it from challenging the validity of the arbitration agreement in subsequent proceedings.

⁴⁸ See also Article 16.

⁴⁹ The Supreme Court of Canada has held that Article 5 does not prevent a court taking into account a limitation period when asked to enforce an arbitral award: *Yugraneft Corp. v. Rexx Management Corp.*, Supreme Court, Canada, 20 May 2010, 2010 SCC 19, at paras. 14-15 and 34.

G. Equal Treatment of Parties

Article 18 requires that the parties be treated with equality and that each party be given a full opportunity of presenting his case.

H. Determining Rules of Procedure

Article 19 allows the parties to set the procedure that will be followed by the arbitral Tribunal, and, failing such agreement, allows the Tribunal to conduct the arbitration in a manner it considers appropriate (subject to the provisions of the Model Law).

I. Place of Arbitration

Article 20 allows the party to agree to the place of the arbitration, and, failing such agreement, allows the Tribunal to determine the place of arbitration. And, notwithstanding agreement to the place of arbitration by the parties, the Tribunal may meet at any place (unless otherwise agreed by the parties) for consultation, hearings, or inspections of goods, property, or other documents.

J. Statement of Claim and Defence

The pleadings exchanged between the parties pursuant to Article 23 constitute one of the sources for ascertaining the scope of the submission to arbitration.⁵⁰ Under Article 23, amendments to the pleadings may be allowed, unless the arbitral Tribunal considers them inappropriate or if the parties have agreed not to allow amendments.

⁵⁰ *PT Prima International Development v. Kempinski Hotels SA*, Court of Appeal, Singapore, 9 July 2012 [2012] SGCA 35 ["*PT Prima*"], noting that although there are important differences between arbitration and litigation, the basic principles applicable to determine the jurisdiction of the arbitrator or the court to decide a dispute raised by the parties are generally the same, and citing among others the Lord Phillips of Worth Matravers, M.R. (as he then was).

K. Hearings and Written Proceedings

Article 24 governs the procedure for oral and written proceedings. The failure to give sufficient advance notice of hearings can constitute a breach of Article 18 and Article 24, and could lead to an award being set aside under Article 34.

L. Default of a Party

Article 25 governs the circumstances where it is appropriate for the Tribunal to terminate the proceedings or make an award in the absence of a party taking a required step (such as filing a statement of defence or failing to appear at a hearing). A default award was upheld in *Corporacion Transnacional*,⁵¹ where one of the parties withdrew from participation.

M. Rules Applicable to Substance of Dispute

Article 28 embodies the principle of party autonomy – granting the parties the freedom to choose the substantive law, including international law.

In the absence of the parties' choice, the Tribunal is restricted to the national law determined by the conflict-of-laws rules that it considers applicable.

An award may be set aside where the Tribunal applies a substantive law that is outside the scope of the submission to arbitration, but not where the Tribunal mistakenly interprets the applicable law.⁵²

N. Form and Contents of Award

The form and content of the Tribunal's award is governed by Article 31. Among other requirements, the award must be in writing, be signed, include reasons, and state the date and place of arbitration.

⁵¹ *Corporacion Transnacional, supra.*

⁵² *Metalclad, supra.*

O. Correction and Interpretation of Award; Additional Award

Article 33 governs the procedure for correction of typos in an award or further interpretation of a part of the award (and the consequent timing for making such correction, interpretation or additional award, as may be required). An application under Article 33 may often precede an application under Article 34.

P. Application to Court to Set-Aside Award

Article 34 sets out the procedure for a party to apply to court to have a Tribunal award set-aside. An award may only be set-aside in specific circumstances, so any reviewing judge must be sure to examine this Article in detail.

By Article 34(2)(a) of the Model Law, the applicant bears the burden of establishing that one or more of the grounds specified in Article 34(2)(a) are present.⁵³

By Article 34(2)(b), the court may, on its own, conclude that the award is in conflict with public policy.

Q. Recognition and Enforcement

Under Article 35, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of Article 36.

R. Grounds for Refusing Recognition or Enforcement

Article 36 provides for an exhaustive list of circumstances where the recognition or enforcement of an arbitral award may be refused. For convenience, I set that out in whole here, as well as in the Appendix:

Article 36

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

⁵³ *Corporacion Transnacional, supra.*

(a) at the request of the party against whom it was invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

IV. OTHER LAWS GOVERNING ARBITRATION

A. The Different Applicable Laws

Before any judicial review of an arbitral award is conducted, the judge must also identify the other laws that may be applicable. Different laws may apply to:

- (1) the substantive relationship between the parties (identified by choice in the parties' underlying contract or in the investment treaty, or identified by national conflicts rules);
- (2) the law governing the arbitration agreement (identified by the choice of the parties or the law of the place of the arbitration or the law governing the underlying contract or international principles);
- (3) the procedural law applicable to the arbitral proceedings (identified by the choice of the parties, or the law of the place of the arbitration and the applicable arbitral rules);
- (4) the choice of law rules that may apply, which again may be affected by the arbitral rules.⁵⁴

English courts have held that, in the absence of a specific choice of law, international law is the law that applies to the agreement to arbitrate formed between an investor and the host state when the investor accepts the standing offer to arbitrate contained in an investment treaty.⁵⁵

⁵⁴ See, for example, ICSID Arbitration (Additional Facility) Rules, Article 42; *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules*, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976) ["UNCITRAL Arbitration Rules"], Article 35(1).

⁵⁵ *Republic of Ecuador v. Occidental Exploration & Production Company*, Court of Appeals, England and Wales, 9 September 2005, [2005] EWCA Civ 1116; *ETI Euro Telecom International N.V. v. Republic of*

In one-off contract arbitration, identifying the governing laws can be a simple task, if the parties' agreement to arbitrate is complete, addresses the scope of the disputes submitted to arbitration, identifies the applicable arbitral institution or arbitral rules, and sets out the place of the arbitration and the governing laws expressly. However, in investment treaty arbitration, the process is usually more complex.

B. The Laws Applicable in Investor-State Arbitration: An Example of Judicial Analysis in the NAFTA Context

The necessary analysis can be demonstrated by reference to the investment treaty protections and procedures contained in Chapter 11 of the North American Free Trade Agreement (the "NAFTA").⁵⁶

The NAFTA's preamble and 22 chapters include extensive disciplines on trade in goods and services (including provisions reducing tariffs and regulating rules of origin, technical standards, government procurement, trade in services, dumping, and countervailing duties), the cross-border movement of natural persons, and investment-protection.

Many of the provisions and concepts incorporated into the NAFTA are derived from the 1947 General Agreement on Tariffs and Trade (the "GATT"). The three Parties (Canada, the United States, and Mexico), all of whom were signatories to the GATT, resolve in the preamble to the NAFTA to build on their respective rights and obligations under that treaty. However, the NAFTA is more complicated than the GATT or its immediate regional predecessor, the Canada-United States Free Trade Agreement, both in terms of its scope and the mechanics of its intended operation.

The option and form of investor-State arbitration offered to investors by Chapter 11, in particular, is derived not from the GATT, but rather from Bilateral Investment

Bolivia, Court of Appeals, England and Wales, 28 July 2008, [2008] EWCA Civ 880; *City of London v. Sancheti*, Court of Appeals, England and Wales, 21 November 2008, [2008] EWCA Civ 1283.

⁵⁶ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2 ["NAFTA"].

Treaties that other countries, especially the United States, had concluded prior to NAFTA's entry into force.⁵⁷

Chapter 11 is divided into three distinct parts. The Parties' substantive obligations are set out in Section A, comprising Articles 1101 to 1114. These obligations include, for example, restraints on certain performance requirements, the duty to accord to investors and their investments national treatment, most-favoured-nation treatment, and, under the heading "Minimum Standard of Treatment", treatment "in accordance with international law, including fair and equitable treatment and full protection and security". Section A also prohibits the Parties from expropriating an investment without compensation.⁵⁸ Section B, comprising Articles 1115 to 1138, sets out the basis upon which the Parties are prepared to submit to investor-State arbitration for alleged breaches of the obligations contained in Section A. Section C defines a number of terms used in the preceding Sections.

1. The Substantive Obligations Subject to Investor-State Arbitration

Under the NAFTA, the Parties have agreed to submit to investor-State arbitration only in respect of certain specified obligations. Section B provides that a qualifying "investor of a Party" may commence an arbitral claim against another Party (but not its own State) for damages for an alleged breach of the obligations set out in Section A of Chapter 11 and two sub-paragraphs of Chapter 15.⁵⁹ Only a Party to the NAFTA has the

⁵⁷ The US was an active proponent of BITs, whereas at the time of NAFTA's drafting Mexico had not concluded any BITs and Canada had only recently negotiated a few such treaties. The rapid change in Canada's willingness to agree to investor-State arbitration is illustrated by the fact that it refused to do so in 1986-87, when the Canada-US Free Trade Agreement was negotiated. By 1991, its position had changed. At the time of the negotiations, Canada and Mexico were not ICSID Contracting States (this continues to the present day).

⁵⁸ The scope of this provision, Article 1110, has engendered an equally intense debate, particularly as to when environmental regulation becomes expropriation. An analysis of this difficult issue is beyond the scope of this paper. See David A. Gantz, "Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA" (2001) 31 E.L.R. 10646.

⁵⁹ Article 1116 states, *inter alia*, that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under. . . Section A [of Chapter 11]" (and two sub-paragraphs from Chapter 15). Similarly, Article 1117 permits an investor of a Party to make a claim on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls, again based upon an alleged breach of Section A of Chapter 11 (and two sub-paragraphs from Chapter 15) only.

necessary standing to allege breaches of the remainder of the agreement through State-to-State proceedings.⁶⁰

The restricted scope of Section B was recognized by the first NAFTA Chapter 11 arbitral Tribunal to issue reasons. In *Azinian v. United Mexican States*,⁶¹ a dispute over the cancellation by a Mexican municipality of a waste collection concession contract, the Tribunal observed:

Section A of Chapter Eleven establishes a number of substantive obligations with respect to investments. Section B concerns jurisdiction and procedure; it defines the method by which an investor claiming a violation of the obligations established in Section A may seek redress.

Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A.

To put it another way, a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA*. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many *Mexican* parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

[emphasis in original]

⁶⁰ NAFTA, *supra*, Article 2004.

⁶¹ ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 at paras. 81-83.

The restricted scope of investor-State arbitration under the NAFTA is of central importance in defining the scope of the submission to Chapter 11 arbitration Tribunals. Since alleged breaches of NAFTA articles other than those set out in Section A (and two sub-paragraphs of Chapter 15) cannot form the basis for a Chapter 11 claim, a Tribunal will exceed its jurisdiction if it bases its decision on other substantial obligations of the NAFTA. To do so is to expand Section B beyond its agreed-upon subject-matter limits, and thereby exceed the scope of the Parties' submission to arbitration. In this respect, a NAFTA Chapter 11 Tribunal is very different from a NAFTA State-to-State panel constituted under Chapter 20. As long as the complainant State has specified the matter in dispute, a Chapter 20 panel has plenary jurisdiction to determine a breach of the relevant obligations anywhere in the NAFTA (except those expressly stated to be excluded from the general dispute settlement process).⁶²

The limited scope of a Chapter 11 panel's subject-matter jurisdiction was addressed in *Ethyl Corporation v. Government of Canada*,⁶³ where the Tribunal identified as a fundamental threshold issue whether the investor's claims fell within the scope of the NAFTA Parties' submission to arbitration. The same issue was addressed in *Feldman v. United Mexican States*,⁶⁴ where the Tribunal held that its limited jurisdiction did not extend to alleged violations of general international law or domestic Mexican law:

The Tribunal has taken due knowledge of the parties' respective allegations and *observes that its jurisdiction under NAFTA Article 1117 (1) (a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law.* Both the aforementioned legal

⁶² NAFTA, Article 2004. See *In the matter of the US safeguard action taken on broom corn brooms from Mexico*, USA-97-2008-01, Final Panel Report, 30 January 1998.

⁶³ UNCITRAL, Preliminary Tribunal Award on Jurisdiction, 24 June 2008 at para. 60. See also Julie A. Soloway, "Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy" (1999) 8 Minn. J. Global Trade 55 at 84.

⁶⁴ ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 [*"Feldman"*]. See also *Waste Management I*, *supra*, per Arbitrator Highet, at paras. 8, and 43-52, dissenting in the result on a point not addressed by the majority.

systems (general international law and domestic Mexican law) might become relevant insofar as a pertinent provision to be found in Section A of Chapter 11 explicitly refers to them, or in complying with the requirement of Article 1131(1) that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." *Other than that, the Tribunal is not authorized to investigate alleged violations of either general international law or domestic Mexican law.*

[emphasis added]

The *Feldman* Tribunal further observed that "NAFTA, and a particular part of NAFTA at that [i.e. Chapter 11], delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority".⁶⁵

Some of the most difficult jurisdictional questions in investment treaty arbitration arise in the context of concession contracts, and the distinction between breaches of contract, on the one hand, and violation of investment treaty obligations, on the other hand. For a review of some of the issues, see *Waste Management Inc. v. United Mexican States*;⁶⁶ *Bureau Vertias Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic Of Paraguay*;⁶⁷ and *Aguas del Tunari S.A. v. Republic of Bolivia*.⁶⁸

For a detailed discussion of the limited scope of jurisdiction in investment treaty arbitration, and the related issue of admissibility, complicated by the presence of an "umbrella clause", see *Phoenix Action, Ltd. v. Czech Republic*;⁶⁹ and *Mobil Corporation v. Bolivarian Republic of Venezuela*.⁷⁰

⁶⁵ *Feldman, ibid.*, at para. 62.

⁶⁶ ICSID Case No. ARB(AF)/00/03, Award, 30 April 2004.

⁶⁷ ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

⁶⁸ ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

⁶⁹ ICSID Case No. ARB/06/5, Award, 15 April 2009.

⁷⁰ ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

2. The Governing Law of Chapter 11 Arbitrations

Having identified the type of claims permitted to be brought before a Chapter 11 Tribunal, the next task is to identify the sources of law to which the panel may have recourse. Determining the rules of law that the parties have agreed to apply is central to the jurisdiction of any arbitral Tribunal. In *Maritime International Nominees Establishment v. Republic of Guinea*, for example, the *ad hoc* committee said:

... the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.⁷¹

As noted by the *Feldman* Tribunal, the governing law of a Chapter 11 Tribunal is set out in Article 1131, which provides that the Tribunal is to consider the NAFTA, the applicable rules of international law, and interpretations of the Free Trade Commission (the trade ministers of each of the NAFTA Parties acting collectively as the interpreter of the NAFTA). The commonly recognized sources of "international law" are set out in Article 38.1 of the *Statute of the International Court of Justice*,⁷² which provides that the International Court of Justice shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;

⁷¹ ICSID Case No. ARB/84/4, Decision of the *ad hoc* Committee, 22 December 1989 at para. 5.03 ["MINE"].

⁷² *Statute of the International Court of Justice*, 18 April 1946. The text is available at: <http://www.unhcr.org/refworld/docid/3deb4b9c0.html>.

- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 1131's stipulation of the governing law of a Chapter 11 Tribunal differs from the governing law applicable to many other investor-State arbitrations. For example, in the absence of an agreement to the contrary, ICSID Convention Tribunals apply the domestic law of the host state and such rules of international law as may be applicable.⁷³ In *Liberian Eastern Timber Corporation v. Republic of Liberia*,⁷⁴ an ICSID Tribunal considered a dispute arising from a concession contract. Given a jurisdiction that encompassed national and international law, the Tribunal's award turned principally on a finding of a breach of contract under Liberian domestic law. In contrast, a Chapter 11 Tribunal would exceed its jurisdiction if it decided a claim solely on the basis of domestic law.⁷⁵

3. The Arbitral Rules Governing Chapter 11 Arbitrations

When submitting a claim to arbitration under Chapter 11, an investor must select the governing arbitral rules. The available choices depend on whether one or more of the Parties involved is a signatory to the ICSID Convention:

- (a) if both the disputing Party and the Party of the investor are Parties to the ICSID Convention, the investor may choose to have the arbitration be governed by that Convention. This is only a

⁷³ ICSID Convention, *supra*, at Article 42.

⁷⁴ ICSID Case No. ARB/83/2, Award, 31 March 1986.

⁷⁵ Although domestic law is not stipulated to be part of the governing law applicable to Chapter 11, it does apply to Article 1904. Chapter 19 of the NAFTA replaces domestic judicial review of antidumping and countervailing duties with binational panel review by five-member expert arbitral panels. The panels are effectively surrogates for the federal courts and are required to apply the substantive antidumping and countervailing duty laws of the nation in which the trade remedy action under review was brought, such law consisting of "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents ... that a court of the importing Party would rely on ... in reviewing a final determination of the competent investigating authority." This is not the case for Chapter 11 Tribunals.

theoretical choice at this time since neither Mexico nor Canada is a Party to the ICSID Convention;⁷⁶

- (b) if either the disputing Party or the Party of the investor, but not both, is a Party to the ICSID Convention, the investor may choose to have the arbitration be governed by the ICSID Additional Facility Rules;⁷⁷ and
- (c) in any case, regardless of the status of the Parties under the ICSID Convention, the investor may choose to have the arbitration be governed by the UNCITRAL Arbitration Rules.⁷⁸

All of the arbitral rules are subject to any provision to the contrary contained in Section B of Chapter 11, such as the right of the Parties under Articles 1128 and 1129 to access the evidence and present submissions in proceedings against any other Party.

V. THE PLACE OF THE ARBITRATION

As noted above, NAFTA awards made pursuant to such rules as the ICSID Arbitration (Additional Facility) Rules and UNICTRAL rules are subject to the control of the national courts at the place of arbitration and the place of enforcement. This fits with Article V(1)(e) of the New York Convention, which provides that one of the grounds for refusing recognition or enforcement of an arbitral award is that it has been set aside by a competent authority of the State in which the award was made.

⁷⁶ ICSID, which was established by the ICSID Convention, has a treaty-based jurisdiction over investment disputes between a Contracting State and a national of another Contracting State. ICSID arbitration can displace domestic remedies in some cases.

⁷⁷ The ICSID Additional Facility is a forum established in 1978 by the World Bank to facilitate the resolution of disputes between foreign investors and a host State, where the State is not a signatory to the ICSID Convention. The Additional Facility is separate from the ICSID itself, and there are important differences between arbitrations conducted under the ICSID Convention and arbitrations conducted under the Additional Facility Rules. For example, while an ICSID arbitration award is subject to an internal review mechanism known as an "*ad hoc* annulment committee" (ICSID Convention, Article 52), the review of an award made pursuant to the ICSID Arbitration (Additional Facility) Rules is governed by the law of the forum in which the award is made, including applicable international conventions (ICSID Additional Facility Rules, Article 3). See Aron Broches, "The 'Additional Facility' of the International Centre for Settlement of Investment Disputes (ICSID)" (1979) 4 Y.B. Comm. Arb. 373.

⁷⁸ NAFTA, *supra*, Article 1120.

Generally speaking, the applicable legislation will incorporate the grounds for refusing recognition and enforcement of awards contained in Article V of the New York Convention, which are reproduced in Article 34 of the Model Law. That said, and this can be an important factor, the domestic courts in the reviewing jurisdiction may interpret differently the scope and standard of review of the applicable grounds. The grounds available for non-recognition under the New York Convention are discussed below.

A. Determining the Place of Arbitration

In arbitration proceedings not conducted under the ICSID Convention, it is necessary to determine the place of arbitration. In the non-ICSID context, a decision on the place of arbitration informs the law that governs the arbitration proceedings and identifies the Court which may supervise the arbitration process and, ultimately, review the arbitration award.

The place of arbitration is a jurisdictional concept – the legal place or "seat" of the arbitration – and a Tribunal may hold hearings at geographical locations other than the place of arbitration.⁷⁹

In the ICSID context, no national court has jurisdiction to review an ICSID proceeding. Rather, the review process is international, conducted by an *ad hoc* annulment committee whose members are appointed by the Chairman of the ICSID Administrative Council.

Arbitration rules usually allow the parties to agree upon the place of arbitration, subject to the requirement of some arbitral instructions that arbitrations under their rules be conducted at a particular place, usually the location of the institution, and subject to the requirements of the arbitration agreement, which may limit the place of arbitration to jurisdictions that are parties to the New York Convention.

⁷⁹ *Methanex Corporation v. United State of America*, UNCITRAL, Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of the Arbitration, 21 December 2000.

Failing agreement and depending upon the applicable arbitral rules, the Tribunal may be required to select the place of arbitration after submissions from the parties. This has occurred frequently in NAFTA Chapter 11 investor-State arbitrations.

The NAFTA requires the place of arbitration to be in Canada, Mexico, or the United States, unless the parties otherwise agree to another place, so long as the State is a party to the New York Convention. Where the parties could not agree on the place of arbitration, various NAFTA Tribunals have determined the place of arbitration having regard to a range of factors, such as the reasoning of relevant national judicial authorities, the principles of fairness and equality, the suitability of the applicable arbitration law, the convenience of the parties and of the arbitrators, the availability and costs of support services, the location of the subject matter in dispute, and the proximity of the evidence and the witnesses to the place of arbitration.⁸⁰

UNCITRAL lists among the more prominent factual and legal factors influencing the choice of the place of arbitration:

... (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.⁸¹

One Chapter 11 Tribunal has recently said:

The perfect place of arbitration, as noted in a letter from the Tribunal to the parties in *V.G. Gallo v. Canada*, "is a jurisdiction which is neither that of the investor nor that of the host State, which has a high quality, independent judiciary, with experience in providing support to, and

⁸⁰ See P. Kirby, "The Choice of the Place of Arbitration under NAFTA Chapter Eleven", in Todd Weiler, ed, *NAFTA Investment Law and Arbitration : Past Issues, Current Practice, Future Prospects* (New York: Transnational, 2004) 341.

⁸¹ UNCITRAL, *UNCITRAL Notes on Organizing Arbitral Proceedings* (New York: United Nations, 2012) at 10. Available online at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

reviewing and setting aside decisions from international arbitral tribunals, and which has the capability of handling disputes in the language of the arbitration, in this case, English."⁸²

VI. GROUNDS FOR CHALLENGING RECOGNITION AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

A. Introduction

A distinction must be made between enforcement of an award and its recognition. Enforcement is normally sought by the successful party who has obtained an award of damages (or costs) looking to attach the losing party's assets. On the other hand, a successful respondent who has defeated a claim might also ask for recognition of an award in order to obtain an order against competing litigation brought by the claimant despite the award.

In jurisdictions where there are applicable time limits, the successful claimant may also seek confirmation of the award before enforcement in the hope that assets may later find their way into that jurisdiction.

National laws will prescribe time limits for the filing of a request to vacate an arbitration award. For example, the United States *Federal Arbitration Act* requires a petitioner to serve "notice of a motion to vacate...within three months after the award is filed or delivered."⁸³

A party seeking or challenging recognition or enforcement of an arbitral award must comply with the procedural rules of the national court at the place of arbitration or the place of enforcement.

As noted above, the role of the court is not to reconsider the merits of the underlying dispute, which have been determined by the arbitrators, whose decision is final, but rather to determine whether the parties received the process to which they

⁸² *Mobil Investments Canada Inc v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Procedural Order No. 1, 7 October 2009 at para. 33.

⁸³ 9 U.S.C., c. 1 at s. 12.

agreed or whether recognition or enforcement would be contrary to the public policy of the State in which enforcement is sought.

B. The Grounds in Article V

A court may refuse to recognize and enforce a foreign arbitral award based on the grounds set out in Article V of the New York Convention. The party challenging the award bears the burden of establishing that the award should not be enforced. The Article V grounds are construed narrowly and, subject to local procedural requirements, are the exclusive grounds upon which a party can oppose enforcement.

C. Article V(1)(a) – Incapacity of a Party and Invalidity of Agreement

A party can challenge the enforcement of an arbitral award by establishing that the parties to the arbitration agreement were "under some incapacity", or that "the agreement is not valid under the law to which the parties have subjected" or "under the laws of the country where the award was made".

There is a distinction between a question as to the validity of an arbitration agreement (which is subject to correctness review by the reviewing court), and a question as to the scope of the protection of an investment treaty where there is a valid arbitration agreement (which is not open to full review by the reviewing court). The differences were illustrated in one of the many disputes between Chevron and Ecuador.⁸⁴ In an award made on 30 March 2010, an arbitral Tribunal (appointed under a Bilateral Investment Treaty entered into between the United States and Ecuador in 1993) found Ecuador guilty of "denial of justice" in respect of "undue delay" in domestic proceedings brought by Chevron (through a related company) alleging breaches of a Concession Contract. Ecuador sought to vacate the award on the basis that the Treaty only applied to investments that existed after it came into force, noting that the Concession Contract was terminated in 1992.

⁸⁴ *Chevron Corporation v. Republic of Ecuador*, PCA Case No. AA 277.

The Netherlands was the location of the arbitration and the matter was brought before the District Court of The Hague, where the Court, in refusing to vacate the award, said:

... A distinction has to be made between, on the one hand, the question about the competency of the Arbitration Tribunal to settle the dispute brought by Chevron et al. (the question about a valid arbitration agreement) and, on the other hand, the question about the competency of the Arbitration Tribunal to make a decision about Investments that had ended at the time of the BIT coming into force (the interpretation and scope of Article XII). Although the Arbitration Tribunal clustered its opinion about the interpretation of Article XII on this point under the denominator "competency" in the Interim Award, this rather concerns an opinion about the scope of protection of the BIT. Unlike the preliminary question as to whether there is evidence of a valid arbitration agreement, this opinion of the Arbitration Tribunal is not applicable for a full review by the court. ...⁸⁵

As to the existence of a valid arbitration agreement, the Court said:

... Article VI paragraph 4 of the BIT is applicable in the sense that it is an open offer from one state which is party to the Treaty to nationals and companies of the other state that is party to the Treaty to settle "*any investment dispute*" by means of arbitration. Article VI therefore forms the basis for (nationals of) the states that are party to the Treaty to take the route of arbitration in the event of investment disputes. Pursuant to Article VI paragraph 1 there is an "*investment dispute*" if the criteria contained in the first paragraph under (a) up to and including (c) are met. Ecuador has not contested that the dispute between the parties arises from, or relates to, the Concession Agreement which can be deemed to be an investment agreement in the sense of Article VI paragraph 1 under a. Nor has Ecuador contested that the dispute between the parties constitutes a dispute in the sense of Article VI paragraph 1 under c. The conditions for the dispute to be settled through the

⁸⁵ *Republic of Ecuador v. Chevron Corporation (USA)*, District Court of the Hague, The Netherlands, 2 May 2012, consolidated cases 386934 / HA ZA 11-402 and 408948 / HA ZA 11-2813 at 4.11.

Arbitration Tribunal as prescribed in Article VI are therefore met.⁸⁶

D. Article V(1)(b) – Party not Given Proper Notice or Unable to Present its Case

The purpose of this Article is to ensure that the requirements of due process are met and that the parties receive a fair hearing.

E Article 34(2)(a)(ii) — Inability to Present Case

1. Applicable Law

An example of a Tribunal failing to give a party an opportunity to present its case can be found in the decision in *Iran Aircraft Industries v. Avco Corp.*,⁸⁷ where the Court set aside an award delivered by the Iran -United States Claims Tribunal.

At a pre-hearing conference, the Tribunal indicated to Avco that it would not be required to produce all of its invoices, but rather could rely upon summaries of them. Avco proceeded on that basis and attached a summary to its supplemental memorial. By the time of the oral hearing, two of the three arbitrators had been replaced. In the award, the majority rejected Avco's claim, holding that "[t]he Tribunal cannot grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices is certified by an independent audit". Judge Brower dissented, holding:

I believe the Tribunal has misled the Claimant, however unwittingly, regarding the evidence it was required to submit, thereby depriving Claimant, to that extent, of the ability to present its case.

...

Since Claimant did exactly what it previously was told to do by the Tribunal the denial in the present Award of any of those invoice claims on the ground that more evidence should

⁸⁶ *Ibid.*, at 4.10.

⁸⁷ United States Court of Appeals, Second Circuit, United States of America, 24 November 1992, 980 F. 2d 141.

have been submitted constitutes a denial to Claimant of the ability to present its case to the Tribunal.⁸⁸

The enforcing Court agreed with Judge Brower and refused to enforce the award under the New York Convention:

At the pre-hearing conference, Judge Mangard specifically advised Avco not to burden the Tribunal by submitting "kilos and kilos of invoices." Instead, Judge Mangard approved the method of proof proposed by Avco, namely the submission of Avco's audited accounts receivable ledgers. Later, when Judge Ansari questioned Avco's method of proof, he never responded to Avco's explanation that it was proceeding according to an earlier understanding. Thus, Avco was not made aware that the Tribunal now required the actual invoices to substantiate Avco's claim. Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof.

We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner. Accordingly, Avco was "unable to present [its] case" within the meaning of Article V(1)(b) and enforcement of the Award was properly denied.⁸⁹

Where the ground specified in Article V(1)(b) is established, there can be no "harmless error": "[i]n itself, a breach of due process is considered to be sufficiently important to justify such redress without the need for the party invoking it to establish actual damage".⁹⁰

F. Article V(1)(c) – Excess of Jurisdiction

A party may defend against enforcement by proving that the award "deals with a difference not contemplated by or not falling within the terms of the submission for

⁸⁸ *Ibid.*, at 144.

⁸⁹ *Ibid.*, at 146.

⁹⁰ Emmanuel Gaillard & John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (London: Kluwer Law International, 1999) at para. 1698.

arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."⁹¹

In *Ecuador v. Occidental Exploration and Production Co. (No. 2)*,⁹² the English courts' approach to the review of a Tribunal's decision on a question of substantive jurisdiction was described as follows:

It is now well-established that a challenge to the jurisdiction of an arbitration panel under section 67 proceeds by way of a re-hearing of the matters before the arbitrators. The test for the court is: was the tribunal correct in its decision on jurisdiction? The test is not: was the tribunal entitled to reach the decision that it did. ...

1. The "Presumption of Jurisdiction"

The application of this article provides an example of some of the differences between commercial arbitration and international investment treaty arbitration. In *Quintette Coal Ltd. Nippon Steel Corp.*,⁹³ one of the early private international commercial arbitration cases in Canada, the Court of Appeal for British Columbia was called upon to consider whether an arbitral Tribunal had decided matters beyond the scope of the questions submitted for arbitration.

The majority emphasized the need to preserve the parties' autonomy to select the forum for their dispute and to minimize judicial intervention in the review of private international commercial arbitration awards. They also went on to state that a mere error of law or fact will not justify setting aside an award in a private international commercial arbitration, and stressed the importance of having regard to the unique characteristics of international commercial arbitration when assessing the appropriate standard of review.

⁹¹ See *PT Prima, supra*.

⁹² High Court of Justice, England and Wales, 2 March 2006, [2006] EWHC 345 at para. 7.

⁹³ British Columbia Court of Appeal, Canada, 24 October 1990, 50 B.C.L.R. (2d) 207 ["*Quintette*"].

Further, Mr. Justice Hutcheon, in concurring reasons, emphasized that where a private commercial Tribunal's jurisdiction is called into question, an applicant must overcome "a powerful presumption" that the Tribunal acted within its powers.⁹⁴

Arguably, this "powerful presumption" of jurisdiction does not apply where a sovereign State is a party to the arbitration. As the Tribunal noted in *Southern Pacific*:

Clearly, then, there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine Egypt's objections to the jurisdiction of the centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the parties.⁹⁵

The United Kingdom Supreme Court recently considered the import of the phrase "presumption of jurisdiction" in *Dallah Real Estate and Tourism Holding Company v. Pakistan (Ministry of Religious Affairs)*,⁹⁶ a decision that has been the subject of much comment. Construing the enforcement provisions of the *English Arbitration Act*, which are similar but not identical to the provisions of the New York Convention, Lord Mance held:

... The scheme of the New York convention, reflected in ss. 101-103 of the 1996 Act may give limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s. 103. But that is as far as it goes in law. *Dallah* starts with advantage of service, but it does not also start fifteen or thirty love up.⁹⁷

The question then arises as to whether an arbitral Tribunal's authority to consider objections to its own jurisdiction has the effect of limiting the role of the court when hearing a challenge to the award. The United Kingdom Supreme Court addressed this issue in *Dallah* as well. After stating that there is no presumption that the Tribunal

⁹⁴ *Ibid.*, at 223.

⁹⁵ *Southern Pacific*, *supra*, at 143.

⁹⁶ Supreme Court, United Kingdom, 3 November 2010, [2010] UKSC 46.

⁹⁷ *Ibid.*, at para. 30.

correctly determined the scope of its own jurisdiction – that being, ultimately, a matter for the court – the Court considered the place in the analysis of the Tribunal's reasoning:

This is not to say that a court seised of an issue under Article V(1)(a) and s. 103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well summarized by the following paragraph which I quote from the Government's written case:

233. Under s. 103(2)(b) of the 1996 Act/Article V(1)(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them.⁹⁸

G. Article V(1)(d) – Defects in Arbitral Composition and Procedure

A court may refuse to recognize or enforce a foreign arbitral award where the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

Article 52(1) of the ICSID Arbitration (Additional Facility) Rules imposes the following mandatory requirement on a Tribunal:

(1) The award shall be made in writing and shall contain:

...

⁹⁸ *Ibid.*, at para. 31.

(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based;

Article 52(1) of the Additional Facility Rules is derived from similar language in the ICSID Convention's Article 48(3), which reads as follows:

The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

In a commentary on ICSID Convention Article 48, Professor Christoph Schreuer states:

The requirement that the award must deal exhaustively with the dispute, as submitted by the parties, is one of the general principles underlying arbitration. A tribunal may not hand down a partial award leaving questions submitted to it undecided. This principle is mandated by the parties' will underlying the arbitration as well as by requirements of procedural economy. An award that is not comprehensive and exhaustive of the parties' questions is the obverse of an excess of powers committed through a decision on questions that have not been submitted to the tribunal.⁹⁹

A "question" is a material legal or factual issue that is raised by either party, the resolution of which could have affected the result.

As noted above, ICSID Convention awards are reviewed, not by domestic courts, but rather by *ad hoc* review annulment committees. Successive *ad hoc* annulment committees reviewing ICSID awards have held that a violation of the obligation to deal with every question may expose the award to annulment.¹⁰⁰

Schreuer summarizes some of the criteria that have been developed by the *ad hoc* review committees as follows:

⁹⁹ Christoph Schreuer, "Commentary on the ICSID Convention: Article 48" (1998) 13 ICSID Review – Foreign Investment Law Journal 248 at 265 ["Schreuer"].

¹⁰⁰ See: *Klockner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985 ["*Klockner*"]; *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986 ["*Amco*"]; *MINE*, *supra*.

The reasons need not deal with all arguments that the parties presented to the tribunal. The reasons are complete if they address all arguments of the parties that were accepted as necessary or relevant for the decision. They must also address all arguments made by the parties that were rejected and which, had they been accepted, would have changed the decision's outcome.¹⁰¹

[emphasis added]

Aron Broches, the principal architect of the Convention, has also stated that:

... the explicit requirement to deal with such questions constitutes a fundamental procedural protection of the parties against arbitrary decisions. Failure of a tribunal to observe it is a serious departure from that fundamental rule of procedure which is a ground for annulment under Article 52(1)(d).¹⁰²

Further, Broches commented in another article that the suggestion that a Tribunal may decline to answer questions submitted to it was "formalistic" and incorrect:

This formalistic approach leads to the absurd result that a tribunal may pick and choose among the questions submitted to it by a party and deal only with those on which it will base a reasoned award, *acting as if the other questions had not been raised*.¹⁰³

[emphasis in original]

H. Article V(1)(e) – Award Not Yet Binding

Recognition may be refused where:

The award has not yet become binding ... or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

¹⁰¹ Schreuer, *supra*, at 274.

¹⁰² Aron Broches, "On the Finality of Awards: A Reply to Michael Reisman" (1993) 8 ICSID Review – Foreign Investment Law Journal 92 at 96.

¹⁰³ Aron Broches, "Observations on the Finality of ICSID Awards" (1991) 6 ICSID Review – Foreign Investment Law Journal 321 at 367.

I. Article V(2)(a) and V(2)(b) – Non-Arbitrability and Public Policy

The grounds for refusal to enforce an arbitral award under Article V(2) may be raised by either the enforcing court or the party challenging the enforcement of the award. If the court finds that:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

The UNCITRAL's 1985 report to the General Assembly describes what was intended by the addition of a ground for review based on the relationship between the award and the public policy of the state in which the award was sought to be set aside:

In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a state but comprised the fundamental notions and principles of justice. ...

... It was understood that the term "public policy" which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which the award was arrived at.¹⁰⁴

The "public policy" ground was therefore intended by UNCITRAL to allow reviewing courts to set aside awards where those awards violated the "fundamental principles of law and justice in substantive as well as procedural respects".¹⁰⁵

This ground for setting aside under the Model Law (and for resisting enforcement under the New York Convention) has been construed strictly. Courts have

¹⁰⁴ *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, UNCITRAL, 18th Sess., U.N. Doc. A/40/17, (1985) at paras. 296-97.

¹⁰⁵ *Ibid.*, at para. 297.

adopted the principle that interference is only justified where enforcement would violate the "most basic notions of morality and justice" or would offend "our local principles of justice and fairness in a fundamental way".¹⁰⁶

In addition, public policy review does not permit the court to reopen the merits of legal issues. In *Schreter*, the Court stated:

... if this Court were to endorse the view that it should reopen the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.¹⁰⁷

The primary justification for the narrow approach to the public policy ground is that it would create an unworkable enforcement regime if domestic concepts of public policy were to be applied to awards made in another jurisdiction according to the standards of that jurisdiction.¹⁰⁸

VII. A RECENT ILLUSTRATIVE EXAMPLE

The recent decision in *Republic of Argentina v. BG Group PLC*,¹⁰⁹ provides a dramatic and controversial example of judicial review based on respect for the terms of the parties' arbitration agreement.

Argentina sought to set aside a substantial award (over \$185 million U.S. dollars) on the principal ground that the arbitral panel exceeded its jurisdiction by ignoring the terms of the parties' agreement (stemming from the agreement between the State parties' agreement in the treaty as to the conditions of their consent). The agreement – a Bilateral Investment Treaty between the United Kingdom and Argentina – provided that disputes

¹⁰⁶ *Corporacion Transnacional; Schreter v. Gasmac Inc.*, Ontario Court (General Division), Canada, 13 February 1992, 7 O.R. (3d) 608 at 624 ["*Schreter*"]; *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)*, United States Court of Appeals, Second Circuit, United States of America, 23 December 1974, 508 F. 2d 969 at para. 9 ["*Parsons*"].

¹⁰⁷ *Schreter*, *ibid.*, at 623.

¹⁰⁸ *Parsons*, *supra*, at paras. 8-9.

¹⁰⁹ United States Court of Appeals, District of Columbia, United States of America, 17 January 2012, 665 F. 3d 1363 ["*BG Group*"].

between an investor and the host State would be resolved in the host State's courts. If, however, no final court ruling was forthcoming within 18 months or the dispute was unresolved after a court ruling, the Treaty provided that resort might then be had to international arbitration. BG Group PLC invoked the arbitration clause without first having filed a claim in the Argentine courts. An arbitral Tribunal ruled that it had jurisdiction, found a treaty violation, and awarded damages. The U.S. Court of Appeals vacated the award. Circuit Judge Rogers, speaking for the court, said:

Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within 18 months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a pre-condition to arbitration. Accordingly, we reverse the orders denying the motion to vacate and granting the cross motion to confirm, and we vacate the Final Award.

...

Because the Treaty provision at issue is explicit, the usual "empathetic federal policy in favour of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties. It may be that parties generally negotiate arbitration clauses to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. A court interpreting such a clause in the international trade context is informed by "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses." *Id.* at 631. In a case such as *Mitsubishi Motors*, this results in enforcing an agreement to arbitrate, which historically required "national courts ... to shake off the old judicial hostility to arbitration." *Id.* at 638 (internal quotation marks and citation omitted). But

where, as here, the contracting parties provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties. "[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 630 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972)). Therefore, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes requires that we enforce the parties' agreement." *Id.* at 629. ...¹¹⁰

In July of this year, a petition for a writ of certiorari was filed by BG Group PLC with the Supreme Court of the United States. The question presented for certification is:

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?¹¹¹

Various groups representing arbitrators and arbitral institutions have filed motions for leave to file *amicus* briefs in support of the appeal. These motions provide a window into the current thinking of arbitrators regarding the respective roles of courts and arbitrators.

Not surprisingly, all of these groups argue that the Court of Appeals should have shown greater deference to the decision of the arbitral Tribunal, and that great deference should generally be shown by the courts to arbitral decisions. Significant emphasis is placed on the cost and efficiency benefits of arbitration. The following passage from the motion of the American Arbitration Association (the "AAA") is representative:

The D.C. Circuit's decision to vacate the arbitral award rendered by three eminent international arbitrators under the Bilateral Investment Treaty signed by the United

¹¹⁰ *Ibid.*, at 1365 and 1373.

¹¹¹ *BG Group PLC v. Republic of Argentina*, Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, 27 July 2012 at i.

Kingdom and Argentina (the "BIT") represents a dramatic and unprecedented instance of such judicial intrusion. In conflict with the precedent of this Court and other circuits, and despite the express provisions of the governing rules to submit questions of arbitrability to the arbitrators, the D.C. Circuit disregarded the thorough analysis and findings of the arbitrators regarding the satisfaction of a precondition to arbitration...

The D.C. Circuit's decision has negative implications for the practice of arbitration in the United States. Because clauses requiring disputing parties to submit to dispute resolution processes such as negotiation or mediation before resorting to arbitration are so common, the decision below introduces significant inefficiencies in the arbitration process and wide-ranging opportunities for delay and dilatory actions. This decision is all the more troubling as it suggests that courts are better placed than international arbitrators, who were mutually selected by the parties to the arbitration themselves, to interpret the provisions of a treaty entered into by two foreign States and governed by international law.¹¹²

Concern about the implications of the decision for the popularity of the United States as a forum for arbitration is another consistent theme. In its motion, the United States Council for International Business writes:

... the decision has far-reaching and adverse if not potentially disastrous implications for the future of the U.S. as an attractive forum for international arbitration and the freedom of choice to arbitrate, in particular, the freedom of the parties to authorize the arbitrators to rule on their own jurisdiction, including the question of whether predicates to arbitration have been satisfied, as provided for in the ICC Rules of Arbitration and the rules of all other international arbitration institutions. ...¹¹³

It is interesting to note that the AAA specifically contrasts their perception of the state of the law in the United States post-*BG Group* with the situation in Singapore. Law

¹¹² *BG Group PLC v. Republic of Argentina*, Motion for Leave to File Brief *Amicus Curiae* of the American Arbitration Association as *Amicus Curiae* in Support of Petitioner, 27 August 2012 at 5 ["AAA Motion"].

¹¹³ *BG Group PLC v. Republic of Argentina*, Motion for Leave to File and Brief of *Amicus Curiae* the United States Council for International Business in Support of Petitioner, Undated at 2.

Minister K. Shanmugam's remarks at the inaugural Singapore International Arbitration Forum in 2010, emphasizing that the court should support arbitration, received particular attention. To this end, the Law Minister said that "[a]n unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore" and "the role of the court is to support, and not to displace, the arbitral process".¹¹⁴

However, it bears emphasising that, even in Singapore, judges are not uniform in their approach to reviewing awards - a point illustrated by a July 2012 decision of the Singapore Court of Appeal restoring a number of awards that had been set aside at first instance on the basis that the judge took too narrow an approach in determining the scope of the arbitration jurisdiction under the parties submission to arbitration.¹¹⁵

In my view, while there is certainly merit to the concerns expressed in the *amicus* motions, their arguments are somewhat overblown and lack nuance. They would be justified if there was a real risk that, on the basis of *BG Group*, U.S. courts will begin intervening regularly and unpredictably in the arbitral process. However, there is no indication that this will be the likely result of the decision.

In *BG Group*, Circuit Judge Rogers recognized the "exceedingly narrow" scope of judicial review of the substance of arbitral awards, acknowledged the need to "shake off the old judicial hostility to arbitration", and reaffirmed the policy rule in favour of dispute arbitral dispute resolution. The intervenors would likely argue that Judge Rogers was merely paying lip service to these issues, but the decision can be read as a principled and limited intervention to uphold the consent of the parties and protect the integrity of their arbitration agreement.¹¹⁶

¹¹⁴ AAA Motion, *supra*, at 20.

¹¹⁵ *PT Prima*, *supra*.

¹¹⁶ In this respect, it warrants noting that the issue on which the court intervened has been a vigorously disputed one with Tribunals and arbitrators splitting on the issue. See *Impregilo v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 17 May 2011, and *Hochtief v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, where the tribunals split, with the majority holding that it could apply the MFN clause to find jurisdiction and the more recent award in *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award 22 August 2012, where the majority found that it did not have jurisdiction.

In response to the petition for certiorari in *BG Group*, counsel for the Republic argues that the case concerns whether there was an agreement to arbitrate, and not compliance with conditions precedent or procedural time limits provided by an arbitration agreement whose existence and validity is conceded, noting:

Unless the investor, a third party beneficiary of the treaty, accepts the offer to arbitrate *according to the express term of that offer*, no arbitration agreement can come into existence.

In this case, the Court of Appeal found that BG did not accept Argentine's offer, and therefore no agreement to arbitrate between BG and Argentina was ever formed.¹¹⁷

As discussed above, the consent of the parties is central to the arbitration process. Without such consent, the decisions of an arbitration Tribunal lack jurisdiction and legitimacy. The cost and efficiency benefits of arbitration are important to users of international arbitration mechanisms, but equally if not more important are the predictability and certainty of the dispute resolution regime. These goals are undercut by arbitral decisions taking jurisdiction in situations that were not intended by the parties. Limited judicial review to uphold the consent of the parties to the arbitration agreement should therefore be welcomed by parties and arbitrators alike. As Park puts it:

In no event should a blanket presumption of arbitrability take the place of an inquiry into what exactly the litigants agreed to arbitrate as interpreted in the context of the relevant transaction. Shallow judicial examination of an arbitrator's jurisdiction can make little sense either in logic or in policy, and in the long run may result in the business community's loss of confidence in both arbitration and the judiciary that enforces the arbitral process.¹¹⁸

The challenge, of course, is to identify those issues that truly do go to the parties' consent to arbitration. While a full treatment of this issue is beyond the scope of this paper, an excellent starting point in this regard is Jan Paulsson's work on the concepts of

¹¹⁷ *BG Group PLC v. Republic of Argentina*, No 12-138, Brief in Opposition, 1 October 2012.

¹¹⁸ Park, *supra*, at 145.

jurisdiction and admissibility and the "lodestar" question of whether the objecting party is taking aim at the Tribunal or at the claim.¹¹⁹

Due respect for the consent of the parties should also obviate concerns about forum shopping. Too often, non-interference with arbitral decisions and respecting the autonomy of the parties are treated as synonymous. While in practice the two are often related, they can and do come into conflict. Parties are not interested in having their consent and intentions overridden by either courts or arbitral Tribunals, and are likely to favour jurisdictions that effectively balance the two by permitting limited judicial interventions over jurisdictions that go too far in either direction.¹²⁰

VIII. CONCLUSION

Outside of the uniquely self-contained review process of ICSID awards under the Convention, and absent voluntary compliance, judicial scrutiny of arbitral awards is inevitable. The goal of arbitrators should not be to avoid judicial scrutiny entirely but rather to produce awards that withstand judicial scrutiny.

The goal of the Courts was well stated by Sornarajah and Menon:

A good and efficient supervisory mechanism over arbitration which permits the necessary leeway to arbitration but at the same time ensures that there are no deviations from the juridical theory on which arbitration rests or on fundamental premises on which business is conducted is necessary for an efficient arbitration system.¹²¹

If arbitrators consistently produce fair and justifiable awards, courts will be well-placed to encourage and reaffirm the arbitration process (even if the courts do not

¹¹⁹ Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen, ed., *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (Paris: ICC Publishing, 2005) 601.

¹²⁰ In this regard, consider Bahrain's experiment with allowing parties to exclude court intervention: See John M. Townsend, "The New Bahrain Arbitration Law and the Bahrain 'Free Arbitration Zone'" (2010) 65 *Disp. Res. J.* 74.

¹²¹ M. Sornarajah and Sundaresh Menon, "International Commercial Arbitration and the Courts: Competition or Partnership?" in *Singapore Academy of Law Conference 2006*, Teo Keang Sood, ed. (Singapore: Academy Publishing, 2006).

always agree with the substantive result). Ultimately, it will be such a culture of earned respect of arbitral awards by the courts, and, more fundamentally, judicial respect of the choices made by the parties themselves, that will best allow parties to trust the arbitration process and resolve their disputes within it - as they agreed to do in the first place.

Appendix

Article 1: Scope of Application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) for the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) 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.

Article 2: Definitions and Rules of Interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32 (2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 4: Waiver of Right to Object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5: Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6: Court or other Authorities For Certain Functions of Arbitral Assistance and Supervision

The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by... [Each State enacting this model law specifies the court, courts or where referred to therein, other authority competent to perform these functions.]

Article 7: Definition and Form of Arbitration Agreement

[As adopted in 1985]

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

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such to make that clause part of the contract.

Article 16: Competence of Arbitral Tribunal to Rule on its Jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or

validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be the subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 18: Equal Treatment of Parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19: Determining Rules of Procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner, as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the

admissibility, relevance, materiality and weight of any evidence.

Article 20: Place of Arbitration

(1) The parties are free to agree on the place of the arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of goods, other property or documents.

Article 23: Statement of Claim and Defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief and remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may ass a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24: Hearings and Written Proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25: Default of a Party

Unless otherwise agreed to by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 28: Rules Applicable to Substance of Dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of the law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 31: Form and Contents of Award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 33: Correction and Interpretation of Award; Additional Award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

Article 34: Application to Court to Set-Aside Award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law, or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) *the award is in conflict with the public policy of this State.*

(3) *An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.*

(4) *The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.*

Article 35: Recognition and Enforcement

(1) *An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.*

[As adopted in 1985]

(2) *The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.*

[As amended in 2006]

(2) *The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.*

Article 36: Grounds for Refusing Recognition or Enforcement

(2) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it was invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*

(ii) *the recognition or enforcement of the award would be contrary to the public policy of this State.*

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.