International Commercial and Marine Arbitration

Georgios I. Zekos

International Commercial and Marine Arbitration

International Commercial and Marine Arbitration analyses and compares commercial–maritime arbitration in a number of different legal systems including the US, the UK, Greece and Belgium. The book examines the role of the courts in arbitration in each of these countries, making reference to the latest case law, and also makes extensive reference to French, German, Italian, Austrian, Swiss and Netherlands law. Tracing the historical emergence of the modern system of commercial arbitration Georgios I. Zekos then goes on to present ways in which the current processes of arbitration can be developed in order to make them more effective.

Georgios I. Zekos BSc (Econ), JD, LLM, PhD is an Attorney at Law & Economist, Greece.

International Commercial and Marine Arbitration

Georgios I. Zekos

Routledge·Cavendish
Taylor & Francis Group
LONDON AND NEW YORK

Published 2008
by Routledge-Cavendish
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge-Cavendish
270 Madison Ave, New York, NY 10016

Routledge-Cavendish is an imprint of the Taylor & Francis Group,
an informa business

This edition published in the Taylor & Francis e-Library, 2008.

"To purchase your own copy of this or any of Taylor & Francis or Routledge's collection of thousands of eBooks please go to www.eBookstore.tandf.co.uk."

British Library Cataloguing in Publication Data
A catalogue record for this book is available
from the British Library

Library of Congress Cataloging in Publication Data
Zekos, Georgios I.
International commercial and marine arbitration / Georgios I. Zekos.
p. cm.
1. Contracts, Maritime. 2. Arbitration and award, International. I. Title.
K1155.Z45 2008
343.09'60269–dc22 2007050597

ISBN 0-203-89520-7 Master e-book ISBN

ISBN 13: 978-0-415-46072-9 (hbk)
ISBN 10: 0-415-46072-7 (pbk)

ISBN 13: 978-0-203-89520-7 (ebk)
ISBN 10: 0-203-89520-7 (ebk)

To my mother Kleio Antoniou Kristali,
sister Aikaterini Ioannou Zekou and
nephew Nikos Euagelou Melitos

Contents

Abbreviations

AAA	American Arbitration Association
AC	Appeal cases
ADR	Alternative dispute resolution
ADRLJ	Alternative dispute resolution law journal
All ER	All English Reports
AMJUR	American Jurisprudence
BJC	Belge Judiciaire Code
CC	Civil Code
CCP	Civil Code of Procedure
DEC	Dikaio of Enterprises and Companies
EEA	English Abitration Act
EG	Epitheorisis of Greek Lawyers
ECJ	European Court of Justice
EU	European Union
F Supp	Federal Supplement
F	Federal Reporter
FAA	Federal Arbitration Act
HD	Hellenic Dikaiosini
HR	House Reporter
ICC	International Chamber Commerce
ICJ	International Court of Justice
ILM	International law materials
JMLC	Journal of maritime law commerce
LCIA	London court of international arbitration
LR	Lloyds reports
NE	North Eastern reporter
NV	Nomiko Vima
NY	New York reporter
NYC	New York Convention
QB	Queens Bench
RUAA	Revised Uniform Arbitration Act
S.Ct	Supreme Court
UAA	Uniform Arbitration Act

USC	United States codification
UN	United Nations
WLR	Weekly law reports
WL	West law
RHDI	Hellenic review of international law

Introduction

The judicial model of decision-making is a strong one; it has been worked out in detail over centuries; and deep in our culture is a habit of obeying it. To that extent, confirmation of the courts is needed to enforce arbitral decisions[1]. Traditional judicial process has played a major role in resolving maritime disputes. Justice emanates from sovereignty and imposes itself upon obedience, and arbitration has its source in liberty. Parties can only submit to arbitration to the extent expressly allowed by the law. Arbitrators exercise a public function to the extent that law allows them. The drift toward the judicial model of procedure and substance compromises[2] the advantages that arbitration offers – informality, speed, expertise, economy and business practicality. Mandatory arbitration may have the perverse effect of driving up the overall cost of litigation, as litigants realize that in order to pursue their claims, they may have to go through arbitration, and then into the courts. Arbitration is from one side a private exercise – it is formed by private agreement, and the particular shape it takes is a result of conscious private choice. From another point, it is an exercise in adjudication – resulting in an award that the force of the state makes obligatory on the litigants in much the same way as the judgment of a public tribunal. There is an effort to balance the contractual and jurisdictional models of arbitration[3].

Arbitration is the process by which a difference among parties as to their mutual legal rights is referred and determined with binding effect by the application

1 "Common law" is the legal system of England, the Commonwealth countries and the US. Beginning in England in the eleventh century, the common law developed through a long accumulation of judicial decisions, bound together by a flexible requirement of following earlier decisions on the topic. "Civil law" legal systems rely on detailed statutory codes as the main source of law, and judicial decisions matter much less. As an illustration of how dependent upon the authority of the common law the arbitration tradition has become, one leading article on reinsurance arbitration cites court decisions 132 times, custom & practice once, and arbitral decisions not at all. Paul M. Hummer, *Reinsurance Arbitrations from Start to Finish: A Practitioner's Guide*, 63 Def. Counsel J. 228 (1996).

2 *Sutcliffe v Thackrah* [1974] AC 727 HL.

3 Nathan Isaacs, "Two Views of Commercial Arbitration," 40 *Harv. L. Rev.* 929, 930, 932, 934, 940 (1927). Alan Scott Rau, "Integrity in Private Judging," 38 *So. Tex. L. Rev.* 485, 487 (1997).

of law by an arbitral tribunal instead of a court. Private arbitration, enabled by pre-dispute agreements whereby parties waive their rights to determine future disputes in a public courtroom, has a long history in the US, UK, Greece, Belgium, and other countries and until lately, arbitration reigned in two domains: commercial–maritime transactions and labour-management relations[4]. Arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit[5]." Arbitration enhances access to justice by permitting claimants to bring claims they could not afford to bring in court[6]. Maritime arbitration, like the commercial arbitration out of which it arose, is a creature of contract. Moreover, maritime arbitration has become popular as an alternative to litigation, because of the costs, delays and procedural complications of court proceedings[7]. Maritime arbitration is covered within the "general" conventions on commercial arbitration[8] involving decisions relating

4 Paul L. Sayre, "Development of Commercial Arbitration Law," 37 *Yale L.J.* 595 (1928). Margot Saunders, "The Increase in Predatory Lending and Appropriate Remedial Actions," 6 *N.C. Banking Inst.* 111, 137 (2002) ("Creditors use arbitration clauses as a shield to prevent homeowners from litigating their claims in a judicial forum, where a consumer-friendly jury might be deciding the case."), David S. Schwartz, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration," 1997 *Wis. L. Rev.* 33, 60 (arguing that businesses "prefer arbitration to litigation for their patterned, repetitive disputes with minor players" because of "lower damage awards" in arbitration).

5 *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 479 (1989).

6 Theodore Eisenberg & Elizabeth Hill, "Arbitration and Litigation of Employment Claims: An Empirical Comparison," *Disp. Resol. J.,* November 2003/January 2004, at 44, 45. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

7 W. Tetley, *International Conflict of Laws*, 1994 at p. 390: "Arbitration is … the settling of disputes between parties who agree not to go before the courts, but to accept as final the decision of experts of their choice, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formality, niceties, proof and procedure required by the courts."

8 European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 364, UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Article 3, 330 U.N.T.S. 3, 21 U.S.T. 2517, UN Convention on the Carriage of Goods by Sea, March 31, 1978, Article 22, 17 I.L.M. 603, Convention on International Multimodal Transport of Goods, Article 27, U.N. TDBOR, U.N. Doc. TD/MT/CONF/17 (1981), International Convention on Salvage, April 28, 1989, Article 23, 1953 U.N.T.S. 193. In addition, maritime arbitration has developed on both an interstate and a transnational relations level. With regard to the former, that is, the law of the sea, arbitration provides one of the means for peaceful settlement of disputes provided by international law and, more notably, by the Convention on the Law of the Sea of December 10, 1982 ("Montego Bay Convention"). Convention on the Law of the Sea, UN Doc. A/CONF.62/122 (1982). It should also be noted that the International Court of Justice (ICJ) may hold simultaneous jurisdiction over a maritime dispute with the International Tribunal for the Law of the Sea and arbitrators. G. Zekos, "Competition or Conflict in the Dispute Settlement Mechanism of the Law of the Sea," 2003 *Hellenic Review of International Law* (RHDI) 153. Tullio Treves, Nuove Tendenze, Nuovi Tribunali, Le Controversie Internazionali 35 (Milan, Italy, 1999) ("The experience of the so-called transnational arbitration … evidences that borderlines between the law of

primarily to factual questions rather than legal questions[9]. Courts have treated "maritime" issues as "commercial" matters, in that way placing these disputes within the scope of the New York Convention (NYC). Arbitration clauses typically specify the place in which the arbitration is to occur and the law and/or procedural rules which the arbitrator or arbitrators are to apply in hearing the case and rendering the award[10].

H. Lauterpacht[11] regards the difference between a court and an arbitral tribunal as a difference of forum and not a difference in the method of resolving a dispute, and so "the judicial character of international arbitration is a matter of historical fact and of positive international law." A judge derives his nomination and authority from the sovereign, while an arbitrator derives his authority from the sovereign, but his nomination depends on the parties' agreement. State courts remain in the background as the forum of ultimate resort. At the enforcement stage it the support of state courts becomes evident. Courts regarded arbitration as a competitor of judicial trials. Joseph Story[12] stated the common law position in the US as follows:

> Now we all know arbitrators, at the common law possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity to administered either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*.

Throughout the nineteenth century, Story's attitude towards specific performance of arbitration agreement generally prevailed in the US courts.

Arbitration advantages include neutrality of forum, speed, lower cost, informality, enforcement, language, and confidentiality. Some disadvantages include

intergovernmental relationships and that regulating international relationships amongst individuals are uncertain. Moreover, dispute resolution mechanisms used by private actors may present strong analogies with jurisdictional or arbitral proceedings used for intergovernmental dispute resolution."). Tullio Scovazzi, "The Evolution of the International Law of the Sea: New Issues, New Challenges," 286 *Recueil Des Cours* 53, 122–24 (2000).

9 Kazuo Iwasaki, "A Survey of Maritime Arbitration in New York," 15 *J. Mar. L. & Com.* 69, 70 (1984) (indicating that an arbitrator's impartiality and knowledge of maritime business are the most important factors in choosing an arbitrator and, in fact, are more important than knowledge of the applicable or maritime law).

10 In fact, there are four main choice of law issues which can arise in respect of arbitration, being the law applicable to: (1) the arbitration agreement; (2) the arbitral procedure; (3) the merits of the dispute; and (4) the conflict of laws. The arbitration clause or agreement does not always clearly specify, however, which law(s) are to apply to each of these four matters. W. Tetley, *International Conflict of Laws*, 1994 at Chapter XII, at pp. 385–419.

11 H. Lauterpacht, *The function of law in international community*, Oxford, 1933 at 379. J. Ralston, *International arbitration from Athens to Locarno*, Stanford, 1929 at 24.

12 *Tobey v Country of Bristol* 23 Fed Cas 1313, *Insurance Co v Morse*, 87 U.S. 445.

lack of coercive powers, difficulty with multiparty disputes, and inability to appeal. Arbitration is an attractive alternative to litigation because parties choose their own neutral dispute resolution forum. Arbitration tends to determine matters expeditiously because there is no court backlog and parties set their own schedules. However, due to the increase of international arbitration and the procedures for selecting forums and arbitrators, the length of time necessary to complete arbitration has also become longer. A major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process. Arbitration is faster, more cost-effective and more amicable than litigation[13].

For 50 years now, the NYC has provided a uniform set of rules for recognition and enforcement across jurisdictions. Reflecting the need to facilitate international transactions and their legal implications, the concise terms of this Convention constitute the world's most encompassing instrument in this regard. By contrast, depending on the territories in question, multi-jurisdictional enforcement of court judgments may involve the application of a variety of bilateral instruments or national laws.

Modern arbitration laws generally recognize the right of parties to agree on arbitration. Party autonomy, the underlying principle of commercial arbitration, has been widely accepted. Recently enacted statutes have been drafted so as to provide for an 'arbitration friendly' legislative framework, whereby the possibility of judicial control and interference with arbitration is considerably limited. It is supposed that the role of the judiciary is mainly one of support and assistance to arbitration before, during and after the arbitral process, while the supervision and control over arbitration is exceptional and very limited. This is particularly so with respect to arbitrations involving international elements. Has a limited involvement of the courts been achieved in practice?

The contractual origin of arbitration proceedings allows for great flexibility. This flexibility is threatened, however, by the desire of the winning party to enlist the power of the state to compel compliance with the award. This requires recourse to the courts because only national courts have the power of the state to compel performance and execute against a party's assets. The requirement of enforceability has both national and international consequences.

The dispute resolution process, as well as the arbitrator's decision, can be tailored to the wishes of both parties, increasing their confidence in the impartiality of the decision-maker and of the expected outcome. Additionally, arbitrators are commonly experts in the field and as a result inspire a great deal of confidence as effective and impartial decision-makers. The US Supreme Court has embraced arbitration as a valid alternative to judicial resolution of disputes,

13 Jason Kay, "The Post-Green Tree Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?" 6 *N.C. Banking Inst.* 545, 556–57 (2002); M. Susan Hale, "Charge Me, Pay Me, But Don't Even Think of Litigating Me: The Dominance of Arbitration in Truth-In-Lending Claims," 2 *Pepp. Disp. Resol. L.J.* 263, 271 (2002).

but not "without regard to the wishes of the contracting parties"[14]. As a result, arbitration has brought relief to overcrowded judicial dockets. Parties challenge the enforceability of arbitration agreements in court because of the upfront costs of arbitration[15]. If an arbitration clause gives one party "better" rights in the form of an arbitration option, the advantaged party has the right to exercise that option by seeking a stay of court proceedings commenced by the other side. However, if the advantaged party takes a step in the court action or leads the other party to believe that it will not exercise its arbitration option, it may be deemed to have waived its right to arbitrate[16].

Since arbitration is always the result of an agreement, the parties also benefit from wide latitude in setting the ground rules of the decision-making process. A set of common assumptions as to how arbitration will be conducted has been developed, drawing from and harmonizing the assumptions of divergent legal cultures[17] and so a gradual homogenization of arbitral practice has gone hand in hand with a growing uniformity in national legislation and in the rules of administering institutions. Has the arbitral process liberated itself from the idiosyncrasies and provincial burdens of domestic legal systems?

Arbitration has been gaining credit by asserting its independence or autonomy from the judicial process. It has struggled to establish itself as a parallel means of adjudication and this book will assess whether arbitration now has a standing equal to that enjoyed by the courts. It should also be borne in mind that arbitration has become a viable alternative for settling certain types of disputes in particular

14 *Mastrobuono v Shearson Lehman-Hutton, Inc*., 514 U.S. 52, 56–57 (1995); *Volt Information Sciences v Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989).

15 *Green Tree Financial Corp. Alabama v Randolph*, 531 U.S. 79 (2000). The Court stated that "[i]t may well be that the existence of large arbitration costs could prevent a litigant … from effectively vindicating her federal statutory rights in the arbitral forum." *Morrison v Circuit City Stores, Inc.* 317 F.3d 646, 664 (6th Cir. 2003). The costs of arbitration can be compared to the costs of litigation "in a realistic manner," by which the court evidently meant considering only the upfront forum costs of each. *Cooper v MRM Inv. Co*., 367 F.3d 493 (6th Cir. 2004). *Pro Tech Indus., Inc. v URS Corp*., 377 F.3d 868, 873 (8th Cir. 2004) ("Under Texas law, we only consider the circumstances at contract formation to determine if a contract is unconscionable, rendering Pro Tech's current inability to afford the costs of arbitration irrelevant to the conscionability determination.").

16 *Shipping Limited v Harebell Shipping Limited* [2004] EWHC 2001 (Comm).

17 Jan Paulsson, "Differing Approaches to International Arbitration Procedures: A Harmonization of Basic Notions, *ADR Currents*," Fall 1996 pp. 17–19 ("in international cases, tribunals strive to look for cross cultural solutions"; the "salutary impetus to meet legitimate expectations leads to harmonization and to the avoidance of peculiarities of national law"); Siegfried H. Elsing & John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," 18 *Arb. Int'l* 59 (2002) ("converging practices have emerged that embrace elements of both systems" and that are "rapidly gaining acceptance in international arbitration as a middle ground acceptable to parties from both sides of the divide"). W. Lawrence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration," 30 *Tex. Int'l L.J.* 1, 57–58 (1995) ("substantial convergence in modern arbitration laws with respect to the procedures to be followed in arbitration and the standards for judicial recourse therefrom").

jurisdictions thanks to the increased availability of judicial assistance in the pre-arbitral and post-arbitral phases. In consequence, many modern arbitration statutes provide for court assistance in the composition and establishment of the arbitral tribunal as well as in other stages of the arbitral process. Court backing extends to fill vacancies emerging after the constitution of the arbitral tribunal[18]. Judicial assistance may be needed because an arbitration agreement inherently lacks the means of assuring that it will be implemented and that an arbitral tribunal will be constituted. The assistance of the courts may be required due to drafting imperfections of the arbitration agreement, giving rise to problems in commencing the arbitration. In any event, the availability of judicial intervention varies from country to country, and the applicable procedural rules allowing such intervention vary between those providing desirable and timely assistance to those imposing unwanted judicial tutorship in the arbitral process. Hence, it will be examined whether it is necessary for arbitration to gain some of the powers courts hold in order to deal effectively with the dispute settlement as an independent dispute mechanism without the courts' assistance.

Is arbitration merely another non-autonomous mechanism for dealing with disputes where courts play a fundamental role and safeguard legality, or has arbitration become a co-equal to the alternative dispute mechanisms of the courts? Does the mere fact that cases are now siphoned from the court system and routed to private arbitrators create a different result? Can courts be understood to be the sole possible and presumably solely desirable framework for delivering justice within a sovereign? Of course, the state is the sole framework conceptualizing law and governance, autonomy and control within a sovereign. The rules that govern commercial–maritime arbitration are to some degree provided by statutory law-makers. This thesis will investigate whether arbitration, compared with litigation, is an equally independent and a fully alternative method of resolving disputes. Consequently, the goal of our analysis will be to investigate the role and impact of courts upon arbitration and prove the real status of arbitration in relation to litigation concerning equality and independence. The analysis will show either the establishment of a fully independent arbitration or arbitration merely as an auxiliary mechanism in order to give parties a sense of independence, which in fact does not always happen. The judicial examination of the four legal systems will not aim to investigate exhaustively all the cases referred to different points of law, but rather the analysis will outline the depth of the court's involvement in the arbitral process. The Federal Arbitration Act (FAA) in the US, the Arbitration Act (AA) 1996 in England, chapter 6 provisions of the Belgian Judicial Code (BJC) in

18 UNCITRAL ML Articles 6 and 11. See also national statutes such as United States: 9 U.S.C. sec. 392; The Netherlands: Netherlands Arbitration Act, Articles 1027–28, 1073; Canada: Commercial Arbitration Act 1986, Articles 1, 6 and 11, in 26 I.L.M. 714 (1987); France: New Code of Civil Procedure, Articles 1457 and 1493; Italy: Code of Civil Procedure, Article 810; Austria: Code of Civil Procedure, Articles 586–87; Germany: Code of Civil Procedure (ZPO) Article 1035; United Kingdom Arbitration Act 1996 Article 18; Swedish Arbitration Act, sections 14–18; Swiss Federal Act Private International Law, Article 179.

Belgium and the provisions on arbitration of the Civil Code of Procedure (CCP) in Greek law are in the main the legal basis for the investigation of this thesis.

In Chapter 1 the historical emergence and development of arbitration will be investigated. In Chapter 2 the role of national courts in international commercial arbitration will be analysed. The four following chapters will be devoted to analysing the role of the courts in commercial–maritime arbitration in the US, UK, Greek, and Belgian legal framework. Emphasis is given in the analysis of US law because of the great deal of case law about arbitration and the fact that arbitration is very developed in the US in comparison to Greece, Belgium, and to a lesser degree in the UK. The comparison of the four legal systems will reveal any convergence or divergence regarding the role and impact of courts upon arbitration—showing the independence and equality of arbitration versus national courts. It will be shown whether arbitration is the second dispute resolution in a legal system or stage of merely a secondary dispute system without autonomony. The presentation of this author's view regarding an independent arbitration co-equal to national courts will be analysed in the next chapter, together with the illustration of a draft law establishing arbitration as co-equal to the courts. Finally, conclusions will be drawn from the whole analysis regarding the present role of the courts in arbitration and recommendations for a new role for arbitration.

1 The historical emergence of arbitration as a dispute mechanism and its characteristics

1 Historical background

Dispute resolution has never been, and it is expected will never be, an exclusive function of the state[1]. Arbitration[2] is one form of alternative dispute resolution (ADR)[3]. ADR is often lauded for its potential to produce "better" quality outcomes, including fairness leading to the same justice outcome, than courts[4]. The ADR boom is motivated by concerns about efficiency, access, and justice[5]. It is worth noting that private arbitration predates the public court system[6]. Arbitration began as an extrajudicial mechanism for resolving disputes[7]. The ancient Sumerians,

1 *Sarah Rudolph Cole,* Arbitration and State Action, 2005 *Brigham Young University Law Review* 1 at 47.

2 Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290 (1921) (Cardozo, J.) ("Arbitration is a form of procedure whereby differences may be settled.").

3 Other forms of ADR include mediation, mini-trial, and summary jury trial. *See* Holly A. Streeter-Schaefer, A Look at Court Mandated Civil Mediation, 49 *Drake L. Rev*. 367, 370–1 (2001). Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. Ill. L. Rev. 1119, 1119–22 (1986). Hans Smit, The Future Of International Commercial Arbitration: A Single Transnational Institution?, 25 Colum. J. Transnat'l L. 8, 9 (1983) ("Rather than permit international disputes to be settled in national courts, many parties often prefer to submit them to a tribunal that is not part of the governmental structure of a particular state. Nationalistic favoritism can be avoided by selecting a forum in a neutral state.").

4 Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668, 669 (1986) at 677, 679 (noting the two concerns that ADR will replace the rule of law with nonlegal values and diminish the development of legal rights for the disadvantaged).

5 Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR," 19 Fla. St. U. L. Rev. 1, 6 (1991) ("In what has become a commonly recognized division in the literature and advocacy about ADR, we see two basically different justifications for processes that resolve cases short of trial—what I call quantitative-efficiency claims versus qualitative-justice claims."). Deborah R. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System, 108 Penn St. L. Rev. 165, 170–85 (2003) (discussing the community justice, court administration, and business interest strands of the ADR movement).

6 William Holdsworth, xiv A History of English law 187 (A.L. Goodhart & H.G. Hanbury eds. 1964).

7 Sarah Rudolph, Blackstone's Vision of Alternative Dispute Resolution, 22 Memphis St. U. L. Rev. 279 (1992). Wesley A. Sturges, A Treatise on Commercial Arbitrations and Awards 548–74 (1930), John T. Morse Jr., The Law of Arbitration and Award 383–406 (1872).

Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration[8]. In Roman law, arbitration agreements were admissible as a reflection of the recognized principle of freedom of contract[9]. In arbitrations dating back to the Oxyrhynchus Papyri from 427 AD, merchants enthusiastically accepted as final the decisions of fellow merchants with knowledge and expertise in the related field[10]. Arbitration has, for that reason, historically functioned as an independent adjudicative dispute resolution mechanism. It is characteristic that arbitration was perceived as superior for resolving price or damages disputes[11]. Even in the 1800s, arbitration was appreciated for its cost-saving advantages[12].

Arbitration's popularity has continued to flourish since Biblical times[13]. At the beginning, the regulation of arbitration by national law was nonexistent, and arbitration was crafted particularly to make possible the dispute resolution needs of a specific industry or community, avoiding imitation of the procedures of any judiciary. Arbitrators applied established custom as the legal rules and standards according to which rights and obligations of the parties were determined, and this was an international commercial law applicable to these international transactions – the *lex mercatoria* – of those times. Maritime arbitration has ancient origins, and additionally, just as maritime law preceded "terrestrial" commercial law, maritime arbitration preceded international commercial arbitration, with its roots dating back to the times of the ancient *lex mercatoria*[14].

Arbitration "took its rise in the very infancy of society" as a private and self-contained method, distinctive from litigation and not as a postscript to the development of public courts[15]. Has this fact been shared by states' legislation and

8 W. Durant, The story of civilization: our common heritage 127, 361 (1935).

9 Schottelius, Die Internationale Schiedsgerichtsbarkeit (Cologne/Berlin 1957) p. 17 et seq.

10 Margit Mantica, Arbitration in Ancient Egypt, 12 Arb. J. 155, 155–59, 160–61 (1957) Henry P. de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tulane L. Rev. 42, 43 (1982) (explaining that arbitration thrived among commercial groups that preferred to keep their differences "in the family"). Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724, 1785 (2001) Lawrence M. Friedman, A History of American Law 45 (2d ed. 1985) (reporting the Quakers' establishment of an arbitration system to resolve citizen disputes in colonial Pennsylvania); Sabra A. Jones, Historical Development of Commercial Arbitration in the United States, 12 Minn. L. Rev. 240, 246–47 (1927) (noting New Amsterdam's 1647 ordinance establishing "The Board of Nine Men" to resolve disputes outside of courts in order to avoid "the great expense, loss of time and vexation" of litigation).

11 Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N.Y. 250, 263 (N.Y. 1872), Hamilton v. Insurance Co., 136 U.S. 242 (1890).

12 *In re Grening*, 26 N.Y.S. 117 (Ny.Sup.Gen.Term 1893), referring to arbitration as among "simple and inexpensive methods of quieting disputes growing out of business transactions."

13 Daniel E. Murray, Arbitration in the Anglo-Saxon and Early Norman Periods, 16 Arb. J. 193, 194–95 (1961) (discussing arbitration's use into the early twelfth century). Derek Roebuck, Even Gods Needed Arbitration: Ancient Greek Arbitration (2001).

14 Robert Jarvis, An Annotated Bibliography of English-Language Materials on Maritime Arbitration, 14 Tul. Mar. L.J. 49 (1989), as well as Black, Maritime Arbitration in the Asian Century, 14 Tul. Mar. L.J. 261 (1990).

15 Julius Henry Cohen, Commercial Arbitration and the Law, 25 (1918) (Quoting John Montgomerie Bell, Treatise On The Law Of Arbitration In Scotland 1 (2d ed. 1877)). at 22–27 (emphasizing the

modern arbitration practice or has arbitration been developed into an appendage of courts? People created arbitration systems designed to settle disputes effectively in accordance with local norms and customs[16]. These self-contained arbitration systems served communities for the reason that disputants and courts treated them as final. Merchants established arbitration tribunals because they felt that the courts were not sufficiently knowledgeable about commercial customs and were exceptionally slow and unwieldy[17]. The New York Chamber of Commerce established an arbitration system when it was founded in 1768, and the Chamber's arbitration panels were independent from the judiciary[18]. Arbitration developed within trade and merchant groups to privately resolve disputes in accordance with the shared understandings and norms of the community[19]. Communities introduced arbitration systems intended to resolve their communal conflicts in accordance with custom, equity, and internal 'law'[20]. Arbitration was viewed in the light of practical expediency and decided according to the ethical or economic norms of some individual groups[21]. The New York Chamber of Commerce arbitration committee continued to resolve merchant disputes when the public courts were closed during the American Revolutionary War and British occupation[22]. Arbitration was the only forum for resolution of civil disputes during

special utility of arbitration despite the development of a reputable judicial system in mercantile cases in which arbitrator expertise in technical matters is essential); Sir Josiah Child, A New Discourse Of Trade 141–44 (4th ed., 1745), at 141 in chapter, "A Court Merchant," said that "this Kingdom will at length be blessed with a happy method, for the speedy, easy, and cheap deciding of differences between Merchants, Masters of Ships, and seamen by some Court or Courts of Merchant. …", at 412 Sir Josiah Child said that conventional litigation in courts of law entailed "tedious attendance and vast expenses" that tended to result in "empty purses and grey heads. …".

16 Richard H. McLaren, The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes, 35 Val. U. L. Rev. 379 (2001) (endorsing, within the sports arena, the use of a unifying body for arbitration with uniform rules to ensure fairness and integrity for all members).

17 Katherine V.W. Stone, Arbitration – National, Research Paper No. 05–18, p. 2.

18 William Catron Jones, Three Centuries of Commercial Arbitration in New York: A Brief Survey, 1956 Wash. U. L.Q. 193, 207 (1930).

19 Katherine Van Wezel Stone, Rustic Justice: Community and Coercion under the Federal Arbitration Act, 77 N.C. L. Rev. 931, 976–79, 992–1035 (1999) (explaining the communal development of arbitration and proposing self-regulation as a template for interpreting and applying the FAA). Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 127 (1992) (diamond merchant arbitrators decided cases "on the basis of custom and usage, a little common sense, some Jewish law and last, common law legal principles").

20 Julius Henry Cohen, Commercial Arbitration and the Law, 22–27 (1918).

21 Earl S. Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 144 (1934). Will Durant, Our Oriental Heritage 645–47, 795–97 (1954) (discussing ancient roots of arbitration).

22 William Catron Jones, Three Centuries of Commercial Arbitration in New York: A Brief Survey, 1956 Wash. U. L.Q. 193, 208–09 (1956) (finding that the Chamber's need for arbitration prompted a special meeting that produced a letter to the British Commander requesting arbitration meetings to resolve mercantile disputes during the revolutionary war). Daniel Bloomfield, Selected Articles on Commercial Arbitration 16 (1927). Stewart Macaulay, Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine, 80 Tul. L. Rev. 1161,

the British occupation and continued to flourish after the revolution in both England and North America[23].

Merchants preferred the arbitrators' equitable determinations and specialized understanding of commercial issues and industry norms. Parties abided by agreements to arbitrate and arbitration awards out of apprehension that they would be ostracized from the commercial community and to maintain ongoing relationships[24]. Consequently, merchant guilds sought to govern their own affairs according to internal norms, standards, and rules and made compliance to arbitration decisions certain with non-legal sanctions such as expulsion[25]. Arbitration was meant to be independent from the judiciary, and in effect oust the courts from the process[26]. The functions of arbitration as a private, flexible, effective, and independent process fuelled its recognition. Arbitration threatened judicial business, as well as judicial jobs linked to the courts' caseloads. Courts perceived as a threat to their power the growing status of arbitration as a favoured means for resolving business disputes. This sparked their envy and distrust of arbitration systems, which in turn led to inconsistent and confused judicial treatment of arbitration agreements and awards. Thus, it seems that arbitration from an independent dispute mechanism system has been transformed into an appendage of the courts. Courts based their refusal to enforce executory arbitration contracts on the theory that arbitrators are simply agents at the will

1169–70 (2006) (advancing "new legal realism" geared to move us toward the "living law"). *Rosenthal v. Great Western Fin. Securities Corp*., 14 Cal. 4th 394, 406 (1996) ("In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the USAA; the similarity is not surprising, as the two share origins in the earlier statutes of New York and New Jersey."). *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 289 (1921) (describing policy of section 2 of the law, which abolished the ancient rule against enforcement of arbitration agreements). William C. Jones, An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States, 25 U. Chi. L. Rev. 445 (1958).

23 Samuel Rosenbaum, A Report On Commercial Arbitration In England 13–14 (1916). Christopher R. Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. Legal Stud. 549, 551–53, 558–60, 573–76 (2003) (finding in a study of franchise agreements that arbitration provisions were less likely where the parties rely on implicit terms but expect to ensure compliance with these terms and control litigation through less formal means).

24 Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions, 99 Mich. L. Rev. 1724 (2001).

25 Lujo Brentano, On the History and Development of Guilds and the Origin of Trade-Unions, at 33–39 (Burt Franklin 1969) (1870) (discussing how early guilds "had their origin in direct imitation of the family" and assumed the family's role in protecting the community). Harry Baum & Leon Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N.Y.U. L. Q. Rev. 238, 246 (1930). Samuel Rosenbaum, A Report On Commercial Arbitration In England 13–14 (1916).

26 Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 before the Subcomm. of the Comms. of the Judiciary, 68th Cong. 7 (1924) (statement of Charles L. Bernheimer); Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 285–86 (1926).

of the parties who appoint them[27]. Arbitrators are summoned to settle disputes objectively and are not subject to the parties' control. Many pre-industrial courts promoted common law rules in support of arbitration[28]. Moreover, some courts favoured arbitration because of its procedural simplicity and efficiency[29]. Other courts held that parties could not, by contract, oust the court of jurisdiction[30]. By contrast, arbitration clauses do not "deprive the court of jurisdiction," rather, the court being the institution in control of a state's dispute system, in enforcing a liberally agreed upon contract containing an arbitration clause, is simply enforcing the desire of the parties, not admitting that it lacks jurisdiction over the proceedings.

On the one hand, in *Home Insurance Co. of New York v. Morse*[31] the court held that a person who consents to arbitration does not waive the right to a judicial forum.

27 Vynior's Case, 77 Eng. Rep. 597, 599 (K.B. 1609). 8 Co. Rep. 80a., Robert B. von Mehren, From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law, 477 Prac. L. Inst./Com. 177, 182 (1988). Tobey v. County of Blistol, 23 Fed. Cas. 1313, 1321–23 (C.C.D. Mass. 1845).

28 *Campbell v. Western*, 3 Paige Ch. 124 (N.Y.Ch. 1832), at *8, n.1, at 128, n. 1 "Awards are much favored, and the court will intend everything in their favor." *Tankersley v. Richardson,* 2 Stew. 130 (Ala. 1829) at 1829 WL 366, at * 1 "This Court must, in accordance with a rule repeatedly laid down, intend in favor of the award …"

29 *Brush v. Fisher*, 70 Mich. 469, 448 (1888), at 447 "there is power in a court of equity to relieve against awards in *some cases* where there has been fraud and misconduct in the arbitrators, or they have acted under some manifest mistake…" at 448 "it is evident that there are greater objections to any general interference by courts with awards." *Campbell v. Western*, 3 Paige Ch. 124, 132 (N.Y.Ch. 1832): *Neely v. Buford*, 65 Mo. 448, at * 2 (1877) ("courts are disposed to regard with favor these tribunals of the parties' own selection"). Hurst v. Litchfield, 39 N.Y. 377 (1868): "Such stipulations (for arbitration) are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts." Prince Steam-Shipping Co. v. Lehman, 39 Fed. 704 (D.C. 1889): "Such agreements have repeatedly been held to be against public policy and void." Insurance Co. v. Morse, 87 U.S. 445, 451 (1874), stating: "Agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

30 Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746). The court gave judgment for the plaintiff because "the agreement of the parties [to arbitrate] cannot oust this court" of jurisdiction. 1 Wils. 129 (1746). Lord Kenyon's emphatic rejection of a motion to enforce a pre-dispute arbitration agreement: "It has been decided *again and again* that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction." *E.g., Thompson v. Charnock,* 8 Term R., 134, 139 (N. Y. ed. of 1834, 91). Thompson v. Charnock, (1799) 101 Eng. Rep. 1310 (K.B.) (Kenyon, C.J.) ("It is not necessary, now, to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer matters in difference to arbitration, is not sufficient to oust courts of law and equity of their jurisdiction."); Tobey v. County of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845) (No. 14,065) (noting that courts are reluctant to compel parties to submit to arbitration precisely because award "shall be final" and shall "close against [the parties] the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs").

31 87 U.S. 445 (1874), at 451–52. "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago [referring to *Kill v. Hollister*]. That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration".

Moreover, the Supreme Court in this case[32] held that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights", and so arbitration was not an alternative dispute mechanism equivalent to courts. On the other hand, in *Port Huron & N.W. Ry. Co. v. Callanan*[33] the court held "it is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts". The Michigan Supreme Court held that "There is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under manifest mistake. … But it is evident that there are greater objections to any general interference by courts with awards[34]". This shows a court's intervention but not its complete conquest of the process which cannot be avoided in some cases if the parties want to use all the facilities of courts' intervention in arbitration. In the absence of a unanimous agreement, the panel disbanded, and the case had to go to the courts after the waste of time and cost of the arbitral proceeding[35]. Moreover, in *Pierce v. Kirby*[36] the court held that "a party who replies to a complaint at arbitration, but otherwise asserts that the arbitrators lack jurisdiction, does not forgo his right to a judicial forum" and so the party's involvement in arbitration did not waive a right to sue, showing arbitration as a non-binding procedure. The fear of prejudice practiced by one side of the trade against another is reported, and so judicial independence was not likely, but the courts did not abandon the test that the expert trade association arbitrators were acting in a "quasi-judicial" capacity[37]. In *Adams' Adm'r v. Ringo*[38] the court specified that "the ancient niceties and technicalities applied to arbitrations have given way to a more liberal and rational construction. This mode of ending litigation is to be encouraged."

The ouster theory appeared to be a cause for judicial hostility to arbitration, mainly for the reason that courts continued to enforce proverbial 'ousters',

32 *Home Insurance Co. of New York v. Morse* 87 U.S. 445 (1874) at 451.

33 34 N.W. 678, 679 (Mich. 1887).

34 *Brush v. Fisher*, 38 N.W. 446, 476 (Mich. 1888).

35 *Towne v. Jaquith*, 6 Mass. 46 (1809); *Green v. Miller*, 6 Johns 39 (N.Y. 1810).

36 21 Wis. 124 (Wis. 1866).

37 *Cf. Graham v. Chamber of Com. of the City of Milwaukee*, 20 Wis. 63 (1865) (upholding the right of a member of Chamber to litigate a dispute with a fellow member, even though the rules required arbitration and the court barred the association from expelling the member). Bernard Gold & Helmut Furth, Student Authors, The Use of Tripartite Boards in Labor, Commercial and International Arbitration, 68 Harv. L. Rev. 293 (1954) (sellers believed to apply less exacting standards to goods than a buyer). *Hoffman v. Cargill Inc.*, 236 F.3d 458 (8th Cir. 2001) (reversing the district court's vacateur on the grounds that the trade association panel of grain buyers was unfair to grain sellers); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (the court of appeals affirmed the district court finding that grain buyers are not unfair arbitrators for grain sellers); *In re Sun Refining & Mktg. Co. v. Statheros Ship. Corp. of Monrovia*, 761 F. Supp. 293 (S.D.N.Y. 1991) (ship owners believed to apply less exacting standards to seaworthiness of vessel than a shipper).

38 79 Ky. 211 (Ky.App. 1880).

including settlement agreements and arbitration awards[39]. Judge Cardozo explained the ouster principle in *Meacham v. Jamestown, Franklin & Clearfield R.R. Co*[40], stating that "if jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary." Courts followed the lead of Lord Coke[41] and Blackstone[42] in holding that an executory agreement to arbitrate would not be enforced by the courts, because the removal of jurisdiction that it entailed was against sound public policy. Initially, courts believed that arbitration usurped their jurisdiction and viewed arbitration as a threat because "ordinary citizens … [made] their own law and disregard[ed] the judicial process[43]." Courts, to a large extent, granted themselves jurisdiction to invalidate arbitration awards[44]. Thus, courts have managed to get in the way of arbitration process and to gain a role in arbitration. Early courts protected their jurisdiction from competition with arbitrations and characteristically in *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*[45] the court held that "The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute." Some judges held that an agreement to arbitrate a dispute could not "oust" a court of its jurisdiction[46]. Joseph Story[47] thought

39 Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121 (1924). Atl. Fruit Co. v. Red Cross Line, 276 F. Supp. 319, 323–24 (S.D.N.Y. 1921) (refusing to compel arbitration notwithstanding a New York arbitration statute). Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

40 211 N.Y. 346, 105 N.E. 653 (1914): at 656.

41 Vinior's Case, 77 Eng. Rep. 595 (K.B. 1609).

42 Sarah E. Rudolph, Blackstone's Vision of Alternative Dispute Resolution, 22 Memphis State L. Rev. 279 (1992).

43 Konstantinos Petrakis, The Role of Arbitration in the Field of Patent Law, 52 Disp. Resol. J. 24 (1997) (suggesting that such opposition to arbitration was a result of ancient courts resisting any procedures that would usurp their jurisdiction) (quoting United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1012 (S.D.N.Y. 1915) (citing Scott v. Avery, 5 House of L. 811 [1856])).Thomas E. Carbonneau, Arbitral Justice: The Demise of Due Process in American Law, 70 Tul. L. Rev. 1945, 1947 (1996) Justice Story asked whether "tribunals possess adequate means of giving redress" or "close[d] … the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs." Adam M. Smith, "Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ, 40 Tex. Int'l L.J. 197, 201 (2005) ("[J]udicial organs often bridled at … arbitration, [but] were not entirely averse to [it].").

44 Linda R. Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 Va. L. Rev. 1305, 1310–11 (1985) ("[J]udicial doctrine rejecting enforcement of contracts to arbitrate became so entrenched that even critics felt powerless to defy precedent.").

45 222 F. 1006, 1007 at 1010–11.

46 *Allgre v. Maryland Ins. Co.*, 6 Har. & Johns. 408 (Md. 1825); *Randel v. Chesapeake, etc., Canal Co.,* 1 Harring. 233 (Del.Super. 1833); *Gray v. Wilson*, 4 Watts 39 (Pa. 1835); *Aspinwall v. Towsey*, 2 Tyler 328 (Vt. 1803); *Allen v. Watson*, 15 Johns. 205 (N.Y. Sup. 1819); and *Rowley v. Young*, 3 Day 118 (Conn. 1808).

47 Joseph Story, 2 Commentaries On Equity Jurisprudence, at § 1457.

that "courts will not specifically enforce arbitration agreements if the effect is to divest the ordinary jurisdiction of the common tribunals of justice" which shows a view that arbitration cannot be an equivalent to courts' dispute mechanism. Additionally, some courts held that public policy prohibits arbitration agreements from precluding litigation, and private tribunals could not be held accountable under the law[48]. Thus, courts have taken the role of the guardian of public policy in a state, and so arbitration is not considered to be a safe, independent, and fully alternative dispute mechanism. Notwithstanding that arbitration predates litigation as a forum for dispute resolution, arbitration has been historically disfavoured by Anglo-American courts. Entirely valid expressions of contractual assent were methodically ignored and refused enforcement by the courts. Peter R. Sonderby[49] and Robert Coulson[50] consider that arbitration can deliver effective dispute resolution services, while avoiding the cost, delay, hostility, and public notice of litigation. The question to be answered is why there is a need to involve courts in arbitration agreements and why not allow arbitration to deal with agreements legalising the whole process. Why shouldn't arbitration be a self-contained method, equivalent to and distinctive from litigation?

Moreover, there has been a long-standing hostility between courts and arbitration[51]. In the 17th century, English courts held that arbitration was a non-binding process. English judges were paid fees based on the number of cases they decided, and so arbitration infringed on their livelihood[52]. The *Park Const. Co.*[53] majority considered that English courts in the 1700s protected their jurisdiction against encroachments by arbitration – not for principles, but for self-interest. Consequently, private arbitration was seen as an economic threat to English judges, whose incomes often depended on fees from disputants[54]. The English

48 *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868), stating that "stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts." *Prince Steam Shipping Co. v. Lehman*, 39 Fed. 704 (D.C.N.Y. 1889).

49 Peter R. Sonderby, Commercial Arbitration: Enforcement of an Agreement to Arbitrate Future Disputes, 5 J. Marshall J. Prac. & Proc. 72 (1971).

50 Robert Coulson, Texas Arbitration: Modern Machinery Standing Idle, 25 Sw. L.J. 290 (1971).

51 The origins of the judicial antipathy to arbitration lie in " 'ancient times' when the English courts fought for extension of jurisdiction–all of them being opposed to anything that would altogether deprive every one of them of jurisdiction." Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 210 n.5 (1956) (Frankfurter, J. concurring). The English hostility to arbitration was adopted by American courts because of the "antiquity of the rule" rather than "its excellence or reason."

52 Preston D. Wigner, The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2, 29 U. Rich. L. Rev. 1499, 1502 (1995). C.H.S. Fifoot, Lord Mansfield 104–05 (1936): "The collaboration of judge and merchant, if it was to exercise its due influence upon the law, required adequate channels of communication. In the development of the special jury Lord Mansfield found the vital medium. … Lord Mansfield converted an occasional into a regular institution and trained a corps of jurors as a permanent liaison between law and commerce".

53 *Park Const. Co. v. Independent School Dist. No. 32*, Carver County 209 Minn. 182 (1941).

54 William M. Howard, The Evolution of Contractually Mandated Arbitration, ARB. J., Sept. 1993, at 28. Scott v. Avery, 10 Eng. Rep. 1121 (H.L. 1856) (opinion of Lord Campbell).

courts became concerned that arbitration had the potential to displace or oust the courts' role in society. Through a series of court decisions limiting the effect of arbitration, the English courts began to view arbitration as a non-binding process based on the principle of agency revocability. In the US, federal and state courts both followed ancient rules of English law[55], that "performance of a written agreement to arbitrate would not be enforced in equity, and … if an action at law were brought … such agreement could not be pleaded in bar of the action, nor would such an agreement be ground for a stay of proceedings until arbitration was had." Besides, Michael H. LeRoy and Peter Feuille[56] argue that "courts were not hostile to arbitration, they were not laissez-faire in sanctioning its use. Nor are they today in applying the pro-arbitration signal sent in *Gilmer* and *Circuit City*. Courts today deny enforcement to a sizeable percentage of contested arbitration agreements is impressive evidence that the federal judiciary does not blindly toe the *Gilmer* and *Circuit City* line". On the one hand, Jonathan R. Nelson[57] argues that judicial hostility to arbitration is not based on judicial jealousy. On the other hand, the House Report No. 68–96 specified that judicial "jealousy" survived for long time[58].

55 S. Rep. No. 5365, 68th Cong., 1st Sess, 2 (1924).

56 Michael H. LeRoy & Peter Feuille, Judicial Enforcement of Pre-Dispute Arbitration Agreements: Back to the Future, www.ssrn.com p. 103, p. 6–7 "American courts have never been hostile to arbitration, nor have they abdicated their role as public adjudicators. Courts have steered a more intermediate course by enforcing pre-dispute arbitration agreements, while reserving power to void or reform the most objectionable arrangements in these contracts". Michael H. Leroy, Misguided Fairness? Regulating Arbitration By Statute: Empirical Evidence Of Declining Award Finality, www.ssrn.com.

57 Jonathan R. Nelson, Judge Made Law and the Presumption of Arbitrability: David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 Brook. L. Rev. 279, 298, n.114 (1992), (Supreme Court's unsupported observation that judicial hostility to arbitration rested upon judicial jealousy was considered and rejected in the well-reasoned opinion of the Second Circuit in *Kulukundis Shipping Co.*).

58 H.R. REP. NO. 68–96, at 1–2 (1924) ("The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment."). Lindsay R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 635 ("Representative Mills of New York, who introduced the original bill in the House, explained that the FAA 'provides that where there are commercial contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract.' Similarly, the chairman of the New York Chamber of Commerce testified before the Senate that the Act would 'enable business men to settle their disputes expeditiously and economically, and (would) *reduce the congestion in the Federal and State courts*.' A Senate Judiciary Committee Report supporting the legislation explained that arbitration provides benefits to both consumers and businesses through speedier resolution and lower costs: 'The desire to avoid the delay and expense of litigation persists …' ") at 634 ("Before congressional adoption of the FAA, contractual arbitration clauses were revocable at will. A party who had previously agreed

During the French Revolution, arbitration was believed to be the natural way of settling disputes and rendering justice, and hence that the national courts should simply be a subsidiary system. The French Revolution not only considered expansion of arbitration, but also the exclusion of professional judges altogether[59]. The judgment on 16–24 August 1790 prohibited any obstacle to arbitration in whatever manner or form. Even matters of personal status could be submitted to arbitration. Besides, the Supreme Court of France, in its judgment on 10 July 1843[60], held that only courts of the state could guarantee the protection of sound justice, and so arbitration clauses were null and void. In France, despite the enthusiasm during the French Revolution for arbitration, it was shortly thereafter looked upon with mistrust and as a threat to the law. Thus, a hostility of courts against arbitration developed in France as well. Merchants needed greater speed and flexibility for the settlement of their disputes than that provided by national courts, and so courts in France were again been forced to change their attitude towards arbitration[61].

to arbitration of disputes could opt unilaterally for litigation, severing the (now void) arbitration clause from the remainder of the agreement. Congress changed this option in 1924 with the adoption of the FAA.").

59 Isser Woloch, The New Regime: Transformations Of The French Civic Order, 1789–1820S, *at* 312–17 (1994). The French Revolution not only considered all obligations, statutes and society as founded on the will of the people and the idea of contract (*contrat social*, Jean-Jacques Rousseau), but as a consequence arbitration was considered a *droit naturel*. Moreover the Constitution of 1791 (Art. 86) and the Constitution of Year III (Art. 210) proclaimed the constitutional right of citizens to resort to arbitration. Huys and Keutgen, L'arbitrage en droit belge et international (Brussels 1981) p. 6. Clère, L'Arbitrage Revolutionnaire: Apogée et Déclin d'une Institution (1790–1806), Revue de l'arbitrage (1981) p. 3 et seq.

60 Cass Civ 10 July 1843 S 1843 p. 561 and D 1843 p. 343. The decision of the *Cour de cassation* of 1843 refused to recognize that a *clause compromissoire* agreeing on arbitration for future disputes was binding. It took until 1925 when, under pressure from institutions of commercial practice, a statute was enacted recognizing the validity of an arbitration agreement in commercial matters. A further indication of the gradually more favourable approach to arbitration is that the courts interpreted the rule forbidding arbitration for State institutions to be only applicable to domestic contracts, but not to international contracts. A major reform and modernization of the French law of arbitration was, of course, enacted in 1980 and 1981. David, Arbitrage du XIXeet arbitrage du XXesiècle, Mélanges offerts à René Savatier (Paris 1965) p. 219 at p. 220 et seq. Böckstiegel, Arbitration and State Enterprises – Survey on the National and International State of Law and Practice (Deventer/Antwerp/Boston/Frankfurt/London 1984) p. 15; Rivero, Personnes Morales de Droit Public et Arbitrage, Rev. arb. (1973) p. 263 at p. 270 et seq. Derains, National Report France, Sanders and Van Den Berg, eds., ICCA International Handbook on Commercial Arbitration (hereinafter *Handbook*) vol. II (Deventer/Boston) p. 1 et seq.; Böckstiegel, ed., Schiedsgerichtsbarkeit in Frankreich (Cologne/Berlin/Bonn/Munich 1983).

61 J Delvolve, J Rouche, G Pointon, French Arbitration law and Practice, 2003 Kluwer Law International p. 3. In Germany, arbitration has traditionally been dominated by the principles, on the one hand, of *pacta sunt servanda* and, on the other hand, of good will and courtesy. The contractual nature of arbitration was stressed to the effect that the submission to arbitration was binding for the parties, but an action in court was at first indispensable for enforcement of an award. In 1930 a simplified procedure for the enforcement of arbitral awards was introduced. Kollmann, Die Schiedsgerichte in Industrie, Gewerbe und Handel (Munich/Berlin 1914) p. 282 et seq. Gesetz über das Abkommen zur Vollstreckung ausländischer Schiedssprüche vom 28.

Arbitration has existed since colonial times[62]. The English reversed their position on binding arbitration in 1889, but American courts continued down the old common law path[63]. The common law doctrine of revocability was followed by American courts until the enactment of the FAA in 1925[64]. Arbitration agreements were not enforced because of established precedent, and so the old English rule was carried on long after courts themselves began to question whether it was founded in reason or justice; courts were hesitant to change the established precedent[65]. The doctrine of revocability was grounded in the public law courts' fear that they might be displaced by a private process of dispute resolution and thereby be put out of work[66]. As the public court system matured in England, it displaced private

Juli 1930, Reichsgesetzblatt, Teil II, at p. 1067; and Gesetz zur Änderung einiger Vorschriften der Zivilprozeβordnung über das schiedsrichterliche Verfahren vom 25. Juli 1930, Reichsgesetzblatt, Teil I, at p. 361 et seq.

62 Bruce L. Benson, An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States, 11 J.L. Econ. & ORG. 479, 481–82 (1995) (discussing the use of arbitration in colonial America).

63 *Meacham v. Jamestown*, Franklin & Clearfield R.R. Co., 105 N.E. 653 (N.Y. 1914) (Cardozo, J.) ("If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."); Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) ("Such stipulations [to arbitrate] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts, provided by the government with ample means to entertain and decide all legal controversies.")

64 *Tobey v. County of Bristol*, 23 Fed. Cas. 1313 (No. 14065) (C.C.D. Mass. 1845). A Massachusetts court refused to order specific performance of an arbitration agreement contained in a public works contract. Id. The Tobey court stated it was impractical to use equity to order arbitration and the plaintiff should exercise the legal remedies available. Id. In *Home Insurance Company* of New York v. Morse, 87 U.S. 445 (1874), the United States Supreme Court held that pre-dispute agreements to arbitrate were invalid due to the common law revocability of such agreements. *Am. Sugar Ref. Co. v. Anaconda*, 138 F.2d 765, 766–67 (5th Cir. 1943) ("The act was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.").

65 S. Rep. No. 536 at 3 (1924). ("Established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice."). *Atlantic Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) Holding that the federal court sitting in admiralty could not compel arbitration under an arbitration clause, Judge Hough declared: [W]ithout legislation, and because the trend of modern opinion is toward the literal enforcement of the contracts of men of mature years and presumably sound mind, this court is asked to provide some method of overriding, or explaining away not only its own previous decisions but those of the Supreme Court, which for a generation or so have been regarded as declaring the law to be that any agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted.

66 Katherine V.W. Stone, Private Justice, The Law of Alternative Dispute Resolution 305 (Foundation Press) (2003). Peter J. Smith IV, Investors win: Howsam v. Dean Witter Reynolds, Inc. makes entering Arbitration quicker, easier, and less expensive, 2003, 4 *Pepp. Disp. Resol. L.J.* 127.

arbitration in providing the main adjudicative function[67]. Arbitrators represented unwanted competition for common-law judges, whose compensation was tied in part to court fees. Judges as a result had strong incentives to increase their jurisdiction and stifle competing dispute resolution mechanisms[68]. Therefore, it could be argued that from the beginning the main concern was not the right application of law but purely the personal interests of a group of the society[69].

Even though common law courts were unenthusiastic about permitting arbitrators to assert power over a controversy at the outset, they declared that courts should treat final awards as final in light of "every consideration of public policy[70]." Courts equate the finality of awards with preclusion of judicial re-determination of arbitrated disputes. Burchell v. Marsh[71] held that substantive appeal of arbitration awards would allow arbitration to become "the commencement, not the end, of litigation". Moreover, courts recognized that finality with the meaning of courts' review of awards was required to prevent arbitration from becoming a superfluous "commencement, and not the end, of litigation," and rejected substantive review of awards as a threat to the effectiveness, flexibility and privacy of arbitration[72]. Courts' limited review of awards to whether the arbitrators exceeded their authority or to whether the procedure was vitally unfair, essentially foreshadowing the limited review that survives in the FAA. On the other hand, judicial distrust and doubt of arbitration tempered obvious enthusiasm for the finality of arbitration awards and so the meaning of the "finality" of arbitration was not clear. Thus, courts retained final control over awards and so courts "naturally tended to overstep their bounds, especially where they regard[ed] themselves as equally, or perhaps even better, qualified to settle the controversy"[73]. Furthermore, courts attempted

67 14 William Holdsworth, A History of English Law 187 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956). English statute of 1697 authorized judicial enforcement of arbitration awards 9 & 10 William III c. 15 (1697). The introduction of the law stated: "for promoting trade and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters. …" Henry Horwitz & James Oldham, John Locke, Lord Mansfield and Arbitration during the Eighteenth Century, 36 The Historical J. 137, 138–139 (1993).

68 *Bernhardt v. Polygraphic Co. of Am*., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (noting that English courts fought "for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction").

69 Jonathan R. Macey, Judicial Preferences, Public Choice and the Rules of Procedure, 235 J. Legal Stud. 627 (1994) (arguing that judicial behavior is likely to conform to judges' rational self-interest rather than to the interest of economic efficiency).

70 Brazill v. Isham, 12 N.Y. 9, 15 (1854). The court emphasized that awards, like court judgments, estop parties from pursuing further litigation.

71 58 U.S. (17 How.) 344, 349–50 (1854).

72 *White Star Mining Co. v. Hultberg*, 77 N.E. 327, 336 (Ill. 1906) (quoting *Burchell v. Marsh*, 58 U.S. 344, 349–50 (1854)).

73 Frances T. Freeman Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell. L.Q. 519, 526 (1960) p 531. *Clark Millinery Co. v. Nat'l Union Fire Ins. Co.*, 75 S.E. 944, 949 (N.C. 1912) (acknowledging that "certainty is an essential of a good award," but finding it difficult to apply and therefore confining inquiry to whether the award was sufficiently uncertain that it would be

to keep control over arbitration by declaring varied levels of authority to review awards for "mistake" of fact and law[74].

Arbitration has the capacity to enhance democratic governance in several important ways. First, it is possible for arbitration to achieve efficiency gains for the public justice system, as logic suggests that having formalized disputes resolved by arbitration will reduce the number left for resolution by public courts. Second, voluntary arbitration enhances personal autonomy by providing a means of governmentally enforceable dispute resolution to complement public adjudication. Democratic governance requires dispute resolution, and it should recognize that this may be achieved through many different methods that allow disputants to "fit the forum to the fuss[75]".

Indeed, historical treatments of the pre-Revolutionary period suggest that what we now call "alternative dispute resolution," was the norm rather than the exception in the colonies[76] of England. Cohen[77] observed, after the passage of New York, Arbitration Act in 1920, that "this statute establishes legal machinery for protecting, safeguarding and supervising commercial arbitration. Instead of narrowing the jurisdiction of the Supreme Court it broadens it … Instead of being ousted of jurisdiction over arbitration, the courts are given jurisdiction over them, and … the party aggrieved has his ready recourse to the courts." Julius Henry Cohen thought of arbitration not as second-class adjudication[78] but not as independent and equivalent to courts. Moreover, with the number of cases being litigated on the rise, Congress passed the FAA in 1925 to make arbitration an equitable alternative

avoidable under contract law). *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291 (N.Y. 1921) (warning courts that if arbitration does not end disputes, it is merely an expensive and superfluous step in litigation).

74 Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 36 (Jan. 9, 1924) (brief submitted by Julius Henry Cohen) (emphasizing that there should be a "delay only of a few days" between application and entry of judgment on an arbitration award, and that defects warranting vacation, correction, or modification of award were those "so inherently vicious that, as a matter of common morality, [they] ought not to be enforced").

75 Frank E.A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 Negot. J. 49 (1994).

76 Bruce H. Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L. Rev. 443, 468–81 (1984). Lawrence M. Friedman, History of American law 32–33, 94 (1973).

77 Cohen, Julius H. (1921), 'The Law of Commercial Arbitration and the New York Statute', 31 *Yale Law Journal*, 147–160. p. 150.

78 Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926) 281 ([Arbitration] has a place also in the determination of the simpler questions of law—the questions of law which arise out of the daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes).

to litigation that would reduce the number of cases in the court system[79]. Congress sought to encourage efficient and speedy dispute resolution but the question to be answered is if the current courts' involvement an independent system or a supplement to courts. It is worth mentioning here[80] that prior to the enactment of the FAA, the subcommittee emphasized that the court's only role should be to make certain that parties have agreed to arbitrate—in so doing waiving any right to trial by jury and ending the court's substantive involvement in the arbitration process. This subcommittee's proposal wanted the establishment of arbitration as a totally independent and alternative dispute system, and so the only role left to courts was their declaration for no jurisdiction to deal with arbitration. In other words arbitration could be established as a self-contained method and equivalent to courts.

At the beginning of the twentieth century, arbitration was not extensively used outside of commercial disputes involving merchants[81]. In the 1920's, Julius Cohen and Charles Bernheimer[82] had a three step plan for promoting arbitration: "The first is to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and third to get a treaty with foreign countries." Before the enactment, a party to an arbitration agreement could at any time prior to the award merely decline to arbitrate, and courts would not enforce the agreement[83]. Thus, even at that time courts managed to gain the first role in enforcing arbitration.

Many states institutionalized arbitration and it was established by law to make it easy for businesses to avoid messy lawsuits, but the question to be

79 *Southland Corp. v. Keating*, 465 U.S. 1, 13–16 (1984); see Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 *Cal. L. Rev.* 577, 601 (1997) (discussing the history of arbitration in the United States in the early twentieth century). *Bull NH Information Systems, Inc. v. Hutson*, 1998 WL 426047 (D. Mass. 1998), at *1: "the FAA is something of an anomaly in the field of federal-court jurisdiction because it creates a body of federal substantive law without simultaneously creating any independent federal question jurisdiction (internal quotes omitted). …"

80 To Make Valid and Enforceable Certain Agreements for Arbitration, S. REP. NO. 68–536, at 17–18 (1st Sess.1924).

81 Frances Kellor, American Arbitration: Its History, Functions And Achievements 6 (Kennikat Press 1972) (1948); Zeb-Michael Curtin, Note, Rethinking Prima Paint Separability in Today's Changed Arbitration Regime: The Case for Inseparability and Judicial Decisionmaking in the Context of Mental Incapacity Defenses, 90 *Iowa L. Rev.* 1905, 1910–13 (2005) (explaining that arbitration was limited to use among commercial actors at the time of the Federal Arbitration Act's (FAA) passage). Jeffrey W. Stempel, A Better Approach to Arbitrability, 65 *Tul. L. Rev.* 1377, 1380 (1991) ("The United States Arbitration Act … was written with the implicit assumption that it would be invoked by commercial actors having relatively equal bargaining power and emotive appeal to a jury.").

82 Cohen testimony at Joint Hearings on S. 1005 and R. 646 before the Joint Committee of the Subcommittees on the Judiciary of the United States Senate and House of Representatives, 68th Cong. 1st Session 17, at 16 (1924). Julius Cohen, The New Federal Arbitration Law, 12 Va. L. Rev. 265 (1925–26).

83 W. Sturges, Commercial Arbitration and Awards, §76 at 237–39 (1930). Ian R. MacNeil, American Arbitration Law, pp. 28, 34–37 (1992). Professor MacNeil regards "modern" arbitration statutes as those that make agreements to arbitrate future disputes irrevocable. Id. at 15.

answered is the two methods are whether independent and equivalent dispute settlement mechanisms[84]. At the time of the FAA's enactment in 1925, Isaacs[85] proposed that there are two views of arbitration, as follows: the "legalistic view" that arbitration is purely a mode of trial and the "realistic view" that it is "a means of reaching results essentially different from those reached by a trial". Moreover, Isaacs[86] emphasized that judicial review of awards would foster legalistic, "trial-like" arbitration complete with formal procedure, records and opinions. In other words, courts were considered to be the means of attributing legitimacy to arbitration rather than arbitration itself being an equally legitimate dispute system. Arbitration could therefore be only a supplement to courts rather than a fully alternative, self-contained method, equivalent to courts as dispute systems.

As arbitration gained impact, courts began to distrust and envy it, but even so they recognized that substantive review of arbitration awards would render arbitration a meaningless precursor to litigation[87]. Historically, the courts were reluctant to enforce agreements to arbitrate, on the theory that such agreements inappropriately ousted the courts of their right and obligation to apply the law of the sovereign to disputes arising within the jurisdiction of the sovereign. Therefore, courts consider themselves the only institution having the privilege of safeguarding the law of the sovereign by having jurisdiction to deal with contractual disputes between parties.

This concise analysis shows that arbitration has emerged as an independent dispute mechanism, but judges have managed to gain the first role in dispute settlement, to the detriment of arbitration as a self-contained mechanism.

84 *Henderson v. Beaton*, 52 Tex. 29 (Tex. 1879), upholding the constitutionality of a Texas statute enacted in 1879 that provided for a board of referees or arbitrators to dispose of civil actions by the consent of parties. *Howard v. Sexton*, 1 Denio 440 (N.Y. Sup. 1845) (arbitration tribunal established under New York law is not defective even if arbitrators fail to take oath as established by law). *Wood v. Donaldson*, 17 Wend. 550 (N.Y.Sup.1837) (statute providing for arbitration in dispute involving contractor and creditors) *Conger v. Dean*, 3 Iowa 463 (Iowa 1856) (state statute did not provide common law right to submit controversies to arbitration, but prescribed procedures for judicial enforcement of arbitration awards).

85 Nathan Isaacs, Two Views of Commercial Arbitration, 40 *Harv. L. Rev.* 929, 930–37 (1927). at 929.

86 Ibid at 934–35.

87 Wesley Albor Sturges, A Treatise on Commercial Arbitration and Awards 792–97 (1930) (discussing the judicial struggle to retain the power to vacate awards for legal mistakes without causing arbitration to become a superfluous extra step in litigation). Wharton Poor, *Arbitration Under the Federal Statute*, 36 Yale L.J. 667, 676–78 (1927) (emphasizing finality as essential to protecting the benefits of arbitration, but noting that arbitration "can by no means be relied upon as a solution of all litigious matters"); at 674–75 (explaining drafters' rejection of English model that allowed judicial review of arbitration awards for legal questions, and their insistence that "once the parties have agreed upon arbitration, they must accept the result the arbitrator reaches no matter how obviously and plainly wrong it appears").

2 Development of modern arbitration and its characteristics

Arbitration provides significant advantages to parties compared to litigation[88]. Courts uphold public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights. Courts endorse equality, due process, and rationality by operating according to particular rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or which have evolved over time at common law. Legal standards are to be used as the basis and course for decisions, with the principle of *stare decisis* providing a principal constraining mechanism on judicial rulings. Judicial proceedings function at the highest level of formality, with the maximum level of procedural due process protection offered at law. Courts determine facts and then apply law to those facts to generate outcomes[89] and if the decision is wrong, the losing party can appeal to a higher court that will set it right. The availability of appellate review ensures that legal rules are correctly applied and permits the advancement of legal standards. Are all these qualities represented by arbitration in a more informal way?

Arbitration is an adjudicatory process and has the power to enhance democratic governance. Arbitration enhances personal autonomy by providing a means of governmentally enforceable dispute resolution to complement public adjudication. Autonomy and flexibility in dispute resolution enhance democracy. As mentioned earlier, what we now call "alternative dispute resolution" was the norm rather than the exception in the colonies[90].

Generally, the parties will need to decide whether the arbitration procedure will be 'Ad hoc', or 'Institutional'. Where the arbitration is 'Ad hoc', the

88 Nat'l Arbitration Forum, The Case For Pre-Dispute Arbitration Agreements: Effective And Affordable Access To Justice For Consumers: Empirical Studies And Survey Results 1 (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf (finding that "[s]eventy-eight percent of trial attorneys find arbitration faster than lawsuits," "[e]ighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits," "[s]eventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits," "[e]ighty-three percent of business attorneys find arbitration to be equally or more fair than lawsuits," "[i]ndividuals prevail at least slightly more often in arbitration than through lawsuits," "[m]onetary relief for individuals is slightly higher in arbitration than in lawsuits," "[a]rbitration is approximately 36% faster than a lawsuit," "[i]ndividuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits," "[n]inety-three percent of consumers using arbitration find it to be fair," "[c]onsumers prevail 20% more often in arbitration than in court," "[i]n securities actions, consumers prevail in arbitration 16% more than they do in court," and that "[s]ixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages."). H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) ("[T]here is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.").

89 Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 *Law & Soc'y Rev.* 95, 96 (1974).

90 Susan L. Donegan, ADR in Colonial America: A Covenant for Survival, *Arb. J.*, June 1993, at 15; Bruce H. Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 *N.Y.U. L. Rev.* 443, 468–81 (1984).

parties themselves decide on the procedure of arbitration proceedings[91]. Where institutional arbitration is chosen, the procedure is set by the relevant institution. However, the parties are free to vary them where the institution is agreeable. Where the parties have chosen institutional arbitration, the place of arbitration is usually the seat of the institution. However, in ad hoc arbitration, the parties can decide that the arbitral proceedings may be conducted wherever they wish. The parties may choose from a wide selection of rules of procedure, including those of the national jurisdiction. The rules of the arbitral institution can be used specifically, or default (depending on the provisions of the agreement for arbitration services), or in amended form by the parties. Ad hoc arbitration remains a prevalent practice in the maritime world, rather than in other sectors of trans-national commercial arbitration.

The use of arbitration expanded rapidly in the second half of the last century because of the rising cost of litigation[92]. The United States Supreme Court validated the use of binding contractual arbitration as a dispute resolution mechanism in many situations in which the parties have neither equal bargaining power nor an ongoing relationship. Consequently, arbitration became common in consumer disputes, employer–employee relations, and practically every other context in which parties order their relations by contract[93]. In fact Amy J. Schmitz[94] says that "Courts developed a "love/hate" relationship with finality in that they hated to give arbitrators final power over cases at the outset, but once arbitrators exercised that power and rendered an award, they loved to enforce the award to avoid burdensome and uncomfortable reassessment of equitable proceedings."

Does arbitration bring reallocation of jurisdiction over various disputes from civil courts and administrative agencies to privately selected arbitrators? Does arbitration transform a system of public law into a system of private justice? Martin H. Malin[95] argues that the courts' involvement in an arbitration procedure

91 Recent research by the University of London School of International Arbitration showed that only 24% of the corporations interviewed opt for ad hoc arbitration, which is perceived as appropriate for "primarily larger corporations with more experience of international arbitration": International Arbitration: Corporate Attitudes and Practices (2006) 12.

92 Deborah R. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System, 108 Penn St. L. Rev. 165, 167 n.11 (2003) (citing a report by the American Arbitration Association that "from 1990 to 2002, the AAA's caseload increased 379 percent").

93 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (allowing arbitration for an employer–employee relationship); Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477 (1989) (allowing arbitration for an investor– broker relationship); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (allowing arbitration of RICO claims).

94 Amy J. Schmitz, Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis, 2002, Georgia Law Review Vol. 37:123, p. 133–4.

95 Martin H. Malin, Privatizing Justice—But by How Much? Questions Gilmer Did Not Answer, 16 Ohio St. J. On Disp. Resol. 589, 627 (2001) (positing that "[i]f courts do not review employment arbitration awards for errors of law, we risk transforming a system of public law into a system of private justice"); ("De novo judicial review of arbitral interpretations of law is necessary to … ensure that arbitration does not result in contracting out of statutory compliance.").

makes this arbitration a system of public law, otherwise arbitration will be transformed into a private justice system. Besides, this author thinks that arbitration by the establishment of an appellate arbitral tribunal as will be analysed later in this thesis, will transform arbitration into a fully self-contained method, equivalent to courts and a parallel civil dispute mechanism.

Will the unique role of arbitration as an effective alternative to litigation be achieved if arbitration does not gain its total independence from courts as a dispute mechanism? The universal decision to enforce arbitration awards without significant review amounts to a policy choice. A party does not relinquish the substantive rights afforded by a statute, it only submits to their resolution in an arbitral, rather than a judicial, forum[96]. Courts respect party autonomy and they see intense deference to arbitral awards as needed to protect the parties' choice of arbitration as an alternative to adjudication. The US Supreme Court[97] specified that arbitration procedure should not be subject to delay and impediment in the courts. Otherwise arbitration remains vulnerable to the traditional judicial distrust that hindered enforcement of arbitration agreements under common law[98]. The drafters of the FAA sought to enclose judicial oversight by intentionally crafting a uniform state and federal remedial scheme based on a unique brand of finality defined through limited judicial review, but it is very doubtful that this finality preserves the independence of arbitration[99]. In the U.S., policy choices concerning the appropriate use of arbitration have been made judicially, not legislatively. These judicial policy choices appear to reflect the interest of the courts in reducing the judicial caseload[100] but not arbitration freeing to manage its own affairs.

Errors in law are significant and arbitration opinions and awards should be subject to some sort of review. The author will argue in this work for the establishment of an appellate arbitral tribunal that can review an award and that it is

96 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

97 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (deferring to "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"). Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 684 (1996) ("One of the company's chief goals in selecting arbitration over litigation is generally to avoid a jury trial.").

98 EEOC v. Waffle House, Inc., 122 S. Ct. 754, 761 (2002) (reiterating that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts").

99 IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 528 (7th Cir. 1996) (Posner, J.) (noting "Congress's emphatically expressed support for facilitating arbitration in order to effectuate private ordering and lighten the caseload of the federal courts"). Stephen L. Hayford, Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act, 2001 J. Disp. Resol. 67, 84–85 (reporting the drafters' concern that expanded review "effectively eviscerates arbitration as a true alternative to traditional litigation," and that opt-in provisions "virtually guarantee that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process far more complicated, time consuming, and expensive").

100 Marc Galanter, In The Hundred Year Decline of Trials and the Thirty Years War, 57 Stan. L. Rev. 1255, 1264, 1270 (2005).

not imperative for a court to review an award. Finality of awards is also important and so an appellate arbitral tribunal can expedite the whole process. Arbitration should be made into a parallel system equivalent to courts and the second pole by keeping its own characteristics. David S. Schwartz[101] argues that

> "…[t]he analogy between federal labor policy and the FAA is faulty arbitration pursuant to collective bargaining agreements is a part of a substantive national labor policy. It is a quid pro quo for a union's giving up the right to strike, and therefore a 'stabilizing' and 'therapeutic' influence that promotes 'industrial stabilization' and 'industrial peace' nationwide. Arbitration pursuant to the FAA is simply an alternative to litigation".

The following analysis will show whether arbitration is an equivalent alternative to litigation.

Like public trial, arbitration is an adjudicatory process in which a third-party neutral decides the dispute. It differs largely in that the proceeding is informal rather than formal, and is not bound by traditional rules of evidence or procedure. Thus, arbitrators are free from the constraints of substantive law in either the procedures by which they conduct their hearings, or in the standards they use to resolve disputes[102]. It has to be taken into account that following formal rules does not necessarily result in justice. Justice can also be achieved through the balanced application of rules and customs in specific disputes. It is argued that judicial inspection limits the extent to which arbitration providers can favour their business customers, and in fact may create pressure to increase the level of "due process" afforded clients[103]. In present practice arbitral tribunals require courts to view their procedures as fair, and businesses want assurances that courts will respect an arbitration provider's rules and enforce awards issued by its arbitrators. Accordingly, providers may file amicus briefs defending their procedures, and they may adjust their procedures in response to judicial censure[104]. According to Christopher R. Drahozal[105] "An institution that develops a reputation for unfairness

101 David S. Schwartz, Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act, 67 Law & Contemp. Prob. 5, 17 (2004) at 43–44.

102 Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 861 (1961) (citing a study demonstrating that while 80% of arbitrators believed their decisions should be based on substantive legal principles, almost 90% considered themselves free to ignore these principles if justice required).

103 Veliz v. Cintas Corp., No. C 03–1180 SBA, 2004 WL 2452851 at * 15 (N.D. Cal. Apr. 5, 2004) (rejecting the challenge to confidentiality requirement under AAA rules: "The AAA is a reputable arbitration body and the reasons for confidentiality are designed to protect all parties in a dispute").

104 Susan Randall, Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185, 222 (2004) (generally describing and critiquing courts' use of the unconscionability doctrine to police arbitration agreements). Ting v. AT&T, 319 F3d 1126 (9th Cir 2003) (holding that agreement that, among other things, prevented consumers from bringing class action was unconscionable); Shankle v. B-G Maint. Mgmt., 163 F.3d 1230, 1235 (10th Cir. 1999) (refusing to enforce the agreement that required an employee to pay half of arbitration expenses).

105 Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 741 at 752.

or biased arbitrators risks losing credibility, which courts rely on to recognize and enforce arbitral awards". Therefore, it becomes obvious that arbitration needs courts in order to get credibility for its awards, which means that presently arbitration is not an independent and equivalent to courts' dispute mechanism.

Legal scholars have generally attributed the remarkably swift change of judicial heart concerning the use of ADR to the interest of judges in reducing their workloads, rather than new doctrinal insights[106]. According to Richard C. Reuben[107] "ADR represents only a change in forum, not in the substantive rights of the parties." Although the process used in arbitration is adjudicatory, it is a much more flexible process than traditional litigation[108]. As mentioned above, arbitration advantages include neutrality of forum, speed, lower cost, informality, enforcement, language, and confidentiality[109]. By contrast, Margaret L. Moses[110] thinks that "Arbitration does not provide the same level of protection as the courts, because, *inter alia*, there is less discovery, an inadequate record of the proceedings, and the awards are unreviewable on the merits. Moreover, because an arbitration award is confidential, it does not develop the law or serve as a deterrent to other potential violators." Arbitration is an attractive alternative to litigation because parties choose their own neutral dispute resolution forum. Moreover, Richard C. Reuben[111] argues that "the arrival of ADR should be recognized as an expansion of public justice, rather than the establishment of a private alternative to public justice". In other words arbitration as an equivalent to courts' dispute mechanism will be a real expansion of public justice.

106 Ian R. Macneil, American arbitration law: reformation, nationalization, internationalization 172–73 (1992) (arguing that judicial policy on ADR is motivated by judicial self-interest in reducing caseloads); Jonathan R. Macey, Judicial Preferences, Public Choice and the Rules of Procedure, 235 J. Legal Stud. 627 (1994) (arguing that judicial behavior is likely to conform to judges' rational self-interest rather than to the interest of economic efficiency).

107 Richard C. Reuben, Public Justice: Toward A State Action Theory Of Alternative Dispute Resolution, 85 Cal. L. Rev. 577 p. 579.

108 Kenneth J. Rigby, Family Law: Alternative Dispute Resolution, 44 La. L. Rev. 1725, 1733 (1984). Once an arbitrator renders a decision, the parties have available to them only very limited grounds for appeal.

109 Stephen B. Goldberg Et Al., Dispute resolution: negotiation, mediation, and other processes, 210 (4th ed. 2003) (discussing potential advantages for choosing arbitration over litigation, including having an expert as an arbitrator, knowing the decision of the arbitrator is binding; having a confidential procedure, proceeding in an informal manner, and having the opportunity to save time and money).

110 Margaret L. Moses, Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. 2006 www.ssrn.com at 68. Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 Tul. L. Rev.1 (1997) (critiquing arbitration case-law for increasingly favouring arbitral forums without regard for basic fairness or rule of law norms).

111 Richard C. Reuben, Public justice: toward a state action theory of alternative dispute resolution, 85 Cal. L. Rev. 577 p 641. Frank E.A. Sander, Varieties of Dispute Processing, in The pound conference: perspectives on justice in the future (A. Leo Levine & Russell R. Wheeler eds., 1976) "multi-door courthouse" at 65.

Does arbitration allow parties to privatize law[112]? Government supervises and controls dispute resolution through the process of judicial review and courts' involvement in the whole arbitration, as will be analysed in the following chapters[113]. Heinrich Kronstein[114] wrote that "[n]o theory in support of organized arbitration can conceal the essential 'lawlessness' of this form of 'private government.' " On the other hand, as mentioned earlier, historically in arbitration not only are laws applicable but also commercial customs and norms which are part of soft law recognised by various formal laws. An equivalent and fully independent arbitration might cause government courts to improve their efficiency and consequently increase their legitimacy[115]. In other words, arbitration enhances access to justice by permitting claimants to bring claims they could not afford to bring in court[116]. Furthermore, arbitration is an alternative dispute resolution mechanism permitting parties to settle disputes before a neutral panel in a pseudo-judicial setting rather than a courtroom[117]. How can arbitration be transformed

112 Stephen J Ware, Default Rules from Mandatory Rules: Privatizing Law through Arbitration, 1999 Minnesota Law Review 703, at 711 "The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law" at 754 "Arbitration privatizes the creation of law".

113 Kenneth R. Davis, When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards, 45 Buffalo L. Rev. 49, 130 (1997) remarking that "Arbitration agreements … diminish the reach of government to supervise and control dispute resolution through the process of in-court adjudication. By carving out spheres of "private government," parties establish their own tribunal, and shape their own decision-making process. They do not appear in court and thus do not participate in the state's legal institution. Rather than following the directions of a judge, a state official, they entrust the dispute to private citizens, the arbitrators of their choice." Edward Brunet, Toward Changing Models of Securities Arbitration, 62 Brooklyn L. Rev. 1459 (1996). Edward Brunet, Replacing Folklore Arbitration with a Contract Model of Arbitration, 74 Tulane L. Rev. 38, 52–61 (1999); Edward Brunet states that "securities arbitration remains lawless.… While securities arbitration surely operates in the 'shadow of the law,' it is clear that the arbitrators need not apply law." Barbara Black & Jill I. Gross, Making It Up as They Go Along: The Role of Law in Securities Arbitration, 23 Cardozo L. Rev. 991, 1040 (2002) ("While it seems that an investor may have difficulty prevailing in court under the established law, arbitration panels, on more than an occasional basis, are reaching decisions favorable to investors even where the 'law is clear' that there is no basis for imposing liability on the broker."); Jennifer J. Johnson, Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration, 84 N.C. L. Rev. 123, 140 (2005) ("there is no meaningful oversight to ensure that arbitrators are applying the law, and limited evidence on the ground suggests that SRO panels may not in fact apply the law").

114 Heinrich Kronstein, Business Arbitration–Instrument of Private Government, 54 Yale L.J. 36, 66 (1944). Heinrich Kronstein, Arbitration is Power, 38 N.Y.U. L. Rev. 661, 699–700 (1963).

115 E. Gary Spitko, Judge Not: In Defense of Minorityculture Arbitration, 77 Wash. U. L.Q. 1065, 1082 (2000).

116 Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, Disp. Resol. J., Nov. 2003/Jan. 2004, at 44, 45. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

117 4 Am. Jur. 2D § 70 Alternative Dispute Resolution (1995).

from a pseudo-judicial setting into a fully alternative mechanism equivalent to courts? In fact, the process of arbitration is a mechanism to avoid national court systems. Arbitration was developed as an alternative to the national court systems and has evolved into a central method of dispute resolution for contractual issues[118]. Nevertheless, the judiciary is not excluded from the dispute entirely because enforcement of an arbitral award requires confirmation by a domestic court and so this confirmation alone could successfully overthrow the speed advantage. To that extent an arbitral award could become the first step in lengthy national litigation for a party, thereby invoking the entire national legal system at the enforcement stage[119]. Hence, enforcement may hinder the finality of the dispute and may negatively influence the alleged cost-cutting advantage of arbitration. Consequently a court may increase its role in the arbitration process as it deems suitable and in this way control arbitration at the enforcement stage.

Arbitration is distinguishable from litigation because its procedures may be tailored to an individual dispute and may produce determinations based not on strict legal rules, but on equity, norms, and customs. Arbitration is a creature of contract[120]. Courts state that arbitrators need not follow the law, which has been described as making decisions based on equity and fairness rather than legal obligation[121]. On the other hand, justice can be achieved not only by the application of formal law but by applying customary usages that have not been formalised as being part of the law of a society. In the United Kingdom arbitration has on occasion been defined quite differently: "The law of private arbitration is concerned with the relationship between the courts and the relationship between the courts and the arbitral process."[122] Moreover, Ian R. Macneil says that the word alternative means[123] alternative to dispute resolution processes of the State – the judges, juries, administrative dispute resolvers, and the like of the State legal system. Consequently, the term ADR presupposes that the main, fundamental dispute resolution system is that provided by the State, alternative methods being secondary, supplemental, and probably suspect. This author considers that an

118 Thomas E. Carbonneau, The Ballad of Transborder Arbitration, 56 U. Miami L. Rev. 773, 773–75 (2002).

119 William H. Knull and Noah D. Rubins, Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?, 11 Am. Rev. Int'l Arb. 531, 547–550 (2000) at 547 (noting that in numerous jurisdictions an arbitral decision may only initiate the process of national court litigation because addressing appeals regarding the arbitral award itself are still unavoidable).

120 Claude R. Thomson & Annie M.K. Finn, Managing an International Arbitration: A Practical Perspective, 60–*Jul. Disp. Resol.* J. 74, 76 (2005) (noting "arbitration is a creature of contract, [and] it can be customized to meet the parties needs").

121 Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703, 720 n.82 (1999) at 711 ("Contracting out of law through arbitration agreements does not necessarily mean that such law will be under-enforced in the sense that plaintiffs 'do worse' in arbitration than they would have done in court. In some cases, arbitrators reach a more 'pro-plaintiff' result than a court would have reached ….").

122 M.J. Mustill & S.C. Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed., (London: Butterworths, 1989) at 3.

123 Ian R. Macneil, American arbitration law at 4 (Oxford Univ. Press 1992).

alternative dispute method does not mean that it has to be secondary and not equivalent. Consequently it has to have different characteristics but not be guarded by any other dispute mechanism such as courts. A dispute system as long as it is guarded by another one is not an alternative dispute system but it is rather an assessment dispute method.

Adjudication differs from arbitration in the following ways: First, adjudication is public, while arbitration is private[124]. Second, adjudication is reviewable by courts of competent jurisdiction to minimize the likelihood of legal error[125]. Third, adjudication is bound by rules of *stare decisis*, ensuring that like cases will be treated alike and providing predictability for actors in the commercial bargaining process[126]. Fourth, arbitration is and has been designed for the resolution of factual disputes, not legal disputes or disputes involving significant issues of public policy[127]. This author argues that arbitration as an alternative dispute mechanism should be able to deal with all legal matters and arbitration as the second pole in a sovereign could vest the power of the state in officials and could be viewed as a form of social ordering as well. Courts are open and accessible for the settlement of disputes but when there is a parties' agreement to arbitrate then courts should remain out of the scene and let the arbitral tribunal deal with the dispute from the commencement to the enforcement of the award. It is argued that in private arbitration there is the possibility of "capture" of the arbitrator by commercial interests, and concomitant bias in the arbitral forum[128]. Can this suggestion be

124 Llewellyn Gibbons, Private Law, Public "Justice": Another Look at Privacy, Arbitration and Global E-Commerce, 15 Ohio St. J. on Disp. Resol. 769, 771 (2000) ("The possibility of keeping the arbitral process and award private is one of the elements of alternative dispute resolution that separates it from the public courts, which are presumptively open to the public.").

125 Owen Fiss, Against Settlement, 93 Yale L. J. 1073 (1985) ("Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement … or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.") at 1077 (describing the "guiding presence" of the judge in ameliorating inequalities between the parties, a presence not, well, present in the arbitral forum).

126 Lon Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 357 (1978) ("It is customary to think of adjudication as a means of settling disputes or controversies … More fundamentally, however, adjudication should be viewed as a form of social ordering.").

127 Atcas v. Credit Clearing Corp. of America, 197 N.W.2d 448 (1972) ("When the making of the agreement itself is put in issue, that issue is more properly determined by those trained in the law. Issues involving a breach or violation of the agreement, which are primarily issues of fact, can be more properly left to the expertise of those trained in the respective fields of arbitration.").

128 James L. Guill & Edward A. Slavin, Jr., Rush Unfairness: The Downside of ADR, Judges' J., Summer 1989, at 8, 11 (1989) ("[A]n arbitrator's decision might be influenced by the desire for future employment by the parties…. Some arbitrators openly solicit work. They write to parties noting their availability, sometimes enclosing samples of their awards."); Kirby Behre, Arbitration: A Permissible Or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Cont. L.J. 66 (1986) (discussing the possibility "that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties–that is, an arbitrator's decision might be influenced by the desire for future employment by the parties.").

easily applicable to courts in another scale and dimension? According to O. Fiss[129] judges ameliorate inequalities between the parties. By contrast, Andrew W. McThenia and Thomas L. Shaffer[130] argue that arbitration leads to reconciliation of the parties rather than litigation.

Margaret L. Moses[131] indicates that "The FAA would only apply when arbitration was voluntarily agreed to by the parties. According to Cohen, its leading proponent and principal drafter, the legislation was to apply to disputes involving facts and simple questions of law, not statutory or constitutional issues, since arbitration was simply not a proper method for deciding points of law of major importance." Thus, arbitration lacks the status of a system to deal with the interpretation of the law. Besides, Amy J. Schmitz[132] suggests that "Arbitration developed as a means for providing private and self contained dispute resolution. It was similar to judicial resolution in that it culminated in a third-party determination, but was independent from the judiciary and therefore free to be more efficient and flexible than litigation." Has practice proved this view or has arbitration become merely auxiliary to courts?

The finality of arbitration under the FAA is defined by the limited judicial review provisions in the act[133]. According to Amy J. Schmitz[134] "Finality as defined by the judicial review limitations of the FAA sought to insulate arbitration from courts' "Monday morning quarterbacking" and protect the allocation of power in the Act between arbitrators and courts." This allocation of power does not establish equivalent dispute systems but merely positions arbitration as a semi-independent and assisting to courts system. The conception of finality in the FAA directed courts to take for granted enforcement of arbitration awards with limited

129 Owen Fiss, Against Settlement, 93 Yale L. J. 1073 (1985) at 1077 (describing the "guiding presence" of the judge in ameliorating inequalities between the parties, a presence not present in the arbitral forum).

130 Andrew W. McThenia and Thomas L. Shaffer, For Reconciliation, 94 Yale L. J. 1660 (1985) (responding to Fiss by arguing that ADR techniques are more likely to lead to reconciliation of the disputing parties than litigation). Alan Scott Rau, Edward R. Sherman & Scott R. Peppet, Processes of Dispute Resolution: The Role of Lawyers 601 (3rd ed. 2001) ("…the privacy of the process may also contribute to a lessening of hostility and confrontation. An arbitration hearing (unlike a trial) is not open to the public…"). Stephen Goldberg, Frank Sander, Nancy Rogers, Sarah Cole, Dispute Resolution: Negotiation, Mediation, And Other Processes 210 (4th ed. 2003) ("privacy" of the process is one of the "theoretical advantages of arbitration"; Andre R. Imbrogno, Arbitration as an Alternative to Divorce Litigation: Redefining the Judicial Role, 31 Cap. U. L. Rev. 413, 418–19 (2003) (noting that arbitration provides "the opportunity for resolution of sensitive matters in a private and informal forum").

131 Margaret L. Moses, Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. 2006, www.ssrn.com p. 18.

132 Amy J. Schmitz, Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis, 2002, Georgia Law Review Vol. 37:123, p. 132.

133 O.R. Sec., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747–48 (11th Cir. 1988) (highlighting importance of finality to effectuate functions of modern arbitration).

134 Amy J. Schmitz, Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis, 2002, Georgia Law Review Vol. 37:123, p. 150.

procedural review. Additionally Amy J. Schmitz[135] says that 'the independence of arbitration from substantive judicial review preserves its self-contained process, which eases judicial caseloads and fosters the efficiency of arbitration by protecting flexibility of proceedings and limiting judicial appeals." Has current practice produced finality regarding arbitral awards or are courts called to deal with judicial review of awards frequently?

Arbitration of commercial and maritime disputes can be a workable alternative to litigation[136]. According to Steven J. Burton[137]

> "In principle, allowing contract parties to agree to settle disputes by arbitration enhances party autonomy. It expands freedom of contract by allowing parties to contract for an arbitral forum, thus making litigation merely a default method of settling disputes…Arbitration might in fact be more effective than litigation at achieving accuracy of results… Even if there is not greater accuracy of results in arbitration, the parties should be empowered to trade off their interests in procedural fairness and efficiency."

It has to be taken into account that a civil litigation system has a one-size-fits-all procedure in each jurisdiction, embodied in generally applicable procedural rules which sacrifice procedural fairness and accuracy in some cases in the name of judicial efficiency. In judging the qualities of arbitration and courts as dispute systems the view of Edward A. Dauer has to be taken into account[138]. He argues that "The trade-off between efficiency and justice is not in itself necessarily a bad thing. … The far bigger problem comes … from the difference between justice and satisfaction. … What seems fair depends upon what one expects." Does satisfaction bring justice or does justice bring satisfaction? It is obvious that nobody should expect arbitration to become a duplicate of the courts, following in the footsteps of litigation. Has arbitration become an autonomous method of settling disputes since courts have got the last word in arbitration with the judicial review of awards?

135 Amy J. Schmitz, Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis, 2002, Georgia Law Review Vol. 37:123, p. 157.

136 Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290 (1921) (Cardozo, J.) ("Arbitration is a form of procedure whereby differences may be settled.")

137 Steven J. Burton, The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate, 2007 University of Iowa Legal Studies Research Paper Number 07–01, p. 13,16.

138 Edward A. Dauer, Justice Irrelevant: Speculation on the Causes of ADR, 74 S.C. L. Rev. 83, 98 (2000).

2 National courts in international commercial arbitration

1 Introduction

International arbitration is a consensual means of dispute resolution, by a non-governmental decision-maker, that produces a legally binding and enforceable ruling.

> Additionally, the US Supreme Court, stated that "an agreement to arbitrate before a specified tribunal [is], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute[1]." Moreover, there are many other definitions of international commercial arbitration[2].

An agreement by the parties to submit any dispute between them to arbitration is the foundation stone of modern international commercial arbitration. International commercial arbitration is consensual: arbitration only occurs pursuant to an arbitration agreement between the parties. Most arbitration agreements are included as standard clauses in commercial contracts and provide for the arbitration of any dispute that may arise in the future between the parties within a defined category. It is also possible for parties to an existing dispute to agree to settle their disagreement through arbitration. This agreement must be in writing and includes an arbitration clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

Pursuant to Article II (2) NYC, there is only one formal requirement for the validity of the arbitral agreement: it must be in writing. In fact, Article II (2) lays down both maximum and minimum requirements as to the form of arbitration agreements. The arbitral clause has to be in a contract or agreement signed by the parties, or contained in an exchange of letters or telegrams. Moreover, technology

1 *Scherk v Alberto-Culver* 417 US 506.

2 G. Wilner, *Domke on Commercial Arbitration*, Sec 1.01 Rev. Ed. 1992 "process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal." H. Brown & A. Marriot, *ADR Principles and Practise*, 1993 at 56–57.

makes it crucial to interpret Article II (2) in a less restrictive manner so as to take account of other means of telecommunication providing a record of the agreement. As recent case law relating to the NYC shows, the development is to accept arbitration agreements:

1 concluded by the exchange of telexes and facsimiles;
2 in cases of renewal of agreement and other connected contracts;
3 contained in the bill of lading and charter party;
4 concluded through an agent;
5 based on sales or purchase confirmation or by reference to general conditions;
6 concluded pursuant to trade usages; and
7 entered into by email or other means of electronic contact[3].

An arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate but it is the basic source of the powers of the arbitral tribunal. Arbitration offers the parties the opportunity to choose their own judge, in a way that is not possible in court proceedings. A major weakness of the arbitral process is the limited powers that the arbitral tribunal may exercise. An arbitral tribunal must depend for its full effectiveness upon underlying national systems of law. Powers possessed by arbitrators, whilst adequate for the purpose of resolving the matters in dispute, fall short of those conferred upon a court of law. If it becomes necessary for an arbitral tribunal to take coercive action in order to deal with the case before it, such action must be taken indirectly, through the machinery of the courts, rather than directly, as a judge may do. The arbitral tribunal cannot bring multi-party disputes together before it, because only courts of law have power to order consolidation of actions. The *lex mercatoria* is utilized primarily by international arbitral tribunals. State-established courts, for their part, must apply state law. State courts only refer to the *lex mercatoria* in cases to enforce awards made by arbitration tribunals[4].

In the current chapter emphasis is given only to the examination of the role of national courts in the proceedings of international commercial arbitration rather than a detailed analysis of international commercial arbitration.

2 International commercial arbitration and national courts

International commercial arbitration is similar in important respects to national arbitration. However, international arbitration has several characteristics that

3 Shipowner v Time Charterer, YCA, Vol. 25 (2000), pp. 714–16. *Chloe Z Fishing Co., Inc (US) and others (US) v Odyssey Re (London) Limited*, Decision of 26 April 2000, No. 99-2521-IEG RBB, YCA, Vol. 26 (2001), pp. 910–38. *Richard Bothell and others* v *Hitachi Zosen and others*, YCA, Vol. 26 (2001), pp 939–48, the court ruled that no valid arbitration agreement existed since it could not unequivocally establish the intention of the parties to that effect from the documents exchanged among them.

4 G. Stoecker, "The Lex Mercatoria: To What Extent does it Exist?," 1990 *Journal of Int'l Arbitration* 101.

distinguish it from national arbitration. Although international arbitration is a consensual means of dispute resolution, it has binding effect only by virtue of a complex framework of national and international law[5]. The disadvantage for international commercial arbitration of providing a national court with exclusive jurisdiction is that the court's view on impartiality and independence of arbitrators may differ from the views of the courts in other countries. Much of international commercial arbitration occurs pursuant to institutional arbitration rules. The leading international arbitration institutions are the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA), each of which has adopted its own set of rules governing the procedural aspect of arbitration. All of these institutes, as well as another dozen or so less-widely known bodies, supervise arbitrations when parties agree to dispute resolution under its auspices. Finally, the UNCITRAL Commercial Arbitration Rules are widely used in so-called ad hoc arbitrations. It is worth mentioning that in recent years, a race towards procedural law has characterized the world of "general" international commercial arbitration[6].

International arbitration differs from international litigation in that arbitrating parties determine to a large extent what procedural rules will govern the resolution of their dispute and who will decide their dispute. The legal basis for arbitration lies in an agreement by parties to submit disputes to an arbitral tribunal specifying not only the issues to be addressed by arbitration but also the jurisdiction of the tribunal evidencing the consent of the parties to arbitrate. If the parties choose institutional arbitration, they agree to submit their dispute to an institution that will administer the arbitration and most of the procedural and jurisdictional questions are resolved simply through reference to the institution and its procedural rules. In an *ad hoc* arbitration, the parties have the freedom to expressly choose the rules by which their arbitration will be governed and if the parties choose ad hoc arbitration, greater care needs to be given to identifying different procedural issues.

International arbitration proceedings are a close substitute for proceedings in public court systems and the main reason parties choose to arbitrate international commercial disputes is because neither party is comfortable litigating in the public courts of the other's home country and arbitration awards are easier to enforce than court judgments. It is argued that international commercial arbitration is becoming more and more like public court litigation, particularly public court litigation as practiced in the US. In other words arbitration is turned into a more legalistic process. Yves Dezalay and Bryant Garth[7] consider that:

> The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business; rather

5 Jack J. Coe, Jr., *International Commercial Arbitration: American Principles and Practice in A Global Context* 59–60 (1997) (noting the ability of parties to customize arbitration proceedings, pertaining to both substantive and procedural issues).

6 Bruno Oppetit, "Philosophie de l'arbitrage commercial international," *J. De Droit Int'l* 819 (1993).

7 Y. Dezaley & B. Garth, "Fussing about the forum," 1996 *L & Soc. Inq* 285, 299.

> legitimacy now comes more from a recognition that arbitration is *formal* and close to the kind of resolution that would be produced through litigation – more precisely, through the negotiation that takes place in the context of US-style litigation.

It seems that Yves Dezalay and Bryant Garth relate the legitimacy of arbitration with its closeness to litigation and not its individuality and complete independence.

Arbitration is an attractive alternative to litigation because parties choose their own neutral dispute resolution forum. However, due to the increase of international arbitration and the procedures of selecting forums and arbitrators, the length of time vital to complete arbitration has also become increasingly long. Parties tend to prefer arbitration because it is typically non-public, allowing companies with long-standing relationships to resolve their disputes away from public scrutiny, saving the underlying business relationship. As mentioned earlier, a major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process and such powers might be required to compel discovery, the attendance of witnesses, or in the extreme: control over the movement of the parties and their assets. In other words, arbitration agreements are in essence a type of forum selection agreement that attempts to avoid many of the problems related to jurisdiction. The effectiveness of private international arbitration, however, is dependent "on substantial and predictable governmental and intergovernmental support[8]." The decision of an arbitrator, however, does not necessarily result in the resolution of a dispute. Parties to an arbitral proceeding will often resort to domestic proceedings in local courts to enforce either the agreement to arbitrate or the award decision reached by the arbitrator[9] that underlines the inefficiency of an arbitral tribunal to produce a directly enforceable award.

The place of arbitration determines the procedural law applicable to the arbitration and the extent of the intervention of national courts[10]. The *lex arbitri,* also known as the *lex loci arbitri* is the law governing the arbitration and all matters relating to the conduct and procedure of the arbitration are subject to this law. The *lex arbitri* may be a different national law than that governing the substance of the parties' dispute or governing the arbitration agreement. At the beginning of the arbitral process, both under domestic legislation and under international treaties, such as the NYC, it is the courts – and not the arbitrators – who enforce the agreement to arbitrate. At the end of the process, it is the courts that enforce the arbitral award. Consequently, although parties tend to agree to arbitration in

8 W. Michael Reisman, *Systems of control in International Adjudication and Arbitration* 107 (1992).

9 Andreas Bucher, "Court Intervention in Arbitration, in International Arbitration In The 21st Century: Towards 'Judicialization' And Uniformity?" 29, 29–44 (Richard B. Lillich & Charles N. Brower eds., 1994).

10 Model Law (Article 1.2): "The provisions of this Law, except for Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

an effort to avoid the courts, the court system plays a crucial role in the framework of arbitration.

In arbitral proceedings, the need often arises for provisional remedies or other interim measures of relief because arbitral proceedings are no less adversarial than litigation in public courts. Provisional remedies and interim relief come in many forms, depending on the parties involved and context of the dispute and most often these remedies entail either the seizure of property, often called attachments or holding orders, or interim orders, also known as injunctions preventing dissipation of the property or to preserve the condition of the property for future inspection and so preserving the *status quo* between the parties pending the resolution of the merits of their dispute. Issues frequently arise as to whether arbitral tribunals or national courts have the power to order such relief. The arbitral tribunal looks to the set of arbitration rules under which it is operating to determine if such jurisdiction is granted. Some arbitral tribunals grant interim measures, others explicitly do not, and many arbitral tribunals direct parties to national courts for resolution of interim awards. Tribunals refer parties to courts because arbitral tribunals possess no coercive power for enforcement of their interim orders, and because provisional remedies can only be properly enforced through the court system. The UNCITRAL Arbitration Rules contain a single provision that explicitly permits arbitral tribunals, as well as courts, to order interim measures of protection, but the Rules provide no coercive power to the arbitral tribunal for enforcement of any interim measures of relief[11].

The basis for court intervention, for either assistance or control, is provided for in Article 5 of UNCITRAL[12]. The requirement for the arbitration agreement is stated in Article 7(2), but the definition of "writing" is broadened and adapted to modern commercial practices in comparison to Article II(2) of the NYC. Article 8 provides for the court to refer the parties to arbitration, unless the agreement is found "null and void, inoperative or incapable of being performed," which parallels Article II(3) of the NYC. Also, the Model Law allows the arbitration to proceed while the issue is pending before a court. Article 9 sets forth the grounds for court-ordered interim measures. Arbitration has to function as an autonomous dispute system from domestic judicial systems. The Model Law provided a reduced role for local court supervision over international arbitrations, but it has not shaped arbitration as a fully independent and autonomous dispute mechanism[13].

US courts have interpreted Article II(3) of the NYC to preclude courts from granting pre-award attachments based upon the intent of the NYC to prevent

11 Gregoire Marchac, "Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA," and UNCITRAL Rules, 10 *Am. Rev. Int'l Arb.* 123, 125 (1999).

12 Gerold Herrmann, "The UNCITRAL Model Law – Its Background, Salient Features and Purposes," 1 *Arb. Int'l* 6, 7–12 (1985).

13 Article 5 of the Model Law specified that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989).

significant judicial intervention until after an arbitration award is made[14]. The arbitral tribunal, if it is empowered by the respective governing rules, only has the power to grant interim measures of relief to the parties who are subject to the arbitration[15]. Some US courts have ruled that provisional relief is not available from a court when the parties have provided for arbitration[16]. In *Cooper v Ateliers de la Motobecane, S.A.*[17] the New York State Court of Appeals interpreted the NYC as purportedly requiring courts "seized of" matters that are the subject to agreements to arbitrate to refer the matter to arbitration without addressing the substance of those matters. Moreover, *Carolina*[18] *Power & Light Co. v Uranex,* suggested that coercive remedies and other court-ordered intervention available only through courts may often facilitate the arbitration process rather than denigrate it and are not necessarily inconsistent with referring the merits of the dispute to arbitration. To make arbitrations effective, it is vital to put into operation some mechanism that can ensure that interim measures can be properly granted and enforced by the arbitral tribunal. Is it necessary for the NYC to be amended to include a specific provision mandating arbitral tribunals as co-equal to courts bound by the treaty and to also recognize and enforce interim measures of relief?

Parties to arbitration face difficulties when one party seeks interim relief at an early stage of the proceedings because the arbitral tribunal has not yet been constituted and so a party can obtain provisional relief only in the regular courts. Thus, most parties in need of immediate assistance seek the aid of national courts for this emergency relief. Furthermore, the losing party in a motion before a court may have a right to appeal, and through appeal may slow the arbitration process considerably. Federal courts disagree over the effect of the NYC on the authority of national courts to grant provisional relief in aid of international arbitration.

14 *McCreary Tire & Rubber Co.* v *CEAT*, 501 F.2d 1032 (3rd Cir.1974); *Cooper v Ateliers de la Motobecane S.A*., 456 N.Y.S.2d 728 (1982). *Daye Nonferrous Metals Co.* v *Trafigura Beheer BV*, 1997 WL 375680 (S.D.N.Y. 1997) (granting injunctive relief against transfers of funds, in aid of arbitration in Paris); *Alvenue Shipping v Delta* Petroleum (U.S.A.), Ltd., 876 F. Supp 482, 487 (S.D.N.Y. 1994) (granting preliminary injunctive relief in aid of arbitration in New York Convention signatory).

15 *Lance Paul Larsen* v *Kingdom of Hawaii*, PCA Arbitration, *available at* http://pca-cpa.org/ENGLISH/RPC/#Larsen.

16 *McCreary Tire & Rubber Co.* v *CEAT,* 501 F.2d 1032 (3rd Cir. 1974).

17 *Cooper v Ateliers de la Motobecane*, S.A., 57 N.Y.2d 408 (1982).

18 *Carolina Power & Light Co. v Uranex*, 451 F. Supp 1044 (N.D. Cal.1977). *Daye Nonferrous Metals Co. v Trafigura Beheer BV*, 1997 WL 375680 (S.D.N.Y. 1997) (granting injunctive relief against transfers of funds, in aid of arbitration in Paris); *Alvenue Shipping v Delta Petroleum (USA),* Ltd., 876 F. Supp 482, 487 (S.D.N.Y. 1994) (granting preliminary injunctive relief in aid of arbitration in NYC signatory); In *Borden Inc.* v *Meiji Milk Products Co*, 919 F.2d 822, the court held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's power under Chapter 2 of the Federal Arbitration Act." In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v *Hovey* 726 F.2d 1286, the court held that without an agreement permitting court-ordered provisional measures, the "unmistakably clear congressional purpose" was to bar such measures.

Mccreary Tire & Rubber Co. v CEAT, Spa[19] is the seminal decision holding that Article II(3) of the NYC forbids court-ordered provisional relief in aid of arbitration. Italy and Greece represent jurisdictions that do not permit arbitral tribunals to grant any form of interim relief. To that extent, the AA of 1996 established a system of court subsidiarity considering the court as the last resort. The ability to grant interim relief is first allocated to the arbitrator. Section 66(1) allows parties to seek the aid of courts for the enforcement of arbitral orders made under sections 38 or 39. Under section 42, the court may make an order requiring a party to comply with a peremptory order of the tribunal. Before granting court enforcement of the arbitral award, courts are required to determine that all possible arbitral forums and methods to obtain enforcement have been exhausted. The court can only step in to grant interim measures under certain preconditions[20]. In Belgian law the court can order conservatory and provisional measures, but the arbitral tribunal can order interim and conservatory measures with the exception of attachment orders as well (Articles 1679, 1696 BJC). Moreover, section 1041(2) of German law allows the court to permit enforcement of interim measures granted by arbitral tribunals. Section 1062(2) also gives competence to a court to enforce an arbitrator's interim order, even if the seat of arbitration is outside of Germany.

Lord Mustill[21] compared the relationship between the courts and arbitrators to a relay race:

> Ideally, the handling of arbitrable disputes should resemble a relay race. In the initial stages, before arbitrators are seized of the dispute, the baton is in the grasp of the court: for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can lend its coercive powers to the enforcement of the award.

19 *McCreary Tire & Rubber Co.* v *CEAT,* 501 F.2d 1032 (3rd Cir. 1974).

20 Adam Johnson, "Interim Measures of Protection under the Arbitration Act 1996," 1 INT. A.L.R. 9–18, 14 (1997). An *ex parte* Mareva injunction is an order directed to the defendant that prevents him from dealing with his assets pending judgment or, in the arbitration context, pending award. Such an injunction is often coupled with an order requiring the defendant to disclose information and documents concerning his assets. Mareva injunctions are often urgent, and conducted in an *ex parte* setting, without notice to the defendant. The Anton Piller order is an order issued by a court to preserve evidence. First developed in cases in the intellectual property (IP) context, in which potential defendants who were given notice of proceedings would often seek to prevent the successful prosecution of claims against them by destroying any offending materials in their possession, an Anton Piller order is a type of search and seizure order that requires the applicant or his representatives to be given access to the defendants premises to search for and retain in safekeeping documents or other materials relevant to the action which might otherwise be destroyed.

21 Lord Mustill, *Comments and Conclusions,* in *Conservatory & Provisional Measures In International Arbitration*, 9th Joint Colloquium (ICC Publication 1993).

Therefore, Mustill's view shows that arbitration commences by a court's involvement and ends up by a court's enforcement which means that the parties cannot avoid the court's jurisdiction for the resolution of their dispute regardless of their arbitration agreement, thus showing a major disadvantage even of international commercial arbitration. According to *Thomas E. Carbonneau*[22] judicial intervention, in matters of transborder or domestic arbitration, is antagonistic to the autonomy and functionality of arbitration. Arbitration for the court is a means for securing civil justice within the US legal system[23]. The goal of reducing judicial intervention in matters of arbitration has been the central objective of modern legislation on arbitration[24]. Judicial interference with arbitration, therefore, thwarts the pursuit of international business itself. The ruling of an arbitral tribunal is usually fair and final, so undoing the effectiveness of this process through judicial supervision could eventually result in a society-wide denial of justice. Local court intervention in international commercial arbitration seems to defeat the purpose of choosing a more neutral alternative means of dispute resolution. Experience shows that it is the unnecessary and untimely referral to municipal courts that has resulted in many frustrated arbitrations.

Is there any conflict between courts and the private world of arbitration? The relationship between courts and arbitration should not give rise to any significant conflict. International commercial arbitration depends for its effectiveness upon the support of the law of the place of arbitration, which might be a local law or a national law. There is an interchange between the arbitral process and national law, which is fundamental to a proper appreciation of international arbitration. Such an interchange can take place at any phase of the arbitral process. At the beginning of arbitration, it may be necessary to ask a court to enforce an arbitration agreement because a party seeks to avoid it by commencing legal proceedings, or to appoint the tribunal. After an award has been made, national courts can be asked by the parties to intervene. The losing party may seek to challenge the award before the courts of the place in which it was made, for instance, on the basis that the tribunal exceeded its jurisdiction or that there was a fundamental miscarriage of justice in the course of the proceedings. The winning party may also need to apply to national courts for recognition and enforcement of the award.

States assist international commercial arbitration and they are bound to do so by the international conventions to which they are parties. Are states entitled to exercise control over arbitration? A state's control is exercised on a territorial basis, firstly, over arbitrations conducted in a state's territory and secondly, over awards brought into the territory of the state concerned for the purpose of recognition and enforcement. A state lends its support to an arbitral tribunal operating within its

22 *Thomas E. Carbonneau, "*The Exercise of Contract Freedom in the Making of Arbitration Agreements," *Vanderbilt Journal of Transnational Law* Vol. 36:1189.

23 Thomas E. Carbonneau, "Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration," 6 *Am. Rev. Int'l Arb.* 1, 4 (1995).

24 Hans Smit & Vratislav Pechota, *International Commercial Arbitration and the Courts* (3rd edn. 2002).

jurisdiction by claiming some degree of control over the arbitral process. States that may be called upon to recognise and enforce international arbitral awards are entitled to ensure that certain minimum standards have been observed in the making of an award. The subject matter of the award should be arbitrable in terms of national laws and that the award itself should not offend public policy. States can apply their own criteria as to the arbitrability of a dispute and as to public policy grounds for refusing recognition of an arbitration agreement or award. As a means of limiting court control of the arbitrability of a dispute, more and more countries are making a distinction between the arbitrability of domestic and of international disputes. According to Gaillard and Savage, such a distinction enables "a dispute to be found non-arbitrable under a country's domestic law, without necessarily preventing the recognition in that country of a foreign award dealing with the same subject matter"[25]. If arbitration is to take place outside of the territory of the court ordering the parties to arbitrate, the country where the ordering court sits will not exercise set-aside jurisdiction. Set-aside jurisdiction is generally vested in the courts of the seat of arbitration. Thus, even if the ordering court's law provides for *de novo* review, that law will not apply in set-aside proceedings. The final award will also not necessarily come within the ordering court's jurisdiction, because the award creditor may choose to seek recognition and enforcement elsewhere[26].

The dependence of international commercial arbitration upon national systems of law is clearly understood in the context of the recognition and enforcement of international awards. A series of reforms have made international commercial arbitration noticeably more transparent, meaning that the rules that regulate decision-making are more ready available to "interested parties," who in this instance are the users of the system[27].

National legislation and international instruments, particularly the NYC 1958 and the UNCITRAL Model Law on International Commercial Arbitration 1985, require arbitration agreements and clauses to be recognized and given effect to by courts and the resulting awards to be enforced internationally by national courts.

25 Gaillard, Emmanuel and Savage, John (eds.), "Fouchard Gaillard Goldman on International Commercial Arbitration," *Kluwer Law International*, The Hague (1999), p. 995.

26 *Compagnie de Navigation et Transports SA v Mediterranean Shipping Co. SA*, 21 *Y.B. Int'l Arb.* 690, 694–95 (DTF 1996).

27 William Want, "International Arbitration: The Need for Uniform Interim Measures of Relief," 28 *Brook. J. Int'l L.* 1059 (2003) (reviewing rule revisions to make interim relief procedures more predictable and transparent, but calling for more significant reforms). Christopher R. Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant," 80 *Notre Dame L. Rev.* 523 (2005) (reporting results of empirical research that demonstrates parties overwhelmingly choose national law and hypothesizing that national law is preferred because it is more predictable than alternative transnational legal rules). Darlene S. Wood, "International Arbitration and Punitive Damages: Delocalization and Mandatory Rules," 71 *Def. Couns. J.* 402 (2004) (noting that the ICC arbitration rules are routinely updated to adjust to changes in the "business climate"); Michael P. Malloy, "Current Issues in International Arbitration," 15 *Transnat'l Law.* 43 (2002) (noting that "competition among arbitration institutions for the growing number of international commercial arbitrations has moved their respective technical details closer to conformity").

An arbitral tribunal is limited in the powers it can exercise, and these powers fall short of the coercive powers possessed by national courts. A state is reluctant to confer on a private arbitral tribunal the powers it confers on the judges in its own courts. The power to enforce an award against a reluctant party is a power that forms part of the prerogative of the state and it is not a power that is possessed by an arbitrator, which shows that arbitration has not established itself as a co-equal to courts' dispute mechanism. The enforcement of awards must take place through the national court at the place of enforcement, operating under its own procedural rules, which vary from state to state. The effect of the international conventions has been to secure a considerable degree of uniformity in the recognition and enforcement of awards.

The reciprocity reservation has the effect of narrowing the scope of application of the NYC instead of applying it to all foreign awards whenever they are made. The NYC applies to commercial relationships, which means that relationships that are regarded as commercial by one state are not necessarily so regarded by others and this does not help to create a uniform interpretation of the NYC. The party seeking recognition and enforcement is required to produce to the relevant court firstly the duly authenticated original award or a duly certified copy thereof and secondly the original agreement referred to in Article II or a duly certified copy thereof. The task of enquiry before the court in which the award is sought to be enforced is limited and does not enable a party to the said proceedings to impeach awards on the merits. Once the above-mentioned documents have been supplied, the court will grant recognition and enforcement unless one or more of the grounds for refusal listed in the NYC are present. The NYC does not permit any review on the merits of an award to which the convention applies. Even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement[28]. The grounds for refusal of enforcement have to be construed narrowly by national courts. The majority of the awards in international arbitrations are honored and enforced by national courts. Recognition and enforcement may be refused if the national court of the state in which enforcement is sought finds that the subject matter of the dispute is not arbitrable under the law of the state and the recognition and enforcement of the award would be contrary to the public policy of that state. Hence, the public policy exception to enforcement is an acknowledgement of the right of the state and its courts to put into effect ultimate control over the arbitral process. There is a tension between the wish to lend the state's authority to enforcement of awards that contravene domestic laws and values and the desire to respect the finality of foreign awards. Arbitration has customarily been subjected to extensive supervision by courts, even allowing reviews of an arbitrator's decisions on the ground of an error in substantive law[29].

28 *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 Fsup 907, *China Agribusiness v Balli Trading* [1988] 2 LR 76, *Parsons Whittmore v Societe Generale* 508 F2d 969.

29 Justice Mason K. "Changing Attitudes in the Common Law's Response to International Commercial Arbitration," 18(2) *The Arbitrator* 73 (1999). In *Excelsior Film TV, srl* v *UGC-PH*, the French Cour

International commercial arbitration was principally a compromise-oriented process in which "strictly legal considerations [can be] pushed aside for the sake of achieving unanimity among the arbitrators and giving something to both sides.[30]" It has to be taken into account that high rates of voluntary compliance ensured that national courts would not be able to glimpse inside the system during enforcement proceedings[31].

What is the appropriate definition of public policy in the context of enforcement of arbitral awards? There is a need for a harmonious international definition of the context of public policy[32]. International public policy is understood to be

de Cassation (Supreme Court) denied Excelsior's appeal and affirmed the lower court's decision to refuse enforcement of the arbitral award rendered in Rome on grounds of public policy for lack of impartiality of one of the arbitrators. Published in *YCA*, Vol. 24 (1999), p 644. "The court drew the conclusion that this disloyality of an arbitrator, who was connected to one of the parties – as revealed in the award, so that it cannot be inferred from UGCPH's failure to challenge this arbitator that it waived its right to rely on this irregularity – created an imbalance between the parties, amounting to a violation of due process, so that the award rendered in Italy under such conditions violates French public policy in the sense of both Articles mentioned above" [Article V(2)(b) NYC and Article 1502(5) of the new French CCP].

30 Fredrick A. Mann, "The Aminoil Arbitration," 54 *Brit. Y.B. Int'l L.* 213, 214 (1983). Christopher R. Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant," 80 *Notre Dame L. Rev.* 523 (2005) (reporting results of empirical research designed to test the frequency with which parties contract out of national law by selecting transnational legal principles to govern their dispute). Fulvio Fracassi, "Confidentiality and NAFTA Chapter 11 Arbitrations," 2 *Chi. J. Int'l L.* 213, 221 (2001) ("Arbitrations that have broad and far-reaching public policy implications tend to draw attention from media and nongovernmental organizations. Maintaining a shroud of confidentiality over proceedings and documentation simply draws intense criticism and does harm to the legitimacy of the process.").

31 Thomas E. Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions," 23 *Colum. J. Transnat'l L.* 579, 606 (1985). Alexis C. Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration," 16 *Am. U. Int'l L. Rev.* 969 (2001); ("In order for the requested court to perform its task of vacating or confirming an award, a party's adversarial opposition to the award generally yields a relatively comprehensive account of the arbitral proceeding and of the basis for the arbitrators' rulings.").

32 *Egerton v Brownlow* (1853) 4 HLC 1 "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good." Cheshire and North, *Private International Law* (13th edn., Butterworths, 1999), p. 123 "some moral, social or economic principle so sacrosanct … as to require its maintenance at all costs and without exception" *Deutsche Schachtbau-und Tiefbohrgesellscaft mbh v Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep. 246 at 254. "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised." *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F.2d 969 "only where enforcement would violate the forum state's most basic notions of morality and justice." BGH, 12 July 1990 III ZR 174/89, NJW 1990 at p. 3210. "A violation of essential principles of German law (*ordre public*) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way. A mere violation of the substantive or procedural law applied by the

narrower than domestic public policy: not every rule of law that belongs to the *ordre public interne* is necessarily part of the *ordre public externe* or *international*[33]. Within the broad concept of public policy, the following sub-categories of rules and norms can be identified: (1) mandatory laws/*lois de police*; (2) fundamental principles of law; (3) public order/good morals; and (4) national interests/foreign relations. International public policy provides the forum judge with a mechanism for the exceptional exclusion of those provisions of the applicable law that are incompatible with the legal system of the forum. The arbitrator, who does not deliver justice on behalf of any state, does not have a national *lex fori* and, as a result, does not have to defend the international public policy of a given state against a foreign law. International public policy requires that no effect be given to contracts involved in setting up corrupt transactions or traffic in human beings or organs. Thus, public policy performs a constructive function and affects the reasoning of the arbitrator independently of the applicable law. The international commercial arbitrator has to pay attention to the public policy of the national judge, as is shown by the effect of mandatory rules of law. It should be taken into account that the public policy in question is that of the national judge, not that of the arbitrator. Nonetheless, the arbitrator has to bear in mind this public policy that constitutes an indistinct threat to his/her award. An arbitral award that violated a mandatory rule of law that was applicable to the contract in question could be set aside or deprived of any effect due to its breach of international public policy. It is not easy to ascertain whether the practice of courts is less accurate when asked to recognise/enforce a foreign award than they are when asked to set aside an award made in their own jurisdiction[34]. Doubt and inconsistencies regarding the interpretation and application of public policy by state courts allow the losing party to rely on public policy to resist, or at least delay, enforcement. This author

arbitral tribunal is not sufficient to constitute such violation." Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978), p. 532. "… it is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."

33 Sanders, *Commentary* in *60 Years of ICC Arbitration – A Look at the Future* (ICC Publishing, 1984). "international public policy, according to a generally accepted doctrine is confined to violation of really fundamental conceptions of legal order in the country concerned." Articles 1498 and 1502 of Title V of the New Code of Civil Procedure (1981). See Mayer, "La sentence contraire a l'ordre public au fond," (1994) *Rev. Arb*. 615. Fouchard, Gaillard and Goldman on *International Commercial Arbitration* (ed. Gaillard and Savage) (Kluwer, 1999), para. 1648. "The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases." Decision dated 4 December 1992, reported in (1997) XXII *Yearbook* 725. The Milan Court of Appeal may have had in mind a more transnational concept when it described international public policy as a "body of universal principles shared by nations of similar civilisation, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions."

34 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* (1999) [1999] 2 QB 222.

considers that international public policy for arbitration between private parties should contain only the fundamental principles of human rights and principles of law such as *due process* which also have to be considered as the basis for national public policy in order to have a harmonious application of the rule in arbitration and only exceptional morals could be part of national policy in national cases.

The provisions of the NYC and model law at least should be interpreted in the same way by courts everywhere. Reasons for refusal are the following: invalid arbitration agreement, lack of due process and no proper notice of appointment. The court of the forum state will have its own concept of what constitutes a fair hearing. The court's function is not to decide whether or not the award is correct but simply to decide whether there has been a fair hearing. A single mistake in the proceedings might be sufficient to lead the court to conclude that there was a denial of justice[35]. Jurisdictional issues, composition of tribunal or procedure not in accordance with the arbitration agreement or the relevant law, make an award not binding, suspended, or set aside. A national court can consider it necessary to investigate the law applicable to the award to see if it is binding under that law. The enforcement court may adjourn the decision on enforcement if an appeal is pending. Some courts might recognise and enforce an arbitral award even if it had been set aside by the courts of the seat of arbitration. It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfill the intentions of the parties.

Most national courts regard arbitration as an appropriate way of resolving international commercial disputes and seek to give effect to arbitration agreements wherever possible, rather than seeking to narrow the scope of the agreement so as to preserve the court's jurisdiction. An arbitrator is likely to consider that it would be sensible to try to resolve all the parties' claims in the same set of proceedings. A national court will also have in mind that, unlike an arbitral award, its judgment might set a precedent for the future. General words such as *disputes, differences* and *claims* have been held by English courts to encompass a wide jurisdiction in the context of the particular agreement in question[36]. In the US the words *controversies* or *claims* have been held to have a wide meaning[37]. The words *any controversy or claim arising out of or relating to this agreement* were described as a broad clause. Linking words such as in *connection with, in relation to, in respect of, with regard to* and *arising out of* is important in any dispute as to the scope of an arbitration agreement, which means that these type of words will apply to all disputes that can be submitted to arbitration. Local project participants and government agencies have employed local court orders to delay or block international arbitration proceedings in

35 *Iran Aircraft v AVCO* Corp. 980 F.2d 141.
36 *The Angelic Grace* [1995] 1 LR 87.
37 *Prima Paint Corp v Conklin Co*. 388 US 395.

favour of judicial review of claims that the project contracts were invalid or unenforceable[38].

It is argued that judicial review of arbitral awards constitutes a form of risk management designed to safeguard against vicious arbitrators and shameless meddlers, but a decision-maker cannot be an arbitrator unless the person alleged to have waived court jurisdiction has in fact authorized the relevant individual to decide the disputed issues. Such public scrutiny of arbitration is unavoidable when the winners ask courts to recognize awards by seizing assets or by denying the losers access to otherwise competent courts. Can arbitrators on a second-degree not review an arbitral award and so achieve public scrutiny?

Modern international arbitration outcomes are more like judicial outcomes in that they are produced by an objective tribunal's reasoned application of established rules to facts. Courts must enforce foreign awards as they would domestic ones[39]. Although NYC covers foreign awards (awards rendered in a country other than the one where enforcement is sought), it also covers awards "not considered as domestic," such as awards arising from disputes that directly implicate international commerce[40]. Courts can reject awards tainted with excess of authority and procedural irregularity[41]. Another set of NYC defenses protects the forum's own interest in withholding support for awards that deal with non-arbitrable subjects or violate public policy. In fact, the Convention's effectiveness depends largely on each country's national arbitration law[42]. Arbitration agreements must be enforced if not "null and void," which is a notion of local contract principles leaving each country free to establish its own grounds for vacating awards made within its territory[43]. It could be said that the Convention will not deprive interested parties of the right to rely on awards to the extent allowed by an enforcement forum's own law and so national arbitration law

38 Kantor, "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?," 24 *Fordham Int. L.J.* 1122 (April 2001).

39 Convention Article III provides for award enforcement "in accordance with the rules of procedure of the territory where the award is relied upon," leaving open a theoretical possibility of onerous conditions on all arbitral decisions, domestic and foreign. Such abuse of rights would violate the NYC just as onerous state arbitration laws violate the FAA. *See Doctor's Associates v Casarotto*, 517 US 681 (1996).

40 *Lander Co. v MMP, Invs*., 107 F.3d 476 (1997) (arbitration between two American companies selling shampoo in Poland); *Bergesen v Joseph Muller Corp*., 710 F.2d 928 (2nd Cir. 1983) (arbitration between Swiss company and Norwegian shipowner).

41 Convention Article V(1)(a)–(d) deals with invalid arbitration agreements, lack of due process, arbitrator excess of authority and irregular composition of the arbitral tribunal.

42 UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985, UN Doc. A/40/17, Annex 1.

43 Convention Article II(3). In the US the validity of arbitration clauses is generally determined by state law principles governing contract formation. See *First Options v Kaplan*, 514 U.S. 938, 943 (1995). Only infrequently does one find invocation of supranational standards for the validity of arbitration agreements. See *Rhone Mediterranée v Achille Lauro*, 712 F.2d 50, 53 (3rd Cir. 1983) (referring to an "internationally recognized defense such as duress, mistake, fraud or waiver").

becomes important[44]. The FAA confirms a foreign award if no treaty reasons exist to deny recognition[45].

Many developed legal systems enforce foreign judgments either pursuant to treaty or as a matter of discretionary comity and courts enforce arbitral awards without examining their merits. Principles of comity (absence of fraud, public policy violations and conflict with a prior judgment or forum selection agreement, as well as the foreign court's impartiality, jurisdiction and granting of due process and proper notice) call for recognition of foreign judgments on condition that there be no serious procedural irregularity or violation of public policy[46]. It should be taken into account that unless vacatur triggers non-recognition (a vacated award will be refused enforcement even without comity, due to overlapping grounds for annulment and non-recognition (FAA §10, *NCPC* Article 1502 and NYC Article V), the annulled award might receive *res judicata* effect at the place where property is located, creating a Law of awards in which bad decisions drive out good ones. Moreover, arbitration rules[47] and contract stipulations provide that awards will be "final and binding" and finality means that awards are subject to mandatory judicial control mechanisms. NYC awards may be denied recognition if deemed defective by *either* the enforcement forum or the arbitral situs[48].

44 Courts in France recognize foreign awards unless contrary to international public policy permitting appeal of recognition orders only on limited grounds that do not include annulment. NCPC 1498, Article 1502 allows appeal of recognition orders for: (i) lack of a valid arbitration agreement; (ii) irregular composition of the arbitral tribunal; (iii) excess of authority; (iv) failure to respect due process *(principe de la contradictio*n); and (v) violation of international public policy.

45 9 U.S.C. §207.

46 *Hilton* v *Guyot*, 159 U.S. 113, 202 (1895) (declining to recognize French judgment on the assumption that French courts did not recognize American judgments, but stating that the merits of a foreign judgment should not otherwise be tried again when there has been "opportunity for a full and fair trial abroad before a court of competent jurisdiction … and there is nothing to show either prejudice in the court … or fraud in procuring the judgment"). Stephen Ostrowski & Yuval Shany, Chromalloy: "United States Law and International Arbitration at the Crossroads," 73 *N.Y.U. L. Rev.* 1650 (1998).

47 ICC Arbitration Rules, Article 28(6) (award "binding"); LCIA Rules, §26.9 (award "final and binding"); AAA International Arbitration Rules, Article 27(1) (award "final and binding"); The 1996 EAA allows pre-dispute waiver of appeal on points of law (§69), but not waiver of challenge for serious procedural irregularity or excess of jurisdiction (§§67–68). *M & C Corp. v Erwin Behr GmbH*, 87 F.3d 844, 847 (6th Cir. 1996) (stating that waiver provisions in the ICC Rules "merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court." Ken Rokison, "Pastures New: The 1997 Freshfields Lecture," 14 *Arb. Int'l* 361, 363 (1998) ("the presumed intention of the parties [is] that all aspects of the merits of their dispute should be decided by their chosen tribunal and not by the court").

48 Convention Article V(1)(a)–(d) and Article V(1)(e). Kenneth R. Davis, "When Ignorance of the Law Is No Excuse: Judicial Review of Awards," 45 *Buff. L. Rev.* 49, 126, 138 (1997) (suggesting that mistakes of law can constitute excess of authority). *Pearlman* v *Keepers and Governors of Harrow School*, [1978] 3 W.L.R. 736, 743 (C.A.) ("The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine … that it is rapidly being eroded.").

Twenty years ago, arbitration was an ad hoc compromise-oriented process characterized by its informality and stress on fairness[49]. The arbitrator was expected to render a just and equitable result, even if that sometimes meant disregarding the express terms of the contract or the apparent provisions of chosen law authorizing arbitrators to act as *amiable compositeur* and *ex aequo et bono* disregarding the strictures of so-called auxiliary rules, such as statutes of limitations, in order to obtain justice[50]. Professor David[51] perceived ad hoc arbitration as "a diffuse, unsupervised, and casuistic process, and harbored no hope that it could foster the development of international arbitration as a discipline 'tant vaut l'arbitre, tant vaut l'arbitrage.' " Nowadays, the legality of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of commerce; rather, legality now comes more from an acknowledgment that arbitration is formal and close to the kind of resolution that would be produced through courts[52]. Arbitral awards are being published and are even making an appearance as influential authorities cited to other arbitration panels. International arbitration has emerged as the paramount means for resolving disputes that arise in the ever-expanding international arena. Hence, arbitration is the *normal* way of settlement of international commercial disputes and has become a fully operational transnational adjudicatory process[53].

49 Yves Dezalay & Bryant Garth, "Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition," 21 *L. Soc. Inq.* 285, 295 (1996).

50 Christine Lecuyer-Thieffry & Patrick Thieffry, "Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes," 45 *Bus. L.* 577 (2000). John Beechey, "International Commercial Arbitration: A Process Under Review and Change," Aug/Oct *Dis. Res. J.* 32 (2000). The doctrine of *amiable composition*, which is often translated to mean "author of friendly compromise," has been described as: allowing arbitrators to decide cases in accordance with customary principles of equity and international commerce. This power permits arbitrators to arrive at an award that is fair in light of all circumstances, rather than in strict conformity with legal rules, [but] … generally [they] may not disregard mandatory provisions of substantive law or the public policy of the forum state. The doctrine of *ex aequo et bono* is very similar to *amiable compositeur*, except that the powers of arbitrators are slightly broader, enabling them to disregard even mandatory provisions of substantive law in order to reach an equitable outcome. Nicholas de B. Katzenbach, "Business Executives and Lawyers in International Trade, in Sixty Years Of ICC Arbitration: A Look At The Future" 67–68 (1984) (explaining that while arbitration might be a choice for domestic disputes, because there exists in national courts a reliable alternative, the unpredictability and risks of failure in domestic litigation of international business disputes makes international arbitration the only real option).

51 Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (1967) 57 at 63.

52 Yves Dezalay & Bryant Garth, "Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition," 21 *L. Soc. Inq.* 285, 299 (1996). "International Arbitration in The 21st Century: Towards 'Judicialization and Uniformity"' (Richard B. Lillich & Charles N. Brower, eds. 1993).

53 Thomas E. Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions," 23 *Colum. J. Transnat'l L.* 579, 580 (1985). Martin Hunter, "Ethics of the International Arbitrator," 53 *Arbitration* 219, 220 (1987) (concluding that the world of commercial arbitration is no longer a club of gentlemen, but one that needs explicit guidelines for conduct). W. Michael Reisman *et al., International Commercial Arbitration: Cases, Materials And Notes On The Resolution Of International Business Disputes* 1215 (1997) ("Arbitral awards

International commercial arbitration awards are being voluntarily published with ever-greater frequency[54]. It could be argued that the international arbitration community's movement toward greater transparency is part of the system's demonstrable move toward the rule of law[55], and there is the danger of arbitration becoming more formal than litigation as a rule-based system. This author argues that a summary of the award containing the legal reasoning should be published, enabling the emergence of arbitration precedent[56].

as a whole enjoy a higher degree of transnational certainty than judgments of national courts."); W. Michael Reisman, *Systems Of Control in International Adjudication & Arbitration: Breakdown And Repair* 113 (1992) (noting that the international arbitration system intentionally minimizes the role of national courts and "may shift the real decision-making from the arbitral tribunal to the courts"). Saul Perloff, "The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration," 13 *U. Pa. Int'l Bus. J.* 323, 324 n.11 (1992). Desiree A. Kennedy, "Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations," 8 *Geo. J. Legal Ethics* 749, 765 (1995) (criticizing arbitration that permits party communication with arbitrators as incompatible with the principle that adjudicators should be impartial).

54 Dora Marta Gruner, "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform," 41 *Colum. J. Transnat'l L.* 923, 959 (2003) ("Today, several arbitral institutions, as well as independent publishers, have started to regularly publish arbitral awards."). Tom Ginsburg, "The Culture of Arbitration," 36 *Vand. J. Transnat'l L.* 1335, 1340 (2003) ("Although certain sources for arbitral decisions exist … they are but the tip of the iceberg of all the cases produced … and … the ICC awards are an explicitly biased sample as the ICC seeks to publish particularly interesting or unusual awards."). Michael D. Goldhaber, Madame La Présidente, American Lawyer/Focus Europe/Summer 2004 http://www.americanlawyer.com/focuseurope/arbitration04.html (last visited January 12, 2006). ("Because arbitration has traditionally been confidential, the appointing parties and institutions have not, until now, been subject to pressure from the media [to diversify along gender lines].").

55 Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse," 97 *Colum. L. Rev.* 1 (1997) (identifying four ideal types of the rule of law, none of which captures the nuance and complexity of the concept, but each of which are invoked by various constituencies in arguing for particular constitutional approaches or outcomes). Catherine A. Rogers, "The Vocation of International Arbitrators," 20 *Am. U. Int'l L. Rev.* 957, 972 (2005). Donald P. Arnavas & Rt. Hon. Lord David Hacking, *Using ADR to Resolve Contract Disputes*, 04–11 Briefing Papers 1 (2004) ("Reasoned awards have always been the norm in international arbitration, but with the shift to more formalized and rule-based decision-making, awards have necessarily become longer and more detailed."). William W. Park, "Income Tax Treaty Arbitration," 10 *Geo. Mason L. Rev.* 803 (2002) ("The marketplace has pushed international arbitration toward reasoned awards."). Christopher B. Kaczmarek, "Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions," 4 *Emp. Rts. & Emp. Pol'y J.* 285, 287–88 (2000) (arguing for written, publicly available opinions in cases involving issues of public law).

56 John Beechy, "International Commercial Arbitratiion: A Process Under Review and Change," 55 October *Disp. Resol. J.* 32, 34 (2000) ("Not long ago, I heard an eminent international arbitrator suggest that recourse to what he described as 'constructive ambiguity' in the drafting of an arbitral award was appropriate and justified if the arbitrator felt that it might bring about a position in which the parties settled their differences."). Bernardo M. Cremades and Steven L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions," 2 *B.U. Int'l L.J.* 317, 336–37 (1984) (suggesting "the formation of institutions which give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*"). Thomas E. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce," 19 *Tex. Int'l L. J.*

3 Conclusion

Neutrality of the forum and enforceability of judgments in other jurisdictions are the two dominant reasons for choosing arbitration over courts[57]. International arbitration relies on national courts to enforce the arbitration agreement and the arbitrators' award, which means that the indispensable role of national courts as enforcers and overseers is in conflict with the all-important goal that arbitration proceedings be insulated from national legal systems to retain their neutrality. There is therefore a need to strike a balance between arbitral autonomy and minimum competence for national judicial review. National laws often authorize courts to interfere "in aid of arbitral proceedings," parties may be able to persuade national courts to intervene to resolve ethical conflicts or rule on charges of ethical misconduct. National court review is limited to severe procedural defects or encroachments on the public policy of the national law of the reviewing court[58]. Arbitrators can interpret and apply the

33, 39 (1984); Kenneth Michael Curtin, "Redefining Public Policy in International Arbitration of Mandatory National Laws," 64 *Def. Couns. J.* 271, 279 (1997) ("Publication of arbitral awards … is becoming more common, thus alleviating the difficulties associated with a lack of precedent."); Klaus Peter Berger, "International Arbitration Practice and the Unidroit Principles of International Commercial Contracts," 46 *Am. J. Com. L.* 129 (1998) (stating that "arbitral awards more and more assume a genuine precedential value within the international arbitration process"), William Tetley, "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)," 60 *La. L. Rev.* 677 (2000) ("With each passing year there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the US), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus developing a system of arbitral precedent."). Cindy G. Buys, "The Tensions Between Confidentiality and Transparency in International Arbitration," 14 *Am. Rev. Int'l Arb.* 121, 137 (2003) (arguing for a presumption in favor of publication that can only be overcome by objection by both parties); Dora Marta Gruner, "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform," 41 *Colum. J. Transnat'l L.* 923, 960 (2003) (proposing establishment of an official international regulatory body to require and oversee award publication except in those cases involving exclusively "issues of a private, consensual nature"); Christopher R. Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant," 80 *Notre Dame L. Rev.* 523, 549–50 (2005) (positing that "by publishing books and articles and speaking at conferences on transnational law, prospective arbitrators may be signalling that they have what Stephen R. Bond calls 'legal internationalism"). Bernard H. Oxman, "International Decisions," 96 *Am. J. Int'l L.* 198 (2002) (noting that with regard to non-commercial contexts "the [ICJ] has invoked other international arbitral awards … on [some] occasions, and has even brought some within the ambit of "precedents" that it will consider on a par with its own prior decisions"); Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" Arbitration International, 23 No. 3 (2007), pp. 357–78.

57 Christian Bühring-Uhle, Lars Kirchhoff, & Gabriele Scherer, "Arbitration and Mediation In International Business" 107–10 (2d edn., 2006).

58 Thomas E. Carbonneau, "The Remaking Of Arbitration: Design And Destiny, In Lex Mercatoria And Arbitration" 10 (Thomas E. Carbonneau ed., 1990) (noting that the French Cour de Cassation "has devised a special notion of *ordre public* for international [arbitral awards]: … public policy is confined to due process considerations and requirements of basic procedural fairness (le contradictiore)"); Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration, in Comparative Arbitration Practice And Public Policy In Arbitration"

rule in a way that ensures the fundamental fairness of the proceedings. Finally, the analysis shows that national courts are involved in cases of international commercial arbitration by assisting arbitral tribunals, and so it seems that arbitration cannot currently be concluded successfully without the involvement of national courts.

(Pieter Sanders, ed., 1987) (suggesting that arbitrators must keep an eye toward the mandatory law of similar enforcement jurisdiction or jurisdictions to ensure that their award is enforceable).

3 The role of courts in commercial–maritime arbitration in US law

1 Introduction

A reference to arbitration may arise from the agreement of the parties or from statute. Arbitration is considered to be an alternative to the judicial settlement of disputes in the public arena and so S. Kroll[1] argues that arbitration replaces state courts. Maritime arbitration is like commercial arbitration in that both are creatures of contract and so are subject to the constraints imposed by the law of contracts on the ability of individuals to negotiate the terms of their agreement, which means that the parties are at liberty to shape the form of their arbitration. A party entering into a contract has a free choice between arbitration and judicial litigation. Parties bind themselves to some form of arbitration by means of an arbitration clause contained in the contract that governs their relationship. For instance, an arbitration clause can be contained in a bill of lading contract and the ultimate holder of the bill of lading contract is then bound to arbitrate any claim arising out of a breach of the bill of lading contract.

As described earlier, in the middle of the eighteenth century arbitration agreements were regarded as against public policy because they oust the jurisdiction of the courts[2]. When the FAA was enacted in 1925, it appeared against the backdrop of a considerably more restrictive general venue statute than the one current today. At the time, the practical effect of 28 USC. § 112 (a) was that a civil suit could usually be brought only in the district in which the defendant resided. The statute's restrictive application was all the more pronounced due to the courts' general

1 Stefan Kroll, "Contractual Gap Filling by Arbitration Tribunals," 2(1) *Int'l A.L.R.* 9, 12 (1999): "Despite all national variations, arbitration is generally understood as the resolution of a dispute between two or more parties by a third person (arbitrator) who derives his powers from an agreement (arbitration agreement) of the parties, and whose decision is binding upon them. The gist of the notion of arbitration as regulated by most of the Laws of Arbitration is that it is conceived as a substitute for court litigation … arbitration is generally seen as a judicial dispute settlement mechanism which replaces state courts." Robert Coulson, *Business Arbitration – What You Need To Know* 7 (4th edn. 1991) at 8 ("Arbitration is the submission of a disagreement to one or more impartial persons. Usually, the parties agree to abide by the arbitrator's decision.")

2 *Meachem v Jamestown*, 105 NE 653, *Kouloukidis Shipping Co. v Amtorg Trading Corp*. 126 F2d 978.

inhospitality to forum selection clauses[3]. Hence, even if an arbitration agreement expressly permitted action to be brought in the district in which arbitration had been conducted, the agreement would probably prove to be vain. Courts regarded arbitration as a competitor of judicial trials. In earlier times, arbitration as a dispute resolving mechanism was viewed by the courts with suspicion. The Congress intended to exercise as much of its constitutional power as it could in order to make the new FAA as widely effective as possible. It is worth mentioning here that in England and in the US the courts resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice, protecting what they called their "jurisdiction." Hence, the text of the Act and the legislative history demonstrate that the Congress based the FAA in part on its undisputed substantive powers over commerce and maritime matters. Congress enacted the FAA in an attempt to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[4] According to Nikolas D. Johnson "The premise behind the FAA was to place arbitration on equal footing with civil court litigation."[5] Besides, Mark I. Levy[6] argues that the FAA does not "divest district courts of their customary authority to provide appropriate relief and to manage their dockets."

It will be examined whether Congress gave full jurisdiction to arbitration to deal with dispute resolution in parallel and independently of courts. Is the FAA an old-fashioned 1925 procedural statute that has been reshaped by the courts – not by legislative amendment – into a significant vehicle of judicial administration?

The right to arbitrate disputes involving commercial and maritime transactions has been codified in the FAA, but arbitration is still consensual and not mandatory[7].

3 *The Bremen* v *Zapata Off Shore Co.,* 407 US 1, 9–10 (1972). N. Healy "An Introduction to the FAA" 1982 *JMLC* 223, *Prima Paint Corp. v Flood & Conklin Co*. 388 US 395.

4 *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.,* 460 US 1, 24–25 (1983) (holding that the FAA establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Margaret M. Maggio & Richard A. Bales, "Contracting around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards," 18 *Ohio St. J.* on *Disp. Resol.* 151, 180 (2002) ("The Act recognized that arbitration agreements are purely matters of contract, and the bill was structured to make the contracting party live up to the bargain." Margaret L. Moses, Privatized "Justice," 36 Loy. *U. Chi. L.J.* 535 (2005) ("depriving large numbers of consumers of access to our court system without their consent could not have been the intent of the drafters of the FAA."). *See Am. Sugar Ref. Co. v Anaconda*, 138 F.2d 765, 766–67 (5th Cir. 1943) ("The act was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.").

5 Nikolas D. Johnson, "Enforceability Of Arbitration Fee Allocation Clauses In Employment-Related Disputes," www.ssrn.com p. 22.

6 Mark I. Levy, "Arbitration Appeals II," *Nat'l L. J*., Aug. 16, 2004, at 12, 12.

7 *Stephen* J. "Ware, Employment Arbitration and Voluntary Consent," 25 *Hofstra L. Rev* 83, 105–10 (1996) (explaining the confusion and controversy over the use of the terms "voluntary" and "mandatory" in the employment-arbitration context); see also Stephen J. Ware, "Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights," 38 *USF. L. Rev* 39, 43 (2003) ("I ask Professor Sternlight (and others) to stop calling contractual

The original purpose of the FAA was to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements on the same footing as other contracts[8]. The FAA was intended by Congress to "even the playing field" for arbitration by instructing federal courts to consider an agreement to arbitrate disputes in the same way as any other lawful agreement between the parties. In other words, Congress decided in enacting the FAA that society has a strong interest in providing the option of choosing binding arbitration as a judicially enforceable means of resolving disputes[9]. Does the introduction of the FAA prove that the leader in commercial disputes is the court (by having the power of sovereign and the last word in the arbitration process)? Are there not established two equal dispute mechanisms – arbitration v courts – and the parties can agree to which one their dispute should be submitted? Thus, enacted 80 years ago as a simple procedural device to enforce arbitration in federal courts, the FAA has also pressed into service as a body of substantive law that binds state courts, requiring that arbitration agreements be enforced on the same footing as other contracts[10]. Gaps in the FAA's statutory scheme have been filled by case law in an ongoing process of statutory interpretation now part of the meaning of the statute[11].

At first sight there are the advantages of speed, simplicity and economy associated with arbitration[12] and therefore judicial involvement should be kept to the minimum to avoid undermining those goals. It will be examined whether courts' involvement is kept to a minimum. What is minimum involvement? These objectives are most likely to be achieved if the parties and their attorneys adopt well-designed rules of procedure; select skilled arbitrators who are able and willing to actively manage the process; limit the issues to focus on the core of the dispute; and cooperate on procedural matters even while acting as effective advocates on

arbitration – mandatory arbitration.") For a response, see Jean R. Sternlight, "Creeping Mandatory Arbitration: Is it Just?" 57 *Stan. L. Rev* 1631, 1632 fn. 1 (2005).

8 *Sonders v Gardner*, 7 F Sup 2d 151, *HIM Portland, LLC v DeVito Builders, Inc*., 317 F.3d 41, 43 (2003) (Justice Torruella wrote: "Congress enacted the FAA to place arbitration agreements upon the same footing as other contracts and to render them valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

9 *Moses H. Cone Memorial Hospital v Mercury Construction Corp*., 460 US 1 (1983) (because FAA establishes strong policy favoring arbitration, "as a "matter of federal law, any doubts … should be resolved in favor of arbitration."). *Perry v Thomas,* 482 US 483, 486, 490–91 (1986) (disputes over commissions on securities sales were arbitrable under a contract that provided for arbitration, even though the California Labor Code mandated court litigation of such "wage" disputes, "despite the existence of an agreement to arbitrate."); *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.,* 473 US 614, 623 n. 10 (1985) (antitrust claims arbitrable, notwitstanding Puerto Rican law requiring judicial resolution).

10 *Doctor's Assocs. v Casarotto*, 517 US 681 (1996). The FAA was deemed to have created simply procedural rights; however, it gradually acquired the status of substantive law as the process of arbitration gained importance.

11 G. Born, *International Commercial Arbitration*, 136–7 2nd ed 2001.

12 CPR Institute for Dispute Resolution, http://www.cpradr.org/home1.htm.

substantive issues. According to Roger S. Haydock[13] and Jennifer D. Henderson "arbitration is, and will be, a significant part of our civil justice system and is a highly favored way to resolve disputes." Moreover, G. Richard Shell[14] argues that arbitration is overtaking litigation as the most fashionable forum for the hearing of civil disputes. The question to be answered is whether arbitration is equal an alternative to litigation.

The actual procedural form that a commercial or maritime arbitration takes can vary depending on the terms parties decide to include in their arbitration agreement. In the resolution of commercial disputes, judicial and arbitration proceedings coexist and to some extent may be said to compete with each other. The judicial process in the US is characterized by its emphasis on due process, which is the overall fairness of the way in which proceedings are conducted and decisions are reached. In the judicial system the expeditious resolution of disputes and the inexpensive resolution of disputes are not viewed as independent values that compete with the value of fairness and so both should promote the primary goal of fairness. The due process clause of the fifth and fourteenth amendments to the US constitution together with their judicial semblance have established a minimum standard of procedural fairness to which all litigants are entitled and below which the public administration of civil justice should not fall. This view of fairness reflects a public sense of fairness that is the manner in which courts carry out their constitutionally mandated task of adjudicating disputes. In the judicial process fairness cannot be determined merely by what the parties in an individual case may consider fair.

It is observed that there is an alteration of maritime arbitration for the worse by the increase of costs, delays and greater legal formality, because arbitrators have tried to remake the historically very informal process into the image of the judicial litigation process[15]. The following analysis will show whether the arbitrators have been influenced by courts and act as judges who have to follow the formality imposed by the specific articles of the procedure code. Moreover, lawyers-arbitrators have tried to incorporate the procedural and evidentiary rules that characterize litigation[16]. In fact, the epoch of custom and lack of formality has passed at the expense of cost effectiveness.

13 Roger S. Haydock, Jennifer D. Henderson, "Arbitration And Judicial Civil Justice: An American Historical Review And A Proposal For A Private/Arbitral And Public/Judicial Partnership," 2002 Pepperdine *Dispute Resolution Law Journal* 16,

14 G. Richard Shell, "*Res judicata* and Collateral Estoppel Effects of Commercial Arbitration," 35 *UCLA L. Rev* 623, 626–27 (1988) ("Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes.").

15 *Advanced Micro Devices v Intel Corp*., 885 P.2d 994 (Cal 1994) (affirming arbitrator's remedial order in an arbitration that took 355 hearing days and four and one-half years to complete).

16 N. Martin, "Why is arbitration getting much too legalistic?" 8th Inte'l Cong. Mar. Arb. 1 at 6 "the era of tradition and informality has passed."

If there is no written agreement to arbitrate, actions of the arbitrator have no legal validity under the FAA[17]. Do state and federal courts have concurrent jurisdiction over arbitration agreements enforceable under the FAA? The FAA controls arbitrations involving interstate or foreign commerce and maritime transactions[18], alleviating the effects of years of judicial hostility towards arbitration[19]. All arbitrations in the US are subject to the FAA, which gives arbitrators wide powers[20]. As a result, state and federal courts have concurrent jurisdiction over arbitration agreements enforceable under the Act[21]. In deciding whether there is a transaction involving commerce governed by the FAA, the court may look at the contract, affidavits, and the parties' business operations[22]. Whether an agreement affects interstate commerce is defined in the FAA[23]. It is not only claims in which contractual rights are asserted that are arbitrable pursuant to the FAA, but statutory claims are also arbitrable. For instance, claims raised under the Sherman Antitrust Act were arbitrable. Claims brought under section 10(b) of the Securities and Exchange Act of 1934 (15 USC 78) and the Racketeer Influenced and Corrupt Organizations Act (RICO 18 USC 1961) were arbitrable[24]. Parties cannot avoid arbitration by combining non-arbitrable claims with ones that are proper subjects of arbitration[25]. An international agreement, which concerned the transfer of a business, has been held by the Supreme Court to be subject to the stay and enforcement provisions of sections 1–3 of the FAA[26]. It was considered that the exception in section 1 was intended to avoid specific performance of contracts for personal services[27]. Where sections 1–14 of the FAA are applicable, they should be implemented in such a way as to make arbitration effective, and not to erect technical barriers[28]. The FAA does not apply to transactions that were primarily local and not substantially interstate. Hence, the parties to a contract must contemplate an interstate commerce connection[29].

Arbitration's adjudicatory nature makes it analogous to public trial, but it is less formal in a number of important respects. FAA[30] arbitration is considered

17 *MCI Telecommunications Corp v Exalon Indus. Inc.* 138 F3d 426, *Collins v International Dairy Queen* 990 F Sup 1469.

18 9 USC 1 *et seq.*

19 *Payphone Concepts Inc. v MCI Telecommunications* 904. F Sup 1202.

20 *Waluia Associates v The Aetna Casualty and Security Company*. 904 F Sup 1142.

21 *Robert Lawrence Co*., 271 F2d 407.

22 *Ideal Unlimited Services Co. v Swift-Eckrich Inc,* 727 F Sup 75.

23 *Southland Corp v Keating*. 465 US 1, *Hart v Orion Inc.* 453 F2d 1358.

24 *Mitsubisi Motors v Solerh*, 87 Led2d 444, *Rodriguez v Shearson*, 104 Led2d 526, *Prima Paint Corp, v Flood & Conklin*, 18 Led 2d 1270, *Chisolm v Kidder* 966 Fsup 218.

25 *Leyva v Certified Grocers of California*, 62 Led2d 34, *United Steel Workers of America v Warrior & Cust Navigation Co.*, 363 US 574, 4 Led 2d 1409.

26 *Sherk v Alberto-Culver Co* 41 Led 2d 270, *Textile Workers Union v Lincoln Mills of Alabama* 353 US 448, 1 Led 2d 972. *Bernhard v Polygramic Co, of America* 100 Led 199.

27 *Hoover Motor Express v Teamsters*, 217 F2d 49.

28 *Erving v Virginia Basketball Club*, 468 F2d 1064.

29 *Lachenery v Profitkey*, 818 F Sup 922, *Burke Country v Shaver Partnership*, 279 SE2d 816.

30 The Act itself does not define "arbitration," *Elberon Bathing Co. v Ambassador Insurance Co*., 77 N.J. 1, 17, 389 A.2d 439 (1978). An arbitration "ordinarily … dispos[es] of the entire controversy

a "private" process, meaning that arbitration proceedings are not conducted in public, unlike public trials[31]. Arbitration under the FAA rests on statutory rather than constitutional or common law grounds.

Arbitration agreements are to be construed according to general rules governing the interpretation of contracts, taking into account the intention of the parties and the strong public policy in favor of arbitration. Although arbitration appears in many respects to be similar to litigation, it is in fact *sui generis*. Arbitration has to gain its independence and produce legal precedent. Arbitrators cannot change or alter terms of the contract between the parties[32] and arbitration should not be compelled when the party who seeks to compel arbitration has waived that right[33]. Waiver occurs when a party seeking arbitration substantially participated in litigation to a point inconsistent with intent to arbitrate. Any party may be deemed to have waived his right to arbitrate by proceeding in litigation, even though he may have pleaded arbitration as a defense[34]. Arbitration was designed to alleviate the expense of litigation and provide an alternative, less expensive forum for the resolution of disputes. Has arbitration been designed and established to be a co-equal and independent dispute mechanism in parallel existence with courts in a single legal system? It was not designed to provide unhappy litigants with another more favorable forum[35].

between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability." *Fit Tech, Inc. v Bally Total Fitness Holding Corp*., 374 F.3d 1, 14 (1st Cir. 2004) ("the question is how closely the specified procedure resembles classic arbitration"). *Harrison v Nisson Motor Corp.,* 111 F.3d 343, 350 (3rd Cir. 1997) ("the essence of arbitration" is that parties "agreed to arbitrate [their] disputes through to completion, i.e. to an award made by a third-party arbitrator."). *McDonnell Douglas Finance Corp. v Pennsylvania Power & Light Co*., 858 F.2d 825, 830 (2nd Cir. 1988) (Arbitration because "the language clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution.") Other circuits have declined to treat an agreement for non-binding arbitration as "arbitration" within the meaning of the Act. See *Dluhos v Strasberg*, 321 F.3d 365, 371 (3rd Cir. 2003). *Salt Lake Tribune Publ'g Co. v Mgmt. Planning*, Inc., 390 F.3d 684, 692 (10th Cir. 2004). *Miller v Miller*, 2004 WL 2715347 (Mich. App.) (a domestic relations litigant is not bound by an "arbitral award" where the arbitrator did not conduct a hearing but met with the parties ex parte in an effort to settle the case; "no arbitration took place in the traditional sense of the word" and "we do not regard the arbitrator's efforts to settle this case to be the equivalent of arbitration").

31 Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute. Whether a given dispute resolution procedure is arbitration within the meaning of the FAA is a question of federal, not state, law. I. Ian R. MacNeil, *et al.*, *Federal Arbitration Law* § 2.1.2A (1999 Supp.). § 2.3.1.1 (Process is arbitration under the FAA where "the decision of the dispute resolver shall be both final and binding, subject only to the limited judicial review spelled out in the FAA.").

32 *Stokely v United Steelworkers of America*, 480 Fsup 48.

33 *Morewitz v West England*, 62 F3d 1356, 133 Led2d 845.

34 *N&D Fashions Inc v DHJ Industries*, 548 F2d 722.

35 *Weaver v Florida Power*, 966 Fsup 1157, Yves Dezalay & Bryant G. Garth, "Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 34–62" (1996)("Arbitration as Litigation"; electing arbitration, says an American practitioner, "doesn't mean that I necessarily want to give up all the trappings of full-scale litigation and what might come with it").

Chapter 1 of the FAA defines the maritime and commerce transactions to which the FAA applies[36], addresses such issues as stays of litigation during arbitration and proceedings to compel arbitration, court appointment of arbitrators and enforcement of arbitrators' subpoenas, and enforcement, modification, correction, or vacatur of arbitral awards[37]. In 1938, however, the Supreme Court held in *Erie R.R. v Tompkins*[38] that there is no "general federal common law." Except where Congress has validly enacted substantive rules of federal law, the court held that the rules of decision in federal court are provided by state law. In *Southland Corp. v Keating*[39] the Supreme Court re-emphasized the fact that the FAA is binding substantive federal law, which preempts state law where there is a conflict, and it established the supremacy of federal law over arbitration contracts. The FAA therefore pre-empts state law and state courts cannot apply state statutes that invalidate arbitration agreements. On the one hand, the Supreme Court has interpreted the FAA to preempt state laws that negate or undermine the enforceability of commercial arbitration clauses – leaving no autonomy for state regulation. On the other hand, the Court has understood the FAA to treat the question of contract revocation, on generally-applicable grounds such as fraud, duress and unconscionability, as one of state law – leaving no federal role. Moreover, in *Allied-Bruce Terminix Cos., Inc. v Dobson*[40] the court held that

36 David W. Rogertson, "Recent Developments in Admiralty and Maritime Law," 29 Tul. *Mar. L.J.* 369, 428–29 (2005) (discussing a series of judicial opinions that hold that the FAA's express exclusion of "contracts of employment of seamen" is inapplicable in cases governed by the NYC).

37 9 US 1.

38 304 US 64, *Robert Lawrence v Devonshire Fabrics*, 271 F.2d 402, *Bernhardit v Polygraphic Co of America* 122 Fsupp 733, *Bernhardit v Polygraphic Co of America*, 350 US 198.

39 465 US 1 (1984). According to the Court, there are "only two limitations on the enforceability of arbitration provisions governed by the [FAA]." First, the arbitration provision "must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" Second, "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" "The Court pointed out the FAA contained no provision indicating the FAA's "broad principle of enforceabilty is subject to additional limitations under State law." *Red Cross Line v Atlantic Fruit Co*, 264 US 109, 120–21 (1924) ("In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced … . If there be a right to specific performance of an arbitration provision in a CBA we must find it in an act of Congress."). *International Union United Furniture Workers v Colonial Hardwood Flooring Co.,* 168 F.2d 33 (4th Cir. 1948) (finding that FAA directives are addressed only to courts of the US, within the plenary jurisdiction of the Congress to regulate federal court procedures). *Allied-Bruce Terminix Cos. v Dobson,* 513 US 265 (1995) (preempting state statute invalidating pre-dispute arbitration agreements, which had been applied to consumer termite-control contract). *Perry v Thomas*, 482 US 483 (1987) (preempting state statute that prohibited arbitration in wage disputes). *Mastrobuono v Shearson Lehman Hutton, Inc*., 514 US 52 (1995) (preempting state court decision that punitive damages could not be given in arbitration, including securities arbitration). *Doctor' Associates, Inc. v Casarotto,* 517 US 681 (1996) (preempting state statute requiring conspicuous disclosure of arbitration clause in franchise agreements). *Nathan E. Ross, Federalism v The Greater Good* … Should Powerful Franchisors be Allowed to Contract for the Home Court Advantage Through Forum Selection Clauses?, 2000 *J. Disp. Resol.* 199, 212 (2000). The power given to Congress under the Constitution allows federal law to preempt contrary state law.

40 *Allied-Bruce Terminix Cos. v Dobson*, 513 US269.

for the reason that the FAA conflicted with the Alabama statute, that would have invalidated the arbitration clause and so the FAA preempted the Alabama law. Taking into account that Congress intended to exercise expansive powers over arbitration contracts, the Court construed the words "involving commerce" to mean "affecting commerce" and a contract involving interstate commerce in fact was sufficient to "evidence a transaction" governed by the FAA. With evidence of congressional intent to extend federal power over contracts affecting interstate commerce, the Court had no trouble finding that the FAA governed this contract between a nationwide termite company and Alabama homeowners. To that extent, in *Doctor's Associates v Casarotto*[41] the US Supreme Court held that Montana's statute conflicted with the FAA and was preempted. Additionally, the FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements regarding violation of the Family and Medical Leave Act ("FMLA")[42].

The rule of preemption, whereby FAA standards and the emphatically pro-arbitration perspective of the FAA control, applies in both the federal courts and the state courts[43]. To that extent, state statutory treatment of arbitration clauses is inconsistent with the FAA in a different way than other standard contract language[44]. A California state court decision, in assessing the tension between federal preemption under *Casarotto* and state arbitration law, concluded that California law regarding the procedure used to compel arbitration is not preempted by the FAA[45]. In view of that, although the FAA preempts state law where the two conflict, much of the substantive law affecting the use of arbitration clauses may still be formed by states[46] but State laws that place burdens on arbitration agreements beyond those applicable to general contract law are inconsistent with the FAA and are therefore preempted. Generally speaking, it provides that such agreements are enforceable and that federal courts must compel parties

41 517 US 681 (1996).

42 Diane O'Neil, v No. 96–2460 Hilton Head Hospital laws.findlaw.com/4th/962460p.html *The Citizens Bank v Alafabco, Inc.*, *et al.* laws.findlaw.com/us/000/02-1295.html

43 *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395 (1967) (The FAA is substantive law for Erie purposes); *Southland Corp. v Keating*, 465 US 1 (1984) (The FAA preempts any state law restricting arbitrability). *Doctor's Associates v Casarotto*, 517 US 681 (1996) (The FAA preempts Montana statute which conditioned enforceability of arbitration clause on compliance with special notice requirements) *Buckeye Check Cashing v Cardegna*, 546 US 440 (2006) (Federal rule on separability trumps state law of contract formation). *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395 (1967) (Where an arbitration clause is contained in a contract, a court may consider only issues relating to the making and performance of the agreement to arbitrate. Defenses addressed to the entire contract, however, are to be decided by the arbitrator.).

44 *Morrison v Colorado Permanente Medical Group P.C.* 983 F. Supp. 937 (1997).

45 *Rosenthal v Great Western Fin. Sec. Corp.*, 926 P.2d 1061 (Cal. 1996) (holding that whether a party is entitled to jury trial to determine validity of an arbitration claim is a matter of state law; noting that the FAA does not state dispositively that jury trial is mandated to determine the issue of arbitrability).

46 *Broemmer v Abortions Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (holding an arbitration clause unconscionable under state law analysis).

to participate in arbitration upon motion made by any party. In the US strong federal policy favouring arbitration developed in the context of the narrower issue of whether a given issue or dispute is "arbitrable," or subject to an arbitration clause[47]. State courts have seen arbitration as a substitute for litigation by deciding cases presented to them with an eye toward the strong national policy favouring arbitration[48].

In enacting § 2 of the Federal Act, Congress declared a national policy favouring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration[49]. The US Supreme Court has interpreted section 2 to mean that state law controls the issue of contract revocation[50]. Courts may revoke arbitration agreements, leaving the parties free to litigate their claims, on generally applicable state law grounds such as fraud, duress, and unconscionability[51]. Unconscionability is the primary means used to challenge employer or business-drafted arbitration agreements. Courts have been fairly receptive to these challenges, striking down arbitration agreements as unconscionable when class actions are prohibited, when an employee must pay an arbitrator's fees or a high filing fee, or when the arbitral process is skewed in favour of the employer or business[52]. The nature of unconscionability allows simple circumvention of the FAA, permitting parties to an arbitration agreement to litigate their claims through judicial application of arbitration-specific principles of unconscionability. Increased judicial willingness to find unconscionability in arbitration agreements suggests a latent judicial hostility to arbitration and use of unconscionability contrary to the FAA. Various courts, including the US Supreme Court, have held that excessive arbitration costs which limit a party's access to an arbitral forum may render an arbitration

47 *Buckeye Check Cashing v Cardegna*, 126 S.Ct. 1204 (2006) (ruling that the FAA preempts state usuery law for purposes of determining validity of arbitration provision in a contract alleged to be void *ab initio*); *Southland Corp. v Keating*, 465 US 116 (1984) (holding FAA preempts state laws restricting arbitrability).

48 *Zuver v Airtouch Communications, Inc*., 153 Wash. 2d 293, 301 (Wash. 2004).

49 *Southland Corp. v Keating*, 465 US 1 (1984). *Green Tree Financial Corp. v Bazzle*, 539 US 444 (2003), argued that the FAA's restructuring of state dispute resolution procedures without a substantive federal interest at stake raised constitutional doubts. *Johnson v Fankell*, 520 US 911, 919 (1997). The States thus have great latitude to establish the structure and jurisdiction of their own courts.

50 *Nagrampa v Mailcoups Inc.,* 401 F.3d 1024, 1029 (9th Cir. 2005) (considering an arbitration clause in a franchise agreement, and holding that the issue of whether the contract was adhesive was an issue pertaining to the contract as a whole and therefore for the arbitrator to decide, but that issues concerning notice and cost were issues pertaining specifically to the arbitration clause and therefore were appropriately addressed by the court).

51 *Doctor's Assocs., Inc. v Casarotto*, 517 US 681, 686–87 (1996). *Wilmot v McNabb*, 269 F. Supp. 2d 1203 (N.D. Cal. 2003).

52 *Morrison v Circuit City Stores, Inc*., 317 F.3d 646 (6th Cir. 2003); *Hooters of Am., Inc. v Phillips*, 173 F.3d 933 (4th Cir. 1999); *Cole v Burns Int'l Sec. Servs.,* 105 F.3d 1465 (D.C. Cir. 1997); *Brower v Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. 1998).

agreement invalid, affording the party access to court[53]. Susan Randall[54] says that the Court's willingness to inquire into a party's financial situation to evaluate

53 *Green Tree Financial Corp. v Randolph* 531 US 79 (2000). *Spinetti v Service Corp. Int'l*, 324 F.3d 212 (3rd Cir. 2003); *Musnick v King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (stating that the "overwhelming consensus" among Circuits is that cost-splitting or "loser pays" provisions of arbitration agreements are not a denial of federal statutory rights; arbitration agreement is not unenforceable merely because the party seeking to vindicate federal statutory rights may have to pay some costs); *Blair v Scott Specialty Gases*, 283 F.3d 595, 610 (3rd Cir. 2002) (demonstrating how the court followed the reasoning of *Green Tree* and required showing of prohibitive arbitration expenses by party opposing arbitration; mere existence of fee splitting provision does not render arbitration agreement unenforceable); *Bradford v Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 553–57 (4th Cir. 2001) (explaining the case-by-case inquiry into financial circumstances of party opposing arbitration required under *Green Tree*); *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15–16 (1st Cir. 1999) (refusing to invalidate arbitration agreement even where plaintiff may be charged "tens of thousands of dollars per case" because claimant's argument too speculative; also observing that "arbitration is often far more affordable to plaintiffs and defendants alike" than litigation); *Williams v Cigna Fin. Advisors, Inc.,* 197 F.3d 752, 764 (5th Cir. 1999) (adopting case-by-case analysis to determine whether claimant can effectively vindicate statutory rights; also holding that a fee-splitting provision did not invalidate the arbitration agreement because the plaintiff had not shown that the arbitration fees required were prohibitive to his ability to vindicate his statutory claims); *Shankle v B-G Maint. Mgmt. of Colo*., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (holding that an arbitration agreement was invalid because the plaintiff's total estimated arbitration costs of between $1,875–$5,000 were prohibitively high); *Raasch v NCR Corp.*, 254 F.Supp. 2d 847 (S.D. Ohio 2003) (explaining that per se invalidation of an arbitration agreement based on fee-splitting provision contradicts Supreme Court's holding in *Green Tree*, that party resisting arbitration bears burden of proving the likelihood of incurring prohibitive costs); *Lloyd v Hovensa LLC*., 243 F.Supp. 2d 346 (D.C.V.I. 2003) ("[F]ee-splitting provision in an agreement does not, in and of itself, deny a plaintiff an opportunity to vindicate his or her statutory rights … plaintiff must show that the costs of the arbitral forum are prohibitive."); *Arakawa v Japan Network Group*, 56 F.Supp. 2d 349 (S.D.N.Y. 1999) (finding that the agreement to arbitrate Title V II claims is not unenforceable as a matter of law simply because the plaintiff faces the possibility of being charged arbitration fees; also arguing that a fee splitting arrangement is contrary to the remedial and deterrent aims of Title VII only if the fees are so great and plaintiff's financial situation is such that fees would substantially deter plaintiff from seeking to enforce statutory rights). Jeffrey W. Stempel, "Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism," 19 *Ohio St. J. On Disp. Resol.* 757, 851 (2004)("there is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts."); Jean R. Sternlight & Elizabeth J. Jensen, "Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?" 67 *Law & Contemp. Probs.* 75, 95 (2004) ("no published studies show that the imposition of mandatory arbitration leads to lower prices.") *West Virginia ex rel. Dunlap v Berger*, 567 S.E.2d 265, 282 (W. Va. 2002) ("[W]e hold that provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable."). In *Shankle*, the court concluded that an arbitration agreement was unenforceable because the plaintiff could not afford the fee, "and it is unlikely that other similarly situated employees could either." *Shankle v B-G Maint. Mgmt. of Colo*., 163 F.3d 1230, 1234–35 (10th Cir. 1999).

54 Susan Randall, "Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability," *Buffalo Law Review Vol. 52*, p. 185, 2004 p. 19.

access to an arbitral forum (with the possible result that the party may then utilize the courts), but not to the judicial system, suggests a bias against arbitration. According to courts, fee-splitting arrangements render an arbitration agreement invalid[55]. Some courts appear to treat forum selection clauses in arbitration agreements differently than in non-arbitration agreements. Unconscionability[56] is the contract-law ground on which courts most often rely in denying enforcement to adhesive arbitration agreements[57]. Where courts find agreements regarding costs, forum selection, punitive damages, and confidentiality unconscionable only in the context of arbitration, they exceed the permissible scope of section 2 and are subject to preemption. Courts have not established uniform standards for determining whether arbitration is too expensive relative to a consumer's resources, instead relying on a case-by-case determination of whether the consumer is unable to pay[58]. If courts are applying the unconscionability defence more often or more austerely to arbitration agreements than to other contracts, they risk violating the FAA's prohibition against singling out arbitration for special scrutiny.

55 *Ingle v Circuit City Stores, Inc.,* 328 F.3d 1165, 1174, 1178 n.17 (9th Cir. 2003) *Torrance v Aames Funding Corp*., 242 F. Supp. 2d 862, 875 (D. Or. 2002). "Requiring payment of arbitrator's fees, as opposed to reasonable costs, is not permitted as a condition of arbitration." *Manuel v Honda R & D Americas, Inc.*, 175 F.Supp. 2d 987 (S.D. Ohio 2001) (holding that a per se invalidation of an arbitration agreement, due to the presence of a fee-splitting provision, contradicts the Supreme Court's holding in *Green Tree*). *Raasch v NCR Corp*., 254 F.Supp. 2d 847, 858 (S.D. Ohio 2003) (noting that the holdings in *Cole*, *Paladino*, and *Armendariz* are "questionable," given the Supreme Court's subsequent decision in *Green Tree*).

56 *Zuver v Airtouch Communications, Inc*., 103 P.3d 753, 761 (Wash. 2004) (finding no procedural unconscionability where arbitration agreement was underlined, bolded, and in capital letters); *Brasington v EMC Corp.,* 855 So. 2d 1212, 1218 (Fla. Dist. Ct. App. 2003) (finding no procedural unconscionability where arbitration agreement was bold, underlined, and near employee's signature line). *Plattner v Edge Solutions Inc.*, No. 03 C 2646, 2003 WL 22859532, at *5 (N.D. Ill. Dec. 2, 2003) (holding that a forum selection clause requiring an Illinois resident to arbitrate in Suffolk County, New York was unconscionable solely on substantive grounds). *Hagedorn v Veritas Software Corp.,* 250 F.Supp. 2d 857, 862 (S.D Ohio 2002) (holding that a forum selection clause requiring a life-long Ohio resident to arbitrate in San Francisco was unconscionable).

57 *Ting v AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Circuit City Stores, Inc. v Adams*, 279 F.3d 889, 893 (9th Cir. 2002)("The [Agreement] is procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely.") *Strand v US Bank Nat. Ass'n* ND, 693 N.W.2d 918, 923 (N.D. 2005) ("all adhesion contracts will include the most common indicators of procedural unconscionability – disparity of bargaining power, lack of bargaining choice, a preprinted standard form contract, and a 'take it or leave it' transaction") *Novak v Overture Services, Inc.*, CV 02-5164, 2004 WL 613001 (E.D.N.Y. Mar. 25, 2004) ("An agreement cannot be considered procedurally unconscionable, or a contract of adhesion, simply because it is a form contract.'").

58 *Phillips v Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 846 (N.D. Ill. 2001) (finding costs prohibitive in light of the AAA's arbitrators fees, the subprime nature of the claimant's mortgage, and her affidavit showing that she was in financial distress and unable to pay the costs); *Mendez v Palm Harbor Homes, Inc.*, 45 P.3d 594, 597 (Wash. Ct. App. 2002) (addressing the plaintiff's educational attainment, employment situation, and family size to show his inability to pay arbitration costs).

The unconscionability doctrine focuses exclusively on the power imbalance between the contracting parties and the "harshness of a particular bargain[59]." To that extent, D. Wood said that "recent court decisions refusing to enforce some kinds of arbitration agreements and some arbitral awards display a new caution and concern for public policies that may be suffering as arbitration sweeps across the legal landscape"[60]. It could be argued that notwithstanding legislative pronouncements and the strong national policy favouring arbitration, the facts point to continuing judicial hostility to arbitration.

The federal courts almost uniformly require that a party establish fraud in the making of the arbitration clause (not merely fraud in the making of the contract in which it is included) in order to allow a party to escape from the obligation to arbitrate a dispute. Regardless of their treatment of issues of formation and validity, lower courts hold that federal law governs the interpretation of arbitration clauses[61]. Lower US courts have applied state laws to issues of contract formation, subject to an FAA-imposed requirement that state law may not single out arbitration agreements for disfavor[62]. Several courts have questioned whether a *per se* rule that an arbitration clause is always a material alteration for purposes of section 2–207 of UCC survives the FAA[63]. The argument for preemption is that singling arbitration clauses out for *per se* treatment denies them equal treatment, as required under

59 *Iberia Credit Bureau, Inc. v Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) at 167 (cautioning that states may not use doctrines of general applicability "in ways that subject arbitration clauses to special scrutiny"); Thompson Cochran & Eric J. Mogilnicki, "Current Issues in Consumer Arbitration," 60 *BUS. LAW.* 785, 788 (2005) (arguing that "treating confidentiality clauses in arbitration agreements differently from other contracts would appear to raise serious federal preemption concerns"); Michael G. McGuinness & Adam J. Karr, California's "'Unique' Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the FAA," 1 *J. Dispute Resol.* 61 (2005) (arguing that the FAA should preempt the use of unconscionability doctrine as backdoor bias against arbitration); *Parilla v IAP Worldwide Servs. VI, Inc*., 368 F.3d 269, 280 (3rd Cir. 2004) (expecting that Supreme Court would not find confidentiality of Title VII arbitrations unenforceable as against public policy) *Hutcherson v Sears Roebuck & Co.*, 793 N.E.2d 886, 897 (Ill. App. Ct. 2003) (holding that because arbitration awards are not confidential, other potential plaintiffs "would not be operating 'in the dark'"). *Malek v 24 Hour Fitness*, Arb. No. 199017 (Apr. 23, 2003) (Chvany, Arb.) (finding that privacy of arbitration did not "mean that there are legal grounds to seal the record in its entirety thereby preventing a party from disseminating information concerning the proceeding"). In *Malek v 24 Hour Fitness*, No. NO3-1473 (Super. Ct. Cal., Contra Costa County, June 4, 2004) (unpublished), an arbitrator awarded a victim of sexual harassment and retaliation substantial compensatory and punitive damages against her health club employer. The underlying arbitration in *Malek* was not covered by a confidentiality agreement or rule. *Zurich American Insurance Co. v Rite Aid Corp.* 345 F. Supp. 2d 497 (E.D. Pa. 2004).

60 Diane P. Wood, "The Brave New World Of Arbitration," 2005 *Capital University Law Review* 383, p. 384.

61 *Recold Sa v Monfort Of Colorado*, 893 F2d 195.

62 *Progressive Casualty Ins. v CA Reasequradora Nacional De Venezueala*, 991 F2d 42, *Saturn Distribution Corp v Williams*, 905 F2d 719, *China Resources Ltd v Fayda Int'l Inc* 747 Fsupp 1101/

63 R. Hirshman "The Second Arbitration Trilogy: The Federalization of Arbitration Law" 1985 *Va.L.R* 1305.

section 2's savings clause, with "any contract"[64]. Particularly in states where the Uniform Arbitration Act (UAA) has been enacted, federal courts have often looked to state law in interpreting the FAA[65]. Federal courts have occasionally invalidated arbitration agreements when they have been found unconscionable or oppressive, such as when arbitration is required to be held in a distant locale at great cost to a litigant who could not afford to pursue his claim in that locale[66].

Arbitration is an alternative dispute resolution mechanism that is supposed to reduce the costs and avoid some of the procedural complexity inherent in the litigation process. Does arbitration strike an ideal balance between fairness and efficiency? Has arbitration been transformed into not only an alternative but also an independent dispute mechanism? Arbitration must achieve at least commercial efficiency in order to satisfy its *raison d'être.* Private parties involved in civil disputes have the right to agree that they will give up the judicial adjudication process and instead will use private dispute resolution processes. Is there an optimal standard of either fairness or efficiency? The judicial mechanism must operate under constitutional imperatives, which means that its vision of fairness has to overlook some of the attractions of efficiency. Besides, the arbitration process has more flexibility in determining the degree of fairness necessary to satisfy the expectations of the parties relying on it and in balancing their interests with the need to achieve commercial efficiency. Although uncertainty remains as to the enforceability and breadth of agreements to arbitrate, recent decisions suggest that courts are willing to entertain a variety of theories to enforce such agreements, including the FAA, common law contractual and exhaustion of remedies theories and state alternative dispute resolution statutes. All arbitrations in the US are subject to the FAA, which gives arbitrators' wide powers, independence from precedent, and freedom to exercise their commercial judgment. Is it time for arbitration to create arbitration precedent?

1.1 The FAA and the RUAA

Many states have their own arbitration statutes, and in a majority of the jurisdictions in the US these statutes are modeled after the UAA[67]. Almost every state's enactment requires that courts compel arbitration upon the motion of any party, much like the FAA. Whereas a few states, such as New York, drafted original arbitration laws, many states have adopted arbitration laws based on the UAA,

64 *Dorton v Collins*, 453 F2d 1161.

65 *Michaels v Mariforum Shipping*, 624 F2d 411, Re Costa and Head 486 So2d 1272, *Merrill Lynch v McCollum* 469 US 1127, *McDermott Inc v Lloyd's Underwriters of London* 944 F2d 1199 "state courts do not necessarily have to grant stays of conflicting litigation or compel arbitration in compliance with the FAA's sections 3 and 4."

66 *Wilder v Absorption Corp*., 107 S.W.3d 181, 185 (Ky. 2003) (holding that enforcement of the arbitration clause requiring arbitration in Washington, defendant's principal place of business, was so unjust and inconvenient as to deprive Kentucky claimants of opportunity for hearing).

67 See, 12 Vt. Stat. Ann. §§ 5651 et seq. (Supp. 1996). R. Connell "The FAA: The expanding impact of state law upon rigorous enforcement" 1989 *JMLC* 327.

itself modelled on the FAA. The UAA deals exclusively with the unique problems of intrastate commerce. It governs arbitration procedure when the agreement does not affect interstate commerce and the FAA does not apply. In addition, several states, including Florida, California, Georgia, Texas and Connecticut have adopted special statutes for international arbitration. The passage of these statutes, which are based in whole or in part on the UNCITRAL arbitration rules, was often motivated by a desire to attract international arbitration, and the business and revenue connected with it, to the state. Thus, 49 jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. A primary purpose of the 1955 Act was to ensure the enforceability of agreements to arbitrate in the face of hostile state law. Any revision of the UAA must take into account the doctrine of preemption.

The National Conference of Commissioners on uniform state law drafted the revised UAA and section 3(c) establishes a certain date when all arbitration agreements, whether entered into before or after the effective date of the RUAA, will be governed by the RUAA rather than the UAA[68]. Moreover, the RUAA deals with matters such as consolidation, summary adjudication, provisional remedies and arbitrator immunity not addressed previously by the FAA. Attachment and restraining orders may be ordered by a court before the appointment of an arbitrator under the RUAA. While a court pursuant to a summary proceeding under section 18 can enforce interim awards, arbitrators may issue a protective order to prevent the disclosure of privileged or confidential information. The parties may agree to procedures contrary to the RUAA, except those concerning public policy issues such as the right to provisional remedies and the jurisdiction of the courts concerning enforcement and certain limited appeals to courts. Hence, the courts are also involved in arbitration under the RUAA and seem to have the last word, thereby creating a precedent.

State arbitration law can serve to overcome the lingering judicial hostility to pre-dispute arbitration and to give balanced life to privately negotiated arbitration agreements. The RUAA accepts that the appropriate role for state arbitration law is to provide default rules and standards in areas not expressly regulated by the FAA or pertinent federal case law[69]. An arbitration agreement subject to the RUAA provisions, either by virtue of a contractual provision or general choice of law analysis, would apparently apply whether the action were in federal or state court. RUAA rules are intended to channel the law of the commercial arbitration process in directions that will guarantee that the process becomes a sincerely viable alternative to traditional litigation, which indicates a tendency towards equality of courts and arbitration as dispute systems. To the extent any RUAA provisions are

68 www.nccusl.org. P. Lurie, "Recent Revisions to the Uniform Arbitration Act in the United States," 2001 *Journal of International Arbitration* 223. www.law.upenn.edu/bll/ulc/ulc.htm

69 *GAF Corp. v Werner*, 62 NY2d 97, 485 NE2d 927, 495 NY2d 312 (1985) (upholding arbitrability of indemnity claim by the CEO of a public corporation, even though arbitration raised issues of fiduciary duty normally subject to judicial review during litigation).

different from their FAA[70] counterparts, the RUAA provisions might be seen as incorporated into the parties' agreement and consequently superseding any federal rules. It should be taken into account that the RUAA tracks the FAA standards for judicial orders, directing that arbitration proceeding and staying parallel court actions. The RUAA directs the court to decide matters of substantive arbitrability, leaving disputes over procedural arbitrability to arbitrators[71]. Application for judicial relief (for enforcement of the arbitration agreement or otherwise) is to be made and decided as a motion, rather than by trial as provided in the FAA[72]. The RUAA for the most part tracks the FAA, authorizing courts (on the motion of a party) to appoint an initial or successor arbitrator.

Courts may order temporary or preliminary injunctive relief, if essential to preserve the *status quo* in a matter that will eventually be decided in arbitration governed by the FAA, and the RUAA grants state courts authority to order provisional remedies "to protect the effectiveness of the arbitration proceeding"[73]. State courts are empowered to enter a court order confirming the arbitrator's provisional remedy, subject to the RUAA's vacatur, modification and correction provisions[74]. The RUAA tracks the FAA regarding the entry of a judgment after a court confirms, vacates, modifies or corrects an arbitral award[75]. Federal courts have held that failure by a neutral arbitrator to disclose dealings or relationships that cast doubt on the arbitrator's impartiality can warrant vacatur under the FAA, and the RUAA makes a neutral arbitrator's failure to disclose "a known direct and substantial relationship with a party" presumptive grounds for vacatur[76]. Moreover, federal courts have held that arbitrators are normally immune from both

70 Richard E. Speidel, "Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?" 40 *Ariz. L. Rev* 1069 (1998) (urging that the FAA be revised to assure arbitration agreements are voluntary and that arbitrators provide written opinions on statutory claims).

71 RUAA § 6(b), (c).

72 UAA § 16 (providing that applications to court under the Act shall be by motion and be heard in the manner and upon the notice for the making and hearing and of motions) and FAA § 4 (which permits a party alleged to be in default under an agreement to arbitrate that is not within admiralty jurisdiction to demand a jury trial on the issue). *Rosenthal v Great Western Financial Securities Corp*., 926 P.2d 1061,1068–72 (Cal. 1996) (determining that the jury trial rights of FAA § 4 did not preempt a state statute permitting a bench determination of the issue).

73 *Merrill Lynch, Lynch, Pierce, Fenner & Smith v Dutton*, 844 F.2d 726 (10th Cir. 1988); *Blumenthal v Merrill Lynch, Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049 (1990); *Peabody Coal Sales Co. v Tampa Electric Co*., 36 F.3d 46 (8th Cir. 1994). RUAA § 8(a).

74 RUAA § 18. Comment 4 to this section clarifies that an arbitrator's award denying a request for a pre-award ruling is not subject to immediate court review, but only after the award is issued. There is no similar FAA provision addressing pre-award rulings by the arbitrator, though the limited federal case law under the FAA supports the notion courts may enforce pre-award rulings. *See Island Creek Coal Sales Co. v City of Gainesville, Florida*, 729 F.2d 1046, 1048 (6th Cir. 1964); *Southern Seas Navigation Ltd. of Monrovia v Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692, 693–95 (S.D.N.Y. 1985).

75 FAA § 13(c); RUAA § 25(a).

76 RUAA § 12(e). *Commonwealth Coatings Corp v Continental Casualty Corp*., 393 US 145, 149 (1968).

civil actions arising out of the arbitral office and from process when summoned to testify with regard to that service. The RUAA codifies this federal common law and extends the immunity to arbitration organizations, such as the American Arbitration Association and JAMS[77].

1.2 The FAA and labor arbitration

Labour arbitration is regulated by section 301 of the LMRA 1947 and the FAA is inapplicable to labour arbitration[78]. The same principles of the FAA apply to collective bargaining agreements (CBA) even though such agreements are exempted from the FAA[79]. It is argued that section 301 was enacted after the FAA and deals, as the FAA does not specifically with labour contracts. It therefore supersedes, within its domain, the standards of the earlier Act[80]. Arbitration developed into the "principal method of resolving disputes between employers and unions that arise in the course of administering CBAs[81]." Thus, labour arbitration provides employers and unions with a vital method for adjusting their relationship[82]. Additionally, Michael H. LeRoy & Peter Feuille[83] think that

77 *Butz v Economou*, 438 US 478, 511–12 (1978) (establishing that extension of judicial-like immunity to non-judicial officials is appropriate if there is a "functional comparability" between that official's acts and judgments and the acts and judgments of judges); RUAA § 14(a) (statutory grant of immunity intended to supplement any immunity afforded arbitrators by any other law).

78 *United Food v Safeway* 889 F.2d 940, *American Workers Union v US Postal Service* 823 F.2d 466, *Willis v Dean Witter Reynolds Inc* 948 F.2d 305, *United Paper-Workers v Misco* 484 US 29, 98 Led2d 286, *Bacashihua v USPS* 859 F.2d 402 *United Paperworkers Int'l Union v Misco, Inc.*, 484 US 29, 40 n.9 (1987)("[T]he federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases."). G. Zekos, "The Role of Courts in Maritime versus Labor Arbitration in USA law," 2000 *ADRLJ* 174, Georgios I. Zekos, "Labour and Employment Arbitration and Courts Under US, English, Scottish and Quebec Laws," 2006 *Vindobona Journal of International Commercial Law & Arbitration* 91, http://www.vindobonajournal.com/

79 *Domino Sugar Corp v Sugar Workers Local Union* 10 F.3d 1064.

80 *Shearson Stone v Liang* 653 F.2d 310.

81 Alan Scott Rau, "Resolving Disputes over Attorneys' Fees: The Role of ADR," 46 *Smu L. Rev* 2005, 2025 (1993).

82 Mei Bickner *et al.*, "Developments in Employment Arbitration," 52 *Disp. Resol. J.* 68, 78 (reporting a massive increase in the use of arbitration in non-union workplaces following the Supreme Court's *Gilmer* decision in 1991). *Halligan v Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2nd Cir. 1998): "In the aftermath of *Gilmer* … mandatory binding arbitration of employment discrimination disputes as a condition of employment has caused increased controversy." Arbitration of individual employment rights has led to concerns that it: (1) is usually imposed upon employees; (2) precludes individuals from suing in court to protect their employment rights; (3) imposes unfair forum fees; (4) denies recovery for attorney fees; (5) offers arbitrators who are typically older white males with a possible predisposition to rule in favor of employers, especially in race and sex discrimination cases; (6) fails to screen arbitrators adequately to determine their qualifications; and (7) is biased by the repeat player effect. *Bradford v Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir. 2001): "[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve."

83 Michael H. LeRoy & Peter Feuille, "Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems," www.ssrn.com at 86–7.

"private justice resides in the shadow of public courts … the shadow of judicial oversight has fostered a healthy mix of autonomy and public accountability for labor arbitration."

Are collective labor contracts "contracts of employment"[84] under the meaning of section 1 of the FAA? It is said that CBAs are contracts of employment excluded from coverage of the FAA[85]. Hence, individual employees can sue under the Labor Management Relations Act for violations of the CBA but only if the employee has exhausted any exclusive grievance procedures provided for by the CBA. An arbitrator's authority in labor arbitration is controlled by the terms of the CBA and by the scope of the issues submitted to the arbitrator. In numerous cases, arbitration clauses in collective labor contracts have been enforced under the FAA without consideration as to whether any of the questions of the collective labor contracts are governed by the FAA[86]. *Lewittes & Sons v United Furniture Workers of America*[87] held that a CBA was not a contract of employment within the meaning of the exclusionary clause of section 1 of

84 *Circuit City Stores, Inc. v Adams Supreme Court 2001*, No. 99–1379. www.supremecourts.gov. The Ninth Circuit reversed, interpreting §1 of the FAA – which excludes from that Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" – to exempt all employment contracts from the FAA' s reach. The better reading of §1, in accord with the prevailing view in the Courts of Appeals, is that §1 exempts from the FAA only employment contracts of transportation workers, but not other employment contracts. *Norfolk & Western R. Co. v Train Dispatchers,* 499 US 117, 129 (1991). *United States* v *American Building Maintenance Industries,* 422 US 271, 279–280 (1975) (the phrase "engaged in commerce" is "a term of art, indicating a limited assertion of federal jurisdiction"); *Jones* v *United States,* 529 US 848, 855 (2000) (phrase "used in commerce" "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce"). *United States v Lopez,* 514 US 549, 556 (1995) (noting that Supreme Court decisions beginning in 1937 "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause"). *The Employers' Liability Cases,* 207 US 463, 498 (1908) (holding unconstitutional jurisdictional provision in Federal Employers Liability Act (FELA) covering the employees of "every common carrier engaged in trade or commerce"); *Ratzlaf* v *United States,* 510 US 135, 147–148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear"). Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers. *Circuit City Stores, Inc., Petitioner v Saint Clair Adams* [March 21, 2001] www.supremecourts.gov.

85 *Willis v Dean Witter Reynolds Inc*, 948 F2d 305, *United Food v Safeway*, 889 F.2d 940, *Hilton Intern Co. v Local 610*, 652 Fsup 1259.

86 *Watkins v Hudson* 90 Led 1005, *Evans v Hudson*, 165 F2d 970, *United Office v Monumental Co*., 88 Fsup 602, *Hoover Motor Express Co. v Teamsters*, 217 F2d 49. Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" 99 *Harv L. Rev*, 668, 679 (1986) (expressing the concern that "by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law").

87 95 Fsupp 851. Jean R. Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration," 74 *Wash. U.L.Q.* 637 (1996), Stephen J. Ware, "Consumer Arbitration as Exceptional Consumer Law," 29 *Mcgeorge L. Rev*., 195 (1998); Stephen J. Ware, "Employment Arbitration and Voluntary Consent," 25 *Hofstra L. Rev*., 83 (1996). In *United Steel Workers v American Manufacturing Co*., 363 US 564, 568 (1960, the Court reviewed the role of the judiciary in the context of collective bargaining and the Labor Management Relations Act (LMRA)

the FAA. A court[88] should not review the merits of a dispute and doubts should be resolved in favor of arbitration[89]. The Supreme Court[90] considered that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards and so courts must defer to the decision of an arbitrator who does not exceed that authority. Hence, a labor/management agreement award is legitimate (not subject to judicial review) as long as "it draws its essence from the collective bargaining agreement". With the conclusion of the Steelworkers Trilogy, the enforceability of contracts to arbitrate and arbitration awards became firmly established in the area of labor relations. By contrast, collective labor contracts in other cases have been held to be "collective employment" contracts[91]. Thus, no award arising from CBA proceedings may be reviewed under the FAA[92].

In determining whether a particular type of claim is arbitrable, the court must consider whether Congress intended to preclude a waiver of judicial remedies for the claim. If such an intention exists, it will be deducible from the text of the statute or its legislative history[93]. No inherent conflict exists between arbitration and the underlying purposes of title VII and, therefore, title VII (Civil Rights Act of 1964 42 USC 2000) claims are arbitrable. In fact, there is no longer doubt that states' statutory claims are arbitrable[94]. However, federal courts previously refused to enforce agreements mandating the arbitration of statutory employment discrimination claims[95]. Courts regarded such claims as too important to entrust to final arbitration. Thus, arbitration seems to be considered as inferior to litigation rather than as an equal and alternative way of dealing with disputes. In *Gilmer v*

holding that the agreement to submit all grievances to arbitration, not merely those that a court may deem to be meritorious and courts have no business weighing the merits of the grievance.

88 *United Steelworkers v Warrior & Gulf Navigation Co.,* 363 US 574, 578 (1960). The Court noted the LMRA provided for enforcement of arbitration provisions in CBAs: "In the commercial case, arbitration is the substitute for litigation. Here, [in the labor relations context], arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under CBAs is part and parcel of the collective bargaining process itself."

89 The US Supreme Court held that "courts are not authorized to review the arbitrator's decision on the merits" even if the arbitrator's fact finding was "silly." *Major League Baseball Players Ass'n v Garvey*, 532 US 504, 509 (2002).

90 *United Steelworkers v Enter. Wheel & Car Corp*., 363 US 593, 595–96 (1960). While the Court in this case found the arbitrator's opinion and award ambiguous "ambiguity in the opinion accompanying the award, which permits the inference that the arbitrator may have exceeded his authority, is not reason for refusing to enforce the award." "So far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

91 *Miller Metal Products Inc v United Electrical*, 121 F Sup 731.

92 *National Wrecking Co. v Local 731* 790 Fsup 785.

93 *Shearson v Mcmahon* 96 Led 2d 185, *Gilmer v Inerstate Johnson Lane Corp* 114 Led 2d 26.

94 *Olde Discount Corp v Tupman*, 126 Led 2d 704.

95 *Alford v Dean Witter Reynolds Inc*, 905 F2d 104, *Utley v Goldman Sachs & Co* 883 F2d 184.

Interstate/Johnson Lane Corp.[96], the court held that arbitration was an adequate forum for statutory discrimination claims, that the ADEA claim was subject to arbitration and there was inherent conflict between arbitration and the purpose of the ADEA, which prohibited making those claims subject to compulsory arbitration. The EEOC's administration of the ADEA would not be hindered, in the Court's opinion, by the enforcement of agreements to arbitrate ADEA claims. The ADEA does not pledge a judicial forum and the procedures available in an arbitration forum are sufficient to provide relief.

Arbitration agreements between businesses and individuals are readily enforceable, thus expanding the horizons for arbitration agreements. According to the Supreme Court decisions, the FAA has established a broad presumption of arbitrability and the lower courts had the authority they needed to enforce predispute mandatory arbitration clauses covering title VII, Age Discrimination in Employment Act (ADEA), and Americans with Disabilities Act (ADA) claims[97]. Courts were reluctant to arbitrate statutory claims contained in CBAs[98] and they have refused to enforce an arbitration agreement where the agreement specifically allows the employer to ignore the results of arbitration[99]. Hence, when parties express their preference for arbitral, rather than judicial interpretation of their obligations, there is a strong presumption favoring arbitrability.[100] In determining the scope of an arbitrator's authority, we look at two sources: the CBA and the submission of the parties to the arbitrator. A non-signatory to an arbitration agreement may require enforcement of that agreement if he is bound by agreement under ordinary contract and agency principles[101]. The arbitrator may look to outside sources to aid in interpreting the CBA, but he must construe the contract and not amend it[102]. Nevertheless, in the CBA the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit[103].

The scope of authority of arbitrators depends on the intention of the parties to arbitration and is determined by the agreement or submission. A labor arbitration award is legitimate so long as it draws its essence from a CBA and does not manifest

96 500 US 20 (1991). "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." Gilmer conceded that nothing in the text of the ADEA or its legislative history explicitly precluded arbitration.

97 *Mitsubishi Motors v Soler Chrysler-Plymouth Inc*, 473 US 1, Antitrust dispute subject to arbitration. *American Express Inc v Mcmachon*, 482 US 220. Securities Exchange Act and RICO claims are arbitrable. *Alexander v Gardner-Denver Co* 415 US 36.

98 *Pryner v Tractor Supply Co*, 109 F3d 354, *ONeil v Hilton Head Hosp*, 115 F3d 272, *Satarino v AG Edwards & Sons*, 941 Fsup 609. *Austin v Owens-Brockway*, 78 F3d 875. Statutory claims are subject to arbitration.

99 *Hull v Norcom Inc* 750 F2d 1547. Charles B. Craver, Labor Arbitration as a Continuation of the Collective Bargaining Process, 66 *Chi.-Kent L. Rev* 571, 604–05 (1990).

100 *CARA's Notions Inc v Hallmark Cards Inc* 966 Fsup 404, *Nodle Bros Inc v Local No 358*, 51 Led2d 300, *Cumberland Typographical Union v The Times*, 943 F2d 401.

101 *Valdiviezo v Pheips Smelter Inc*, 995 Fsup 1060.

102 *Alvey Incorporated v Teamsters Local Union*, 132 F3d 1209.

103 *Alexander v Gardner Co*, 39 Led2d 147, *Coady v Ashcraft*, 996 Fsup 15.

an infidelity to the agreement[104]. Arbitrators are not required to disclose the basis or reasoning upon which their awards are made. The reviewing court need only to infer from the facts of the case the grounds for the arbitrator's decision even where tenuous at best. Hence, an arbitrator in labor disputes has no obligation to the court to give his reasons for an award, like in a commercial arbitration under the FAA[105]. In the end, the validity of a given arbitration award will depend on whether the arbitrator has complied with the expressed stipulations of the parties who are free to restrict or expand the arbitrator's authority beyond usual norms[106]. A court is bound to enforce an arbitration award even when the basis for the arbitrator's decision is ambiguous. Mere ambiguity in opinion accompanying an arbitration award which permits an inference that an arbitrator might have exceeded his or her authority is no reason for refusing to enforce an award[107]. An arbitration award is invalid when it is a product of certain misconduct or the arbitration proceeding suffered from certain infirmities. Hence, an arguably technical error may not be asserted as grounds for vacating a labor arbitration award[108]. Arbitration should be enforced so long as it has a basis that is rationally inferable from the purpose of the CBA. Finally, even if the FAA, section 1, applied to labor arbitration awards, it provides for no wider standard of review than does the governing Steelworkers trilogy[109]. An arbitration award should not be vacated unless: (1) The award was procured by corruption, fraud, or undue means; (2) There is evidence of partiality or corruption among the arbitrators; (3) The arbitrators were guilty of misconduct, which prejudiced the rights of one of the parties; or (4) The arbitrators exceeded their powers[110]. The court retains the power to vacate an award when it is found to be arbitrary or capricious[111]. Courts review a summary judgment in a labor-arbitration case *de novo*. Judicial review of labor-arbitration awards, however, "is among the narrowest known to the law"[112].

104 *Syufy Enterprises v Nothern California State*, 68 Led2d 839.

105 *Hilde Constr. Co. v International Union*, 499 Fsup 971, *Barrentine v Arkansas Freight Inc*, 450 US 728, 67 Led2d 641.

106 *Irving Materials Inc v Coal and Supply Drivers*, 779 Fsup 1066.

107 *Keen Mountain Co. v Chambers*, 481 Fsup 532.

108 *Sheet Metal Workers v Wer-Coy Fabrication Co*, 578 Fsup 296.

109 *District No 9 v Wagner Div*, 567 Fsup 973, *American Can v United Steelworkers of America*, 120 F3d 886.

110 *Local 347 v Arco Chemical Co*, 979 Fsup 1094.

111 *Brown v ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) ("[A]n award cannot be vacated as arbitrary and capricious unless no ground for the decision can be inferred from the facts"); Kenneth R. Davis, "When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards," 45 *Buff. L. Rev* 49, 85 (1997) (noting that "the FAA restricts the statutory grounds for vacating an arbitration award essentially to partiality and procedural unfairness, matters not directly involving the legal correctness of the award"); Daniel M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in international arbitrations," 22 *INT'L LAW*. 693, 701 (1988) (concluding that "the US courts have adopted a very strict reading of the grounds for vacating an arbitration award").

112 *Champion Boxed Beef v Local No. 7,* 24 F.3d 86, 87 (10th Cir. 1994). "The arbitrator's factual findings are beyond review, and, so long as the arbitrator does not ignore the plain language of

Moreover, the court reviews *de novo* a district court's grant or denial of a motion to compel arbitration[113].

This concise analysis shows the role of FAA in labor arbitration and courts' involvement in all stages of labor arbitration. Of course, arbitrators have considerable power and independence, but they are always under the scrutiny of courts.

1.3 Court ADR[114]

Increasingly throughout the US in every kind of case – even when no contract exists between the parties – the courts are ordering parties into non-binding arbitration in order to provide them with a "process of law" to reach an impartial evaluation of their cases. Congress encouraged federal district courts to adopt local ADR programs as a potential means of reducing delays and costs in civil litigation[115].

the [CBA], so is his interpretation of the contract." *Denhardt v Trailways, Inc*., 767 F.2d 687, 68889 (10th Cir. 1985) (holding that time-limit provision is "for the arbitrator alone to apply"). *Morrison Knudsen Corp. v Fireman's Fund Ins. Co.,* 175 F.3d 1221, 1240 (10th Cir. 1999).

113 *Gibson v Wal-Mart Stores Inc.,* 181 F.3d 1163, 1166 (10th Cir. 1999); *Armijo v Prudential Ins. Co. of America*, 72 F.3d 793, 796 (10th Cir. 1995). G. Richard Shell, "ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?" 68 *Tex. L. Rev* 509, 572–73 (Feb. 1990) ("A careful review of ERISA discloses that, if Congress intended anything with respect to enforcement of the FAA, it intended to preserve the full application of the FAA in ERISA cases.").

114 Ettie Ward, "Mandatory Court-Annexed Alternative Dispute Resolution In The United States Federal Courts: Panacea Or Pandemic?," 2007 *St. John's Law Review* 77 Deborah R. Hensler, "ADR Research at the Crossroads," 2000 *J. Disp. Resol.* 71, 77 ("[S]tate and federal courts have turned away from non-binding arbitration and towards mediation."). Gina Viola Brown, "A Community of Court ADR Programs: How Court-Based ADR Programs Help Each Other Survive and Thrive," 26 *Just. Sys. J.* 327, 328 (2005). Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution," 1 *J. Empirical Legal Stud.* 843, 843 (2004) ("Although there is clear positive evidence of cost and time savings and numerous other benefits … it is evident that much depends on the shape and structure of such programs."). Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis," 24 *J. Legal Stud. 1*, 1–2 (1995) at 4 ("[M]andatory ADR can have the perverse effect of increasing the cost of litigation, by adding another layer to it, without promoting settlement."). Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR," 19 *Fla. St. U. L. Rev 1*, 3 (1991) ("An important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the transformations proponents of ADR would like to see in our disputing practices."); Amy J. Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law," 9 *Harv Negot. L. Rev 1*, 5–8 (2004) (distinguishing binding arbitration from non-binding "ADR").

115 Civil Justice Reform Act of 1990, 28 USC. § 473(a)–(b) (Supp. IV 1992) (requiring so-called "pilot" districts to refer appropriate cases to ADR programs such as mediation, neutral evaluation, and summary jury trial, and requiring other districts to consider adopting such programs). Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication," 10 *Ohio St. J. On Disp. Resol.* 211, 246–52 (1995). Owen M. Fiss, "Against Settlement," 93 *Yale L.J.* 1073 (1984) (analyzing adjudication in terms of public values that are threatened by settlement and ADR processes). M. Hyman, "Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?," 34 *UCLA L. Rev* 863 (1987) (analyzing various

While the ABA has long supported voluntary arbitration in the federal courts, it strongly opposes mandatory arbitration programs.[116] While voluntary arbitration can often be a useful, cost-effective way to resolve many legal disputes, it must be the parties' decision whether to waive their right to judicial fact-finding and pursue this option. Some scholars[117] argue that compulsory arbitrations are not true court substitutes.

During the 1980s and 1990s, many federal courts implemented ADR procedures and began providing services such as mediation and arbitration in all three types of courts –district, bankruptcy, and appellate – reflecting both a general societal trend toward greater use of ADR and specific statutory authorization to use ADR[118].

traits of litigating attorneys that conflict with facets of fruitful negotiations). Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities," 38 *S. Tex. L. Rev* 407, 408 n.1 (1997). Jack M. Sabatino, "Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?," 58 *Ohio St. L.J.* 175 (1997). "Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR," *59 Alb. L. Rev*. 847 (1996) (tracing expanded use of ADR within business world). Deborah R. Hensler, "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System," 108 *Penn. St. L. Rev* 165, 168–70 (2003 (discussing the historical antecedents of the ADR movement that may be traced back to the Puritan, Populist, and Utopian societies); Judith Resnik, "Migrating Morphing and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts," 1 *J. of Empirical Legal Stud.* 783, 814 (2004) (noting that various religious and ethnic groups utilized their own methods of settling disputes). Judith Resnik, "Uncovering, Disclosing, and Discovering How The Public Dimensions of Court-Based Processes Are At Risk," 81 *Chi.-Kent L. Rev*. 521 (2006) (the privacy that surrounds many arbitrations makes the process less observable and transparent, which in turn raises fundamental questions about accountability in the adjudication of public law claims).

116 L Katzler, Should Mandatory written opinions be required in all securities arbitrations, www.wcl.american.edu/pub/journals/lawrev/kantz6.htm. M Washington "Compulsory arbitration of statutory employment disputes:judicial review without judicial reformation" 1999 New York ULR 844. D Roy, Mandatory arbitration of statutory claims in the union workplace after *Wright v Universal Maritime Service Corp*., 1999 *Indiana Law Journal* 134. S Blackman, "Alternative dispute resolution in commercial intellectual property disputes," 1998 The American University LR 1709. Richard M. Alderman, "Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform," 38 *Hous. L. Rev* 1237 (2001). "The problem with the current use of pre-dispute mandatory arbitration … is that instead of being used as a means to resolve disputes, it is often employed as a means to an alternative end – the destruction of consumer rights."

117 Michael H. LeRoy & Peter Feuille, "Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems," 17 *Ohio St. J. On Disp. Resol.* 19, 90 (2001) ("while some cases fit the prototype of a short, inexpensive and therefore accessible process, other functioned worse than court adjudications. It appears that when employment arbitrations fail to deliver on their reputed advantages over civil trials, courts invest less faith in this ADR process"). Michael H. LeRoy, "Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards," 16 *Stanford L. & Pol'y Rev*. 573, 607 (2005), Michael H. LeRoy & Peter Feuille, "When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Employment Arbitration," 50 *UCLA L. Rev*. 143, 191 (2002) ("While courts broadly approve this ADR method, they are willing to deny enforcement of contracts that create access barriers for employees.").

118 The Civil Justice Reform Act of 1990 required 13 district courts to adopt ADR programs and required all other district courts to "consider" using ADR. Civil Justice Reform Act of 1990,

In 1998 Congress passed and the President signed the Alternative Dispute Resolution Act of 1998[119]. Twenty district courts retain authority to refer cases to arbitration under the 1988 Act[120]. While ADR methods are often thought of as alternatives to trial, the very small percentage of cases that are tried indicates that ADR procedures serve primarily as alternatives to traditional forms of pretrial dispute resolution and not as alternatives to trial. Some courts that do not provide ADR services through a court-based program nonetheless make it available by authorizing individual judges to refer cases to ADR providers outside the court. These actions show an effort of courts to get involved in arbitration at all costs and keep disputes in their jurisdiction.

1.4 The FAA and employment arbitration

"Employment law" applies to all employees, while "labor law" applies only to employees represented by a labor union[121]. "Employment arbitration" arises out of a contract between an employer and an individual employee, while "labor arbitration" arises out of a CBA between an employer and a union[122]. Is the FAA applicable to contracts of employment? Employment arbitration is governed

Pub. L. No. 101–650, § 103(a)–(b), 104 Stat. 5089, 5090–96 (amended 1991, 1994, 1996, 1997, 2000) (CJRA).

119 Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 USC. §§ 651–58 (Supp. 1998)).

120 The ADR Act of 1998 requires that "[e]ach … district court shall authorize, by local rule …, the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with [the ADR Act]." Under the ADR Act, "an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration …."

121 Michael Z. Green, "Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims," 31 *Rutgers L. J.* 399, 443 n.158 (2000). *Craft v Campbell Soup Co*., 177 F.3d 1199 (9th Cir. 1998). "The FAA does not apply to any employment contracts." Katherine Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s," 73 *Denv U. L. Rev.* 1017, 1036–37 (1996) (contending mandatory arbitration agreements are the "yellow dog" contracts of the 1990s because of their potential to limit employment to those workers willing to waive their legal rights as a condition of employment); Thomas E. Carbboneau, "Cases And Materials On Arbitration Law And Practice" 66–70 (4th edn. 2007). Miriam A. Cherry, "Whistling In the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law," 79 *Wash. L. Rev*. 1029 (2004) (by enforcing mandatory arbitration agreements, courts avoid dealing with a considerable volume of employment litigation). William B. Gould IV, Kissing Cousins?: "The FAA And Modern Labor Arbitration," 55 *Emory L.J.* 609 (2006) (expressing a more optimistic view that employer promulgated arbitration is providing fairness, for example, by utilizing arbitration services that adopted the Due Process Protocol for Mediation and Arbitration of Statutory Disputes in 1995).

122 *Circuit City Stores, Inc. v Najd*, 294 F.3d 1104, 1108–09 (9th Cir. 2002) (enforcing form arbitration provision in employment agreement, despite absence of bargaining).

primarily by the FAA[123] and the FAA's contractual approach currently applies to employees' agreements to arbitrate, just as it applies to any other party's agreement to arbitrate regardless of the substantive law claims (causes of action) involved. Employees' arbitration agreements are enforced according to the standards of ordinary contract law[124]. The FAA is not applicable to contracts of employment of seamen, railroad employees, or any other workers engaged in foreign or interstate commerce and, therefore, the effect of this inapplicability is merely to leave arbitrability of disputes in excluded categories as if this title had never been enacted[125]. It seems that the Arbitration Act's exclusion of contracts of employment of workers engaged in foreign or interstate commerce is limited to workers employed in transportation industries[126]. In fact, the FAA "workers engaged in interstate commerce" exemption does not encompass all employment contracts affecting commerce, but only those of employees actually engaged in the channels of interstate commerce[127]. In practice, courts have limited section 1 to other workers actually involved in the interstate transportation of goods[128]. In *Lenz v Yellow Transportation, Inc.*[129] decided Dec. 16, 2005, the court ruled that a customer service representative for a transportation company did not qualify for the FAA exemption in § 1 for "transportation workers" because his job duties did not involve him in the actual movement of goods, thus bringing more employees under the jurisdiction of the FAA.

Employment contracts of employees who were not seamen or railroad employees were not excluded from the provisions of the FAA[130]. If Congress had wished to exempt all employees from the coverage of the FAA, it could have said so. Its scope has been limited by creating a category of contracts not subject to the Act's structure. It could be argued that an employment contract does not evidence a transaction involving commerce within the meaning of section 2 of the FAA[131]

123 *Circuit City Stores v Adams*, 121 S. Ct. 1302 (2001) (holding that employment agreements, other than for transportation workers, are covered by the FAA).

124 Jean Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. ULQ 637, 642–43 (1996) ("it is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts.") *Montes v Shearson Lehman Brothers, Inc*., 128 F.3d 1456 (11th Cir. 1997)(arbitration of claim for overtime pay under Fair Labor Standards Act).

125 *Mason-Dixon Lines Ltd v Local Union No 560*, 443 F2d 807.

126 *Miller Brewing Co. v Brewery Workers*, 739 F2d 1159, 83 Led 2d 926. *AFL-CIO v NLRB*, 525 F2d 237.

127 *Re Kaplan* 143 F3d 807, *Telectronics Pacing Systems Inc v Guidant Corp* 143 F3d 428.

128 *Rojas V TK Communications Ltd* 87 F3d 745, *O Neil V Hilton Head Hosp* 115 F3d 272 *Sine v Local No 992*, 644 F2d 997.

129 431 F.3d 348.

130 *Asplundh Tree Expert v Bates*, 71 F3d 592, *Cole v Burns Services*, 105 F3d 1465.

131 *Bernhardt v Polygraphic Co*, 100 Led 199, *Hilton International Co. v Union Local 610*, 652 Fsup 1259. *Mcwilliams v Logicon Inc*, 143 F3d 807. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev 395, 437–39 (1999) (arguing that public resolution of employment discrimination claims by the courts forms public values

since there is no evidence that the individual is working in commerce, producing goods for commerce, or engaging in activity that affected commerce. In cases such as *Asplundh Tree Expert Co. v Bates*[132], lower federal courts took the view that the interstate commerce exception applied only to employees involved in the physical movement of goods. In *Prudential Ins. Co. v Lai*[133], the Ninth Circuit refused to enforce an agreement which was a condition of employment because the employer did not present its employees with an agreement to arbitrate, which clearly waived the right to litigate. In this case, employees had not knowingly waived their right to litigate. The *Lai* decision marked the first time since *Gilmer* that a federal court had struck down an arbitration agreement in the private non-union sector because of unfairness at the contracting stage. Moreover, in *Duffield v Robertson Stephens*[134] the federal appellate courts held that an agreement to arbitrate which is a condition of employment is unenforceable, and determined that Congress did not intend rights under this statute to be subject to mandatory arbitration.

The FAA does not violate the judicial power provisions of Article III of the federal constitution and is based on the federal foundations of control over interstate commerce and over admiralty[135]. On the one hand, in *Roe v Kidder*[136] it was held that the Title VII claim of the Civil Rights Act of 1964 as amended by 42 USC 2000 may be arbitrated under the FAA. On the other hand, in *Alford v Dean*

that govern future conduct). at 400–01 (concluding that arbitration is less effective than litigation at promoting the goal of ending workplace discrimination but conceding that "arbitration is the only viable forum for certain employees because it generally offers affordable and expeditious resolution of claims"); at 457 (rejecting the view that no statutory claim should be arbitrable, and calling for a "particularized inquiry to determine whether arbitration furthers the policy objective of the statute at issue"). Carrie Menkel-Meadow, "Whose Dispute Is It Anyway?: A Philosophical and DemocraticDefense of Settlement (In Some Cases)," 83 *Geo. L.J.* 2663, at 2666 (arguing that an evaluation of the merits of settlement versus adjudication should consider the multiple variables particular to each dispute); Owen M. Fiss, "Against Settlement," 93 *Yale L.J.* 1073, 1087 (1984) (pointing out that in evaluating the effects of settlement on the judicial system and the quest for justice, one must appreciate that "[a]ll cases are not equal");

132 71 F.3d 592 (6th Cir. 1995). In *Katzenbach v McClung*, 379 US 294 (1964) the Supreme Court said that restaurants are engaged in interstate commerce, even if they serve no out of state customers, simply because they obtain supplies from out of state. Even activity that involves no interstate transportation or communication has been held to constitute interstate commerce. In *Wickard v Filburn*, 317 US 111 (1942) the Court said that the consumption of homegrown wheat involved interstate commerce because the individuals involved would have purchased wheat on the open market had they not grown their own.

133 42 F.3d 1299 (9th Cir. 1994). *Seus v John Nuveen & Co*., 146 F.3d 175, 183 (3rd Cir. 1998) (disagreeing with *Lai* decision). *Renteria v Prudential Ins. Co. of Am.,* 113 F.3d 1104, 1108 (9th Cir. 1997) (holding that employer cannot have employees sign away statutory rights without informing them of their waiver). *Maye v Smith Barney Inc*., 897 F. Supp. 100, 107 (S.D.N.Y. 1995) (criticizing *Lai* as contrary to Supreme Court precedent and based on inadequate legislative history).

134 144 F.3d 1182 (9th Cir. 1998).

135 *Sherk v Alberto-Culver Co* 41 Led 2d 270, *Allied–Bruce Terminx Co. v Dobson* 130 Led 2d 753.

136 1990 WL 52200, *Nicholson v CEC International* 877 F2d 221.

Reynolds Inc.[137] the court said that Title VII claims are not arbitrable under the FAA. Furthermore, in *Dean Witter Reynolds, Inc. v Byrd*[138] the Supreme Court held that, while it may be more efficient to treat state and federal securities claims alike, Congress' primary goal with the FAA was to guarantee the enforceability of contracts to arbitrate. The Intertwining Doctrine provided a means whereby parties could avoid arbitration of securities claims by simply tying state law claims to federal claims.

In fact, arbitration has traditionally been used in labor and commercial transactions where the parties have an enduring relationship; disputes often arise, and resolution depends on the correct disposition of a specialized body of facts and law[139]. It is argued that ADR lacks comparable judicial procedural protections and standards for appellate review. The process is also confidential, outside of public or judicial scrutiny, and lacks enforcement mechanisms to address participant misconduct or abuse of the process[140]. Courts scrutinize arbitration agreements in the consumer and employment context[141]. Cole argues that pre-dispute arbitration agreements should be enforced only when the incentives and ability of the

137 905 F2d 104, *Pierce v Shearson Lehman*, 1990 WL 60751. *Craft v Campell Soup Co*, 161 F3d 1199, 177 F3d 1083 (The FAA does not apply to employment contracts). Where the arbitration clause requires the employee, but not the employer, to arbitrate and eliminates statutory rights while limiting the damages recoverable by the employee, it is unconscionable; the extent of the unconscionable provisions requires that the entire arbitration clause be held unenforceable, instead of severing the unconscionable parts while enforcing the obligation to arbitrate. *Armendariz, et al., v Foundation Health Psychcare Services, Inc*, (2000 WL 1201652), 99 Cal.Rptr.2d 745, 6 P.3d 669. An employee could not be compelled to arbitrate where the employment agreement permitted his employer to sue. *Ramirez v Circuit City Stores, Inc.,* 90 Cal. Rptr. 2d 916 The arbitration clauses were also substantively unreasonable and unconscionable because they denied the consumers the important right to vindicate their statutory rights by failing to provide for class actions and declaratory and injunctive relief in the arbitration proceedings. *Lozada v Dale Baker Oldsmobile, Inc, et al.,* 91 F.Supp.2d 1087. Where arbitration provisions are unclear, the court may construe the arbitration contract to determine the intent of the parties and, where appropriate, may determine that the parties agreed to arbitrate consolidated claims (the same rationale could apply to class actions) in a single proceeding.

138 *Dean Witter Reynolds v Byrd*, 470 US 213 (1985). Michael H. LeRoy, "Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards," 16 *Stan. L. & Pol'y Rev* 573 (2005) (finding, based on study of employment arbitration awards subjected to judicial review, that employees succeed more often in arbitration than at trial, but recover less, and that women more often received "split awards," such as awards denying attorney's fees).

139 Arthur A. Chaykin, "Mediator Liability: A New Role for Fiduciary Duties?," 53 *U. Cin. L. Rev* 731, 733 (1984). *Hill v Gateway 2000, Inc*., 105 F.3d 1147, 1148 (7th Cir. 1997) (holding arbitration clause in lengthy warranty at the bottom of computer box enforceable); *Sagal v First USA Bank*, 69 F. Supp. 2d. 267 (D. Del. 1999) (enforcing arbitration clause in consumer class action based on amendment to credit cardholder agreement).

140 *Floss v Ryan's Family Steakhouses, Inc.,* 211 F.3d 306, 315 (6th Cir. 2000) (acknowledging "potential for bias exists" where employer has exclusive contract with for-profit ADR service, which determines the pool of potential arbitrators, in disputes brought by employees).

141 *Floss v Ryan's Family Steak Houses, Inc*., 211 F.3d 306, 315 (6th Cir. 2000) (holding prehire arbitration agreement between employee and private arbitration service hired by employer that authorizes provider to alter applicable rules and procedures without notice to or consent of employee is void for lack of consideration); *Hooters of Am., Inc. v Phillips*, 173 F.3d 933, 938

parties to negotiate is similar[142]. It is argued that many mandatory consumer or employee ADR agreements are not the product of an arms-length transaction or true negotiation but are presented on a "take-it-or-leave-it" basis by the party in a position of economic power, thus depriving parties of a jury trial, discovery, and appellate and due process rights inherent in a civil justice system. Sternlight[143] argues that the US Supreme Court's preference for arbitration has no legitimate basis in legislative history and that neither economic nor other policy arguments support a policy allowing large companies to impose possibly unfair arbitration clauses on unaware consumers and employees. Moreover, Sternlight[144] considers that arbitration permits parties to write their own laws, which compromises society's role in setting the terms of justice. Besides, US Supreme Court precedent pronounces a strong national policy in favor of agreements to arbitrate or to resolve disputes in private forums[145].

(4th Cir. 1999) ("Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute complete default of its contractual obligation to draft arbitration rules and to do so in good faith."); *Cole v Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1485 (D.C. Cir. 1997) (speculating that any tendency to "lean" in favor of an employer "would be because the employer is a source of future arbitration business"), at 1485 (holding statutory claims not arbitrable where predispute arbitration agreement required employee to pay all or part of arbitrator's fees); *Rosenberg v Merrill Lynch*, *Pierce, Fenner & Smith, Inc*., 995 F. Supp. 190, 208 (D. Mass. 1998) (holding arbitration impermissible where one of the parties had no role in arbitrator selection); *Broemmer v Abortion Serv of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (holding adhesion contract that had patient arbitrate malpractice claim and waive jury trial right unenforceable as beyond patient's reasonable expectations).

142 Sarah R. Cole, "Incentives and Arbitration: The Case against Enforcement of Executory Arbitration Agreements between Employers and Employees," 64 *Umkc L. Rev* 449, 459–60 (1996) (discussing reasons why merchants chose arbitration as their preferred means for resolving disputes).

143 Jean R. Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration," 74 *Wash. ULQ* 637, 678 (1996) (noting that Chief Justice Warren Burger was a strong, early advocate touting ADR as a cheaper, quicker, and final forum to resolve disputes).

144 id at 695 (warning readers that 'the next time that you try to file a lawsuit … you may well find the door of the courthouse … barred').

145 *Allied-Bruce Terminex Cos. v Dobson*, 513 US 265 (1995) (concluding the FAA covers the full range of Congress's commerce powers and thus applying the FAA to an agreement between a homeowner and local pest-extermination company); *Gilmer v Interstate/Johnson Lane Corp*., 500 US 20, 26 (1991) ("By agreeing to arbitrate, … a party does not forgo the substantive rights; … it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 628 (1985))); *Rodriquez de Quijas v Shearson/Am. Express, Inc.*, 490 US 477, 481 (1989) (citing federal policy favoring arbitration in holding that securities fraud claims are arbitrable); *Shearson/Am. Express, Inc. v McMahon*, 482 US 220, 227 (1987) (stating that because of the federal preference for arbitration, "the burden is on the party opposing arbitration … to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"); *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, Inc., 473 US 614, 626 (1985) (finding federal statutory antitrust claim subject to foreign arbitration); *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp*., 460 US 1, 24 (1983) (announcing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Stephen J. Ware, Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen), 29 *Mcgeorge L. Rev*.

An employment agreement between a highly paid consultant and his corporate employer was not a contract of employment of a worker engaged in foreign or interstate commerce within the meaning of the FAA and, therefore, the arbitration clause contained in such agreement was enforceable.[146] The Supreme Court's decision in *Circuit City Stores, Inc. v Adams*[147], finding arbitration provisions in employment contracts enforceable under the FAA, has spurred additional employers to adopt arbitration provisions for nonunion employees. Some courts have refused to enforce or rewrite arbitration agreements that charge fees for cases involving statutory claims[148]. Moreover, courts have found no congressional intent to preclude waiver of a judicial forum under Title VII and courts have also ordered arbitration of many other federal statutory claims[149]. Additionally, Courts have

195, 202–10 (1998) (defending the contractual approach for enforcement of mandatory arbitration contracts and asserting that extant contract defenses are sufficient to protect consumers).

146 *Plundh Tree Export Co. v Bates*, 71 F3d 592. *Circuit City Stores, Inc. v Adams*, (2001) W.L. 273205, The 9th circuit reversed, holding that employment contracts are excluded from the scope of the FAA, 9 USC. 1, et seq. *Circuit City Stores, Inc v Adams,* 194 F. 3d 1070 (9th Cir. 1999).

147 532 US 105 (2001). Attorney Urges Employers to Adopt Mandatory Programs as Risk Management Tools, 17 Individual Emp. RtS. 41, 42 (2001) (noting that major advantages of mandatory arbitration are capping damages and eliminating class actions).

148 *Ferguson v Countrywide Credit Indus., Inc*., 298 F.3d 778, 780–88 (9th Cir. 2002) (refusing to enforce unilaterally imposed arbitration agreement that required the employee to pay half of the arbitration costs, covered claims employers are likely to bring but excluded those employees are likely to bring, and contained discovery provisions favorable to the employer); *Paladino v Avnet Computer Techs., Inc*., 134 F.3d 1054, 1059–60 (11th Cir. 1998) (refusing to require arbitration where large fees were imposed on employee and Title VII damages were not available); *Cole v Burns Int'l Sec. Servs*., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (reading agreement to require employer to pay all fees in order to enforce arbitration agreement). *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (finding that fee-splitting provision did not affect enforceability of arbitration agreement). The Supreme Court recently held that an agreement which failed to specify the amount and apportionment of fees was enforceable because the plaintiff, although arguing that the cost was prohibitive, did not meet her burden of showing that the cost was so great that it would impermissibly interfere with her right to vindicate her claim. *Green Tree Fin. Corp. v Randolph*, 531 US 79, 90–91 (2000). Michael Z. Green, "Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims," 31 *Rutgers L.J.* 399, 399, 407 (2000) (citing the rise in the use of employment arbitration but arguing that arbitration is less favorable to employers than many suggest and offering reasons that employers should not impose blanket arbitration requirements on employees). *In re Halliburton Co*., 80 S.W.3d 566, 557 (Tex. 2002) (upholding arbitration agreement imposed on employees by energy firm).

149 *EEOC v Luce, Forward, Hamilton, & Scripps*, 303 F. 3d 994, 1004 (9th Cir. 2002) (reversing the court's conclusion to the contrary in *Duffield v Robertson Stephens & Co*., 144 F.3d 1182 (9th Cir. 1998)); *Seus v John Nuveen & Co*., 146 F.3d 175, 182 (3rd Cir. 1998) (finding that ambiguous arbitration clause covered employment dispute in light of policy of favoring arbitration); *Patterson v Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (finding employee bound by arbitration provision in handbook and acknowledgment form, although handbook contained disclaimer asserting that it was not a binding contract); Armijo v Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995) (finding that ambiguous arbitration clause covered employment dispute in light of policy of favoring arbitration). *Wikle v CNA Holdings, Inc., No. 01-1119*, 2001 US App. LEXIS 8440, at *1, 3 (4th Cir. Apr. 23, 2001) (requiring employee to arbitrate Family Medical Leave Act

found arbitration agreements unconscionable on various grounds and some courts have refused to enforce agreements that limit statutory remedies, while others have declined to require similar remedial schemes in arbitration[150].

Can arbitration prevent class actions? Courts are unwilling to hold that an arbitration agreement is unenforceable because it precludes class litigation[151].

("FMLA") claim under CBA); *Williams v Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (requiring arbitration of ERISA claims, in agreement with Second, Third, Fifth, and Eighth Circuits); *Johnson v Circuit City Stores, Inc.,* 148 F.3d 373, 374, 378–79 (4th Cir. 1998) (ordering arbitration of claim under the Civil Rights Act of 1866, 29 USC. § 1981); *Bercovitch v Baldwin Sch., Inc*., 133 F.3d 141, 150 (1st Cir. 1998) (finding Americans with Disabilities Act does not preclude waiver of right to litigate); *O'Neil v Hilton Head Hosp*., 115 F.3d 272, 274 (4th Cir. 1997) (finding nothing in FMLA precludes waiver of right to judicial remedies); *Stewart v Paul, Hastings, Janofsky & Walker, LLP*, 201 F. Supp. 2d 291, 291, 294 (S.D.N.Y. 2002) (requiring arbitration of FMLA and disability discrimination claims); *Adkins v Labor Ready, Inc.,* 185 F. Supp. 2d 628, 646–47 (S.D. W. Va. 2001) (ordering arbitration of Fair Labor Standards Act claim over objection of plaintiff), *aff*'d, 303 F.3d 496 (4th Cir. 2002). *Perry v Thomas*, 482 US 483, 492 (1987) (holding that the FAA preempted state law, which allowed judicial actions to collect unpaid wages despite any agreement to arbitrate the claim). *Tupper v Bally Total Fitness Holding Corp*., 186 F. Supp. 2d 981, 985, 993 (E.D. Wis. 2002) (ordering arbitration of plaintiffs' common law claims that their terminations violated implied contracts with the employer).

150 *Dumais v Am. Golf Corp*., 299 F.3d 1216, 1219 (10th Cir. 2002) (refusing to enforce arbitration agreement where illusory because employer can alter the agreement at will); *Murray v United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297, 304–05 (4th Cir. 2002) (refusing to enforce arbitration agreement as one-sided where, inter alia, employer had complete control over selection of panel from which arbitrator would be chosen); *Penn v Ryan's Family Steak Houses, Inc.,* 269 F.3d 753, 759–60 (7th Cir. 2001) (finding promise to arbitrate illusory where arbitration provider retains right to change rules without notice and thus, there was no consideration for promise to arbitrate); *Hooters of Am., Inc*., 173 F.3d at 938 (refusing to compel employee to arbitrate because Hooters breached the agreement "by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith"). *Ferguson v Countrywide Credit Indus*., 298 F.3d 778, 785–86 (9th Cir. 2002) (finding unilaterally imposed arbitration agreement unconscionable where it required the employee to pay half of the costs, covered claims employers were likely to bring but excluded those employees were likely to bring, and contained discovery provisions favorable to the employer); *Hendrix v Countrywide Home Loans, Inc., No. B153848*, 2002 Cal. App. Unpub. LEXIS 6598, at *9–10 (Cal. Ct. App. July 17, 2002) (finding unconscionable and unenforceable arbitration agreement that covered claims employers were likely to bring but excluded those employees were likely to bring, required employees to pay half the cost of arbitration after the first hearing day, and allowed arbitrator to impose all costs on employees who lose claims). *Paladino v Avnet Computer Techs., Inc*., 134 F.3d 1054, 1060, 1062 (11th Cir. 1998) (refusing to require arbitration where large fees imposed on employee and Title VII damages not available), *Gannon v Circuit City Stores, In*c., 262 F.3d 677, 681–82 (8th Cir. 2001) (severing provision limiting punitive damages while enforcing agreement to arbitrate), *DeGaetano v Smith Barney, In*c., No. 95 Civ 1613, 1996 WL 44226, at *5–6 (S.D.N.Y. Feb. 5, 1996) (ordering arbitration despite limitations on Title VII damages).

151 *Hale v First USA Bank, No. 00 Civ 5406*, 2001 US Dist. LEXIS 8045, at *20–23 (S.D.N.Y. June 12, 2001) (finding that unavailability of class action does not render TILA claim inarbitrable); *Pyburn v Bill Heard Chevrolet*, 63 S.W.3d 351, 364–65 (Tenn. Ct. App. 2001) (finding that trial court erred in refusing to enforce agreement to arbitrate claims under the Tennessee Consumer Protection Act and related common law claims based on the unavailability of a class

In *Adkins v Labor Read*[152]*y, Inc.*, the district court granted the employer's motion to compel arbitration despite the conclusion that a class action could not proceed in arbitration. Moreover, in 2001, in *Circuit City Stores, Inc. v Adam*s[153], the US Supreme Court not only reaffirmed its judicial preference favoring arbitration, but the majority declared its unadulterated affection for this dispute resolution

action where no class was certified). *Vigil v Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572–73 (E.D. La. 2002) (rejecting plaintiff's argument that arbitration agreement that precluded class actions involving small consumer claims unconscionable); *Furgason v McKenzie Check Advance, Inc.,* No. IP00-121-CH/G, 2001 WL 238129, at *11–12 (S.D. Ind. Jan. 3, 2001) (enforcing the arbitration agreement and denying the plaintiff the right to arbitrate class claims under RICO and state usury statutes based on the agreement's provision barring class arbitration); *In* re Managed Care Litig., 132 F. Supp. 2d 989, 999 (S.D. Fla. 2000) (holding class allegations involving claims under RICO and ERISA, and other state and federal statutory and common law claims do not preclude enforcement of arbitration agreements). *Acorn v Household, Int'l, Inc*., 211 F. Supp. 2d 1160, 1170–72 (N.D. Cal. 2002) (refusing to order arbitration where class actions precluded, finding agreement unconscionable); *Lozada v Dale Baker Oldsmobile, Inc*., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (refusing to enforce arbitration agreement because it precluded class claims under the Truth in Lending Act and the Michigan Consumer Protection Act); *Szetela v Discover Bank*, 118 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 2002) (directing lower court to strike provision prohibiting class actions from arbitration clause as unconscionable and against public policy); *State v Berger*, 567 S.E.2d 265 (W. Va. 2002) (granting writ of prohibition against lower court which had ordered arbitration of consumer claim, finding unconscionable the provisions limiting punitive damages and class actions). Ian R. Macneil, *et al.*, Federal Arbitration Law: Agreements, Awards and Remedies under the FAA, § 18.9.2 (Supp. 1994) ("There is much to commend" courts holding that arbitration agreements prohibiting class actions are void as against public policy, because "such provisions certainly thwart the broad pro-arbitration policies of the FAA."). *Ting v AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (refusing to enforce an express no-class action clause in an arbitration agreement on the grounds that doing so would leave consumers without any effective method of vindicating certain categories of claims). David Ruder considered that the arbitration of class action claims by self regulatory organizations (SROs)7 would be "difficult, duplicative and wasteful" because courts have already developed procedures to manage class action claims showing a view of arbitration not being a co-equal and alternative to courts dispute method. Letter from David S. Ruder, Chariman of the Securities and Exchange Commission, to all Self Regulatory Organizations (July 13, 1988). Maureen A. Weston, Universes Colliding: The Constitutional Implications of Arbitral Class Actions, 47 *Wm. & Mary L. Rev* 1711 (2006) (by steering class action disputes to a private setting, some arbitration agreements eliminate any obligation to provide procedural protections for absent class members).

152 185 F. Supp. 2d 628 (S.D. W. Va. 2001), *aff'*d, 303 F.3d 496 (4th Cir. 2002). *Marzek v Mori Milk & Ice Cream Co*., No. 01 C 6561, 2002 WL 226761, at *3 (N.D. Ill. Feb. 13, 2002) (ordering arbitration of FLSA claim, noting that nothing in arbitration agreement precluded class claims but also suggesting that if class action were not available agreement would still be enforceable). In *Johnson v West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000). the court found that the FLSA did not preclude waivers of the right to file a collective action and that by entering the arbitration agreement the plaintiff had waived that right. *Szetela v Discover Bank*, 118 Cal. Rptr. 2d 862, 862 (Cal. Ct. App. 2002) (finding prohibition on class action unconscionable and thus, invalid). Sara Adler, "Employment Class Actions and Alternative Dispute Resolution," 53 *Lab. L.J.* 133, 133, 137 (2002) (pointing out that arbitration is currently used for remedial issues in some employment class actions and suggesting that use for liability determinations will grow despite the complexity and need for continuing court or agency supervision).

153 532 US 105 (2001).

alternative as well. The US Court of Appeals for the Ninth Circuit had interpreted Section 1 of the FAA exception as applying to all contracts of employment[154]. Besides, the Supreme Court in *Circuit City Stores, Inc. v Adams*[155] narrowly construed the exemption in section 1 such that only transportation workers' contracts are exempt. This author considers the need for a change of section 1. Employment contracts of transportation workers should be subject to arbitration under the FAA in order to achieve uniformity in arbitrability, rendering all disputes concerning interstate matters arbitrable. The advantages of arbitration do not disappear when transferred to the context of employment. Parties can avoid the excessive costs of litigation, which may be of specific importance in this context, and frequently involve smaller sums of money than in commercial disputes. It is worth mentioning that it has been decided that an employment contract renders the FAA inapplicable[156]. In addition, courts and legislatures may not single out arbitration provisions for treatment distinct from the treatment of "regular" contracts[157].

The extent to which arbitrators are permitted to interpret laws under the current regime suggests that courts and legislators are satisfied that arbitrators can indeed apply these laws correctly. Therefore, arbitration is gaining support because arbitrators apply the law correctly. It is obvious that arbitrators cannot apply law in a totally different way (opposite direction) than that of courts. Arbitration has developed as an alternative system that applies the same rules as courts but in a less formal way, rather than being a legal system twisting law rules or introducing illegal rules. Arbitrators generally enjoy *quasi-judicial* privilege for their deliberations and thought processes. However, discussing the basis for the panel's award with an outside party may waive this immunity for all arbitrators. If arbitrators are questioned about a case, or asked to testify or to sign an affidavit, the assigned staff should be contacted immediately.

In order to show their impact upon arbitration, the analysis in this chapter will investigate the role of courts in the whole arbitration proceeding from commencement of arbitration to the review and enforcement of awards in US law. Do courts have a limited involvement in arbitration? Can arbitration tribunals under the FAA complete an arbitral process, from issuing an award to enforcing it, without a court's involvement? Is arbitration merely another mechanism of dealing with disputes where courts play a fundamental role? Is the fundamental basis upon which the legislator drafted the whole Act the powers of the federal

154 *Craft v Campbell Soup Co*., 177 F.3d 1083 (9 th Cir. 1999).

155 121 S. Ct. 1302 (2001). "Unlike the 'involving commerce' language in § 2, the words "any other class of workers engaged in … commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it."

156 *Circuit City Stores v Ahmed* laws.findlaw.com/9th/9855896.html

157 *Hill v Gateway 2000, Inc*., 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 US 808 (1997). Traci L. Jones, "State Law of Contract Formation in the Shadow of the FAA," 46 *Duke L.J.* 651 (1996).

court rather than the arbitral tribunal? Should arbitration become legalistic or less legalistic?

2 Arbitrability

Arbitrability is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law. It should not be confused with the question of whether a particular dispute does or does not fall within the scope of the arbitration agreement, although in the US the term arbitrability is used to describe this question as well. The relevant issues are, whether the parties seeking or resisting arbitration have a valid arbitration agreement; and (2) whether the particular dispute between those parties, falling within the contours of the arbitration agreement, determines the "arbitrability" of the dispute[158]. In effect, the concept of arbitrability is a public-policy limitation upon the scope of arbitration as a method of settling disputes. Arbitrability of a dispute is not calculated by the status of a grievance but by the nature of the duties and obligations of the parties under the contract.[159] If the arbitration agreement covers matters incapable of being settled by arbitration under the law of the agreement, under the place of arbitration, or under the law of the country of enforcement, the agreement is ineffective since it will be unenforceable. As arbitrability of a dispute is based on contract interpretation, it raises a legal question reviewable by courts of appeal *de novo*[160]. Arbitrability is the issue of whether the parties to a contract agreed to arbitrate a particular claim and are therefore precluded from resolving that claim in court[161].

158 John S. Murray *et al.*, Arbitration 107 (1996) (referring only to Question (2) as a matter of "arbitrability"). Arguably, however, the question of "arbitrability" necessarily encompasses both questions since both questions are distinct and must be answered before one can conclude that a dispute is in fact arbitrable. *Nat'l Union Fire Ins. Co. v Belco Petrol. Corp*., 88 F.3d 129, 135 (2nd Cir. 1996) ("The 'arbitrability' of a dispute comprises the questions of: (1) whether there exists a valid agreement to arbitrate at all under the contract in question … and if so; (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement.").

159 *AFL-CIO v Canron Inc*, 580 F2d 77.

160 *Cogwell v Merrill Lynch* 78 F3d 474, *Louis Dreyfus Negoce, S.A. v Blystad Shipping*, 252 F.3d 218, 224 (2nd Cir.) ("Where the arbitration clause is broad, 'there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.'") Jay R. Sever, "Comment, The Relaxation of Inarbitrability and Public Policy Checks on US and Foreign Arbitration: Arbitration Out of Control?," 65 *Tul. L. Rev* 1661, 1689 (1991) (adding that "decentralization," also termed "delocalization," refers to "state practice of lifting domestic restraints to purely international arbitration").

161 Denton Whitney, Recent Development, "*Spahr v Secco*," (2004) 19 *Ohio St. J. on Disp. Resol.* 1127. *Nat'l Union Fire Ins. Co. v Belco Petrol. Corp.,* 88 F.3d 129, 135 (2nd Cir. 1996) ("The 'arbitrability' of a dispute comprises the questions of: (1) whether there exists a valid agreement to arbitrate at all under the contract in question … and if so; (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement.").

The common rule under the FAA is that the courts[162] decide issues of arbitrability – i.e., whether a dispute is subject to arbitration or must be resolved in court. Nevertheless, parties can agree, either in express contractual language or by incorporating right terms of an arbitral body that the question of arbitrability is to be decided by the arbitrators[163]. When the situation is not straightforward, the courts have to decide whether they or the arbitrators are to rule on issues of arbitrability.

When determination of arbitrability is entangled in the merits of the dispute, then it is likely to be decided by arbitration. In fact the Supreme Court held that the arbitrator rather than the court should determine certain procedural gateway matters[164]. Procedural arbitrability issues, such as time limits on a claim and waiver, are also presumptively for arbitrators[165]. Moreover, the arbitrator, not the court, must decide whether class-wide arbitration proceedings are available or forbidden[166]. Whether the arbitration agreement forbids class arbitration is a contract interpretation question for the arbitrator[167].

An arbitrable dispute is one that the court finds the parties intended to submit to arbitration[168]. In contrast, the parties retain the ability to agree to submit the

162 *John Wiley Sons Inc v Livingston*, 376 US 543. *Pacificare Health Systems Inc v Book*, 538 US 401 (2003) ("question of arbitrability then it would be appropriate for a court to answer it in the first instance"). *Oil, Chemical & Atomic Workers Int'l Union v American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976) ("The issue of arbitrability is for judicial determination because no party has to arbitrate a dispute unless it has consented thereto."). Under the FAA, there is a general presumption that the issue of arbitrability should be resolved by the courts. *First Options of Chicago, Inc. v Kaplan,* 514 US 938, 944–45 (1995).

163 Our review of "whether the issue of arbitrability is for the court or for the arbitrator" is *de novo. Bell v Cendant Corp.*, 293 F.3d 563, 565–66 (2nd Cir. 2002); at 566 "the issue of arbitrability may only be referred to the arbitrator if there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Shaw Group Inc. v.Triplefine Int'l Corp*., 322 F.3d 115, 120 (2nd Cir. 2003). *Qualcomm Incorporated v Nokia Corporation*, 466 F.3d 1366 (Fed. Cir. 2006), *Contec Corp. v Remote Solution Co.*, 398 F.3d 205 (2nd Cir.2005).), at 208 "when parties to an arbitration agreement explicitly incorporate rules that empowers arbitrator to decided issues of arbitrability incorporation serves as a clear and unmistakable evidence of parties' intent to designate such issues to arbitrator."

164 *Green Tree v Bazzle*, 351 SC 244.

165 *Howsam v Dean Witter Reynolds, Inc.*, 537 US 79 (2002).

166 *Pedcor Management Co., Inc. v Nations Personnel of Texas, Inc.*, 343 F.3d 355, 359 (5th Cir. 2003)(because in *Green Tree* "the scope of the arbitration agreement itself was broad, and the issue there concerned only the kind of arbitration proceeding agreed to, the plurality, plus Justice Stevens, i.e, the Court, held that this matter of contract interpretation should be for the arbitrator, not the courts, to decide"); In *re Wood*, 140 S.W.3d 367, 369 (Tex. 2004)(in *Green Tree* "the Court held that, as a question of contract interpretation, the issue of class arbitrability had been committed to the arbitrator").

167 *Green Tree Financial Corp v Bazzle* 539 US 444 (2003). *Dunlap v Berger*, 567 S.E.2d 265, 279–80 (W. Va. 2002), *cert. denied*, 537 US 1087 (2002) (explaining that the drafting party argued that the FAA preempts application of state unconscionability doctrine to arbitration agreement purporting to waive punitive damages); *Discover Bank v Super. Ct.,* 129 *Cal. Rptr.* 2d 393, 408 (Cal. Ct. App. 2003) (suggesting that FAA preempts any departure from enforcing arbitration agreements as written).

168 *Mediterranean Enters Inc v Ssangyang Corp*, 708 F2d 1458.

arbitrability question itself to arbitration, thereby allowing the arbitrator to decide the scope of his power under the agreement[169]. In interpreting the arbitration agreement to determine whether the particular dispute is arbitrate the court will, first of all, determine that the transaction either involves interstate commerce or maritime issues. Hereafter, the court will investigate whether a valid agreement to arbitrate exists[170]. Moreover, certain areas of law are deemed inarbitrable on the ground that they implicate public policy questions that should be decided through the public system of dispute resolution rather than through a private process. An alternative interpretation of the arbitrability issue is that certain issues should be resolved by courts because there are third-party effects that the parties to a transaction will not take into account. In fact, an award can have effects upon third parties by its final content as well.

The court may hear a dispute despite the presence of an arbitral agreement if the court determines that the arbitral agreement is null and void, inoperative or incapable of being performed[171]. The question of arbitrability has generally been a matter for domestic determination rather than international agreement[172]. Although state law applies to contracts to arbitrate to determine if the parties agreed to arbitrate, there is a body of federal substantive law created by the FAA governing arbitrability of disputes[173].

Are statutory rights forfeited through arbitration agreements? Arbitration involves purely a substitution of forum and not a waiver of substantive rights[174]. In *Chevron USA, Inc. v Natural Resources Defense Council, Inc*.[175]., the Supreme

169 *First options of Chicago Inc v Kaplan*, 115 S.Ct 1920.

170 *National Union Fire Ins, of Pittsburgh v Belco Petroleum Corp*, 88 F3d 129. *Berger V Cantor Securities*, 967 Fsup 91, *Gutierrez v Academy Corp*, 967 Fsup 945.

171 *Quasem Corp v W/D Mask Cotton*, 967 Fsup 288.

172 US courts, at various times, have found each of the following areas to be inarbitrable: the Securities Act of 1933, *see Wilko v Swan*, 346 US 427, 438 (1953); the Civil Rights Act, *see Utley v Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989); RICO claims, *see Page v Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 298–300 (1st Cir. 1986); ERISA claims, *see Barrowclough v Kidder, Peabody & Co*., 752 F.2d 923, 941 (3rd Cir. 1985); bankruptcy matters, *see Zimmerman v Continental Airlines*, 712 F.2d 55, 59 (3rd Cir. 1983); the antitrust laws, *see American Safety Equip. Corp. v J.P. Maguire*, 391 F.2d 821, 822 (2nd Cir. 1968); patents, *see Beckman Instruments, Inc. v Technical Dev Corp.*, 433 F.2d 55, 63 (7th Cir. 1970); and the Commodities Exchange Act, *see Breyer v First Nat'l Monetary Corp.*, 548 F. Supp. 955, 959 (D.N.J. 1982); *Wilko v Swan*, 201 F.2d 439, 445 (2nd Cir.), *rev'd*, 346 US 427 (1953) (stating that the congressional policy of protecting investors, reflected in the Securities Act of 1933, did not override a congressional policy favoring arbitration, evidenced in the FAA, particularly when the parties so agreed).

173 *Hatzlachh Supply Inc. v Moishe's Elecs. Inc*., 828 F. Supp. 178 (S.D.N.Y. 1993).

174 In *Mitsubishi*, the Court stated: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

175 467 US 837 (1984). Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 *Yale J.* On Reg. 283, 283 (1986). 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.2 (4th ed. 2002) ("*Chevron* is one of the most important decisions in the history of administrative law. It has been

Court held that statutory silence or ambiguity serves as an implied delegation of interpretive authority from Congress to administrative agencies. Moreover, in *FDA v Brown & Williamson Tobacco Corp*.[176] the court specified "deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." Furthermore, in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*.[177] the Supreme Court embraced arbitration as an operative means of determining statutory rights and responsibilities and enforced a pre-dispute agreement to arbitrate statutory claims. To that extent, the FAA's presumption of arbitrability applies to statutory claims arising under federal and state law including, notably, civil rights claims. Perhaps one of the last remaining bastions of non-arbitrability is administrative law.

The conflict between ensuring the protection of substantive rights while limiting judicial review becomes most evident when the statutory claims being arbitrated pose unsettled or novel legal questions, a situation more likely to take place when the statutory regime under which claims arise is itself relatively new and its legal parameters uncertain[178]. This author considers that arbitration as an independent and co-equal to courts' dispute system is capable of protecting the substantive rights arising from different statutes, taking into account that arbitrators are distinguished experts in every field as judges are. Furthermore, novel legal questions can be examined by arbitration and their view could create precedent applicable to courts. Statutory arbitration rules are generally subject to private agreement and the FAA simply gives effect to the parties' agreement, but does not in itself compel arbitration[179]. For instance, statutory claims under anti-discrimination laws are appropriate candidates for arbitration, even when

cited and applied in more cases than any other Supreme Court decision in history."), Thomas W. Merrill, "The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards," 54 *Admin. L. Rev* 807, 809 (2002) ("*Chevro*n, of course, is the Court's most important decision about the most important issue in modern administrative law – the allocation of power between courts and agencies 'to say what the law is.'").

176 529 US 120, 159 (2000).

177 473 US 614 (1985). *EEOC v Waffle House, Inc*., 534 US 279, 295–98 (2002) (stating that although the EEOC was not bound by employee's promise to arbitrate claim under ADA, the employee could be compelled to arbitrate his claim). *Circuit City Stores, Inc. v Adams*, 532 US 105, 114–19 (2001) (holding that the FAA applies generally to employment contracts other than those involving transportation workers). *Gilmer v Interstate/Johnson Lane Corp.,* 500 US 20, 23 (1991) (holding that an ADEA claim could be subject to pre-dispute agreement to arbitrate). *Trivisonno v Metro. Life Ins. Co*., No. 01-3213, 2002 WL 1378229, at *5 (6th Cir. June 24, 2002) (arbitrators' failure to explain reasoning in FMLA case not a basis for vacating award).

178 Michael A. Scodro, Note, Arbitrating Novel Legal Questions: A Recommendation for Reform, 105 Yale L.J. 1927, 1927–28 (1996) ("The greatest potential for injustice in the arbitral resolution of such statutory claims, both to the parties and to society more generally, arises when these claims raise novel legal questions.").

179 Stephen J. Ware, "Opt-in" for "Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act," 8 *Am. Rev. Int'l Arb.* 263, 267 (1997) (asserting that parties can specify extra-statutory grounds for judicial review of arbitral awards, such as for consistency with "public policy," since judicial function in arbitration cases is to effectuate parties' agreement).

employment is conditioned on a pre-dispute agreement to arbitrate disputes[180]. Only if the particular statute at issue expressed a congressional intent that claims under it are *not* be arbitrable would the FAA's presumption in favor of arbitration be trumped[181].

Do enforcing pre-dispute arbitration agreements enable courts to achieve more manageable caseloads and to avoid becoming super-personnel departments? Enforcing pre-dispute arbitration agreements should not be viewed as merely enabling courts to achieve more manageable caseloads and to avoid becoming "super-personnel departments", but arbitration is a new dispute resolution system which is supposed to bring justice by applying more informal procedures rather than abolishing any rule of law and procedure. In *Broughton v Cigna Healthplans*[182] a plaintiff pursuing injunctive relief under the California Consumer Legal Remedies Act ("CLRA") did not have to arbitrate because arbitration was not a suitable forum in which to carry out the public interest aim of the statute. United States courts have held antitrust claims arbitrable in both international and national cases.[183] Besides, in *Arriaga v Cross Country Bank*[184], the court found that only Congress can carve-out exceptions to the FAA confirming the strong FAA mandate.

180 *Circuit City Stores, Inc. v Adams*, 532 US 105, 123 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."). Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination La*w, 56 Wash. & Lee L. Rev 395, 433 (1999) (calling for *de novo* review of arbitrator's interpretations and asserting that "judges and lawmakers act in concert as the judicial process augments and amplifies statutory law"). *United States v Mead Corp*., 533 US 218, 226–27 (2001). "that *Chevron* deference is significantly more powerful than ordinary deference. It is also clear that *Chevron* applies whenever agencies exercise delegated lawmaking authority from Congress. With these propositions established, judges are more likely to take *Chevron* seriously." *EEOC v Waffle House, Inc*., 534 US 279, 296 n.11 (2002) (recognizing that an increasing number of employees will be subject to arbitration requirements as a condition of employment).

181 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 631 (1985). *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 26 (1991). *Debs v Northwestern Ill. Univ.*, 153 F.3d 390, 396 (7th Cir. 1998). Michael Z. Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L.J. 399, 453 (2000) (asserting that employees have a 63% win rate in arbitration as opposed to a 15 per cent win rate in court). *Masco Corp. v Zurich Am. Ins. Co.,* 382 F.3d 624 (2004). A general presumption in favor of arbitration exists "and any doubts are to be resolved in favor of arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"

182 988 P.2d 67 (Cal. 1999). An injunction is a "court order commanding or preventing an action." Black's Law Dictionary 788 (7th edn. 1999). *Cruz v PacifiCare Health Sys., Inc.*, 111 Cal. Rptr. 2d 395, 398 (Ct. App. 2001), Joseph T. McLaughlin, Arbitrability: Current Trends in the United States, 59 *Alb. L. Rev* 905, 930 (1996) (noting that "most state courts hold that, while divorcing parents may arbitrate disputes involving the custody, care, and costs of their children, the arbitrator's decision is subject to the court's *de novo* review if the decision is not in the child's best interests").

183 *Cindy's Candle Co v WNS Inc* 714 Fsupp 973.

184 163 F. Supp. 2d 1189 (S.D. Cal. 2001). *Rhone-Poulenc Specialists v SCM Corp*. 769 F2d 1569.

In *Shearson/American Express v McMahon*[185] the court, in holding both SEA and RICO claims arbitrable, reinforced the use of its two-step analysis to determine the arbitrability of disputes. The FAA is substantive law based on the Commerce Clause and so it would unavoidably require application of the FAA in state courts under the Supremacy Clause[186]. Hence, questions of arbitrability have to be addressed with *regard to the federal policy* favouring arbitration and the FAA establishes that, as a matter of federal law, *any doubts* regarding the extent of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defence to arbitrability[187]. Additionally, the FAA was seen as a way to overcome the rule of equity that arbitration agreements were not enforceable[188]. Did the FAA aim through procedure to provide a federal forum to enforce pre-dispute arbitration agreements and reserve power to the states to regulate the enforceability of arbitration agreements in their respective forums? The US Supreme Court interpreted the FAA as creating substantive arbitration law that forbids state laws from restricting the enforceability of arbitration agreements. The US Supreme Court in *Circuit City Stores*[189] has recently reaffirmed *Southland*

185 482 US at 220 (1987). ("The duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights"). A striking instance of the decline of the non-arbitrability doctrine involves claims under 19 USC 1337, that authorizes the International Trade Commission to examine unfair trade practises, *Farrel Corp v United States International Trade Commission*, 1991 US App. Lexis 27700. Margaret M. Harding, "The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power," 46 *DePaul L. Rev* 109, 111 (1996) (noting that despite arbitration being the primary method of dispute resolution, for the majority of investors it is compulsory); William A. Gregory & William J. Schneider, "Securities Arbitration: A Need for Continued Reform," 17 *Nova L. Rev* 1223, 1224 (1993) (noting that most investors view forced arbitration as being unfair); Lewis D. Lowenfels & Alan R. Bromberg, "Securities Industry Arbitrations: An Examination and Analysis," 53 *Alb. L. Rev* 755, 757 (1989) (arguing that after *McMahon* and *Rodriguez*, most disputes will be resolved through arbitration). J. Kirkland Grant, "Securities Arbitration: Is Required Arbitration Fair to Investors?," 24 *New Eng. L. Rev* 389, 480–81 (1989). Shirley A. Wiegand, "Arbitration Clauses: The Good, the Bad, the Ugly," 47 *Okla. L. Rev* 619, 619 (1994) ("Judicial response to arbitration clauses has changed from overt hostility to warm receptivity.").

186 *Erie Railroad Co. v Tompkins*, 304 US 64 (1938). *Bernhardt v Polygraphic Co. of America*, 350 US 198 (1956). *Prima Paint Corp. v Flood & Conklin Manufacturing Co*., 388 US 395 (1967).

187 Thomas E. Carbonneau, "Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds" 110 (1989) ("Challenges to the validity of arbitration agreements on the basis of state law provisions, therefore, were seen essentially as a dilatory tactic, meant to defeat the manifest purpose of the federal legislation."). Michael A. Landrum & Dean A. Trongard, Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights, 24 *Wm. Mitchell L. Rev* 345, 362 (1998) (arguing that the *Mitsubishi Motors* reasoning on the arbitrability of statutory claims created "a rut in the mud of legal reasoning which the Court has continued to track in other, totally different 'statutory claim' cases").

188 Sabra A. Jones, "Historical Development of Commercial Arbitration in the United States," 12 *Minn. L. Rev* 240, 242 (1928); Earl S. Wolaver, "The Historical Background of Commercial Arbitration," 83 *U. Pa. L. Rev* 132, 132 (1934). *Berkovitz v Arbib & Houlberg, Inc.*, 130 N.E. 288 (N.Y. 1921). The court said: "arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow."

189 532 US 105 (2001).

and has again expanded the FAA, this time holding that it includes employment contracts. It could be argued that arbitrators have been given the required power and credibility to deal with issues of public policy and arbitrators can successfully award and modify injunctive relief.

While section 206 of the FAA applies only to federal courts, the Convention must be deemed self-executing as to state courts[190]. In actions falling under the Conventions (NYC, Inter-American Convention), stays of litigation involving arbitrable claims should be mandatory[191]. US (and foreign) courts have long held that certain categories of claims are inherently incapable of arbitration, either because the legislature has so commanded or because public policy so requires. Section 208 provides that the FAA's first chapter shall be applicable under the NYC, except where it is "in conflict" with either the Convention or its implementing legislation[192].

Courts are frequently called upon to determine, in the context of applications for injunctions to compel arbitration or to stay litigation pending the results of arbitration, whether the parties agreed to arbitrate a particular dispute. While the factual contexts in which such disputes arise are varied, the overriding principle is that arbitration provisions are liberally construed in favor of arbitration. In *First Options of Chicago, Inc. v Kaplan, et al.*, the Court ruled that courts may independently review whether parties agreed to arbitrate a dispute under the FAA, unless there is "clear and unmistakable" evidence that the parties agreed to let the arbitrator decide the question of arbitrability. The Court also held that parties might challenge arbitrability in the courts after unsuccessfully making such a challenge in arbitration, which is of particular significance to companies that wish to arbitrate with third parties in multi-party disputes. Therefore, unless the agreement clearly states that the arbitrator shall decide whether a dispute is arbitrable, the parties may bring that issue before a judge for resolution, which allows the court to decide on its jurisdiction to deal with the matter.

Despite the presumption of arbitrability, strong federal policy favouring arbitration may not extend the reach of arbitration beyond the intended scope of the clause providing for it[193]. Regarding the question of whether a dispute can be arbitrated, courts have attempted to establish general guidelines to assist them in the interpretation of the arbitration clause[194]. Narrow clauses demand closer judicial examination of a claim of non-arbitrability[195]. During the 1980's, the

190 G. Born & D. Westin , International Civil Litigation in United States Courts, 1992.

191 *Faberge Int'l Inc*, v Di Pino 491 NYS2d 345.

192 9 USC. 208.

193 *Spear, Leeds & Kellong v Central Life Co*, 85 F3d 21. *Program Inter. Inc v Barhyt*, 928 F Sup 983. *JLM Industries v Stolt-Nielsen*, (387, F.3d 163, [2nd Cir. 2004]) that while the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, but not more so.

194 *Sedco Inc v Petroleos Mexicanos*, 767 F2d 1140, *Porter Hayden Co. v Century Indem Co*, 136 F3d 380.

195 *Insurance Company of North America v ABB Power Generation*, 925 F Sup 1053, *Stands Tallow Corporation v Kil-Management A/S* 901 F Sup 147.

Supreme Court rendered a series of decisions that expressly adopted expansive federal standards of arbitrability[196].

The effect of Section 2 of the FAA is the creation of a substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Arbitration Act[197]. Under the FAA a disputed issue is arbitrable unless it may be said with positive assurance that the arbitration clause is not subject to interpretation of the asserted dispute. It is argued that, in fact, the FAA gives the arbitrator[198] the power to determine the scope of the arbitration clause as well as the substantive merits of the claim. It could be said that section 2 of the FAA was addressed only to the federal courts. Any doubt about the arbitrability of public law statutory claims was eliminated by *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc., Shearson/American Express, Inc. v McMahon,* and *Rodriguez de Quijas v Shearson/American Express, Inc.*

The FAA's presumption of arbitrability applies to statutory claims arising under federal and state law including, notably, civil rights claims[199]. The Court has repeatedly asserted that arbitration involves merely a substitution of forum and not a waiver of substantive rights[200]. Hence, whole bodies of regulatory law, for instance antitrust, securities, RICO, and civil rights legislation among them have been subjected to arbitral decision-making[201]. Bankruptcy courts are limited in their capacity to override arbitration agreements[202] unless there is a serious conflict

196 *Perry v Thomas*, 482 US 483.

197 *Moses Cove Hospital v Mercury*, 74 Led 2d 765, *Porter Hayden Co. v Century Idem Co*., 136 F3d 380.

198 *Acevedo Maldonado v PPG Industries*, 514 F2d 614, *Robert Lawrence v Devonshire Fabrics* 271 F2d 402.

199 *EEOC v Waffle House, Inc*., 534 US 279, 295–98 (2002) (stating that although the EEOC was not bound by employee's promise to arbitrate claim the under ADA, the employee could be compelled to arbitrate his claim); *Circuit City Stores, Inc. v Adams*, 532 US 105, 114–19 (2001) (holding that the FAA applies generally to employment contracts other than those involving transportation workers); *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 23 (1991) (holding that an ADEA claim could be subject to predispute agreement to arbitrate).

200 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 628 (1985).

201 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 640 (1985) ("Accordingly, we require this representative of the American business community to honor its bargain, by holding this agreement to arbitrate enforceable"); *JLM Industries, Inc. v Stolt-Nielsen SA*, 387 F.3d 163, 179–81 (2nd Cir. 2004) (even "horizontal" antitrust claims based on price fixing among competitors can be subject to arbitration). Cf. *Circuit City Stores, Inc. v Adams*, 532 US 105, 123 (2001) (employment discrimination lawsuit asserting claims under state's Fair Employment and Housing Act should be enjoined, and arbitration should be compelled; the Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law"). *Borowiec v Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004) (held, "the text, legislative history, and purposes of the [Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 USC. § 2301], do not evince a congressional intent to bar arbitration of written warranty claims"); *Walton v Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002) (same; "[c]onsumers can still vindicate their rights under warranties in an arbitral forum").

202 *Mintze v American Financial Services, Inc*. 434 F.3d 222 (3rd Cir. 2006).

between the relevant provisions of the US Bankruptcy Code and the FAA, or that arbitration of the claim would unavoidably jeopardize the objectives of the US Bankruptcy Code[203].

It is a well-settled proposition that the question of arbitrability is generally an issue for judicial determination in the first instance[204]. An important legal and practical exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they "clearly and unmistakably so provide"[205]. Thus, we should examine and determine whether the parties have a "clear and unmistakable" agreement to arbitrate arbitrability as part of their alternative dispute resolution choice.

Article II(1) of the NYC permits signatory states to treat categories of claims as "incapable of settlement by arbitration" – or non-arbitrable. Among other things, various nations refuse to permit arbitration of disputes concerning labor or employment grievances, and claims in real estate and franchise relations. More broadly, some nations forbid arbitration of "all matters in the realm of public policy." The FAA itself contains no provisions dealing expressly with the subject

203 *MBNA Am. Bank, N.A. v Hill*, 436 F.3d 104 (2nd Cir. 2006).

204 *Primex International Corp. v Wal Mart Stores, Inc.*, 89 NY2d 594, 598. The Supreme Court has held that, when a contract is governed by the FAA, arbitrability is a question for the courts, unless the parties clearly and unmistakably provide otherwise. *AT&T Techs., Inc. v Communications Workers,* 475 US 643, 649 (1986). The Court of Appeals Granted Cross-Motion to Compel Arbitration Relying on Two Supreme Courts' Decisions Exploring what Constitutes a Question of Arbitrability (12 June 2007) *Certain Underwriters at Lloyd's London v Westchester Fire Insurance Company*, case no: 06-1457, United States Court of Appeals, 3rd Circuit, USA. The Court of Appeals affirmed the order, relying on the Supreme Court's decisions in *Howsam* and *Green Tree Financial Corp.*, two cases exploring what constitutes a "question of arbitrability" subject to judicial determination. In *Howsam v Dean Witter Reynolds, Inc.*, the Court stated that "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." In *Green Tree Financial Corp. v Bazzle*, the plurality stated that disputes implicating "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties" did not constitute questions of arbitrability subject to judicial determination. As neither party disputed their contractual obligation to arbitrate the noticed disputes arising under the reinsurance contracts, the Court held that Lloyd's objection to consolidation raised a procedural matter properly resolved through arbitration.

205 *AT&T Technologies v Communications Workers of America*, *supra*, 475 US, at 649; *see*, *First Options of Chicago v Kaplan*, *supra*, 514 US, at 944 *PaineWebber Inc. v Bybyk*, 81 F3d 1193, "[t]he language of the [NASD] Code itself commits all issues, including issues of *arbitrability* and timeliness, to the *arbitrators*" *In re Guild Music Corp.*, 100 B.R. 624, 628 (Bankr. D.R.I. 1989). *In re Spectrum Information Technologies, Inc.*, 183 B.R. 360, 363 (Bankr. E.D.N.Y. 1995) (The Court held that 'notwithstanding the strong federal policy favoring arbitration, the District Court and the Bankruptcy Courts within the 2nd Circuit have historically found, especially with respect to core proceedings, that arbitration should not triumph over the specific jurisdiction bestowed upon the bankruptcy courts under the Bankruptcy Code'.). S.P. Bedell/L. Harrison/B. Grant, "Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements," 13 *Journal of Contemporary Law* 1 (1987), pp. 1–29; J.D. Becker, "Bankruptcy Courts and Arbitration: A Question of Competence," 7 *Am. Rev Int. Law* (1996), pp. 259–65; R.M. Schwartz, "The US Bankruptcy Courts' Failure to Interpret the NYC as a Treaty Obligation," 14 *Arbitration International* 2 (1998), pp. 231–34.

of non-arbitrability. Prohibitions on the arbitrability of claims under US law are based, therefore, on other statutes or public policies. US statutes have seldom dealt expressly with the subject of non-arbitrability, thus leaving development of the doctrine largely to the courts[206]. The arbitrator has authority to resolve only questions of contractual rights, and this authority remains, regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII[207]. An arbitrator could have considered securities claims just as he could consider contract claims. The Foreign Sovereign Immunities Act of state doctrine does not allow the enforcement of an arbitral award concerning claims of expropriation[208]. Moreover, an arbitrator can deal with at least some public law claims[209].

Arbitral tribunals have sometimes invoked "international" public policy as a basis for refusing to exercise jurisdiction[210]. Claims of illegality are based upon national law prohibitions against the arbitration of particular claims. Courts have permitted the arbitration of antitrust claims in purely domestic matters[211]. The law of the judicial forum where enforcement of an agreement is sought determines non-arbitrability. Where federal US claims provide allegedly non-arbitrable claims, US courts have generally applied federal US law to issues of non-arbitrability, both at the stages of enforcing arbitration agreements and arbitral awards. Where a claim is allegedly non-arbitrable under foreign law, US courts appear to require that foreign non-arbitrability doctrines satisfy "international" standards[212]. Courts recognize that arbitrators are competent to handle complex factual and legal issues without direction or instruction from the court based on the fact that judicial review of arbitration awards, while limited, is still sufficient to ensure that arbitrators comply with the law[213]. This approach shows the understanding that arbitration is

206 In *Alexander v Gardner-Denver Co*, 415 US 36, the Court held that statutory claims for damages under Title VII of the Civil Rights Act of 1964 were not precluded by a prior arbitral award rejecting the plaintiff's allegations among other things, the Court suggested that certain Title VII claims were non-arbitrable. The same result was reached in *Barrentine v Arkansas-Best Inc*, 450 US 728 under the Fair Labor Standards Act. In both cases, the Court emphasized the important "public" rights at issue and the perceived inability of the arbitral process satisfactorily to resolve disputes concerning such rights.

207 *United Steel Workers of America v Enterprice Wheel Corp*, 363 US 593, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614, *Apollo Computer Inc v Berg*, 886 F2d 469.

208 *Libyan Oil Co. v Socialist People's Libyan*, 482 Fsupp 1176.

209 *Mitsubishi Motors Corp v Soler-Crysler Plymouth Inc*, 473 US 614.

210 *Shearson v McMahon* 482 US 220, *Rodriuez v Shearson Inc*, 490 US 477, *Riley v Kingley Underwriting Ltd* 969 F2d. 953, Decision of the Bologna Tribunal on July 18, 1987 XVII Y.B. Comm. Arb. 534 (1992). *Georgia Power Co. v Cimarron Coal Corp*, 526 F2d 101. G.H. Sampliner, "Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin," 11 *Int'l Arb. Rep.* 22 (September 1996); H.G. Gharavi, "The Legal Inconsistencies of *Chromalloy*," 12 *Int'l Arb. Rep. 21* (May 1997).

211 *Kowalski v Chicago Tribune Co*, 854 F2d 168, *Gilmer v Johnson Lane Corp* 11 S.Ct. 1647.

212 *Ledee v Ceramiche Ragno*, 684 F2d 184.

213 *Cole v Burns Int'l Sec. Servs*., 105 F.3d 1465, 1468–69 (D.C. Cir. 1997) (regarding cases of contracts to arbitrate statutory claims, the court stated it had "assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law");

another method of dispute resolution, but not equally alternative to litigation and litigation is the system that affirms legality and justice.

3 Initiating the arbitration

The FAA does not mandate notice or a particular form of notice of arbitration. It is in the claimant's interest that the respondent receives notice of the commencement of the arbitration process because commercial arbitration is a consensual process. To the extent that a contracting party perceives that the other party is not willing to nominate an arbitrator, then it may seek recourse to the court by filing a petition seeking a court order to compel the other party to proceed to arbitration[214]. This means that the court will examine and interpret the parties' arbitration agreement. The constitutional doctrine of due process guarantees to parties a minimum degree of fairness[215]. The giving of notice and the sufficiency of notice become issues when one party wants a claim to be arbitrated and the other side does not. The party who seeks to compel arbitration may elicit the aid of a court and the party who seeks to avert it can apply to a court for a stay of the arbitration proceedings. The issue of notice is presented when a party is seeking to prevent arbitration on the ground of unreasonable delay or on the ground that the party claiming the right to arbitrate has not complied with contractual terms for notice or other contractual prerequisites to arbitration[216]. The court in *Totem Marine Tug & Barge Inc. v North American Towing*[217] held the need for a minimal level of notice in order to achieve a fundamental fair hearing. The FAA is silent on the standard for the adequacy of notice but the notice must allow a party to have a fair opportunity to be heard on those claims. While the FAA allows parties to appeal decisions not to compel arbitration, this right would be pointless without constant support from the judiciary to stay proceedings until issues concerning arbitrability were resolved[218]. A motion to compel arbitration under section 4 of the FAA must be made in the district with authority over the forum selected in a private bargained-for agreement[219].

Under US law a party is ordinarily not required to commence arbitration before the adverse party files suit[220]. Besides, under most institutional rules, the

Dick v Dick, 534 N.W.2d 185, 190–91 (Mich. Ct. App. 1995) (allowing for the use of binding arbitration in resolving child custody disputes); *Faherty v Faherty*, 477 A.2d 1257, 1263 (N.J. 1984) (in dicta, stating that an arbitrator may be as capable of protecting a child's best interests as is a judge).

214 *East v M/V Alaia*, 673 F Sup 796.

215 R. Force, "Administrative adjudication of traffic violations confronts the doctrine of separation of powers," 1974 *Tul LR* 84.

216 *General Guar Co. v New Orleans Agency*, 427 F2d 924, *Alascon Inc. v ITT North Elec Co*, 727 F2d 1419, *John Wiley & Sons Inc v Livingston*, 376 US 543.

217 607 F2d 649.

218 *McCauley v Halliburton Energy Servs. Inc.,* 413 F.3d 1158, 1159 (10th Cir. 2005).

219 *Ansari, L.P. v Qwest Commc'ns Corp.*, 414 F.3d 1214, 1215 (10th Cir. 2005).

220 *General Guaranty Ins. Co. v New Orleans General Agency*, 427 F2d 924.

respondent will be afforded an opportunity, within specified time-limits, to reply to the claimant's request for arbitration and assert any counterclaims. It seems that a court has the power and role of initiating arbitration process, which means interpretation of the parties' agreement and arbitrability.

4 The arbitration agreement

Can all parties be compelled to arbitrate their disputes? Parties cannot be compelled to arbitrate disputes under the FAA unless they have agreed to do so[221]. The FAA forbids federal courts from applying state statutes and decisions, which limit arbitration agreements[222]. Thus, the court may not impose arbitration on a party that has not agreed to be subject to it[223]. Moreover, arbitration under the FAA is a matter of consent not coercion and the parties are generally free to structure their agreement as they see fit.[224] An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation of arbitration. If there is a valid arbitration, there must first be a valid agreement to arbitrate.

Historically, arbitration clauses were treated as separable parts of the contract, although such treatment generally meant the agreement was being deprived of its efficacy[225]. The *Prima Paint* Court established the doctrine of separability, ruling that to avoid arbitration, claims of fraud in the inducement must specifically go "to the 'making' of the agreement to arbitrate" itself, not to the entire agreement generally. However, in the 2003 case of *Spahr v Secco*[226], the Tenth Circuit Court of Appeals held that mental incapacity claims must be decided by a court before going to arbitration. Until the *Spahr* decision, circuit courts routinely applied *Prima Paint*, sending almost all cases with arbitrability disputes to arbitration without much analysis.

An arbitration agreement may be spelt out in the main contract, as an arbitration clause[227], or it may be set down in a separate "submission to arbitration." The FAA covers e-contracts as well[228]. Section 2 does not require that merely because

221 *Manhattan Construction Company v Rotec Inc* 905 F Sup 1142, *Paine Webber Inc, v Charles Landay*, 903 F Sup 193, 9 US 2 James R. Foley, Recent Development: *Bradford-Scott Data Corp., Inc. v Physician Computer Network, Inc.*, 13 *Ohio St. J. On Disp. Resol.* 1071, 1071 (1998). When a party is resolute on trying to avoid arbitration, "a federal district court may be required to ascertain whether an arbitration clause contained in an agreement between or among the involved parties requires that the dispute be submitted to arbitration."

222 *Houlihan v Offrman*, 31 F3d 692, *Prudential Securities Inc v Emerson*, 905 Fsup 1038, *Doctor's Association v Casaroto*, 134 Led2d 902.

223 *Fleet Tire Service v Oliver Rubber Corp*, 118 F3d 619.

224 *Goodwin v Ford Motor Credit*, 970 Fsup 1007.

225 *Hamilton v Home Insurance*, 137 US 370.

226 *Spahr v Secco*, 330 F.3d 1266 (10th Cir. 2003).

227 Arbitration Clause Incorporated into Agreement by Reference through Email Enforced – *Ibeto Petrochemical Industries Ltd. v M/T "Beffen" and Bryggen Shipping and Trading A/S*, Case No 05 Civ 2590 (SAS), United States District Court for the Southern District of New York (21 November 2005).

228 Christopher R. Drahozal, "New Experiences of International Arbitration in the United States," 54 *Am. J. Comp. L.* 233, 251–53 (2006) (noting the FAA's coverage of e-contracts and how the

a contract contains an arbitration clause, every dispute arising under the contract must be arbitrated. A broad arbitration clause allows the court to compel arbitration and permits the arbitrator to decide whether the dispute is arbitrable. A narrow clause requires the court itself to decide if the dispute is arbitrable[229]. In addition, an arbitration clause contained within a non-existent agreement cannot exist. Claims that an agreement does not exist can rest, among other things, on the absence of any written instrument, the failure of consideration, the existence of an agreement, between the parties, or the absence of any meeting of the minds—general contract law principles would deny the existence of any binding contract in these circumstances[230]. The most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes[231]. Therefore, in order to minimize the likelihood of expensive court proceedings to determine arbitrability, courts should refrain from deciding questions of performance of substantive terms of the contract except where expressly required to do so by the parties[232].

The courts have similarly held that the illegality of part of the contract does not nullify an agreement to arbitrate. Nor does the alleged breach or repudiation of the contract preclude the right to arbitrate.[233] The question is whether a claim

US differs from most other countries in enforcing pre-dispute arbitration agreements in consumer electronic contracts).

229 *Prudential Lines v Exxon Corp*, 704 F2d 59. Joshua R. Welsh, "Has Expansion of the FAA Gone Too Far?: Enforcing Arbitration Clauses in Void *Ab Initio* Contracts," *Marq. Law Rev*, vol. 86 (2002), pp. 581, 595 n.112 ("This holding, it would seem, allows an arbitration agreement to which both parties had not agreed, to nonetheless allow an arbitrator to determine his own jurisdiction based on the mere fact that the agreement contained pertinent language."). Charles L. Knapp, "Taking Contracts Private: The Quiet Revolution in Contract Law," 71 *Fordham L. Rev* 761, 793 (2002) (writing that "under the FAA as currently construed … by the Supreme Court … it is virtually impossible for either a court or a state legislature to take the position that an arbitration clause must meet standards of disclosure or conspicuousness any higher than those imposed on any other contractual term"); In *General Power Products v MTD Products, Inc. & Chongqing Zongshen General Power Machine Co*, the Court held that the defendant had standing to compel arbitration, but denied defendant's motion to compel arbitration. The District Court held that the arbitration clause was limited to the interpretation of the agreement, and that no interpretation was necessary to sustain the specific claims – tortious interference, trade secret misappropriation, and unfair competition – alleged by Plaintiff. *General Power Products, LLC v MTD Products, Inc. & Chongqing Zongshen General Power Machine Co. Ltd.,* Case no: 06-CV-143, District Court for the Southern District of Ohio, USA. (20 March 2007).

230 *Restatement of Contracts*, 2d ed, 1981, Sections 3, 178–9.

231 *Bauhimia Corp v China Nat'l Machinery*, 819 F2d 247, *Mediterranean Enterprises Inc v Scangyong Corp*, 708 F2d 1458. Justice Stevens states that the Court's recent decisions "have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration" over litigation. *Circuit City Stores, Inc. v Adams*, 532 US 105, 109 (2001) (narrowly construing an FAA provision excluding from its pro-arbitration mandate "contracts of employment of … workers engaged in foreign or interstate commerce" at 105, 131–32 (Stevens, J., dissenting).

232 *Hydrick v Management Recruiters*, 738 Fsupp 1434, *Pennsylvania Data v Nixdorf Computer Corp*, 762 Fsupp 96.

233 *Wilko v Swan*, 201 F2d 439. The court rejected the argument that the arbitration agreement should be severed from the contract and enforced on its own. According to the court, New York law,

of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators. The view of the Court of Appeals for the Second Circuit[234], is that – except where the parties otherwise intend – arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. On the one hand, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the "making" of the agreement to arbitrate – the federal court may proceed to adjudicate it[235]. So, to immunise an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract. On the other hand, the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Especially, in ruling upon a section 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. As the "saving clause" indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so[236].

The existence of any agreement at all between the parties by its nature cannot fall within the scope of arbitration[237]. So, the question of the very existence of a charterparty, which embodies the arbitration agreement, requires

which applies to the question of contract formation under the FAA, provides that no contract will arise if a condition precedent to the formation of that contract is not met. Because the contract was void, rather than merely voidable, the plaintiffs were only required to challenge the validity of the contract, not the arbitration clause in particular, to bar enforcement. *Adams v Suozzi*, Case No. 04-6017, US Court of Appeals for the Second Circuit 30 December 2005.

234 *Prima Paint Corp v Flood & Conklin*, 388 US 395, *Shaffer v Jeffrey*, 915 P.2d 910 (Okla. 1996) (agreement to arbitrate is voidable when fraudulently induced).

235 *Moseley v Electronic Facilities*, 374 US 167. If the contract embodying a purported arbitration agreement never existed, the arbitration agreement itself does not exist. *Specht v Netscape Commc'ns Corp*., 306 F.3d 17, 26 (2nd Cir. 2002); *Interocean Shipping Co. v Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676 (2nd Cir. 1972). "Void" contracts "produce no legal obligation." "Voidable" contracts are subject to rescission, but otherwise create legal obligations *Sphere Drake Ins. Ltd. v Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2nd Cir. 2001). A contract is "void" when, for example, there was no meeting of the minds about essential terms or where there was fraud in the factum. *Denney v BDO Seidman*, L.L.P., 412 F.3d 58, 67–68 (2nd Cir. 2005). If a contract is "void," a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically; if a contract is "voidable," the party must show that the arbitration clause itself is unenforceable. When there is a "condition precedent to the formation or existence of the contract itself … no contract arises 'unless and until the condition occurs.'" *Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon, & Co.*, 86 N.Y.2d 685, 690, 636 N.Y.S.2d 734, 737 (1995) (citation omitted) (emphasis added); accord *SCS Commc'ns, Inc. v The Herrick Co.*, 360 F.3d 329, 341 (2nd Cir. 2004). Only if a contract is "void," and not "voidable," can a party challenge the enforceability of an arbitration clause without alleging a particular defect with that clause.

236 *Guaranty trust Co. v York*, 326 US 99.

237 *Merrit-Chapman v Pennsylvania Comm*, 387 F2d 768.

a trial under section 4[238]. Some decisions, like *El Hoss*[239], rely on the parties' intentions in concluding that the parties' arbitration clause was not separable and that the non-existence of any underlying contract deprives the arbitrators of jurisdiction. A party who affirmatively requests a ruling from the tribunal on the arbitrability of its claims cannot later challenge the tribunal's jurisdiction in court[240]. A few lower courts have held that challenges to the legality of the underlying agreement require judicial resolution[241]. A court cannot bypass the arbitration agreement simply because a public policy issue might arise[242]. Nussbaum[243] said that the invalidity of the main contract entails invalidity of the arbitration agreement. Moreover, US courts have uniformly held that an agreement to arbitrate is not rendered invalid by a claim that the underlying contract has been rescinded[244]. Besides, a few lower courts have considered claims that an arbitration clause is unenforceable because the underlying contract lacked consideration or mutuality[245]. The Supreme Court[246] narrowly limited the circumstances in which a federal law will be held to render particular arbitration agreements invalid. Fraud, or misrepresentation, is a defence one may use to challenge an arbitration provision[247]. When federal law does render arbitration agreements invalid, the claims at issue are usually deemed "non-arbitrable." US courts have generally held that claims of novation or termination, when directed specifically at the arbitration provision, are for judicial resolution[248].

There must be written evidence of the agreement to arbitrate. The requirement of writing is to be found both in international treaties and in national law. In fact, agreement in writing is sufficient for enforcement as an agreement to arbitrate disputes need not be signed or subscribed to by parties[249]. A submission agreement

238 *Interocean Shipping Co. v National Shipping Corp*, 462 F2d 673.

239 *El Hoss Engineering Co. v American Independent Co*, 289 F2d 346, *Republic of Nicaragua v Standard Fruit Co*, 937 F2d 469, *Republic of Philippines v Westinghouse Electric Corporation*, 714 Fsupp 1362.

240 *PowerAgent, Inc. v Electronic Data Systems Corp.*, 358 F.3d 1187 (9th Cir. 2004).

241 *Michele Amoruso v Fisheries Corp*, 499 Fsupp 1074.

242 *National Rail passenger Corp v Consolidated Rail Corp*, 892 F2d 1066.

243 R. Nussbaum "The Separability Doctrine in American and Foreign Arbitration" 17 *NYU LR* 609.

244 "Annotation, Violation or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein," 3 *ALR* 2d 378.

245 *Lawrence v Comprehensive Business Services*, 833 Fsupp 1159, *Axtell v Merrill Lynch*, 744 Fsupp *194 Seymour v Gloria Jean's Coffe Bean Corp*, 732 Fsupp 988, *Compare hull v Norcom Inc*, 750 F2d 1547.

246 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*, 473 US 614 (1985).

247 In re FirstMerit Bank, N.A., 52 S.W.3d 749, 756 (Tex. 2001) (discussing consumers' challenge of arbitration based on fraud, along with unconscionability, duress, and revocation).

248 *Compare China Resource v Fayda Int'l Inc*, 747 Fsupp 1101, *National Rail Passenger Corp v Consolidated Rail Corp*, 892 F2d 1066.

249 *Ocean Industries Inc v Soros Associates*, 328 F Sup 944. The Court held that parties to a contract are Free to withdraw their agreement to arbitrate by amending the contract, if they do so unambiguously The court noted the strong federal policy in favor of arbitration and the presumption in favor of contract interpretations that give effect to an arbitration provision. Nonetheless, it held that the parties to a contract are free to withdraw their agreement to arbitrate by

can take the form of a brief agreement to submit an existing dispute to the procedures of an arbitral institution. Arbitration clauses in point and click electronic contracts are enforceable notwithstanding the FAA (9 USC. 4) requirement of a "written" agreement. Courts have held that the parties' acceptance – either orally or by conduct – of an unsigned, written contract containing an arbitration clause satisfies section 2 of the FAA[250]. The Federal Circuit held that the district court, not the arbitrator, should decide whether the plaintiff was a successor to an agreement that required arbitration of a dispute[251]. The US Court of Appeals for the Second Circuit declined to enforce an arbitration clause under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where the clause was on a purchase order that was not signed by the party who was resisting arbitration[252]. Most new laws of arbitration are concerned with defining the requirements for writing as widely as possible. For instance the 1996 Act in England includes an agreement made orally that there is reference to a written form which itself contains an agreement to arbitrate. An oral agreement to written terms that contain an arbitration agreement is sufficient.

The policy favouring arbitration does not go so far as to authorize courts to force arbitration when the parties have not agreed to arbitrate and so in *Wachovia Bank N.A. v Schmidt*[253], the Fourth Circuit Court of Appeals denied a petition to compel arbitration by a bank accused of fraudulently inducing an investor's participation in a tax shelter because the court determined that in spite of two broadly worded arbitration clauses in documents connected to the underlying transaction about which the investor complained, the dispute was not arbitrable. Hence, arbitration clauses in documents connected to but not themselves at the heart of the dispute, are an insufficient basis to compel arbitration[254]. Besides, in

amending the contract, if they do so unambiguously. It is not necessary to explicitly refer to the prior arbitration provision in order to do so. Here, the new forum-selection clause was an unambiguous revocation of the arbitration clause because it was exclusive and therefore inconsistent with a continuing obligation to arbitrate. *Spanski Enterprises, Inc. & Poltel International LLC v Telewizja Polska*, S.A., Case no: 07-930, United States District Court, Southern District of New York, USA. (23 April 2007).

250 *Imptex International Corp v lorprint Inc*, 625 FSupp 1572.

251 *Microchip Technology Inc. v US Philips Corp.,* 367 F.3d 1350 (Fed. Cir. 2004).

252 In *Kahn Lucas Lancaster, Inc. v Lark International, Ltd.* (2nd Cir. 7/29/99).

253 445 F.3d 762 (4th Cir. 2006). In *Reddam v KPMG LLP & Sidley Austin Brown and Wood LLP*, 457 F.3d 1054 (9th Cir. 2006). The Ninth Circuit held that the arbitration agreement's language referencing the NASD rules was not integral to the arbitration agreement. *ING Fin. Partners v Johansen*, 446 F.3d 777 (8th Cir. 2006) (broker's employment agreement providing for arbitration of "any dispute … in accordance with the rules of the National Association of Securities Dealers" was broad enough to permit arbitration of sex discrimination claims despite fact that NASD rules themselves did not extend to such claims). *Marks 3-Zet-Ernst Marks GmbH & Co. KG v Presstek, Inc*, 455 F.3d 7 (1st Cir. 2006).

254 *US Small Business Administration v Chimicles*, 447 F.3d 207 (3rd Cir. 2006) (receiver's claims against investment fund subscription agreement not subject to arbitration clause of fund's partnership agreement); *Suburban Leisure Center, Inc. v AMF Bowling Products, Inc.*, 2006 US App. LEXIS 28508 (8th Cir. 2006) (claims based on earlier oral agreement not subject to arbitration clause of later written agreement containing merger and integration clause); *Tittle v*

Image Software, Inc. v Reynolds & Reynolds Co.[255]., the court held that since there was a basis to conclude that the updated software fell within the original agreement, the dispute was subject to its arbitration clause. An arbitration agreement does not only evidence the consent of the parties to arbitrate but also serves as a basic source of the powers of the arbitral tribunal. An arbitral tribunal can exercise such powers as the parties are entitled to confer and do confer upon it. It is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal. The parties are masters of the arbitral process to an extent impossible in proceedings in a court of law.

Who interprets the clause? Does the arbitrator decide on the existence of a valid arbitration agreement between the parties? Arbitration agreements are no more than contracts to which usual rules of contract interpretation apply[256]. In interpreting any contract, the court must be confident that the contract is not ambiguous[257]. The court cannot expand the parties' agreement to arbitrate even in the interest of preventing piecemeal litigation.

Arbitration agreements can be incorporated by reference[258]. Any claims out of bills of lading contracts make their way into arbitration when there is an arbitration clause contained in the bill of lading contract. An arbitration clause should be enforceable even if the dispute is over validity of a contract containing such a clause[259]. A choice of law provision will not be construed to impose restrictions on parties' rights under the FAA[260]. The US Carriage of Goods by Sea Act 1936 does not invalidate the foreign choice of law and choice of forum provision

Enron Corp., 463 F.3d 410 (5th Cir. 2006) (dispute among insureds about division of insurance policy proceeds not subject to arbitration clause in insurance contract that required arbitration of claims between insureds and insurer). *Cf. Lipton-U. City, LLC v Shurgard Storage Crts*., Inc., 454 F.3d 934 (8th Cir. 2006) (clause providing that if purchase option was exercised the parties would arbitrate "additional terms … not contemplated by" the contract did not require arbitration of price term that had been contemplated by the contract but rescinded by the court on the basis that there had been no meeting of the minds).

255 459 F.3d 1044 (10th Cir. 2006).

256 *Singer v Smith Barney Shearson*, 926 F Sup 183, *Scott-Data Corp Inc v Physician Computer Network Inc*, 136 F3d 1156. *Sphere Drake Ins. Ltd. v All Am. Ins. Co*., 256 F.3d 587, 591 (7th Cir. 2001) (concluding that as arbitration depends on a valid contract, an argument that the contract does not exist and cannot logically be resolved by the arbitrator); *Canada Life Assurance Co. v Guardian Life Insurance Co.*, 242 F. Supp. 2d 344, 349 (S.D.N.Y. 2003) ("it is well settled that when the existence of the contract from which the obligation to arbitrate arises is itself called into question, it is the obligation of the court, before a dispute is referred for arbitration to determine, in the first instance, whether the contract itself is valid").

257 *Cable Science Corp. v Rochadle Village Inc*, 920 F2d 147.

258 *Kidder, Peabody & Co. v Zinsmeyer Trusts Partnerships*, 41 F3d 861.

259 *Sokagon Enterprise Corp. v Tushie-Montgomery Associates Inc*, 86 F3d 656, *Spahr v Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) where a party claims a lack of mental capacity to enter into a contract, a court rather than an arbitrator should decide the claim.

260 *Paine Webber Inc v Bybyk* 81 F3d 1193, *Volt Information Services Inc v Stanford University*, 439 US 468 "Selection of California arbitration rules upheld." *Shalala v Illinois Council on Long Term Care, Inc.*, 529 U. S. 1 (2000) R032; No. 98-1109; 2/29/00. *R Lawerence Co. v Devonshire Fabrics Inc*, 271 F2d 402.

in arbitration clauses of bills of lading[261]. In conclusion, the question of what constitutes abandonment of an arbitration agreement is a question of fact[262]. The arbitrability of a dispute is examined after a court is satisfied that an arbitration agreement is valid[263].

Do courts authorise the whole arbitral process? Is the existence of a valid agreement containing an enforceable arbitration provision a question reserved for the court?[264] Unless the parties explicitly provide otherwise, it is argued that the court, rather than the arbitrator, determines whether the parties agreed to arbitration[265]. The court will not resort to rules of construction where the intent of the parties is clear and unambiguous[266]. Besides, silence or ambiguity with respect to whether a particular claim is within arbitration agreement is interpreted in favor of arbitration[267]. If the arbitration agreement falls within the scope of the FAA, the court must engage in a two-part inquiry to ascertain whether a dispute is arbitrable before it and it then orders the parties to proceed with arbitration[268]. For instance, sale and delivery of goods across state lines demonstrates interstate commerce in its most basic form[269]. In *Prima Paint Corp. v Flood & Conklin Manufacturing Company*[270] the district court and the court of appeals held the

261 *Vimar Seguros v M/V Sky Reefer*, 115 S.Ct.2322. 46 USC. 1300.

262 *Dean Witter Reynolds Inc v Fleury*, 138 F3d 1339. *Davis v Houston Lighting & Power*, 990 F Sup 515.

263 *Hoffman v Aaron Kamni Inc*, 927 F Sup 640, *Svedala Industries Inc v The Home Insurance Company*, 921 F Sup 576. *Prima Paint Corp v Flood & Conklin* 388 US 395 "an allegation of fraudulent inducement of a contract containing an arbitration clause was arbitrable under the FAA."

264 *Pollux Marine Agencies v Louis Dreyfs Corp*., 455 F Sup 211, *IDS Life Ins Co. v SunAmerica Life Ins Co*, 136 F3d 537.

265 *Thomas v A Baron Co,* 967 Fsup 783. *Green Tree Fin. Corp. v Randolph*, 531 US 79, 91 (2000) (declining to invalidate arbitration agreement based on speculative evidence of its high costs, which "would undermine the 'liberal federal policy favoring arbitration'" Harry H. McWilliams, II *V* Logicon, Inc., D.C. No. 95-2500-GTV. The court reviewed the district court's ruling regarding the arbitrability of Mr. McWilliams' claims *de novo*. The court has concluded that the exceptions specified in 9 USC. § 1 extend only to those individuals employed directly in the channels of commerce itself. *Paladino v Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1069–61 (11th Cir. 1998) (Cox, J. and Tjoflat, J. concurring). The workers engaged in interstate commerce exclusion do not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce. *United Elec., Radio & Mach. Workers of Am. v Miller Metal Prod., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (rejecting a narrow construction of the exemption, but expressly limiting its holding to CBAs). Because the Fourth Circuit has not reaffirmed this holding in over 40 years, there is some question whether it is still good law. *Asplundh Tree Expert v Bates*, 71 F.3d 592, 600 (6th Cir. 1995).

266 *McDonalds Corp v Goler* 560 NW2d 458, *Harmsen v Mcdonalds Inc* 403 NW2d 48.

267 *Smith Barney Inc v Vogele* 967 Fsup 165.

268 *Hoffman v Cargill Inc* 968 Fsup 465, *Daisy MFG Co. v NCR Corp* 29 F3d 389, *Hodge Bros v Delong Co* 942 Fsup 412.

269 *Farmers Grain Co. v Langer* 273 F 635.

270 *Prima Paint Corp. v Flood & Conklin Mfg. Company*, 388 US 395, 398-99 n.2 (1967). Andre V. Egle, Comment, *Back to Prima Paint Corp. v Flood & Conklin Manufacturing Co.*: "To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement," 78 *Wash.*

arbitrator, not the court, should determine whether there had been fraud in the inducement of the contract and the avoidance of arbitration would not be justified based on an allegation of fraud in the inducement of a contract simply because it contained an arbitration clause. In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clear and unmistakable" evidence to the contrary)[271] and these limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide and so a clear reference in the parties' arbitration agreement means that the arbitrator decides it[272]. It seems that in the same case the Supreme Court considers that matters such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy falls into the category of matters that the contracting parties would likely have expected a court to decide, and therefore the question of whether an arbitration agreement survives a corporate merger is decided by a court[273]. Thus, the Supreme Court establishes that certain aspects of arbitration are the main area where courts have the authority to interpret and establish precedent. The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts[274]. According to Justice Thomas the FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement[275]. The decision of *what* to

L. Rev 199, 211–12 (2003). (While it is true that if there are grounds for invalidating the Arbitration agreement between parties, it should be specifically pled, that in and of itself will not end the court's inquiry. One state supreme court that considered the issue indicated that it will look beyond the pleadings to make a determination of whether the defense bears upon the arbitration agreement or the container contract.)

271 *AT&T Technologies, Inc. v Communications Workers,* 475 US 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *Chelsea Square Textiles, Inc. v Bombay Dyeing & Mfg. Co.,* 189 F.3d 289, 294 (2nd Cir. 1999). *Howsam v Dean Witter Reynolds, Inc.,* 537 US 79, 83 (2002). *Norfolk & Western R. Co. v Train Dispatchers,* 499 US 117, 129. *United States v American Building Maintenance Industries,* 422 US 271 *Gulf Oil Corp. v Copp Paving Co.,* 419 US 186, 202, an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used.

272 *Green Tree v Bazzle* 351 SC 244 *Green Tree Financial Corp., Nka Conseco Finance Corp., Petitioner v Lynn W. Bazzle, etc., et al.* laws.findlaw.com/us/000/02-634.html.

273 *John Wiley & Sons v Livingston* 376 US 543.

274 *Major League Baseball Players Assn. v Garvey,* 532 U. S. 504, 509–510 (2001). *Perry v Thomas*, 482 US 483 (1987) (preempting state statute that prohibited arbitration in wage disputes). *Red Cross Line v Atlantic Fruit Co*, 264 US 109, 120–21 (1924) ("In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced …. If there be a right to specific performance of an arbitration provision in a CBA we must find it in an act of Congress.").

275 *Green Tree Financial Corp., Nka Conseco Finance Corp. V Bazzle*, laws.findlaw.com/us/000/02-634.html. Peter J. Kreher & Pat D. Robertson III, Case Comment: Substance, Process and the Future of Class Arbitration, 9 *Harv Negot. L. Rev* 409, 421–422 (2004) ("The Bazzle decision overrules this line of cases by allowing an arbitrator to certify a class when an agreement is silent or ambiguous on that issue."). Linda R. Hirshman, "The Second Arbitration Trilogy: The Federalization of Arbitration Law," 71 *Va. L. Rev* 1305, 1378 (1985) (concluding that the state

submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract according to many court decisions is for the court, not for the arbitrator. Besides, in *Green Tree v Bazzle* Justice Stevens' interpretation of the parties' agreement was that it is to be made in the first instance by the arbitrator, rather than the court. In *Telectronics Pacing Systems Inc. v Guidant Corp.*[276] the arbitration clause had an exception for disputes where a third party was a necessary party – but the clause stated that the arbitrators were to determine whether a third party was a necessary party. Thus, the issue of whether the conditions for the exception to arbitration were satisfied was an issue for the arbitrators, not the court. Moreover, In *Buckeye Check Cashing Inc. v Cardengna*[277] the Supreme Court first confirmed that an arbitration provision is severable from the contract in which it appears. As long as the challenge is not to the arbitration clause itself, the contract's validity should be determined by the arbitration tribunal. And, finally, the court held that this analysis applies whether the court proceedings concerned are in federal or state courts. The validity of the contract at issue was thus a decision to be made by the arbitration tribunal. It is now beyond doubt that when a dispute in the US concerns the validity of a contract as a whole, rather than just the arbitration provision, it will be resolved by the arbitrator. Thus, in *Buckeye*[278], the Court expanded the holding in *Prima Paint* by finding that an arbitrator rather than a court decides a claim that a contract is void for illegality. On the other hand arbitration as a co-equal to courts' dispute mechanism should permit all matters to be decided exclusively by the arbitrator. While the FAA requires a contract containing an arbitration clause to be in writing, it does not require that contract to be signed, and Scalia in *Buckeye*[279] states that the claim that the contract was in fact never signed will be heard in court, and not sent to the arbitrator. Mental capacity is a valid adjudicable legal defence to the entire contract, including the arbitration clause. Moreover, Justice Thomas, dissenting in *Buckeye* specifies that: "I remain of the view that the FAA (FAA), 9 USC §1 et seq., does not apply to proceedings in state courts. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 US 265, 285–97

law-making after *Southland* is limited to providing "neutral rules of contract formation and enforcement addressed only to the arbitration clause … [which] will be examined in light of the federal policy favoring arbitration").

276 143 F.3d 428 (8th Cir. 1998).

277 *Buckeye Check Cashing Inc v Cardengna* (Unreported, 2006) (Sup Ct (US)) Cardegna, 894 So. 2d at 861 the majority concluded that "where a party sufficiently alleges that a contract is void … the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract."

278 In its only arbitration decision of 2006, *Buckeye Check Cashing v Cardegna*, 126 S. Ct. 1204 (2006), the US Supreme Court reaffirmed the severability principle, emphasizing that arbitral tribunals have power to decide the validity of agreements containing arbitration clauses, at 1210. The Supreme Court held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." Syllabus, *Buckeye Check Cashing, Inc. v Cardegna et al.* "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."

279 *Buckeye*, 126 S. Ct. 1204, 1208.

(1995) (Thomas, J., dissenting); *Doctor's Associates, Inc. v. Casarotto*, 517 US 681, 689 (1996) (same); *Green Tree Financial Corp. v. Bazzle*, 539 US 444, 460 (2003) (same). Thus, in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law."

A nonsignatory to an arbitration agreement may require enforcement of that agreement if he is bound by the agreement under ordinary contract and agency principles[280]. Moreover, the Eleventh Circuit US Court of Appeals ruled that a non-signatory to an arbitration agreement could require a signatory to arbitrate. The court, relying on the legal doctrine of equitable estoppel, ruled that when a person who has signed an arbitration agreement alleges substantially interdependent and concerted misconduct by the non-signatory and one or more signatories, the non-signatory may compel arbitration of the dispute[281]. Under the Fifth Circuit's decision in *Grigson v Creative Artists Agency, L.L.C*[282] the trial court could sustain Carson's motion to compel arbitration under the doctrine

280 *Valdiviezo v Phelps Smelter Inc* (1997) 995 F Sup 1060. In *KKW Enterprises, Inc. v Gloria Jean's Gourmet Coffees,* (1st Cir. 7/19/99), the US Court of Appeals upheld an arbitration clause in a franchise agreement that required the arbitration hearing to be held in Chicago, Illinois. *EEOC v Waffle House, Inc*., 534 US 279, 289 (2002) (stating that liberal policy favoring arbitration does not require binding nonparties to arbitration agreement).

281 *MS Dealer Serv Corp. v Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (outlining the two situations in which nonsignatories can use equitable estoppel to compel arbitration against signatories that *Grigson* transforms into its two-prong test). *Alliance Title Co. v Boucher*, 25 *Cal. Rptr.* 3d 440, 445–47 (Ct. App. 2005) (discussing and applying *Grigson's* first prong to compel a signatory to arbitrate its claims with a nonsignatory); *Hughes Masonry Co. v Greater Clark County Sch. Bldg. Corp*., 659 F.2d 836, 840–41 (7th Cir. 1981) (compelling the plaintiff to arbitrate with a nonsignatory because his tortuous interference claims relied on a contract containing an arbitration provision). *Koechli v BIP Int'l, Inc.,* 870 So. 2d 940, 944 (Fla. Dist. Ct. App. 2004) (adopting *Grigson's* two-prong test from *Westmoreland v Sadoux,* 299 F.3d 462 (5th Cir. 2002)); *Autonation Fin. Servs. Corp. v Arain*, 592 S.E.2d 96, 101 (Ga. Ct. App. 2003) (applying *Grigson* estoppel to allow a nonsignatory defendant to compel arbitration with a plaintiff where the court found both *Grigson* prongs met); *Luke v Gentry Realty, Ltd.,* 96 P.3d 261, 268 (Haw. 2004) (adopting *Grigson's* two-prong test from *Westmoreland).*

282 210 F.3d 524 (5th Cir. 2000). *Grigson,* 210 F.3d at 526 ("Proceedings against parties and non-parties to the arbitration agreement are stayed pending the outcome of arbitration, when the action against the non-party is dependent upon interpretation of the underlying contract.") *Alliance Title Co. v Boucher,* 25 *Cal. Rptr.* 3d 440, 445–47 (Ct. App. 2005) (discussing and applying *Grigson's* first prong to compel a signatory to arbitrate its claims with a nonsignatory); *Koechli v BIP Int'l, Inc.,* 870 So. 2d 940, 944 (Fla. Dist. Ct. App. 2004) (adopting *Grigson's* two-prong test from *Westmoreland v Sadoux,* 299 F.3d 462 (5th Cir. 2002)); *Autonation Fin. Servs. Corp. v Arain*, 592 S.E.2d 96, 101 (Ga. Ct. App. 2003) (applying *Grigson* estoppel to allow a nonsignatory defendant to compel arbitration with a plaintiff where the court found both *Grigson* prongs met); *Luke v Gentry Realty, Ltd.*, 96 P.3d 261, 268 (Haw. 2004) (adopting *Grigson's* two-prong test from *Westmoreland). On the other hand* see *E.I. DuPont de Nemours & Co. v Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199–202 (3rd Cir. 2001) (declining to compel a nonsignatory to arbitrate with a signatory under an intertwined claims version of equitable estoppel). *Ervin v Nokia, Inc.,* 812 N.E.2d 534, 542–43 (111. App. Ct. 2004) (rejecting *Grigson* estoppel in favor of traditional estoppel as defined by Illinois law).

of equitable estoppel. *Grigson* estoppel excessively stretches the applicability of arbitration to cover cases in which there is no existing agreement, literally or constructively, between the parties at suit. Frank Z. LaForge[283] argues that: "courts should only compel signatories to arbitrate with nonsignatories under traditional theories of agency, third-party-beneficiary doctrine, and in rare cases, traditional equitable or promissory estoppel." The court in *Sunkist* stated that both a substantial nexus must exist between the non-party that wishes to compel arbitration and one of the parties, and that the dispute at issue be "intimately founded in and intertwined with" the arbitration agreement or the underlying contract[284]. Hence, non-signatories can enforce arbitration against signatories where the non-signatory is a third-party beneficiary of the contract[285]. Neither the FAA nor the US Supreme Court defined what constitutes an agreement to arbitrate[286]. The involvement in

283 Frank Z. LaForge, "Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under *Grigson v Creative Artists, 2005*," *Texas Law Review* 225 at 255. *Philadelphia Flyers, Inc. v Trustmark Ins. Co*., No. 04-2322, 2004 US Dist. LEXIS 12772, at *10 (E.D. Pa. 2004). The court held that principles of equitable estoppel may require a non-signatory to be bound by the terms of a contract, including an arbitration clause, if the non-signatory attempts to enforce the terms of the contract. Anthony M. DiLeo, "The Enforceability of Arbitration Agreements By and Against Nonsignatories," 2 *J. Am. Arb.* 31 (2003) (discussing the issues presented in addressing the enforceability of arbitration agreements by and against nonsignatories to those agreements); James M. Hosking, "The Third Party Nonsignatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent," 4 pepp. *Disp. resol. L.J.* 469 (2004) (discussing the nonsignatory issues within the framework of intemational arbitration law); Hope T. Stewart, "The Equitable Estoppel Argument For and Against Commercial Arbitration: From *Hughes Masonry Co. Inc. v Clark County School Building Corp.* to *Northern, Ltd. v R.E. James*, 103 Com. L.J. 336 (1998) (arguing against the judicial development of new forms of equitable estoppel allowing the enforcement both by and against nonsignatories).

284 *Sunkist Soft Drinks Inc v Sunkist Growers* 10 F3d 753. *Thomson CSF v AAA* 64 F3d 773. *Daval Aciers v Armare SRl* in March 1997 *Mealey's Int'l Arb. Rep* 17. In *Nitro Distrib., Inc. v Alticor, Inc*, the "community of interest" theory asserted by Amway applied only where a non-signatory attempts to bind a signatory to an arbitration agreement – not the reverse, and so the court held that, "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so."453 F.3d 995 (8th Cir. 2006) at 999 (quoting *Thomson-CSF, S.A. v American Arbitration Ass'n*, 64 F.3d 773, 779 (2nd Cir. 1995)). The court in *American Bankers Insurance Group v Long* illustrates the conditions under which a non-signatory may effectively assert estoppel to compel a signatory to arbitrate claims against the non-signatory. 453 F.3d 623 (4th Cir. 2006).

285 *E.I. DuPont de Nemours & Co. v Rhone Poulene Fiber & Resin Intermediates*, S.A.S., 269 F.3d 187, 195 (3rd Cir. 2001) (discussing cases holding that a third-party beneficiary is "bound by contract terms where its claim arises out of the underlying contract to which it was an intended third party beneficiary"); Restatement (Second) Of Contracts ch. 14, introductory note (1981) (noting that the United States has recognized "the power of promisor and promisee to create rights in a beneficiary by manifesting an intention to do so").

286 *Johnson v Tele-Cash, Inc.*, No. 99-104-GMS (D. Del. December 29, 1999) *Johnson v Tele-Cash*, Inc., 82 F. Supp. 2d 264, 266 (D. Del. 1999) ("Without a guarantee that Johnson may effectively … vindicate his statutory cause of action in the arbitral forum, it is questionable that the statute will continue to serve both its remedial and deterrent function." (finding inherent conflict between FAA and TILA renders TILA disputes nonarbitrable pursuant to predispute arbitration agreement). In *Johnson v West Suburban Ban*k, (225 F.3d at 369.) the Third Circuit held that claims arising

the dispute of persons who would not be parties to arbitration does not preclude the enforcement of an arbitration agreement voluntarily entered into by the parties.[287] The utility of such agreements would be seriously compromised if simply adding as a defendant a person not a party to an arbitration agreement could foreclose arbitration defences[288] and so an arbitration agreement must be enforced despite the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

Was the district court's order compelling arbitration a final order and so immediately appealable? The Supreme Court in *Green Tree Financial Corp. v Randolph*[289] concluded that where, as here, the District Court has ordered the parties to proceed to arbitration and dismissed all the claims before it, that decision

under the TILA may be subject to predispute arbitration agreements, even though such arbitration may render class action litigation impossible. Compare *Harris v Green Tree Fin. Corp.*, Nos. 97-2029/98-1018 (3rd Cir. July 1, 1999) (upholding mandatory arbitration clause) and *Randolph v Green Tree Fin. Corp.*, No. 98-6055 (11th Cir. June 22, 1999) (invalidating mandatory arbitration clause). (*Sagal v First USA Bank*, 69 F.Supp.2d 627 (D. Del. 1999)). In *Sagal*, Judge McKelvie held that the TILA's limitation on damages for class actions did not override the enforcement under the FAA of an otherwise-valid mandatory arbitration clause because there is no direct conflict between the two statutes.

287 *Holmes v Coverall North America, Inc*. (Md Ct App 1994) CCH BFG ¶10,574.

288 *Hilti, Inc. v Oldach*, 392 F.2d 368, 369 n.2 (1st Cir. 1968); Jay M. Zitter, "Annotation, Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract," 11 A.L.R.4th 774 (1982).

289 529 US 1052. The term "final decision" has a well-developed and longstanding meaning: It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment. *Digital Equipment Corp. v Desktop Direct, Inc.,* 511 US 863, 867. *Evans v United States*, 504 US 255, *Coopers & Lybrand v Livesay,* 437 US 463, 467 (1978), *Catlin v United States,* 324 US 229, 233 (1945) at 236 (noting that had petitioners' motion to dismiss been granted and a judgment of dismissal entered, "clearly there would have been an end of the litigation and appeal would lie …"). *St. Louis, I. M. & S. R. Co. v Southern Express Co.*, 108 US 24, 28–29 (1883). *Sears, Roebuck & Co. v Mackey,* 351 US 427, 431 (1956) (explaining that had the District Court dismissed all the claims in an action, its decision would be final and appealable) *Seacoast Motors of Salisbury, Inc. v Chrysler Corp.*, 143 F. 3d 626, 628–29 (CA1 1998); *Arnold v Arnold Corp. – Printed Communications for Business*, 920 F. 2d 1269, 1276 (CA6 1990) (order compelling arbitration in an "embedded" proceeding treated as a final judgment when the District Court dismissed the action in deference to arbitration and had nothing left to do but execute the judgment); *Cincinnati Gas & Electric Co. v Benjamin F. Shaw Co.*, 706 F. 2d 155, 158 (CA6 1983) (rejecting the argument that because a declaratory judgment and other relief was sought in suit where arbitration was ordered, order to arbitrate should not be appealable); *Howard Elec. and Mechanical Co. v Frank Briscoe Co.*, 754 F. 2d 847, 849 (CA9 1985) (plaintiff brought suit for work performed under contract and then sought arbitration; order compelling arbitration held appealable). Cf. *In re Hops Antitrust Litigation*, 832 F. 2d 470, 472–473 (CA8 1987) (District Court order requiring arbitration of some claims before it is not a final appealable order because other matters remained pending before the court); *County of Durham v Richards & Assocs., Inc.,* 742 F. 2d 811, 813, n. 3 (CA4 1984) (noting that a number of Courts of Appeals have held that an order compelling arbitration may be appealed even when it is entered in the course of a dispute over the underlying claim). Restatement (Second) of Contracts §204, Comment *d* (1979) (where an essential term is missing, "the court should supply a term which comports with community standards of fairness and policy").

is "final" within the meaning of §16(a)(3), and therefore appealable. The Court of Appeals erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable. Moreover, the Court[290] refused to invalidate the arbitration agreement because the 'risk' that Randolph will be saddled with prohibitive costs is too speculative to rationalize the invalidation of an arbitration agreement. Consequently, arbitration is promptly enforceable if it is fair, affordable, and accessible regardless of whether the arbitration clause is contained in adhesion contracts[291]. Consistent with the pro-arbitration approach of the FAA, section 16 sought to facilitate appeals from orders that favoured litigation over arbitration while curtailing immediate review over orders compelling arbitration[292].

Any party may be deemed to have waived his rights to arbitrate by proceeding in litigation, even though he may plead arbitration as a defense[293]. Therefore, the factors relevant to a determination whether a party has waived its right to enforce an arbitration agreement are the following: the party's actions are inconsistent with the right to arbitrate; the litigation machinery has been substantially involved and the parties were well into preparation of a lawsuit; whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; whether important intervening steps had taken place, such as taking advantage of judicial discovery procedures not available in arbitration; whether the delay affected, misled, or prejudiced the opposing party[294].

290 *Green Tree Financial Corp. v Randolph* 531 US 79 (2000). The Eleventh Circuit held it had jurisdiction to review the order because that order was a "final decision" appealable under section 16 of the FAA.

291 *Baron v Best Buy Co*., 75 F. Supp. 2d 1368, 1370–71 (S.D. Fla. 1999) (refusing to grant a defendant's motion to compel arbitration before the National Arbitration Forum because defendants "failed to demonstrate in this record that the National Arbitration Forum is a neutral, inexpensive, and efficient forum to determine these claims as required by law"). Moreover, the Court held that "the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum," and this would apparently make the arbitration clause unenforceable. 121 S.Ct. 513 (2000). Jeremy Senderowicz, "Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts," 32 *Colum. J.L. & Soc. Probs.* 275, 298 (1999) ("The benefits of arbitration which accrue to consumers [include] savings on legal fees by the company (some of which will inevitably be passed on to consumers in the form of lower costs)." The court in *Cole v Burns Int'l Sec. Serv* indicates that arbitration agreements should not be enforced unless they provide for "more than minimal discovery." *Cole v Burns Int'l Sec.Serv,* 105 F.3d 1465 (D.C. Cir. 1997).

292 Pierre H. Bergeron, "District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction over Orders Compelling Arbitration," 51 *Emory L.J.* 1365, 1372–73 (2002).

293 *N & D Fashions Inc v DHJ Industries* 548 F2d 722.

294 *Metz v Merrill Lynch* 39 F3d 1482. *Ferro Corp. v Garrison Indus. Inc.*, 142 F.3d 926 (6th Cir. 1998). *Amin v Lammers* (ED Pa 1995) CCH BFG ¶10,666. Even if the franchisor's actions could be construed as a waiver of the latter franchise agreement's arbitration provision – which it could not – the complaining franchisee was not a party to this agreement. Instead, the complaining franchisee and the franchisor had executed their own franchise agreement,

Consolidation[295] and class actions[296] are both methods of adjudicating numerous individual actions involving common questions of law or fact[297]. Will US courts compel consolidation of two arbitrations? Some courts in the US have required parties to join consolidated arbitrations and the court's rationale for

which included its own arbitration provision. There was no allegation that the franchisor had taken any actions with respect to this agreement's arbitration provision that could constitute a waiver.

295 *Gammaro v Thorp Consumer Disc. Co.,* 828 F. Supp. 673, 674 (D. Minn. 1993) ("Certainly consolidation is not identical to class treatment, but in this Court's view … a similar result [is compelled] when class treatment is sought. The Court must give effect to the agreement of the parties, and this arbitration agreement makes no provision for class treatment of disputes. Accordingly, the Court finds that it is without power to order this matter to proceed to arbitration as a class action."). Most federal courts hold that they may not consolidate arbitration proceedings in the absence of an agreement providing for consolidation. Some federal courts permit and some state arbitration laws provide for consolidation even without express party agreement. For example, *Lefkovitz v Wagner*, 395 F.3d 773, 780–81 (7th Cir. 2005); Cal. Civ Proc. Code § 1281.3.

296 *Lytle v Citifinancial Servs., Inc.*, 810 A.2d 643, 665–66 (Pa. 2002) (rejecting the argument that the severable no-class action provisions in the parties' arbitration agreement were unconscionable and violated public policy, due to lack of evidence indicating plaintiffs would be precluded from effectively vindicating their claims without a class arbitration, but allowing trial court to consider evidence on remand regarding the costs of arbitration). *Circuit City Stores, Inc. v Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003) (finding an arbitration agreement prohibiting class-action arbitration substantively unconscionable), *Rosen v SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (holding that a prohibition on class action arbitration does not make a contract unconscionable) *Cruz v American Airlines, Inc*., 356 F.3d 320, 328 (D.C. Cir. 2004) ("The district court's decision not to order notice to the class is also a matter within the court's 'discretion,' and so we will also reverse that only if the decision was an abuse of discretion."). *Chisolm v Kidder, Peabody Asset Management, Inc*., 966 F. Supp. 218, 227 (S.D.N.Y. 1997) (finding "absolutely nothing" in any Supreme Court or Second Circuit precedent to justify broader scope of review for statutory claims and holding that "such a radical reassessment of the manifest disregard standard cannot be instituted by this court"). *Johnson v W. Suburban Bank*, 225 F.3d 366, 369 (3rd Cir. 2000) (finding that claims under TILA are arbitrable despite rendering class action unavailable). *Champ v Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (holding that § 4 of FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter*"); Herrington v Union Planters Bank*, 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000) (interpreting agreement silent on consolidation and class actions to preclude class arbitration). *Bazzle v Green Tree Fin. Corp*., 569 S.E.2d 349, 361 (S.C. 2002) (deciding that arbitrator did not act in manifest disregard of law in permitting class arbitration to proceed. *Johnson v West Suburban Bank*, 225 F. 3d 366 (CA3 2000) (holding arbitration clause in short-term loan agreement enforceable even though it may render class action to pursue statutory claims unavailable).

297 *Randolph v Green Tree Financial Corp*., No. 96-D-11-N, 1997 US Dist. LEXIS 21721 (M.D. Ala. Nov 26, 1997). *Champ v Siegel Trading Co. Inc.*, 55 F.3d 269 (7th Cir. 1995). The US Court of Appeals for the Seventh Circuit likewise held that "absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration. Rule 81(a)(3) of the Federal Rules of Civil Procedure (FRCR) says that the Federal Rules fill in only those procedural gaps left open by the FAA. Therefore, absent an express provision in the parties' arbitration agreement providing for class arbitration. Rule 81(a)(3) does not provide a district court with the authority to reform the parties' agreement and order the arbitration panel to hear these claims on a class basis pursuant to Rule 23. *Dickler v Shearson Lehman Hutton Inc*., 408 Pa. Super. 286, 596 A.2d 860 (1991), alloc. denied, 532 Pa. 663, 616 A.2d 984 (1992); *Government of the United Kingdom v Boeing Co*., 998 F.2d 68 (2nd Cir. 1993)

consolidation is expediency and elimination of the risk of inconsistent results[298]. The FAA[299] does not explicitly provide for consolidation and class action claims, and the Supreme Court ruled in *Green Tree Financial Corp. v Bazzle*, that when arbitration is governed by the FAA, the decision to consolidate arbitration when the agreement is silent is left to the arbitrators, not the courts[300]. *In Champ v Siegel Trading Co., Inc.*, the court precluded class arbitration where the predispute agreement was silent[301]. Moreover, in *Chapman v Lehman Brothers, Inc.*[302], the Southern District of Florida ruled that SRO prohibitions on class actions do not include collective actions brought pursuant to the Fair Labor Standards Act. Federal courts may grant consolidation when the contract explicitly states that the parties have agreed to allow courts to order consolidation[303]. Besides, in *Discover Bank v*

(holding that a district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation). *Connecticut Gen'l Life Ins. Co. v Sun Life Assurance Co. of Canada*, 210 F.3d 771 (7th Cir. 2000) (noting that court deciding whether to consolidate arbitration proceedings should not insist that it be clear, rather than merely more likely than not, that the parties intended consolidation).

298 *Connecticut Gen. Life Ins. Co. v Sun Life Assur. Co. of Can*., 210 F.3d 771, 774 (7th Cir. 2000) (Judge Posner acknowledges the general rule that courts cannot consolidate arbitration in defiance of parties' contractual agreement, but finds the agreement in question permits consolidation). *Compania Espanola de Petroleum v Nereus Shipping 527 F2d 966 Johnson v W. Suburban Bank*, 225 F.3d 366, 369 (3rd Cir. 2000) (finding that claims under TILA are arbitrable despite rendering class action unavailable). *Champ v Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (holding that § 4 of FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter"); *Herrington v Union Planters Bank*, 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000) (interpreting agreement silent on consolidation and class actions to preclude class arbitration). *Bazzle v Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 (S.C. 2002) (deciding that arbitrator did not act in manifest disregard of law in permitting class arbitration to proceed). *New England Energy, Inc. v Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988) (stating that "the [FAA] makes no reference to consolidation of arbitrations").

299 *Discover Bank v Superior Court of Los Angeles*, 113 P.3d 1100, 1110 (Cal. 2005). *Ting v AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Kinkel v Cingular Wireless*, LLC, 828 N.E.2d 812 (Ill. App. 2005); *Eagle v Fred Martin Motor Co*., 809 N.E.2d 1161 (Ohio App. 2004). *Amchem Prods., Inc. v Windsor*, 521 US 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quoting *Mace v Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)). *Dickler v Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864 (Pa. Super. Ct. 1991) ("We agree with the California appellate court [in *Keating*] which was the first to allow class actions in arbitration proceedings ….").

300 9 USC. §§ 1–16 (2003), 123 S.Ct. 2402 (2003), *Id.* at 2407. The court held that: (1) class arbitration *is* allowed under the FAA, even where the agreements are silent; and (2) arbitrators, not judges, should interpret the pre-dispute arbitration agreements to consider whether arbitration of class claims is offered.

301 55 F.3d 269 (7th Cir. 1995).

302 279 F. Supp. 2d 1286 (S.D. Fla. 2003).

303 *Conn. Gen. Life Ins. Co. v Sun Life Assur. Co. of Can.,* 210 F.3d 771, 773 (7th Cir. 2000); *Glencore, Ltd. v Schnitzer Steel Products Co.*, 189 F.3d 264, 268 (2nd Cir. 1999).

Superior Court of Los Angeles[304], "Amicus curiae US Chamber of Commerce argues that the imposition of classwide arbitration undermines the purpose of the FAA by drastically altering the rules by which the parties agreed to arbitrate, transforming arbitration into a less efficient and less desirable mechanism of dispute resolution."

A court's obligation under the FAA to liberally interpret and enforce arbitration agreements is not diminished when the underlying controversy involves a violation of a federal statute[305]. US courts should also look to foreign law to determine arbitrability. Adhesive arbitration agreements have been held to be enforceable[306]. While the enforceability of arbitration is federally mandated, determining whether a *valid and recognizable* contract to arbitrate exists is the realm of state contract law. The appropriate state law "would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration"[307]. It is, therefore, clear that state contract law governs whether a valid agreement to arbitrate exists, and thus the party seeking to avoid arbitration may call upon

304 113 P.3d 1100, 1116 (Cal. 2005).

305 *Shearson/American Express Inc. v McMahon*, 482 US 220, 226. Thomas J. Stipanowich, "Punitive Damages and the Consumerization of Arbitration," 92 *Nw. L. Rev 1* (1997); *Schoonmacher v Cummings and Lockwood of Connecticut*, 252 Conn. 416, 747 A.2d 1017 (2000) (stating that court determines that public policy of facilitating clients' access to an attorney of their choice requires a court to conduct *de novo* review of arbitration decisions involving non-competition agreements among attorneys); *State of Connecticut v AFSCME*, *Council 4*, 252 Conn. 467, 747 A.2d 480 (2000) (concluding that arbitration award reinstating employee for admittedly making harassing phone calls to a legislator which conduct violated state law should be overturned as a violation of clearly expressed public policy). *Lozada v Dale Baker Oldsmobile, Inc.*, 91 F.Supp. 2d 1087 (W.D.Mich. 2000) (finding an arbitration provision is unconscionable in part because it waives class remedies allowable under Truth in Lending Act ("TILA"), as well as certain declaratory and injunctive relief under federal and state consumer protection laws), *Connecticut Gen'l Life Ins. Co. v Sun Life Assurance Co. of Canada*, 210 F.3d 771 (7th Cir. 2000) (noting that court deciding whether to consolidate arbitration proceedings should not insist that it be clear, rather than merely more likely than not, that the parties intended consolidation).

306 *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 115 S. Ct. 2322, 2326 (1995); Christine N. Schnarr, Recent Development, Foreign Forum Selection Clauses under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case, 74 *Wash. U. L.Q.* 867, 873 (1996). Anne Brafford, Note, "Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?," 21 *J. Corp. L.* 331, 348 (1996); Jeffrey W. Stempel, "A Better Approach to Arbitrability," 65 *Tul. L. Rev* 1377, 1414 (1991) (discussing adhesion and unconscionability attacks on contract). Jeffrey W. Stempel, Pitfalls of Public Policy: The Case of Arbitration Agreements, 22 *St. Mary's L.J.* 259 (1990) (noting judicial dislike for removal of recourse to courts). Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v Casarotto,* 31 *Wake Forest L. Rev* 1001, 1004–05 (1996). Michael Z. Green, "Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?," 5 *Loy. Consumer L. Rep.* 112, 112 (1993). Jeffrey W. Stempel, "A Better Approach to Arbitrability," 65 *Tul. L. Rev*. 1377, 1392–93 (1991). Stewart E. Sterk, "Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense," 2 *Cardozo L. Rev* 481, 482–83 (1981). Ludwig Von Zumbusch, Comment, "Arbitrability of Antitrust claims Under US, German, and EEC Law: The International Transaction Criterion and Public Policy," 22 *Tex. Int'l. L.J.* 291, 309 (1987).

307 *Allied-Bruce Terminix Cos. v Dobson*, 513 US 265, 281 (1995).

applicable state contract law principles[308]. The arbitration provision in *Gateway*[309] was not singled out for individual treatment; indeed, the UCC is a generally applicable statute. Both US common law principles and the Uniform Commercial Code address the difficulties that arise when the parties have exchanged contracts with differing terms and conditions.

There is a difference of opinion on the question of whether the inclusion of an arbitration clause in an acceptance is a *per se* material alteration of the offer. The principles of contract law provide that unconscionable contracts, or agreements obtained through duress, are unenforceable[310]. Parties sometimes argue either that contracts containing arbitration provisions or the arbitration agreements are unconscionable or that this precludes enforcement of the arbitration clause. US courts have held that the NYC permits claims of duress and unconscionability[311]. Claims of unconscionability and duress also present choice

308 *Perry v Thomas*, 482 US 483, 492–93 n.9 (noting that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally");

309 *Hill v Gateway 2000, Inc*105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 US 808 (1997). UCC section 22–07.

310 Restatement of Contract, 2d, Section 208, UCC Section 2–302. *Lea Tai Textile Co. v Manning Fabrics Inc* 411 Fsupp 1404. *Melena v Anheuser-Busch, Inc.*, 816 N.E.2d 826, 833–34 (Ill. App. 2004) (holding that arbitration agreements presented to employees which are a condition of continued employment are not "voluntary" from the perspective of employees, and therefore are unenforceable). *Walker v Ryan's Family Steak Houses, Inc*., 400 F.3d 370, 384 (6th Cir. 2005) (refusing to enforce arbitration agreement that recited that employees had the right to consult an attorney, because "in reality, they had no opportunity to exercise that right because they had to sign the agreements on the spot"). *Pennington v Frisch's Restaurants, Inc*., No. 04-4541, 2005 WL 1432759, at *2 (6th Cir. June 17, 2005) (enforcing employment arbitration agreements where employees signed a form acknowledging that they had "received, read, and underst[ood]" the agreements). *Circuit City Stores, Inc. v Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (holding that pre-dispute arbitration agreement was procedurally unconscionable because it was a prerequisite for employment) Stephen J. Ware, Money, "Politics and Judicial Decision: A Case Study of Arbitration Law in Alabama," 30 *Cap. U. L. Rev* 583, 620 (2002) (analyzing Alabama arbitration cases and concluding that "[u]nconscionability challenges to arbitration agreements have fared poorly in the Supreme Court of Alabama since March 23, 1998, when business-funded justices gained a majority on the court"); Melissa Briggs Hutchens, "At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama," 53 *Ala. L. Rev* 599 at 608–10 (discussing Alabama cases denying challenges based on high arbitration costs).

311 *Ingle v Circuit City Stores, Inc*., 328 F.3d 1165, 1175 (9th Cir. 2003), *cert. denied*, 540 US 1160 (2004) (finding one-year limitation on claims under arbitration agreement in employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute). *Fleetwood Enters., Inc. v Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002) (denying unconscionability challenge to an arbitration agreement); Jeffrey W. Stempel, "Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism," 19 *Ohio St. J. On Disp. Resol.* 757, 812–13 (2004) (emphasizing slow and restrained application of unconscionability in the wake of formalist intellectual and social developments). Celeste M. Hammond, "The (Pre) (As)summed 'Consent' of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers," 36 *J. Marshall*

of law issues: what law defines the defence? Most decisions appear to apply federal law[312]. Lower US courts have not considered whether foreign law can govern the issues of duress and unconscionability – for example, where the parties' underlying contract and arbitration agreement are governed by foreign law and the arbitration is to be conducted in a foreign country. Arbitration clauses are contained in contracts in the form of standard terms. Even if the parties choose not to negotiate the specific terms of an arbitration clause in a contract, the terms concerning arbitration will vary based on the form of contract selected. The essence of due process is notice, opportunity to be heard and an impartial tribunal. Notice is guaranteed by the requirement that a federal court may not proceed in an *in personam* action unless it has jurisdiction over the defendant.

Are all forms of arbitration, whether court-ordered or contractual, subject to the Constitution's procedural due process requirements? There is no state action present in contractual arbitration[313]. The Supreme Court's state action doctrine explains that constitutional protections of individual rights and liberties apply only to the actions of governmental bodies[314]. Private utilization of a statutory procedure does not constitute state action. It could be argued that arbitration cannot become a public function but the public administration of private arbitration could be the resolution for an independent system.

Fraud *in factum* exists where there is a "misrepresentation of the character or essential terms" of a contract[315]. The Supreme Court has strictly adhered to the distinction between fraud and other challenges directed to the parties' underlying contract and those directed specifically to the arbitration clause. Where a party alleges that there was fraud in procuring the arbitration agreement itself – as distinguished from the parties' underlying agreement – that is generally an

L. Rev 589, 602–04 (2003) (discussing the Supreme Court's strict two-prong unconscionability analysis). *Graham v Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981) (arbitration agreement allowing one party to choose arbitrator held unconscionable).

312 *Compare Spa v Miller Inc* 988 F2d 1518, *Tonetti v Shirley* 219 Cal.Rptr 616, *Coleman v Prudential Securities* 802 F2d 1350. *Green Tree Fin. Corp. v Lewis*, 813 So. 2d 820, 825 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate consumer); *Garcia v Wayne Homes, LLC*, No. 2001 CA 53, 2002 WL 628619, *12–13 (Ohio Ct. App. April 19, 2002) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

313 *Dluhos v Strasberg*, No. 00-CV-3163, 2001 WL 1720272, at *5, *11, (D.N.J. 2001), *aff'd in part*, 321 F.3d 365 (3rd Cir. 2003); *MedValUSA Health Programs, Inc. v MemberWorks, Inc.*, 872 A.2d 423 (Conn. 2005)(holding that judicially-confirmed arbitration award granting punitive damages is exempt from due process limits because judicial confirmation is not state action). *Brannon v Mass. Mut. Life Ins., Co*., No. Civ A. 99–3497, 2000 WL 122241, at *5 (E.D. La. 2000); Court-ordered arbitration involves state action because the party participation in the arbitral process is compulsory and required by a government actor as opposed to a private agreement. Thus, court-ordered arbitration must satisfy constitutional due process requirements.

314 *Edmonson v Leesville Concrete Co.,* 500 US 614, 619 (1991) (noting that private parties' actions lie outside the scope of the Constitution's protection generally). *Lugar v Edmondson Oil Co., Inc*., 457 US 922, 936–37 (1982) (noting that court enforcement of state action transfers authority from the legislative to judicial branch, rendering the regulatory framework subject to judicial modification).

315 *Cancanon v Smith Barney* 805 F2d 998, Restatement of Contracts 2d Section 163.

issue for judicial resolution. A claim that an arbitration agreement itself had been fraudulently procured, as part of a fraudulent scheme, was not arbitrable[316]. It is worth mentioning that the Court in *Prima Paint* distinguished *Moseley* on the grounds that it involved a challenge to the arbitration clause itself. Several courts of appeals have apparently held that a claim of fraudulent inducement is generally arbitrable unless the fraud was directed solely towards the arbitration agreement[317]. So long as a claim is made that the arbitration agreement was fraudulently induced, that claim must be judicially resolved, even if the same fraud was directed as well to the underlying agreement[318]. An agreement providing for nonbinding arbitration is held to be enforceable under the FAA[319].

Regarding the enforceability of arbitration agreements that contain unlawful provisions some courts compel arbitration to go forward once the unlawful provisions are severed, regardless of the objections of a party resisting arbitration[320]. Enforcement of arbitration agreements honours the objective of the parties[321]. Other courts hold that arbitration agreements containing unlawful provisions are entirely void[322], providing parties the opportunity to seek relief in court. This contradictory court intervention robs arbitration predictability and efficiency of

316 *Moseley v Electronic Missile Facilities, Inc*., 374 US 167 (1963) at 171. "We believe that, as alleged here, the issues goes to the arbitration clause itself, since it is contended that it was to be used to effect the fraudulent scheme." Justice Black explained that "fraud in the procurement of an arbitration contract … makes it avoid and unenforceable and … this question of fraud is a judicial one, which must be determined by a court." For example, in *Schacht v Beacon Insurance Co* (742 F2d 386) the 7th Circuit rejected an effort to avoid arbitration, reasoning that the plaintiff: nowhere contends that the alleged fraud in the inducement applied solely to the arbitration clause. Its claim of fraud applies equally to all provisions of the contract. Thus … the district court properly concluded that Prima Paint precludes the court from addressing that claim."

317 *Riley v Kingsley Underwriting Agencies Ltd* 969 F2d 953.

318 *Chatain v Robinson-Humphery Co* 857 F2d 851.

319 *Porter Hayden Co. v Century Indemnity Co.*, No. 96–2556 (4th Cir. February 17, 1998). The statute of limitation defense raised by respondent fell within the scope of the arbitration agreement and, therefore, must be submitted to arbitration for resolution in accordance with the FFAA. The Court also held that the choice of Maryland law as the substantive law did not evince an unequivocal intent of the parties to invoke state law of arbitrability rather than federal law. *Wolsey v Foodmaker*, 144 F.3d 1205 (9th Cir. May 19, 1998).

320 *Gannon v Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001). (Severance is a judicial remedy where courts remove unlawful provisions from private agreements. After the offending provisions are severed, the remaining provisions of the contract still remain in force.) *Booker v Robert Half Int'l Inc*., 413 F.3d 77, 79 (D.C. Cir. 2005); *Hadnot v Bay*, Ltd., 344 F.3d 474, 478–79 (5th Cir. 2003); *Morrison v Circuit City Stores*, Inc., 317 F.3d 646, 675 (6th Cir. 2003).

321 *Booker v Robert Half Int'l, Inc*., 413 F.3d 77, 84 (D.C. Cir. 2005).

322 *Circuit City Stores, Inc. v Adams* (*Adams III*), 279 F.3d 889, 896 (9th Cir. 2002); *Perez v Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1286–87 (11th Cir. 2001); *Hooters of Am., Inc. v Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Shankle v B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233–35 (10th Cir. 1999); *Graham Oil Co. v ARCO Prods. Co.,* 43 F.3d 1244, 1249 (9th Cir. 1994) (holding that where the unlawful provisions of the arbitration clause are fully integrated and contravene public policy as set forth by congressional mandate, severance is inappropriate).

making it a favoured method of dispute resolution[323]. In *Hooters of America, Inc. v Phillips*[324] nearly every provision in the agreement was unlawful and so the entire arbitration agreement was voided.

At the end of the day, the power of arbitrators to arbitrate usually depends on a court's determination concerning the arbitrability and validity of an arbitration agreement. On the one hand, the parties with their agreement decide on the above-mentioned matters. On the other hand, it seems that courts have a supervisory role, which fundamentally authorizes and validates arbitration agreements[325].

5 Enforceability of international arbitration agreements

Of fundamental importance to the enforcement of most international arbitration agreements in US courts is the NYC[326]. Where the Convention applies, its substantive provisions concerning the enforceability of arbitration agreements must be given effect in both federal and state courts. Moreover, the FAA's second chapter provides special jurisdictional and procedural rules for the enforcement of agreements that are subject to the Convention. A primary objective of the Convention was to render international arbitration agreements enforceable. Where the Convention's jurisdictional requirements are satisfied, Article II obliges the courts of contracting states to "recognize" arbitration agreements and "refer the parties to arbitration." That obligation is subject only to a limited number of specific exceptions listed in the Convention[327]. US courts have not only interpreted the Convention's jurisdictional requirements expansively, rendering the Convention applicable to a wide range of international arbitration agreements, but have also narrowly interpreted the Convention's exceptions to the enforceability of arbitration agreements. The Convention does not give a definition as to which arbitration agreements fall under Article II[328].

Section 202 also specifically provides that "commercial" relations include those which fall within the definition contained in section 2 of the domestic FAA of arbitration agreements affecting interstate and foreign commerce, but it excludes agreements and awards between US nationals having no reasonable

323 *Bhd. of Locomotive Engrs v Louisville & Nashville R.R. Co*., 373 US 33, 47 (Goldberg, J., dissenting) (1963) (commending the efficacy and efficiency of private labor arbitrations). *Adam Borstein,* Arbitrary Enforcement: When Arbitration Agreements Contain Unlawful Provisions, 2006 *Loyola of Los Angeles Law Review* 1259.

324 173 F.3d 933 (4th Cir. 1999). *Hooters of America, Inc. v Phillips.,* 173 F.3d 933, 939–40 (4th Cir. 1999) ('the promulgation of so many biased rules' created 'a sham system unworthy even of the name of arbitration');

325 *Prima Paint Corp v Flood Conklin* 388 US 395, 9 USC 4.

326 A. Foustoukos, Conditions Required For Validity of an Arbitration Agreement, 1988 *J Int'l. Arb*. 113.

327 Comment "International Commercial Arbitration under the United Nations Convention and amended arbitration statute" 47 *Wash.LR* 441.

328 D. van de Berg, "When is an arbitral award non-domestic under the NYC of 1958, 1985 Pace LR 25?"

relationship to the US. The definition of "commercial" under the Convention is broader than that of "commerce" under the domestic FAA[329]. It is clear in the US that the term "commercial relationship" includes employee-employer relations, fiduciary relationships, relationships giving rise to antitrust and other public law disputes, cases involving claims by foreign regulatory authorities, insurance and reinsurance contracts, and maritime agreements[330]. Like US courts, foreign courts have generally interpreted the "commercial" relationship requirement broadly. Likewise, disputes may emerge involving application of the Convention to concession agreements or other contracts involving what might be regarded as elements of national sovereignty. Congress shares that intention, as demonstrated by its amendment of the FAA to make clear that the act of state doctrine does not frustrate enforcement of arbitral awards or agreements[331]. It is important to note that reciprocity under the US reservation is determined by reference to the place where the arbitration is conducted and the award is made, not to the parties' nationalities. The applicability of the Convention's reciprocity requirement to arbitration agreements – as distinguished from awards – is not clear[332]. The reciprocity limitation in Article I(3) and the US reservation refer, by their literal terms, only to arbitration awards, not agreements. At least arguably, therefore, Article II's requirements for the enforcement of arbitration agreements apply without regard to reciprocity, including, for example, to agreements to arbitrate in non-signatory states with nationals of non-signatory states. Article I(3)'s reciprocity limitation has no relevance to the problem of conducting arbitration under the terms of the Convention[333]. Article XIV[334] of the Convention refers more broadly to reciprocity, without limiting the principle to awards, and the purposes of the reciprocity reservation appear applicable to agreements as well as awards. Thus, courts have limited the reach of Article II of the Convention to only those arbitration agreements that specify an arbitral *situs* in another Convention signatory – that is, they have refused to "refer" a party to arbitration in a *situs* within a country that is not a signatory to the Convention[335]. US courts will order US parties (and others) to arbitrate against parties from non-signatory states, provided that the arbitral *situs* is in a signatory state. For instance, an agreement between two US entities to arbitrate in London constitues "enforcement abroad" and is, therefore, within the scope of section 202[336]. The Convention's requirement

329 *Sumitomo Corp v Parakopi Compania Maritima* 477 Fsupp 737.

330 *Corcoran v Ardra Co* 566 NYS2d 575, *Meadous Co. v Baccala Inc* 760 Fsupp 1036, *Antco Shipping Co. v Sidermar* 417 Fsupp 207.

331 9 USC. 15.

332 G. Quigley "Convention on Foreign Arbitral Awards" 58 ABA. J. 821.

333 *Fuller Co. v Compagnie De Bauxites* 421 Fsupp 938.

334 Article XIV. A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

335 *Tolaram Fibers Inc v Deutsche Engineering* 1991 US Dist Lexis 3565, *EAST Inc of Stamford v M/V Alaia* 876 F2d 1168.

336 *Jones v Sea Tow Services* CV–92-4669. *Brier v Northstar Marine Co* CV-91-597, *Reinholtz v Retriever Marine Towing* CV-92-14141.

regarding an agreement in writing is generally more stringent than those under the FAA. Courts have held that the parties' acceptance – either orally or by conduct – of an unsigned, written contract containing an arbitration clause satisfies section 2 of the FAA[337]. US courts distinguish between agreements to arbitrate certain future disputes involving public law protections (like the antitrust laws), and those which arbitrate pre-existing public law claims. The judicial role in determining whether to enforce an international arbitration agreement under the NYC is very limited[338]. US courts have emphasized that Article II (3) requires that national courts "shall" refer parties to arbitration[339]. Thus, courts, not arbitration, have formulated the precedent on the interpretation and enforcement of international arbitration agreements.

6 Jurisdiction

Parties to a contract may freely select a forum that will resolve any disputes over the interpretation or performance of the contract. Such clauses are *prima facie* valid and enforceable unless shown by the resisting party to be unreasonable[340]. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements. For instance, the clause in *Levine*[341] contains no such mandatory language binding the parties to a particular forum, but provides only that the underwriters will submit to the jurisdiction of a US court. The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning, and the plain meaning of the words used by the parties to this contract do not manifest an intention to limit jurisdiction to a particular forum[342].

The terms of an arbitrator's jurisdiction and powers in any particular case depend on a proper construction of the arbitration agreement. A valid agreement to arbitrate excludes the jurisdiction of the national courts and means that any dispute between the parties must be resolved by a private method of dispute resolution, but courts are in fact involved in many stages of the arbitration process, even by overruling arbitration.

In the US, for example, personal jurisdiction exists over all the major arbitration associations based on their contacts with the country. Even if personal jurisdiction does not exist, it can easily be ensured by requiring that arbitrators consent to

337 *Imptex International Corp v lorprint Inc* 625 FSupp 1572.

338 *Dean Witter Reynolds v Byrd* 470 US 213.

339 *Builders Federal Ltd v Turner Constructions* 655 FSupp 1400.

340 *M/S Bremen v Zapata Off-Shore Co.*, 407 US 1.

341 *Levine v Shell Oil Co.*, 25 NY2d 205, 211, John J. Barcelo III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," 36 V and. *J. Transnat'l L.* 1115, 1125–26 (2003)("Thus, in the vast majority of cases the arbitral process will go forward, but parties with a legitimate basis for objecting to the arbitrators' jurisdiction will have an opportunity, after only moderate delay, to make their case to a judge").

342 *Brooke Group Ltd. et al., Appellants, V Jch Syndicate 488, et al.,* Respondents. 488, 87 N.Y.2d 530, 663 N.E.2d 635, 640 N.Y.S.2d 479 (1996).

the jurisdiction of US courts. The consent of a party to a contract is sufficient to establish jurisdiction over that person or entity[343]. It is worth mentioning that the risk of bias is likely to be greater between national court systems than it is between American state courts because the former feature much larger differences in legal rules, legal culture, and background norms[344].

It is generally recognized that any decision given by an arbitral tribunal as to its jurisdiction is subject to control by the courts of law, which in this respect have the final word. In practice, recourse to the courts on issues of jurisdiction is likely to take place at the beginning of the arbitral process, during the actual course of the process and following the making of the award. Jurisdictional challenges frequently result in national court proceedings, in addition to which the arbitral tribunal itself is often called upon to resolve questions of jurisdiction. Most institutional arbitration rules provide specifically that the arbitral tribunal has the power to decide its own jurisdiction, and that in accepting the applicable rules a party consents to this principle. The former principle is often referred to as that of "Kompetenz-Kompetenz." Closely related to Kompetenz-Kompetenz is the separability of the arbitration agreement. Closely related to the separability doctrine is the allocation of authority between arbitrators and national courts over the interpretation and enforceability of the parties' arbitration agreement. The tribunal's decision will be subject, depending on national law, to either interlocutory or eventual judicial review of the tribunal's award. An arbitral tribunal can also consider its own jurisdiction even in countries where national courts would decide questions of arbitrability if one party raised them in litigation to enforce or resist the arbitration agreement.

343 Andreas F. Lowenfeld, "Can Arbitration Coexist with Judicial Review?" *A Critique of LaPine v Kyocera*, ADR Currents, Sept. 1998, at 1, 15 no 28 (noting a large New York law firm's experience with international transactions involving investments, joint ventures, technology licenses, and trade in goods). Thomas E. Carbonneau, "The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi," 19 *V and. J. Transnat'l L.* 265, 297 (1986) (asserting that the doctrine of *Mitsubishi* does injustice to the public policy demands of antitrust regulation); Robert B. von Mehren, "From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law," 12 *Brook. J. Int'l L.* 583, 627–28 (1986) [hereinafter von Mehren, *Future of Arbitration*] (asserting that arbitrators should be entrusted with public law issues if they are able to establish their neutrality); Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law Through Arbitration," 83 *Minn. L. Rev* 703, 704 (1999) (stating that courts must either make mandatory rules inarbitrable or require *de novo* review of arbitral awards that implicate such rules); Christine L. Davitz, Note, US Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefer's Edict, 30 *Vand. J. Transnat'l L.* 59, 95 (1997) (suggesting that the Supreme Court has expanded the FAAFAA beyond congressional intent). *But see* Eric A. Posner, "Arbitration and Harmonization of International Commercial Law: A Defense of Mitsubishi," 39 *Va. J. Int'l L.* 647, 651 (1999) (contending that a middle ground of randomly reviewing some, but not all, arbitral awards may be preferable).

344 Kevin M. Clermont & Theodore Eisenberg, "Xenophilia in American Courts," 109 *Harv L. Rev* 1120 (1996).

As mentioned earlier, the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and survives the termination of the contract[345]. One possible consequence of the principle of separability is that if an arbitral tribunal or court concludes that the parties' entire underlying contract was void, that conclusion would not necessarily cancel the parties' arbitration agreement[346]. Hence, the doctrine of separability provides that an arbitration clause is "separable" from the contract containing it and thus may survive a successful challenge to the validity of the contract[347].

Where the parties' agreement is either invalid or illegal, this does not affect the validity of the underlying contract. As a consequence, the separability and Kompetenz-Kompetenz principles can significantly reduce any meaningful judicial role in decisions as to the scope of the parties' arbitration obligations[348]. The doctrine of Kompetenz-Kompetenz provides that arbitrators have jurisdiction to decide challenges to arbitration agreements upon which their own jurisdiction is based. Parties can be denied a judicial forum if they have agreed to do so. Both the separability and Kompetenz-Kompetenz doctrines can also be justified on grounds of party intent even where institutional rules (and the arbitration agreement itself) do not expressly provide for such a result. Either the arbitral tribunal or the competent court can decide which law governs the validity of the arbitration clause[349]. The prevailing view about the arbitrator's duty to decide on a matter comes from the courts and there is no reference to arbitration awards dealing with the relevant matter.

An arbitral tribunal can determine those disputes that the parties have agreed that it should determine. A challenge to jurisdiction can be partial or total. A partial

345 *Heyman v Darwins Ltd* [1942] AC 356, *Prima Paint Co. v Flood & Conklin Corp* 388 US 395, UNCITRAL Art. 21.2

346 *Teledyne Inc v Kone Corp* 892 F2d 1404 If "the destruction of [the underlying] transaction carries over to the arbitration agreement, the arbitrators are deprived of their jurisdiction, and an award already rendered would lose all legal effect." *Buckeye Check Cashing v Cardegna*, 546 US 440 (2006) (federal rule on separability trumps state law of contract formation).

347 *Nolde Bros., Inc. v Bakery & Confectionary Workers Union*, 430 US 243, 250 (1977) ("the parties' obligation under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the expired agreement"); see also *Litton Fin. Printing Div v National Labor Relations Board*, 501 US 190, 206 (1991) (limiting Nolde to cases where the dispute "involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement").

348 Editorial Analysis, "A Critique of the Uniform Arbitration Act (2000) (Part Two)," *World Arbitration & Mediation Report*, vol. 12 (2001), pp. 94, 102. ("The right of arbitrators to rule first on questions pertaining to their jurisdictional authority – recognized in most foreign and international laws on arbitration and known as the *kompetenz-kompetenz* doctrine – has never been incorporated into the US statutory law on arbitration."); Natasha Wyss, "*First Options of Chicago, Inc. v Kaplan*: A Perilous Approach to Kompetenz-Kompetenz," *Tulane Law Rev.*, vol. 72 (1997), pp. 351, 355 (The FAA is "notorious among world arbitration statutes for its failure to incorporate the *kompetenz-kompetenz* doctrine").

349 *Union of India v McDonnel Douglas* [1993] 2 LR 48, *J.J. Ryan Inc v Rhone Poulenc* 863 F2d 315.

challenge raises the question of whether certain claims are within its jurisdiction. It is accepted that a tribunal has power to investigate its own jurisdiction[350]. The nullity of an award made without jurisdiction when there was no arbitration agreement is recognized both in national laws and in the international convention governing arbitration. Under US law, the NYC creates original jurisdiction in US district courts when a dispute regarding arbitration: (1) involves a non-US citizen; and (2) when a dispute "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." The district court may compel arbitration under the NYC even if the site of arbitration is outside the US. Thus, in cases where jurisdiction is otherwise unavailable, the presence of an international party or other international components may provide another avenue for subject matter jurisdiction in the federal district court. A New York federal court recently granted a cedent's motions to stay litigation and compel arbitration against its reinsurer[351], although the arbitration forum named in the arbitration clause no longer existed. Have the parties agreed to arbitrate even if the chosen forum no longer exists? If any related or successor organization exists, courts will most likely substitute the related or successor organization for the one named in the arbitration clause[352].

Judicial review of the merits of most arbitral rulings in US courts is extremely limited. Should the same standard apply to jurisdictional rulings? US courts have not frequently considered interlocutory appeals from arbitrators' jurisdictional rulings. If the tribunal does not make an interim award, then there generally will be no basis under the FAA for interlocutory judicial review. Even if an interim jurisdictional award is made by the tribunal, interlocutory review is probably not available under the FAA. Under Sections 9 and 10 only "final" arbitral awards can be either confirmed or vacated, and US courts have generally refused to consider

350 *Seacoast Motors Of Salisbury, Inc.v.Daimlerchrysler Motors Corporation*, 2001 No. 01–1262 www.kscourts.org. *Hart Surgical, Inc. v Ultracision, Inc*., 244 F.3d 231 (1st Cir. 2001) "district court properly exercised its jurisdiction." *Green Tree Fin. Corp. v Randolph*, 531 US 79, 88–89 (2000), held that it lacked jurisdiction over Seacoast's appeal because the arbitrability decision was "embedded" in the underlying substantive dispute and thus interlocutory. Seacoast, 143 F.3d 626, 628–29 (1st Cir.), cert. denied, 525 US 965 (1998). *Rosa v Park West Bank & Trust Co*., 214 F.3d 213, 215 (1st Cir. 2000). *GAF Corp. v Werner*, 485 N.E.2d 977, 979 (N.Y. 1985) (upholding arbitrability of indemnity claim by the CEO of a public corporation, even though arbitration raised issues of fiduciary duty normally subject to judicial review during litigation).

351 *Constitution Reins. Corp. v Republic Western Ins. Co.,* No. 98 Civ 9208 (HB) (S.D.N.Y. Mar. 9, 1999).

352 *LaVecchia v Munich Reins. Co*., No. 99-757(JAG) (D. N.J. Apr. 12, 1999). A federal court recently recommended that a reinsurer's motion to compel arbitration against a Liquidator be remanded to the New Jersey state court supervising the liquidation to rule on whether the dispute between the reinsurer and the Estate should be arbitrated. The magistrate judge found that the reinsurer had waived its right to remove the case to federal court when it signed reinsurance agreements with a forum selection clause. The magistrate judge resolved the conflict by recommending the matter be remanded to the court selected by the liquidator for a determination of whether the dispute is arbitrable.

interlocutory challenges to arbitral decisions[353]. Interlocutory appeals from an order denying arbitration are "final" and thus appealable, but appeals from an order compelling arbitration are not appealable on an interlocutory basis[354].

The Bremen[355] and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. In the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies of antitrust violations, this agreement is against public policy[356]. In *Eastern Associated Coal Corp. v United Mine Workers of America*[357] held that an award should be vacated on public policy grounds only if the parties engaged in illegal conduct. It will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. Moreover, in *Ruhrgas AG v Marathon Oil Co.*[358] the court derived "counsel against" recognizing judicial discretion to proceed directly to personal jurisdiction from *Steel Co. v Citizens for Better Environment*[359], in which this Court held that Article III generally requires a federal court to satisfy itself of its subject-matter jurisdiction before it considers the merits of a case.

Much of the US Supreme Court's decisions take the position that location is not a sufficient reason to hold an arbitration clause unconscionable. Each determination should be based on the facts of the specific case, and there may be instances where the choice of *situs* will be considered unconscionable. If the arbitration agreement is not unconscionable, or was not entered into via duress, fraud, or other form of coercion, the arbitration agreement is valid. The high cost of ancillary litigation in the US, coupled with the unsettled state of the law governing arbitration, detracts from its otherwise attractive features[360]. Parties sometimes have second thoughts about the arbitral *situs* that they have selected. They may conclude that there is a more convenient forum closer to home, or the contractual *situs* may become spectacularly unacceptable to one or both sides. Courts have at least entertained

353 *Transportacion Maritima Mexicana v Campanhia de Navegacao* 636 Fsupp 474.

354 *South Louisiana Cement, Inc. v Van Aalst Bulk Handling, B.V.*, 383 F.3d 297, 300–01 (La. 2004).

355 *The Bremen v Zapata Off-Shore Co.* 407 US 1.

356 *United States v Philadelphia National Bank* 374 US 321, *American Safety Corp v JP Maguire* 391 F2d 821.

357 531 US 57 (2000).

358 145 F.3d 211, *Abram Landau Real Estate v Benova* 123 F3d 69 (holding that First Options is applicable only to an arbitrator's ability to decide whether the parties entered into a valid arbitration agreement at all, and therefore, that broad and general arbitration clause gives arbitrators jurisdiction to decide other arbitrability issues). A reviewing court should have reviewed independently the question of arbitrability. *General Motors Corp v Pamela Equities Corp* 146 F3d 242. *Roubik v Merrill Lynch* 181 Ill 2d 373. C Harper "The Options in First Options: International Arbitration and Arbitral Competence" 579 PLI/Lit 127.

359 523 US 83 *Employers Reinsurance Corp. v Bryant*, 299 US 374, 382. *State Farm Fire & Casualty Co. v Tashire*, 386 US 523 *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee,* 456 US 694.

360 *Aerojet General Corp v American Arbitration Association* 678 F2d 248, *American Construction Corp v Mechanised Construction of Pakistan* 659 Fsup 425.

the possibility that the parties' selection of an unacceptably inconvenient or unfair arbitral forum will not be enforced and, arguably, that a new arbitral forum will be judicially imposed[361].

In the US, the FAA generally permits jurisdictional challenges to be raised in both actions to vacate and to confirm but except perhaps in extraordinary cases, not in interlocutory actions. Besides, under the UNCITRAL Model Law, interlocutory judicial review of an interim award on jurisdiction is possible. That is generally not the case under the FAA in the US, although extraordinary injunctive relief may be possible. The FAA creates important substantive rights for every party to an arbitration agreement in interstate commerce, but confers no independent basis for federal subject matter jurisdiction[362]. Hence, the state court cannot ignore the FAA. For international arbitrations, the federal courts have jurisdiction under the statutes implementing the NYC (9 USC 203, 9 USC 302)[363]. The district court has to apply a federal statute that controls the issue before the court and, therefore, the Supreme Court has held that the courts are bound by the FAA[364]. Parties to litigation cannot control the legal principles to be applied by the courts,[365] but in arbitration parties can format the rules. It could be argued that this principle should be followed to a degree by arbitration in order to have a minimum standard followed by arbitrators[366].

As mentioned above, the Kompetenz-Kompetenz doctrine provides for the arbitral tribunal to first resolve issues relating to its own jurisdiction, subject to subsequent judicial review. The NYC does not appear to either forbid or require national courts to apply the Kompetenz–Kompetenz doctrine. US courts appear to have consistently applied US notions of Kompetenz–Kompetenz, albeit without analysis. Section 208 has been held to incorporate section 4's provisions for summary trials concerning the existence, validity, and scope of an arbitration agreement[367].

7 Applicable laws

Arbitration does not exist in a legal vacuum and it is itself governed by the rules of arbitration, which the parties have adopted, and by the law of the place

361 *Bauhimia Corp v China National Machinery* 819 F2d 247.

362 *DAI v Hollingsworth*, 949 F. Supp. 77 (D. Conn. 1996).

363 *Productos Mercentiles v Faberge* 23 F3d 41.

364 *Stewart Organisation Inc v Ricoh Corp* 487 US 22, *Prima Paint Corp v Flood & Conklin* 388 US 395, *Dalton v Spector* 511 US 462.

365 *Swift v Hocking Valley* 243 US 281, *US Aluminum Corp v Alumax Inc 831 F2d 878, Compagnie de Reassurance v New England Corp* 57 F3d 56.

366 Michael G. Weisberg, Note, "Balancing Cultural Integrity against Individual Liberty: Civil Court Review of Ecclesiastical Judgments," 25 *U. Mich. J.L. Ref.* 955, 995 (1992) (explaining "formal agreement to arbitrate requires a minimum standard of appropriate conduct from the arbitrators in order for the proceeding to be legally valid").

367 *Cargill Int'l Sa v M/T Pavel Dybenko* 991 F2d 1012. *Legion Insurance Company v John Hancock Mutual Life Insurance Company Court of Appeals*, www.ca3.uscourts.gov. The District Court had jurisdiction over this case under the FAA, 9 USC.7.

of arbitration. The modern tendency both nationally and internationally has been to give great weight to the autonomy of the parties, and courts should not intervene in the first instance but only where so provided in the law. If they are to be effective, laws must back up arbitration rules and the relevant law in this context is the law of the place referred to as the *lex arbitri* or *curial* law[368]. International commercial arbitration will involve more than one system of law or of legal rules: (a) the law governing the parties' capacity to enter into an arbitration agreement; (b) the law governing the arbitration agreement and the performance of the agreement; (c) the law governing the existence and proceedings of the arbitral tribunal; (d) the law governing the substantive issues in dispute (applicable law); and (e) the law governing recognition and enforcement of the award.

International arbitration agreements can be subjected by the parties to non-US law. Alternatively, in the absence of any choice-of-law clause, application of ordinary conflict of law rules may provide for a foreign governing law. Besides, US courts have not frequently considered whether foreign law governs the interpretation, existence, or enforceability of an international arbitration agreement. Courts have generally applied the FAA and federal common law, notwithstanding a foreign choice-of-law clause, apparently on the theory that these issues are procedural or remedial and subject to the law of the forum. In *Moses H. Cone v Mercury Constr. Corp*.[369] the Supreme Court agreed with the Circuit Court, finding that both the state court and the federal court were required to apply the federal substantive law of arbitration since the parties' agreement fell within the scope of the Arbitration Act. In fact, in *Moses H. Cone Memorial Hospital, Southland, and Mitsubishi Motors*, the Supreme Court specifically reasoned that the FAA was meant to encourage arbitration, in order to relieve congested federal courts and to promote more efficient dispute resolution. A pro-arbitration policy is reflected in the concerns about the costs, delays, and quality of judicial dispute-resolution, which gave rise to the FAA[370].

368 Theodore C. Theofrastous, Note, "International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate," 31 *Case W. Res. J. Int'l L.* 455, 456–57 (1999) ("Because every arbitral proceeding takes place somewhere, and is enforced somewhere, it is presumed that these proceedings and awards are governed by the laws of the states where those activities take place").

369 *Moses H. Cone Mem'l Hosp. v Mercury Construction Corp.*, 460 US 1, 4 (1983). "But in a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing–neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration but declined to compel the hospital to arbitrate, [the contractor] would have no sure way to proceed with its claims except to return to federal court to obtain [an order compelling arbitration–a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act."

370 Jean R. Stemlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," 72 *Tul. L. Rev* 1, 1 (1997) (arguing that the current pro-arbitration policy neglects the contractual principle of consent and often leads to the violation of constitutional rights); J. Douglas Uloth & J. Hamilton Rial, III, Equitable Estoppel as a Basis for Compelling Nonsignatories to

International arbitrations are also governed by municipal procedural law and most frequently by the law of the jurisdiction in which the arbitral tribunal sits. This law, known as the *lex loci arbitri*, may be crucial in resolving procedural issues that arise. Thus, arbitral tribunals often meet in a jurisdiction with an arbitration law that is both developed and supportive of arbitration as a dispute resolution mechanism. In the US, both state and federal law govern international arbitration. Is arbitration independent and equally alternative to litigation or merely a supplementary mechanism in order to diffuse the number of cases accumulated before the courts?

Choice of law questions arise in proceedings before both national courts and arbitral tribunals. Choice of law questions can be referred either to national courts concerning enforcement of arbitration agreements and awards or to obtain ancillary judicial assistance[371]. As a delaying tactic, parties resisting arbitration often challenge the validity and/or scope of the arbitration agreement they have signed. The traditional approach begins with a choice of law analysis. This approach, used in some federal circuits in the US, seeks the law applicable to the arbitration agreement in order to assess its validity. A choice of law analysis was reaffirmed by the Tenth Circuit Court of Appeals in *Avedon Engineering Inc. v Seatex*[372], where the Tenth Circuit asserted that the lower court should have determined, as a threshold issue, which law governed the formation of the main contract[373]. When courts allow the law governing the main contract to extend automatically to a determination of the validity of the arbitration agreement, such an approach can lead to a repudiation of the principle of severability. Besides, under the substantive rules method, the arbitration agreement is governed not by the local laws of one of the parties, but solely by principles generally accepted in international commerce. The substantive rules method is also consistent with the notion that in international

Arbitrate – A Bridge Too Far?, 21 *Rev Litig.* 593, 632 (2002) ("Since 1999, courts have arguably reached too far to find an agreement to arbitrate.").

371 In *Scherk v Alberto Culver Co* 417 US 506, 515–17, the Supreme Court held that in international commercial cases it is permissible to "substitute" arbitration for litigation. According to the US Supreme Court, in *Scherk v Alberto-Culver Company*: "(U)ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. (Absent such agreement, one enters) the dicey atmosphere of … a legal no-man's-land (which) would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." Restatment 2d, Conflict of Laws Sec 187e, 1971. G Park, "Judicial Controls in the Arbitral Process," 1989 *Arbitration International* 230.

372 126 F3d 1279 (10th Cir. 1997). Nathalie Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 7 *Am. Rev Int'l Arb*. 319, 356 (1996) (affirming that arbitrators can and should apply mandatory rules, "even if they are not part of the chosen law or the proper law of the contract" because "the parties have an interest in an award which is not challengeable and can be enforced").

373 *Coastal Indus. Inc. v Automatic Steam Prods. Corp.*, 654 F2d 375, 377–78 (5th Cir. 1981).

arbitration, arbitrators, unlike judges, belong to no national order. Some US courts, such as the Second Circuit in *Genesco Inc. v T. Kakiuchi & Co*[374] have adopted a position similar to the French substantive rules method by reasoning that the FAA constitutes federal substantive law and therefore preempts specific state contract law on certain issues. The *Genesco* Court held that whether one side is bound by an arbitration clause must be "determined under federal law, which comprises generally accepted principles of contract law."

It is entirely possible for each of these issues to be subject to the laws of a different nation[375]. The possibility of applying different national laws to different substantive and procedural issues raised in arbitration can be seen as a peculiarly complex example of depeçage[376]. Depeçage refers to the application of different national laws to different aspects of a contractual or other legal relationship. But of much greater significance than convenience is the effect of the local law of the arbitral *situs* on the arbitration.

7.1 Conflict of laws rules established by the law of the arbitral situs

Except where statutory protections or public policy issues are involved, US courts seldom disturb an arbitral tribunal's selection of conflicts rules or substantive law. US courts have concluded that arbitrators are obliged to apply federal statutory protections – such as the antitrust and securities laws – in order to render an enforceable award[377]. In the US, the traditional view was that, in the absence of a choice of law clause, the arbitrators should ordinarily apply the substantive law of the state in which the arbitration is sited. What conflicts of laws rules dictated this result, or were to be applied by the arbitrator? It seems that the parties' selection of the arbitral *situs* was deemed an implied choice by the parties of the *situs'*s substantive law[378]. US courts and scholars have more recently moderated the traditional *situs* rule, particularly in international matters. There has been uncertainty about the appropriate choice of law principles to be applied by international arbitrators. The historical view in many civil and common law states was that the arbitration *situs*'s conflict of laws rules would be applied by the arbitrators. A variation of this rule was the US view that the arbitral *situs*'s substantive laws were applicable. Besides, the traditional rule that the arbitral *situs*'s conflicts or substantive rules must be applied has been eroded

374 815 F2d 840, 845 (2nd Cir. 1987). *Hart Ski Mfg. Co. v Maschinenfabrik Hennecke,* 711 F2d 845 (8th Cir. 1983).

375 Restatment 2d, Conflict of Laws Sec 218.

376 R. Reese, "Depecage: A Common Phenomenon in Choice of Law," 1973 *Colum. L Rev* 58.

377 *PPG Industries Inc v Pilkingston Plc* 835 Fsupp 1465. *Richards v Lloyds of London*, Nos. 95–55745, 56467 (9th Cir. Feb. 3, 1998). Antiwaiver provisions of Securities Act of 1933 and Securities Exchange Act of 1934 do not void choice of law and choice of forum clauses in an international agreement. Applying *Bremen v Zapata Off-Shore Co.*, 407 US 1 (1972), the court held that none of the traditional grounds for repudiating the choice of forum clause are applicable.

378 G. Wilner, Domke on Commercial Arbitration, § 25.01 1992.

substantially in recent years. According to Goldman[379], there has been an "almost total abandonment of the application of the rules of conflict of the so-called arbitral forum."

7.2 Mandatory requirements of the arbitral situs

Regardless of the parties' agreement to "foreign" curial law, there will almost always remain mandatorily applicable rules of the nation in which the arbitration proceedings are conducted[380]. For example, a violation of US due process principles in an arbitration conducted in the US would presumably not be cured by the parties' prior agreement that foreign law provided the curial law. US courts have not considered the effect of institutional rules on the respective roles of arbitrators and courts in deciding disputes about the existence and validity of an arbitration agreement. Nothing precludes parties from agreeing to arbitration agreements that do not provide for arbitration of claims of fraudulent inducement or the invalidity of the underlying contract[381]. Most decisions have held, however, that the "pro-arbitration" rules of interpretation of arbitration clauses include claims of fraudulent inducement of the underlying agreement within the category of arbitrable issues[382]. Courts have rejected the distinction between fraud in the factum and fraudulent inducement[383]. These decisions have held that claims of fraud in the factum pertaining to the underlying agreement are generally for arbitrators. Courts have applied federal common law standards of fraud[384]. Most US courts have applied US federal common law standards to all issues of the validity of arbitration agreements, even where the parties' choice of law clause or conflict of law rules clearly pointed towards the applicability of foreign law. Fraudulent inducement as a ground for non-enforcement of an arbitration agreement is not specifically mentioned in the NYC. For that matter, neither are fraud in the factum, duress, waiver, or illegality[385].

7.3 Voluntary application of conflict of laws rules of arbitral situs

Even if an arbitrator is not bound to apply the conflict of law rules of the arbitral *situs*, he/she may nonetheless decide that, in the circumstances, it is appropriate to do so. Hence, arbitral tribunals not infrequently conclude that an agreement on a country as arbitral *situs*, coupled with the lack of strong connecting factors to other nations, warrants application of the *situs*'s conflicts rules[386]. The choice of

379 L. Goldman, "La lex mercatoria dans les contracts et larbitrage internationaux: realite et percpectives" 1979 *Journal du Droit International* 475.
380 R. Hirsch, "The Place of Arbitration and the Lex Arbitri," 1979 *Arb Inter'l* 43.
381 *IS Joseph Co v Michigan Sugar Co* 803 F2d 396.
382 *Peoples Security Life Ins v Monumental Life Ins* 867 F2d 809.
383 *RM Perez & Assoc. Inc v Welch* 960 F2d 534, *Villa Garcia v Merrill Lynch* 833 F2d 545.
384 *Cohen v Wedbush Inc* 841 F2d 282.
385 *Technetronics Inc v Leybold* 1993 US Dist. Lexis 7683.
386 *Scherk v Alberto-Culver* 417 US 506.

applicable law is surrounded by uncertainty, which is not consistent with the ideals of predictability that arbitration purports to offer. Neither the NYC nor the FAA expressly permit non-recognition of an arbitral award because the arbitrators erred in their choice of law analysis. Thus, judicial review of arbitrators' choice of law decisions concerning the substantive law applicable to the merits of the parties' dispute is usually minimal by US courts[387]. Besides, there are grounds under the NYC and FAA for non-recognition of arbitral awards which could permit a US court to reject an arbitrator's choice of law. In particular, awards that "manifestly disregard" applicable law or that violate applicable public policy need not be enforced. Does this mean that arbitrators always decide matters of applicable law? A few US decisions have held, usually in actions to compel arbitration, that the arbitral tribunal must apply a particular law. This is most common where the case involves claims under a US federal statute, like the antitrust laws, which US courts have held incapable of prospective waiver.

Parties to an arbitral agreement will often wish for their own national law to apply, both because the choice-of-law may affect the future selection of arbitrators and because local law will be most familiar. Historically, under the laws of most US states, choice-of-law agreements were not enforceable. The Restatement (First) Conflict of Laws regarded private choice-of-law agreements as unacceptable exercises of legislative authority, and many state courts followed this rule. The first restatement contained no reference to the parties' autonomy to select the applicable law. However, the principle of party autonomy gained essentially uniform acceptance in US courts[388]. Section 187 of the Restatement (Second) Conflict of Laws illustrates the general enforceability of choice-of-law agreements in the US. The section provides that "the law of the state chosen by the parties to govern their contractual rights and duties will be applied," provided that there is a reasonable basis for the parties' choice and that it violates no applicable public policy. Additionally, section 1–105(1) of the Uniform Commercial Code[389] provides that "when a transaction bears a reasonable relationship to this state and to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties." Moreover, the common law in most US states also enforces choice-of-law agreements, particularly in international transactions. Choice-of-law agreements are also enforceable under the laws of most other leading trading nations. As we have seen, the principle of

387 *Atsa of California v Continental Ins* 754 F2d 1394 (reversing district court's holding that Egyptian law should apply, on grounds that arbitrator had authority to determine applicable law), *Buques v Reinadona 1989 US Dist Lexis* 5429 (refusing to disturb arbitrators' conclusion that New York law governed parties' agreement), *Konkar v Fritzen* 80 Civ 3230 ("It cannot be said, therefore, that the panel was in 'manifest disregard' of the law in holding that neither in New York nor United States was so clearly the center of gravity as to require application of United States law."), *Mobil Oil v Asamera Oil* 392 NYS 2d 614 (dicta that award would be vacated because arbitrators applied "wrong" substantive law).

388 E. Scoles, "Conflict of Laws," 1982 West Publishing at 632–36.

389 R. Anderson, "Uniform Commercial Code," 1981, The Lawyers Co-operative Publishing Co.

party autonomy is expressly recognized under the Rome Convention[390]. Likewise under English common law, "when the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general determines the proper law of the contract"[391]. Despite a general recognition of party autonomy in the selection of substantive law, some national laws impose limits on the enforceability of private choice-of-law agreements. In particular, some states will not enforce choice-of-law agreements if either: (a) the chosen law lacks a reasonable relationship to the parties' transaction; or (b) the chosen law is contrary to some fundamental public policy of the forum, or, less clearly, another state. In addition, under any national law, a choice-of-law clause must be construed, among other things, in order to determine what issues fall within its scope.

On the other hand, some US jurisdictions and many foreign nations do not impose any reasonable relationship requirement. For instance, during the 1980s, New York[392] enacted a choice-of-law statute specifically to eliminate such a requirement where the parties' agreement selects New York law. The Rome Convention[393] goes further and appears to contain no reasonable relation requirement whatsoever. The freedom of the parties to agree upon the substantive law governing their relations is the foundation of international commercial arbitration. International arbitrators virtually always give effect to contractual choice of law provisions and similar rules prevail in most US jurisdictions. The same is true under the Rome Convention and in most European jurisdictions. It is well settled in most US jurisdictions that a private choice-of-law agreement will be overridden only if it contravenes a "fundamental policy" or "offends our sense of justice or menaces the public welfare." Public policies that have been found capable of invalidating choice-of-law agreements include discrimination

390 Article 3 – Freedom of choice. 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract. 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties. 3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules." 4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

391 Dicey and Morris, "The Conflict of Laws," 1993 Butterworths at 1168–80.

392 G. Kobourn & Winn, "The rules of construction in choice of law cases in New York," 1988 *St John's LR* 243.

393 1980 Rome Convention. Article 1 – Scope of the Convention. 1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

prohibitions[394], and constitutional guarantees[395]. In most cases in US courts, it is the forum's policy that will invalidate a private choice-of-law agreement. However, there are cases where the public policy of another jurisdiction will be given effect by the forum court[396].

Are some public law claims "non-arbitrable"? The non-arbitrability of public policy claims in international arbitration raises complex choice-of-law questions. Bockstiegel said "agreement on the conclusion that there is disagreement seems to be the only common denominator that one can find between arbitrators, courts, and publicists regarding the question, which is the applicable law on arbitrability"[397].

7.4 The choice-of-law governing the parties' arbitration agreement

The choice-of-law governing the parties' arbitration agreement is a theoretically complex subject. An arbitration agreement is regarded, under most nations' laws as "separable" from the underlying contract to which it relates. As a consequence, it is frequently said that a different law from that applicable to the underlying agreement may govern the arbitration provision of an agreement. The law governing an arbitration agreement is usually regarded as applicable to the agreement's: (a) validity; (b) effect; and (c) interpretation. It is possible for different laws to govern each of these issues. Moreover, the law governing the arbitration agreement is also potentially applicable to issues of non-arbitrability and curial law. In US courts, selection of the law governing the arbitration agreement involves a choice between US federal and US state law. These federalism issues will generally not be relevant to an arbitrator's choice of law analysis, except where US law potentially governs the arbitration agreement. In the US, courts have devoted comparatively little attention to the choice-of-law applicable to the arbitration agreement. That is because arbitration agreements are governed principally by section 2 of the FAA. Section 2 has been held to govern: (a) interpretation of arbitration agreements (providing a pro-arbitration rule of construction); (b) many issues relating to the validity and enforceability of arbitration agreements; (c) arguably, some issues relating to the formation of arbitration agreements; and (d) remedies for the enforcement of arbitration agreements. Where the FAA is applicable, US courts have generally applied section 2 without engaging in any meaningful choice-of-law analysis. This conclusion is apparently based either on the view that Congress intended the FAA to preempt state and foreign law in US courts or the traditional common law view that the enforceability of arbitration agreements was a question of remedies, governed by the procedural law of the forum.

Nevertheless, section 219 of the Restatement provides that the "method" of enforcing an arbitration agreement is determined by the law of the forum

394 *Muschany v United States* 324 US 49.

395 *Bachchan v India Abroad Inc* 1992 WL 110403.

396 Restatement 2d Conflict of Laws, 1971, Sec 187, 184.

397 J. Bockstiegel, "Public Policy and Arbitrability," ICCA Congress Series No 3 at 184, 1987, Sanders.

(notwithstanding the applicability of section 218's rules to the agreement's validity). Thus, the availability of an order compelling arbitration, a stay of litigation, and/or damages would be controlled by the forum's law. In federal courts, the availability of orders compelling arbitration and stays of litigation is governed by sections 3 and 4 of the FAA. In principle, decisions dealing with the law governing the arbitration agreement may receive somewhat less deference than other choice-of-law rulings, because of their relevance to the arbitrator's jurisdiction. Judicial deference will be at a minimum where decisions concerning non-arbitrability are concerned.

It is unusual for the parties to agree in their underlying contract and arbitration clause on the curial law. Nevertheless, many national laws specifically permit the parties to select the curial law, including a foreign curial law. The FAA does not expressly address the question whether parties may agree to a foreign curial law. In general, however, the parties enjoy broad freedom under the FAA to agree upon arbitral procedures and it is likely that US courts would in principle give effect to agreements selecting a foreign curial law.[398] The few US authorities considered that the subject are in accord[399]. So, the parties are free to include a choice of law provision, which impacts upon procedural rules, and must be in accordance with the law of the US. There is no direct precedent on the extent to which agreement on a foreign curial law would affect the power of US courts to provide ancillary relief – such as discovery[400] of provisional measures – in connection with arbitrations conducted in the US.

Arbitrations are conducted in a particular country, without express agreement or even debate over the subject of the curial law. When that happens, the law of the arbitral *situs* provides the curial law and must be consulted to determine the various issues governed by the curial law. In some cases, however, disputes arise as to what nation's law provides the curial law. One party may argue that the arbitral *situs*'s law does not provide the curial law – typically on the grounds that the parties have agreed to a foreign curial law or that the substantive law governing parties' underlying contract provides the curial law. It is unclear whether a foreign law may provide the curial law for an arbitration conducted within national borders. Conflict of laws rules other than those of the arbitral *situs* are frequently applied in contemporary arbitration decisions selecting the applicable substantive law. Unfortunately, while several alternatives to the traditional *situs* rule can identified, there is no consensus regarding, or even a clear trend towards,

398 *Volt Information Sciences v Board of Trustees* 109 S.Ct 1248. In *re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573, n.3, (Tex. 1999). Where arbitration provisions are unclear, the court may construe the arbitration contract to determine the intent of the parties and, where appropriate, may determine that the parties agreed to arbitrate consolidated claims (the same rationale could apply to class actions) in a single proceeding. *Connecticut General Life Ins. Co. v Son Life Assurance Co. of Canada*, 210 F. 3d 771, 2000 WL 490692 (7th Cir. 2000).

399 *Remy Amerique Inc v Touzer Distribution* 816 F supp 213.

400 Thomas H. Oehmke, "Commercial Arbitration," 89–3 (3d edn. 2007) (arbitrator not required to permit discovery absent contractual requirement).

any of these alternatives. Therefore, substantial uncertainty often surrounds conflict of law determinations of international arbitral tribunals[401].

Under US law, for example, the US cannot enter into enforceable arbitration agreements. In the US, courts have refused to give effect to foreign law restrictions on the capacity of state-owned entities to enter into arbitration agreements[402].

401 In *Roby v Corporation of Lloyd's* 996 F.2d 1353 (2nd Cir. 1993) the Second Circuit held that forum-selection and choice-of-law clauses are presumptively valid and that to overcome this presumption "it is not enough that the foreign law or procedure be different or less favorable than that of the United States. Instead, the question is whether the application of the foreign law presents a danger that the Roby Names 'will be deprived of *any* remedy or treated unfairly.'" Similar holdings have come out of the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See Lipcon v Underwriters at Lloyd's, of London*, 148 F.3d 1285 (11th Cir. 1998); *Richards v Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Haynsworth v The Corp.*, 121 F.3d 956 (5th Cir. 1997); *Allen v Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v R.W. Sturge, Ltd*., 55 F.3d 1227 (6th Cir. 1995); *Bonny v Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Riley v Kingsley Underwriting Agencies, Ltd*., 969 F.2d 953 (10th Cir. 1992). *See Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 US 614, 617 (1985). On the arbitrability of domestic antitrust claims, see *Syscomm Int'l Corp. v Synoptics Communications, Inc*., 856 F. Supp. 135 (E.D.N.Y. 1994) (holding that antitrust claims arising from domestic transactions are arbitrable). Joseph D. Becker, "Antitrust and International Arbitration–The New American Synthesis," *Int'l Bus. Law.,* Nov 1985, at 447 ("The Court's acceptance of the propositions that foreign arbitrators will respect treble damage claims, that they will enforce American antitrust law where applicable, and that their omissions may be corrected at the award enforcement stage will strike some as so much Micawberism."). Stephen J. Choi & Andrew T. Guzman, "The Dangerous Extraterritoriality of American Securities Laws," 17 *Nw. J. Int'l L. & Bus.* 207, 215–19 (1996). *Wilko v Swan*, 346 US 427, 436 (1953) (implying that arbitrators' analysis of statutory requirements may be less precise than desired), Soia Mentschikoff, "Commercial Arbitration," 61 *Colum. L. Rev* 846, 861. *Barrentine v Arkansas-Best Freight Sys., Inc.*, 450 US 728, 744 (1981) ("Because the arbitrator is required to enforce the intent of the parties, rather than to effectuate the statute, he may issue a ruling that is inimical to the public policies underlying the [Fair Labor Standards Act], thus depriving an employee of protected statutory rights."); *Alexander v Gardner-Denver Co*., 415 US 36, 56 (1974) ("[T]he special role of the arbitrator … is to enforce the intent of the parties rather than the requirements of enacted legislation."). *Scherk v Alberto Culver Co*., 417 US 506, 515–17 (1974) (recognizing that the conflicts-of-law problems that will almost inevitably exist in international agreements weigh in favor of supporting contractual provisions specifying in advance the forum and applicable law); *Roby v Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2nd Cir. 1993) ("Forum selection and choice-of-law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws."). Andreas F. Lowenfeld, "International Litigation And Arbitration" 338 (1993): If the [arbitration] agreement contains a choice-of-law clause, it is virtually always followed. For one thing, international arbitration is part of the tradition of party autonomy that includes the freedom to choose a forum and to choose the law to govern their relations; for another, arbitrators owe their jurisdiction to the agreement of the parties, and the choice-of-law clause is a condition of that agreement. Tom Cullinan, "Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements," 51 *Vand. L. Rev* 395, 397–98 (1998). Stephen L. Hayford, "A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and Judicial Standards for Vacatur," 66 *Geo. Wash. L. Rev* 443, 446–47 (1998) (noting that reasoned awards would increase the likelihood of court challenges to awards and would also "increase the formality, the cost, and the time to decision in commercial arbitration").

402 Note, Authority of Governments Corporations to submit disputes to arbitration, 49 *Colum. LR* 97, *Buques v Refinadora SA* 1989 US Dist Lexis 5429.

Moreover, US courts have applied federal standards derived from the domestic FAA. So, state requirements, such as signing of the agreement by a party's attorney, are preempted by the FAA. Where the law of the enforcement forum is deemed applicable – as it usually is by US courts – then the standards developed under the domestic FAA are applicable[403]. Whether or not US law applies, courts must also consider whether the Convention imposes express or implied limits on the challenges available under national law to an agreement's validity. There is precedent suggesting that the Convention is more pro-enforcement than the domestic FAA. So, the federal arbitration policy applies with special force in the field of international commerce[404]. A number of US courts have refused to apply foreign law to determine the validity of arbitration agreements in actions under the NYC or FAA[405]. In general, US courts have not applied the arbitral *situs*'s law to determine the validity of arbitration agreements. Although Article V of the NYC contains choice-of-law principles, those rules are not applicable under Article II(3).

It is not easy to apply the law of the place the award "was" made in an action to enforce an arbitration agreement, which occurs well before any award is rendered. In many cases, the parties' arbitration agreement specifies no arbitral *situs*, making it difficult even to speculate about the place where an award might be made. Article V(1)(a) does not offer conclusive guidance as to what law should govern the validity of the parties' arbitration agreement. Application of the forum's standards for interpretation and enforcement of the arbitration agreement is consistent with the common law approach of US courts prior to enactment of the FAA. US law is applicable to determine whether an arbitration agreement is "null and void" under Article II(3). It remains unclear, however, whether federal law or state law defines the grounds for "revocation of any contract" under section 2's so-called "saving clause." As we have seen, the Supreme Court has fairly assiduously avoided definitively resolving the question. On the one hand, the Court's decisions have made clear that state laws singling out arbitration agreements for invalidity are preempted. Some US courts have held that federal law governs all issues of validity and enforceability – including formation, mutuality, unconscionability[406], illegality, and fraudulent inducement. Other courts, including the weight of contemporary authority, have held that generally applicable state contract law governs these issues unless it singles out arbitration agreements for adverse treatment. When a US court applying Article II(3) of the Convention looks to the forum law, it is these principles of enforceability under the domestic FAA that are presumptively applicable. At least in principle, therefore, state contract

403 *McDermott Inc v Lloyds Underwriters of London* 944 F2d 1199.

404 *David v Matallgesellschaft Ltd* 923 F2d 245, *Filanto Spa v Chilewhich Int'l Corp* 789 FSupp 1229.

405 *Meadows Indemnity Co. v Baccala Ins* 760 FSupp 1036.

406 A challenge to the unconscionability under normal state contract law of the arbitration provision itself is for the arbitrator to decide. *See Hawkins v Aid Association for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003).

law defenses may be applicable under Article II(3) – unless there is some reason to create broader federal law under the Convention than under the FAA. In the US, restrictions on arbitrability imposed by state (as opposed to federal) law are preempted by the FAA and NYC. It could be argued that arbitrators had very little say in establishing the prevailing view about choice of law. Of course, arbitrators have applied choice of law but they have not influenced courts in their precedent.

8 Arbitrators

The use of commercial arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which US society relies for fair determination of legal rights. Persons who act as commercial arbitrators therefore undertake serious responsibilities to the public as well as to the parties. Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. Unlike judges, arbitrators are not selected by a formal institutional process designed to insure their competency and disinterest. Does the fact that the same institutional process does not select arbitrators as well as judges mean that they are not capable of implementing the substantive law correctly? Arbitrators as judges can be equally good or bad because their legal knowledge is not sufficient to solve serious legal problems[407] and critical legal issues. Parties can and should agree on an appointing authority in ad hoc arbitrations. Most arbitration institutions will serve as the appointing authority, for a fee, in arbitrations not subject to their own rules. Most institutional rules require that arbitrators shall be "impartial" and "independent." These are vitally important requirements that go to the heart of the arbitral process. Independence and impartiality are also requirements of national law in virtually all developed jurisdictions, including the US. Similarly, the NYC implicitly recognizes lack of independence or impartiality as a basis for declining enforcement of an arbitral award.

Despite the central importance of the impartiality and independence of arbitrators, there is remarkable uncertainty over the meaning and application of these principles. First, there is the choice-of-law question of what standards govern the arbitrators' impartiality. It could be said that the answer will be the standards contained in any applicable institutional rules, plus the standards imposed by national law in both the arbitral *situs* and the places where enforcement of the award may be sought. Second, there is disagreement between and within different

407 John D. Shea, "An Empirical Study of Sexual Harassment/Discrimination Claims in the post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?" 32 Suffolk *U. L. Rev* 369, 388 (1998) ("A party may indeed 'forgo' his or her statutory rights if the arbitrator deciding the dispute lacks the requisite training and experience to properly address the critical legal issues involved in the dispute.").

jurisdictions concerning the standards applicable to party-nominated arbitrators. The acceptance of non-neutral party-appointed arbitrators was explicit in US judicial decisions, which not infrequently contain comments like: "As everyone knows, the party's named arbitrator in this type of tribunal is an amalgam of judge and advocate"[408].

The need for an impartial tribunal is fundamental for commercial arbitration in order to achieve efficiency. There is no express provision guiding an arbitrator's failure to disclose relationships or conflicts[409]. At the time of the first hearing, arbitrators are required to make disclosure of such circumstances (personal ties and business relations with any of the parties) that might preclude any of them from rendering an unbiased award based merely upon an objective and impartial consideration of the evidence presented to the panel. No arbitrator shall sit on a panel where the dispute concerns a claim in which to his knowledge, he or his employer may have a direct or indirect interest in the outcome of the arbitration. If a party seeks to challenge one of the arbitrators, he has to do so as soon as the information is disclosed. Any further challenge to the arbitrator can be made in the courts after an award is issued[410]. Thus, disclosing the facts or relationship prior to the arbitration hearing may rebut the appearance of partiality. If the other

408 *Cia Navegacion v Hugo Neu Corp* 359 Fsup 898, *ATSA of California Inc v Continental Ins* 754 F2d 1394. *Commonwealth Coatings Corp. v Continental Cas. Co*., 393 US 145, 149 (1968) (recognizing the need for arbitrators to disclose any dealing that might create an impression of possible bias); *Prima Paint Corp. v Flood & Conklin Mfg. Co*., 388 US 395, 407 (1967) (Black, J., dissenting) (asserting that nonlawyer arbitrators are "wholly unqualified to decide legal issues").

409 *ANR Coal Co. v Cogentrix of N.C., Inc.*, 173 F.3d 493, 499 (4th Cir. 1999) ("The material and relevant facts an arbitrator fails to disclose may demonstrate his 'evident partiality' under [the FAA]. However, nondisclosure, even of such facts, has no independent legal significance and does not in itself constitute grounds for vacating an award."). *AT&T v United Computer Sys. Inc*., 7 F. App'x 784, 788 (9th Cir. 2001) ("Failure to disclose information is not a ground for vacating an arbitration award under the FAA."), *Fed. Vending, Inc. v Steak & Ale of Fla., Inc*., 71 F. Supp. 2d 1245, 1246 (S.D. Fla. 1999) ("[T]he evident partiality inquiry [of the FAA] is a case-specific and fact-intensive one."). *Woods v Saturn Distrib. Corp*., 78 F.3d 424, 427 (9th Cir. 1996) ("In nondisclosure cases, vacatur is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party."); *US Care, Inc. v Pioneer Life Ins. Co. of Ill*., 244 F. Supp. 2d 1057, 1062 (C.D. Cal. 2002) ("A court cannot require a higher level of impartiality than is provided for by the parties in an arbitration agreement."). Lee Korland, "What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the FAA," 53 Case W. *Res. L. Rev* 815, 821 (2003) ("The FAA does not provide any standards for arbitrators' conduct. Thus, any requirement that an arbitrator disclose potentially disqualifying conflicts of interest or conduct an investigation to uncover such conflicts stems from case law …"). The Fifth Circuit, sitting en banc, reversed a prior decision by a panel of the same court, and upheld an arbitral award in the face of a challenge by one of the parties based on the arbitrator's failure to disclose a prior relationship with the firm representing the other party. *Positive Software Solutions Inc. v New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007).

410 *International Produce Inc v A/S Rosshavet* 638 F2d 548 *Sun Refining & Marketing Co. v Statheros Shipping Corp.*, 761 F.Supp. 293 (S.D.N.Y. 1991), *aff'd without opinion*, 948 F.2d 1277 (2nd Cir. 1991). "Full and early disclosure increases the probability that successful attacks on the award for "evident partiality" can be avoided." *Hartford Steam Boiler Inspection & Ins. Co. v Industrial Risk Insurers*, 1997 WL 94089 (Conn. Super Ct. 1997).

party is notified and fails to object, then that party has waived its right to object after the award. An arbitrator should disclose any and all potential conflicts or relationships prior to the arbitrator's appointment; however, failure to do so will not automatically result in vacation of the award. The Fifth Circuit in *Positive Software Solutions v New Century Mortgage* and its subsequent grant of rehearing *en banc*[411] held that an arbitrator "displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. The evident partiality is demonstrated from the nondisclosure, regardless of whether actual bias is established."

There are a few cases where a challenge to an arbitrator for bias was allowed to be made in the courts prior to the issuance of an award, but the rule is that the courts will consider objections to the qualifications or impartiality of the arbitrators only in a post-award challenge[412]. Parties[413] cannot avoid arbitration by making allegations of bias prior to the arbitration taking place. An alleged 'bias' of the arbitration administrator will not prevent arbitration, provided a valid selection

411 436 F.3d 495 (5th Cir. 2006), *reh'g en banc granted*, 449 F.3d 616. at 502. *Schmitz v Zilveti*. 20 F.3d 1043 (9th Cir. 1994). *Commonwealth Coatings Corp. v Continental Cas. Co*., 393 US 145 (1968) at 151–52. An arbitrator must disclose when he or she "has a *substantial* interest in a firm which has done *more than trivial* business with a party." International Bar Association Guideline on Conflicts of Interest in International Arbitration 4.4.2, (an arbitrator need not disclose that he and counsel for one of the parties have previously served together as co-counsel.) *Available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf. *Weber v Merrill Lynch, Pierce Fenner & Smith, Inc.*, 2006 US Dist LEXIS 67207 (N.D. Tex. 2006) (arbitrator disclosed membership in same country club as two potential witnesses, which relationship did not satisfy "onerous burden" of actual bias). *Wise v Wachovia Securities LLC*, 450 F.3d 265 (7th Cir. 2006) (arbitrators' granting summary judgment without explanation did not demonstrate corruption, partiality, or exceeding of powers). *Bulko v Morgan Stanley DW Inc.*, 450 F.3d 622 (5th Cir. 2006) (award by attorney on inactive status not vacated despite NASD arbitration clause requiring arbitrator to be "an attorney … or other professional" who had devoted a certain percentage of time to securities-related work). *Thomason v Citigroup Global Mkts*., 2006 US Dist. LEXIS 3168 (D. Utah 2006) (court refused to vacate the award based on purely "remote, uncertain, or speculative" evidence). *Applied Industrial Materials v Ovalar Makine Ticaret Vesanayi, A.S.*, 2007 WL 1964955 (2d. Cir. 2007), the court held that a reasonable person would conclude that "evident partiality" existed where an arbitrator decided not to investigate a prospective conflict and failed to notify the parties of the "Chinese Wall" that he had erected. The Court stated that "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award." Instead, the duty to investigate arises "when an arbitrator knows of a potential conflict."

412 *Astoria Medical Group v Health Ins* 182 NE2d 85. *ANR Coal Inc v Cogentix of North Carolina* 173 F3d 493 (past representation of one of the arbitration parties not be disclosed in order to avoid evident partiality). *Consolidation Coal Co. v Local* 1643 48 F3d 125. Desiree A. Kennedy, "Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations," 8 *Geo. J. Legal Ethics* 749, 765 (1995) (criticizing arbitration that permits party communication with arbitrators as incompatible with the principle that adjudicators should be impartial).

413 *Alter v Englander*, 901 F. Supp. 151, 154 (S.D.N.Y. 1995); *Pompano-Windy City Partners, Ltd. v Bear, Stearns & Co., Inc*., 698 F. Supp. 504 (S.D.N.Y. 1988); *Valdiviezo v Phelps Dodge*, 995 F. Supp. 1060 (D. Ariz. 1997); *Copen Associates, Inc. v Dan River, Inc*., 385 N.Y.S.2d 557 (N.Y. App. Div 1976). *Lapine Tech. Corp. v Kyocera Corp*., 130 F.3d 884, 889 (9th Cir. 1997); *Gateway Tech., Inc. v MCI Telecomm. Corp*., 64 F.3d 993, 997 (5th Cir. 1995).

process is in place. The FAA provides that a party can appeal to a court for an order vacating the award where there was evident partiality in the arbitrators' behavior[414]. Arbitrators must not refuse to hear pertinent and material evidence, and must refrain from any other misbehaviour by which the rights of a party may be prejudiced[415]. Courts do not allow parties to depose arbitrators to explain themselves after they have rendered an award and so sympathy survives in practice merely because it is not detectable – by the courts[416]. Total neutrality eliminates the parties' ability to appoint arbitrators, shifting it to an external and disinterested party[417].

The powers of a tribunal are those conferred upon it by the parties' agreement, within the limits allowed by the applicable law that powers must be sufficient for the tribunal to carry out its task effectively. The arbitral tribunal owes its existence to the parties. The arbitrators, not the parties, are the final judges of the matters in dispute. The parties and the institutional rules of arbitration can impose specific duties upon an arbitral tribunal. Terms of appointment of arbitrators are imposed by operation of law and include the duty to act with diligence and the duty to act judicially. The duty of the arbitrators to act judicially is a duty that extends to all aspects of the proceedings. Where an arbitrator fails to act judicially, the immediate sanction is for him to be removed. An arbitrator's removal can be made either under the rules of the relevant arbitral institution or by a national court.

The court in *Astra Footwear v Harwyn International*[418] finds that section 5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform. The court did not appoint an arbitrator when one arbitrator on a three-person panel died, but instead ordered parties to select a new panel[419]. Parties do not always agree upon an

414 *ANR Coal Co. v Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999) (stating that relationship between arbitrator and a party is too insubstantial for a "reasonable person" to conclude that there was improper partiality so as to vacate award under the FAA); *Beebe Med. Center, Inc. v Insight Health Servs. Corp.*, 751 A.2d 426 (Del. Ch. 1999) (finding that an arbitrator's nondisclosure of a relationship with an attorney representing a party in an arbitration matter is substantial enough to create a "reasonable impression of bias" that requires vacatur of the arbitration award). *Nasca v State Farm Mut. Automobile Ins. Co.*, 2000 WL 374297 (Colo. Ct. App., April 13, 2000) (finding that party-appointed arbitrator had duty to disclose substantial business relationship with the party).

415 *Fairshild & Co. v Richmond* 516 Fsup 1305, *Diapulse Corp v Carba Ltd* 626 F2d 1108.

416 *Hoeft v MVL Group, Inc.*, 343 F.3d 57 (2nd Cir. 2003) (arbitrators may only be deposed about claims of bias or prejudice on clear evidence of impropriety, but not about the "thought process underlying their decisions"); *Certain Underwriters at Lloyds v Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003) (procedural rulings, reliance on one party's evidence is not evidence of evident partiality).

417 Thomas E. Carbonneau, "The Exercise of Contract Freedom in Marking Arbitration Agreements," *36 Vand. J. Transnatl. L.* 1189, 1213 (2003).

418 442 Fsup 907.

419 *Coeneni v Pressprion & Co* 453 F2d 1209. M Blessing, "Globalisation and Harmonization," 1992 *J Int'l Arb.* 79. F Gelinas, "Arbitration and the challenge of Globalization," 2000 *J Int'l Arb.* 117.

arbitrator or appointing authority. In these circumstances section 5[420] of the FAA authorizes a district court to designate appointment of an arbitrator. US courts have exercised this power by appointing arbitrators.[421] The court appointed an arbitrator notwithstanding parties' reference to non-existent procedures[422]. It is unusual that a party will persist in its refusal to appoint an arbitrator to the point of forfeiting its right to make an appointment. Courts have ordered the parties to have recourse to an arbitration institution for the appointment of an arbitrator. Individuals sometimes cannot serve because of a conflict or otherwise will not serve. In those circumstances, assuming that the parties cannot reach a new agreement, section 5 permits judicial appointment[423]. Courts have rejected arguments that section 5 does not permit the appointment of the same individual as the arbitrator in two related arbitrations[424]. It could be argued that the law does not specify that the arbitral tribunal will in any case appoint the arbitrators but the FAA gives the right to the court to appoint arbitrators.

If the parties have agreed to arbitrate in a particular place in the US, it is clear that sections 5 and 206 will permit the district court at that place to select the arbitrators[425]. The power to appoint arbitrators is granted in the same section as the power to compel arbitration and so section 206 permits orders compelling arbitration in other US judicial districts. If the parties have not agreed upon an arbitral *situs*, neither sections 4, 5 nor 206 speak clearly to the question of whether a US court (and if so, which one) would have jurisdiction to appoint the arbitrators. Where both parties are subject to the personal jurisdiction of a particular district court, and where subject matter jurisdiction exists, the court will conclude that it has the power to appoint an arbitrator under sections 5 and 206[426].

Perhaps the most vital initial step in any arbitration is the appointment of the arbitrator or arbitrators who will resolve the dispute. The identity of the arbitrators will significantly affect the character and quality of arbitral proceedings and may directly impact the outcome. More fundamentally, care must be taken to provide a mechanism for selection of replacements if the original designee refuses, dies, or otherwise becomes unable to serve. Failure to do so may lead to invalidation of the entire arbitration agreement. At least in the US, courts have generally sustained

420 9 US 5.

421 *Zechman v Merrill Lynch* 742 Fsup 1359, *Schulze v Tree Top* 642 Fsup 1155.

422 *Chattanoga Mailers v Chattanoga Press* 524 F2d 1305.

423 *Masthead Drilling v Fleck 549* Fsup 854.

424 *ORE Chemical Co. v Stinnes Inc* 611 Fsup 237 In *Atsa of California Inc v Continental Insurance Co* 754 F2d 1394 the parties had agreed to ICC rules and the court ordered to apply to ICC for appointment of arbitrators.

425 The Court Granted Defendant's Motion to Compel Arbitration Pursuant to 9 USC. § 206 (20 June 2007) the Court concluded that the alleged defect in the arbitration clause was curable under Chinese law through a supplementary agreement between the parties. Therefore, the Court refused to find as a matter of law that the arbitration clause was incapable of being performed and granted defendant's motion to compel arbitration. *Apple & Eve, LLC v Yantai North Andre Juice Co. Ltd.*, Case no: 07-CV-745, United States District Court, Eastern District of New York, USA.

426 *US Lines Inc v Liverpool* No 93 Civ 3807.

the arbitration agreement in these circumstances, and selected a replacement arbitrator under the FAA (sections 5 and 206). Some arbitration clauses contain provisions regarding vacancies that may occur on the panel. If the parties do not choose an appointing authority, national law will often (as under the FAA) permit judicial appointment of an arbitrator. But this is often undesirable, because it can be slow, expensive, and (most seriously) conducive to parallel appointment proceedings in different national courts. Under the domestic FAA in the US, if court appointment of an arbitrator is required and the parties have not agreed upon the number of arbitrators, only a single arbitrator will be appointed.

Other important considerations in the appointment process are any restrictions or qualifications contained in the parties' arbitration agreement, the curial law, the applicable law of the parties' dispute (if it can be ascertained at the outset) requisite industry or technical expertise, and the language of the arbitration. Arbitration clauses sometimes contain various types of requirements that arbitrators must process, or "defects" that they may not process. Any qualification or prohibition designated by the parties must comply with applicable national law, and be sufficiently precise to be enforceable[427]. A judicial challenge to an arbitrator is available, after raising the matter within the arbitration, as a defense to enforcement of an award. It may also be available as a basis for an interlocutory judicial appeal or collateral attack in some national legal systems. There is no basis under the FAA[428] for an interlocutory challenge to the appointment of a biased or corrupt arbitrator. This avoids the risk of judicial interference in the arbitral process and prevents delay, but leaves the court at the enforcement stage with the difficult dilemma of either vacating an award (sometimes unanimously rendered) after substantial effort and expenditure. It is not clear in the US[429] what effects an institutional appointing authority's refusal to uphold a challenge will have in a subsequent judicial action. Moreover, the district court's orders stay a pending arbitration proceeding and are immediately appealable[430].

427 *Sperry International Trade Inc v Government of Israel* 670 F2d 8. As to formal criteria, the ICC Rules provide that the Court will look to the views of the "appropriate" national committee, which is often the nation of the arbitral *situs*. Similarly, according to the LCIA's Rules. Under the AAA International Rules, for example, the parties can ask the AAA to submit to them a list of names from which its party can delete names that are unacceptable to it.

428 *Floraynth Inc v Pickholz* 750 F2d 171.

429 *Fertilizer Corp of India v IDI management Inc* 517 FSupp 948 (party-appointed arbitrator did not disclose the fact that he acted as counsel to party on several prior occasions; the court refused to vacate the award because the arbitrator was party-appointed, the award was unanimous and there was no showing of prejudice).

430 *PCS 2000 LP v Romulus Telecomm., Inc.*, 148 F.3d 32, 34 (1st Cir. 1998) ("Because the district court's stay order is in the nature of an injunction, we have appellate jurisdiction."); see 28 USC. § 1292(a)(1) (permitting interlocutory appeals from injunctions). 9 USC. § 16(a)(2) (authorizing an immediate appeal from "an interlocutory order granting … an injunction against an arbitration that is subject to this title"). *Haviland v Goldman, Sachs & Co*., 947 F.2d 601, 604 (2nd Cir. 1991). *Tejidos de Coamo, Inc. v ILGWU*, 22 F.3d 8, 10 (1st Cir. 1994), the district court's order is not entitled to the abuse of discretion standard normally accorded the grant of injunctive relief. "[I]f a district court's ruling rests solely on a premise as to the applicable rule of law … and the

Professional contracts have a positive side – fostering trust between counsels – and are not significantly different from contracts between judges and the bar[431]. The more serious practical risk is from party-appointed arbitrators who knowingly discuss the arbitral tribunal's deliberations with the specific objective of advantaging one party in the presentation of its case or in settlement discussions. Because of the difficulties in uncovering such wrongdoing, the sanctions for it ought to be significant.

9 Provisional measures in arbitration

During the course to arbitration, it may be necessary for a national court to issue orders intended to preserve evidence, to protect assets and to maintain the *status quo* pending the outcome of the arbitration proceedings themselves. The arbitral tribunal cannot deal with interim measures until it has been established and national courts may be expected to deal with such urgent matters. The assistance of a national court may be necessary because the tribunal's powers are limited to the parties involved in the arbitration itself[432]. The courts will often tend to defer to the jurisdiction of the arbitral tribunal once the tribunal is constituted[433]. The proper role of the courts in granting interim relief should be to enforce or supplement the function of the arbitral tribunal. The primary object of an application to the courts for interim or provisional relief will generally be to obtain an interlocutory preservative or injunctive remedy, pending a final determination of the substantive issues by the arbitral tribunal as contemplated by the arbitration agreement between the parties. In the US, there has been a division between the Third and Fourth Circuit Federal Courts of Appeals and the Second, Fifth and Ninth Circuits as to whether interim measures may be granted in a pending arbitration, the latter having granted interim measures in aid of the arbitration[434]. It is argued that an arbitrator's powers

facts are established or of no controlling relevance, that ruling may be reviewed [de novo] even though the appeal is from the entry of a preliminary injunction. *Louisiana Pub. Serv Comm'n v FCC*, 476 US 355, 368 (1986). "[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v National Solid Waste Management Ass'n*, 505 US 88, 108 (1992) (internal quotation marks and citations omitted). *Thornburgh v American College of Obstetricians and Gynecologists*, 476 US 747, 757 (1986). The Supremacy Clause of Article VI of the US Constitution prevents the states from impinging on federal law and policy.

431 *Hunt v Mobil Oil Corp* 583 FSupp 1092.

432 *McCreary Tire & Rubber Co. v Sear Spa* 501 F2d 1032.

433 *BF Waste Systems of North America, Inc. v Waste Mgmt. Holdings, Inc*, No. Civ A16577 WL 671277 (Del. Ch. 1998, unreported) [US] (refusing injunctive relief to protect property pending arbitration, since the tribunal had power to grant such relief under AAA Rules).

434 *McCreary Tire & Rubber Co. v CEAT SpA*, 501 F.2d. 1032, 1038 (3rd Cir. 1974), *Tennessee Imports v Pier Paulo Filippi*, 745 F. Supp. 1314 (M.D. Tenn. 1990), *Carolina Power & Light Co. v Uranex*, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977). *Bank Mellat v Helliniki Techniki* [1984] QB 291. The court in *Bank Mellat* held that security would only be awarded in exceptional circumstances. Ian R. Macneil et. al., "Federal Arbitration Law: Agreements, Awards, and Remedies under the FAA," § 24.1.2 (1999). § 25.4.1. The majority view is that courts have

of compulsion are inferior to those possessed by the courts; and, *a fortiori*, where the tribunal is not yet in existence, the only recourse has to be a national court.

CPLR 7502(c) allows a party to obtain a preliminary injunction or order of attachment in aid of arbitration, even before the arbitration starts, without having to establish the merits of the underlying claim, or meet the other stringent standards necessary in non-arbitrable disputes to obtain injunctions and attachments[435]. In order to obtain an injunction, the party must demonstrate first that its grievance is arbitrable; second, that an injunction is necessary to preserve the arbitration; and, third, that irreparable harm and imbalanced hardships would result without the injunction[436].

Recourse to the courts thus may provide parties subject to an agreement to arbitrate with an effective mechanism for obtaining immediate, interim relief[437]. When a dispute is subject to arbitration, however, the filing in a court of a request for interim relief is not without its own drawbacks. First and foremost, litigation may be considered contrary to the parties' expectations, which is after all to have the dispute arising from the contract between them resolved in arbitration. Second, the enforcement of interim relief issued by a court is limited to the geographical reach of the court's jurisdiction. Further, courts in the US, in view of the presence of the agreement to arbitrate, and in view of the NYC's directive that courts "refer to arbitration" disputes subject to an arbitration clause, have struggled with the related questions of whether they have jurisdiction to grant interim relief and whether the party filing for it has waived all rights to arbitrate. The better view, accepted by many courts after the decision in *Carolina Power & Light v Uranex*[438], is that the NYC does not preclude a court from providing interim relief until the arbitral panel is able to do so, and that seeking such relief does not waive a party's right to arbitration. The interim relief fashioned by the court, however, should extend

the authority to award interim remedies in appropriate cases, however, there is a minority of cases that have reached the opposite conclusion.

435 *In Re Bunzl*, 224 AD2d 245, 637 NYS2d 703 (1st Dep't 1996). The following lists reported cases where relief under CPLR 7502(c) has been both granted and denied. Granted: *Wagner Acquisition Corp. v Giove*, 1998 WL 265733 (2d Dep't, May 26, 1998); *Chiavarelli v State University of New York Health Science Center at Brooklyn*, 671 NYS2d 279 (2d Dep't 1998); Denied: *Erickson v Kidder Peabody & Co. Inc.*, supra; *Hill v Reynolds*, 187 AD2d 299, 589 NYS2d 461 (1st Dep't 1992).

436 *International Bhd. of Teamsters, Local Union No. 251 v Almac's, Inc*., 894 F.2d 464, 465 (1st Cir. 1990).

437 A majority of federal courts also allow courts to grant interim relief while arbitration is pending under the FAA, with the exception of the Eighth Circuit. *Teradyne, Inc. v Mostek Corp*., 797 F.2d 43, 47–51 (1st Cir. 1986), *Blumenthal v Merrill Lynch, Pierce, Fenner & Smith, Inc*., 910 F.2d 1049, 1052–53 (2nd Cir. 1990), *Roso-Lino Beverage Distribs., Inc. v Coca-Cola Bottling Co.,* 749 F.2d 124, 125 (2nd Cir. 1984), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bradley*, 756 F.2d 1048 (4th Cir. 1985), *Merrill Lynch v Salvano*, 999 F.2d 211, 216 (7th Cir. 1993), *Merrill Lynch v Dutton*, 844 F.2d 726, 728 (10th Cir. 1988). *See, Merrill Lynch, Pierce, Fenner & Smith, Inc. v Hovey*, 726 F.2d 1286 (8th Cir. 1984) (held that where the FAA is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief).

438 451 F. Supp. 1044 (N.D. Cal. 1977).

only for the period of time needed to allow the arbitrator(s) to address the issue. In *Merrill Lynch, Pierce Fenner & Smith, Inc. v Salvano*[439], the Seventh Circuit ruled that a restraining order should have been imposed only until the arbitration panel was able to address the issue, indicating that the court's authority to grant injunctive relief does not extend "ad infinitum."

Prior to the onset of arbitration the courts have granted injunctive relief[440]. The rules of most international arbitral regimes authorise a tribunal to order interim measures, but a tribunal has no executive authority to enforce the order against the assets of a party. Courts have granted attachments in maritime cases under section 8, even though the dispute was to be arbitrated[441]. Granting provisional remedies would not conflict with the strong federal policy in favour of arbitration and enforcement of arbitral awards. Courts in the US have denied requests for pre-award attachments on the grounds that such remedies were contrary to the parties' agreement to arbitrate. Additionally, courts upheld interim measures that facilitated the arbitration proceedings and identified, beyond the terms of reference in the arbitration agreement, the existence of inherent arbitral authority over interim relief. Hence, arbitrators had the power to order interim measures, but judicial authorities should take measures requiring enforcement. Most arbitrators are more reluctant than national courts to order provisional measures. Arbitral tribunals will be concerned about prejudging the merits of the parties' dispute or appearing partial.

Provisional measures are needed at the outset of the parties' dispute because ordinarily no arbitral tribunal will be in place and functioning at the beginning of the parties' dispute. Another approach could be that an arbitration management authority can take provisional measures until an ad hoc arbitral tribunal is established and so courts will be kept out of the arbitration process.

Although not addressed by the Supreme Court, the question of the judiciary's power to grant provisional relief pending arbitration has been decided by lower courts. Generally, four approaches have emerged: (1) the "hollow formality" test; (2) the preliminary injunction test; (3) the contractual language test; and (4) the plain meaning test. Preliminary injunctions are appropriate in any circumstance where the conduct sought to be enjoined would render the arbitration a "hollow formality"[442]. Moreover, the court reasoned that section 3 "does not preclude a

439 999 F.2d 211 (7th Cir. 1993).

440 Alan Scott Rau, "Provisional Relief in Arbitration: How Things Stand in the United States," 22(1) *J. of Int'l Arb*. at 1 (2005).

441 *Reefer Express Lines v Petmovar SA* 420 F Sup 16.

442 *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bradley*, 756 F.2d 1048 (4th Cir. 1985). Cynthia J. Butler, Note, "The Propriety of Judicially Granted Provisional Relief in Pending Arbitration Cases," 9 *Ohio St. J. On Disp. Resol.* 145 (1993) (explaining arguments in favor of adopting the "contractual language" test, which contends that judicial intervention is proper only when the contract between the parties specifically provides for this type of relief); Anthony S. Fiotto, Note, "The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute," 66 *B.U.L. Rev* 1041 (1986) (discussing that courts have the power under the FAA to permit preliminary injunctions pending arbitration because the purpose behind arbitration

district court from granting one party a preliminary injunction to preserve the status quo pending arbitration." No clear mandate or language within the statute abrogates district courts' equitable powers. The court further noted that Congress could not have intended to deny courts the equitable remedy of provisional relief without detailed discussions and "evaluation of the statute's effects". Preserving the *status quo* of the parties pending arbitration was a goal of the FAA, which in itself provided the basis for injunctive relief. If there is an enforceable arbitration agreement between two parties and the language of the agreement does not contemplate judicially ordered injunctive relief, then all issues, including preliminary injunctions, are for the arbitrator to decide. Several district courts have taken the position that permitting courts to grant preliminary injunctions pending arbitration is contrary to the intent of Congress and violates the plain meaning of the FAA. It could be argued that arbitrators should be able not only to grant preliminary injunction and other provisional measures but also to enforce them like courts, thereby so minimizing courts' impact upon arbitration.

The court noted that nothing in the history of the statute indicated intent on the part of Congress to foreclose the courts from using their equitable powers prior to the actual arbitration. The court of appeals indicated that if the contractual language of the agreement explicitly contemplates judicial intervention in the form of injunctive relief, then a district court may grant an injunction pending arbitration. Several scholars have argued that court-granted provisional relief pending arbitration should be allowed only when it is expressly provided for in the parties' arbitration agreement. On the one hand the FAA does not address provisional remedies, preliminary injunctions, attachments, or temporary restraining orders. On the other hand, it is true that no language in the congressional history of the FAA explicitly precludes the court from granting provisional relief. However, all the goals and objectives underlying the FAA lend support for the implication that Congress did not want the judiciary to retain any powers, including their equitable ones. Allowing preliminary injunctions pending arbitration would encourage parties to divert cases from arbitration to the courts, thereby resolving some of the merits prior to the arbitration.

agreements demands such provisional relief, the public interest would be better served, and issuance of injunctions will not impinge on the rights of the arbitral process); Philip E. Karmel, Comment, "Injunctions Pending Arbitration and the FAA: A Perspective from Contract Law," 54 *U. Chi. L. Rev* 1373 (1987) (the judiciary has the power to grant injunctive relief pending arbitration and that "unless a specific contractual provision to the contrary exists, courts should imply a status quo maintenance provision into arbitration agreements where breach of the status quo would constitute bad faith"); Elizabeth A. Phillips, Note, "Injunctions Pending Arbitration: Do the Courts Really Have Jurisdiction?" *Blumenthal v Merrill Lynch*, 1991 *J. Disp. Resol.* 381 (discussing a Second Circuit case that held that a district court is not precluded from issuing a preliminary injunction); Megan J.F. Williams, Note, "The FAA and the Power of the District Court," 7 *Ohio St. J. On Disp. Resol.* 389 (1992). John Leubsdorf, "The Standard for Preliminary Injunctions," 91 *Harv L. Rev* 525, 546 (1978) (analyzing provisional relief and critizing courts and legal scholars who utilize the preservation of status quo as justification for granting of provisional relief).

Courts should never order preliminary injunctions pending arbitration for a number of reasons. First, the plain language and meaning of section 3 of the FAA precludes the court from granting such relief. Second, the legislative history of the Act demonstrates a congressional intent to bar the judiciary from utilizing this power. Determining the validity of arbitration clauses was the only duty that Congress imposed on the judiciary. The judiciary's actions, in cases such as *Bradley* and *Teradyne,* effectively write the preliminary injunction powers into the statute[443]. The Supreme Court has indicated that preliminary injunction orders contravene both the motive and intent behind section 3[444]. It could be argued that arbitrators, not judges, should determine the appropriateness and necessary scope of injunctive relief under the circumstances of each case. Therefore, Congress should amend the FAA both to explicitly bar courts from exercising this type of equitable power pending arbitration and to allow arbitrators to do so instead.

An arbitrator will grant provisional relief if he/she is satisfied that the law allows him to do so. Tribunal-ordered provisional relief will not be enforceable in a national court unless the law permits such relief and the law of the enforcement jurisdiction provides for judicial enforcement of the tribunal's orders. The FAA and UAA are silent on the arbitrator's powers to order provisional measures. United States courts have recognized the power of an arbitrator under the FAA to order provisional measures, provided that this is consistent with the parties' agreement. Temporary equitable relief in arbitration is essential to preserve assets or enforce performance, which if not preserved or enforced, may render a final award meaningless[445]. Besides, some courts have held that arbitrators lack the power to issue provisional relief, where the parties have not expressly authorized them to do so[446]. To that extent, Article 17 of the UNCITRAL model law limits provisional measures to those that are necessary and that concern the subject matter of dispute. An arbitrator's powers are limited to the subject matter of the arbitration and to the parties to the arbitration. The arbitrator can order provisional measures against the parties to the arbitration and not against a third party[447].

443 *Teradyne, Inc. v Mostek Corp*., 797 F.2d 43 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bradley*, 756 F.2d 1048 (4th Cir. 1985).

444 *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.,* 460 US 1 (1983); *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395 (1967). *Merrill Lynch, Pierce, Fenner & Smith, Inc. v McCollum*, 469 US 1127, 1129 (1985). A number of courts have addressed this issue. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Guinness-Harp Corp. v Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2nd Cir. 1980); *Merrill Lynch, Pierce, Fenner & Smith Inc. v Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983).

445 *Pasific Reinsurance Corp v Ohio Corp* 935 F2d 1019.

446 *Charles Construction Co. v Denderian* 586 NE2d 992.

447 *Carolina Light Co. v Uranex* 451 Fsup 1044 In *Charles Construction Company v Derderian* 586 NE2d 992 the court has not accepted the owner's claim that the contractor's only avenue for obtaining provisional measures is through a court order independent of the arbitration proceeding. The court upheld the entry of protective court orders even though a dispute between the parties is subject to arbitration. *Hull Man v Massachusetts Man* 399 Mass 640. The court upheld preliminary injunction requiring contractual payments to continue while dispute is arbitrated pursuant to court order.

Rodman[448] says that provisional measures are not available in arbitration except in maritime cases. United States courts have adopted a view similar to that of the UNCITRAL model law and parties will be presumed to have conferred the power to award provisional relief on their arbitrator even where institutional arbitration rules are involved[449]. The authority of arbitrators to grant interim measures stems from their inherent powers to conduct the arbitral proceedings and any additional power granted to them in the contract between the contracting parties. US courts have upheld the authority of arbitrators to make security orders[450]. It has been argued that a foreign court enjoys the exclusive power to do so under foreign law instead of the arbitral tribunal[451].

Arbitrators are often not able to issue effective provisional relief. Interim measures are usually needed, and sought, at the commencement of the parties' arbitration. It typically requires several months for an arbitral tribunal to be selected. If challenges are made to the impartiality of nominees, even longer will be required. During this period, there will be no realistic possibility of tribunal-ordered provisional measures. Arbitrators will want to do justice and issue awards granting interim measures in terms little different from that of a court. There are cases where arbitrators grant provisional measures *sua sponte* without having been requested to do so by either party. Jarvin[452] considers that intervention by state courts offers the only effective means for implementing conservatory measures during arbitration.

A party that seeks provisional measures will face a counter demand for security for damages in the event that the party seeking the relief fails to prevail on the merits. The NYC does not contain any provision dealing expressly with provisional relief. United States courts have interpreted Article II(3) of the NYC as forbidding national courts from ordering attachments prior to the commencement of arbitration pursuant to a preexisting arbitration agreement[453]. An order of attachment will remain valid if it has been confirmed in a contract action before a defendant obtains a stay of proceedings because the underlying controversy is subject to arbitration[454]. *Angelina M. Petti*[455] argues that "a stay would allow a court to successfully protect the parties' contractual rights as well as their rights under the FAA." Federal arbitration law applies to the extent it is not inconsistent with the NYC (9 USC 208). Federal law permits attachment to be used in admiralty cases. The Supreme Court has concluded that the availability of provisional

448 Rodman, *Commercial Arbitration*, Par 26.1 1984 West Publishing.

449 *Konkar Maritime v Compagnie Belge* 668 Fsup 267.

450 *Swift Indust Inc v Botany Indust Inc* 466 F2d 1125.

451 *Warth Line Ltd v Merinda Marine Co* 778 Fsup 158.

452 Jarvin, "Is Exclusion Of Concurrent Court's Jurisdiction Over Conservatory Measures To Be Introduced By A Revision Of The Convention," 1989 *Journal of International Arbitration* 171.

453 *Cooper v Ateliers del Motobecane* 442 NE2d 1239.

454 *American Resource Co. v China Co* 297 NY 322. *Boys Market Inc v Retail Clerks Union* 398 US 235.

455 *Angelina M. Petti,* "Judicial Enforcement Of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3," 2006 *Hofstra Law Review* 565 at 576.

remedies encourages rather than obstructs the use of agreements to arbitrate[456]. There is no indication in either the text or the apparent policies of the NYC that resort to prejudgment attachment was to be precluded[457]. Courts have rejected the argument that Article II(3) forbids all court ordered provisional measures in aid of arbitration[458]. United States courts have confirmed the availability of injunctive relief in aid of an international arbitration under US law[459]. Federal law generally governs the availability of preliminary injunctions in federal courts. A number of court decisions have granted injunctive relief in aid of arbitration notwithstanding the Cooper/McGrey interpretation of Article II(3) of the NYC[460].

9.1 Enforcement in US courts of provisional measures ordered by arbitrators

Arbitral tribunals sometimes do order provisional relief. The ability of an arbitrator to enforce his orders is a matter of national law. United States law permits judicial enforcement of provisional measures ordered by an arbitrator[461]. Judicial enforcement actions for interim relief will arise in the same context as actions to enforce final awards. One party will seek to confirm, or the opposing party will seek to vacate, the interim award in a national court. Actions to enforce provisional measures raise many of the same issues that are present in other enforcement contexts, such as the appropriate standard of judicial review. The enforcement of provisional measures ordered by an arbitrator is likely to raise questions as to whether judicial review or enforcement of an interim award is appropriate, and the extent to which the tribunal's measures are consistent with court-ordered measures. Courts should consider whether the parties' agreement contemplated provisional measures. Furthermore, courts have been willing to review and enforce arbitral awards of provisional measures[462]. Arbitral awards of provisional measures can be enforced. The inability to enforce an award of provisional measures would render meaningless the arbitrator's power to grant such equitable relief[463]. The standard for judicial review of an arbitrator's award of provisional measures should be similar to that of a final award on the merits of the case. In fact US courts permit arbitrators broad discretion to fashion appropriate remedies. One basis for

456 *Boys Market Inc v Retail Clerks Union* 398 US 235.

457 *Carolina Power v Uranex* 451 Fsup 1044.

458 *Filanto Spa v Chilewhich Corp* 789 Fsup 1229, *Atlas Inc v World Trade Inc* 453 Fsup 861.

459 *Rogers Inc v Dongan Ltd* 598 FSup 754, *Borden Inc v Meiji Co* 919 F2d 822.

460 *Antros Compania SA v Antre* 430 Fsup 88.

461 *Island Greek Co. v Gainesville* 729 F2d 1046, Anthony S. Fiotto, "The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute," 66 *B.U. L. Rev* 1041, 1065 (1986) ("The public interest in private dispute resolution is hardly served when a court stands idly by while the parties' chosen method for resolving their grievances is threatened. Courts should … invoke their historic equity powers to fashion interim measures which will ensure the vitality of the private process.").

462 *Konkar Maritime SA v Companie Belge* 668 Fsup 267.

463 *Puerto Rico v Star Lines Ltd* 454 Fsup 368.

denying enforcement of an award is excess of authority, which can be raised as a defense in the context of provisional measures as well. The court will not grant provisional measures unless the requesting party makes some reasonable showing that it will prevail on the merits. A court's preliminary injunction will not prejudice the arbitrator's subsequent decision on the merits. The arbitral tribunal may have the power to award damages for wrongfully obtained court-ordered provisional relief[464]. Finally, the role of courts in provisional measures is vital and fundamental.

10 Stay of proceedings

The FAA's stay of litigation provision is mandatory and if the issues in the case are within the reach of the arbitration agreement, the district court has no discretion to deny stay. Complications[465] arise when a defendant seeks both to compel arbitration and to stay the action pending arbitration. A non-frivolous appeal of a denied motion to compel arbitration warrants issuance of an automatic stay of proceedings[466]. Upon motion of a party, section 3 of the FAA permits a court to stay court proceedings. The court merely enters an order staying proceedings until such arbitration proceedings are completed[467]. The FAA does not instruct courts on whether a stay of proceedings in the district court should be granted pending an arbitrability appeal, which one can assume has led to the circuit split on this issue. *Angelina M. Petti*[468] argues that: "the court plays a vital and important role throughout and at the close of the arbitral proceedings. Issuing a stay pending arbitration will, in a practical sense, encourage such a role."

Furthermore, once the courts hold the arbitration agreement to be enforceable, the next question – often overlooked – is *how* they can best enforce the agreement in practice[469]. The courts will customarily remedy actual and anticipated breaches of arbitration agreements with the statutory remedies prescribed by the FAA – compelling arbitration and staying their own proceedings. By entering into such agreements, parties embark on a contractual obligation to resolve particular disputes by arbitral proceedings, instead of through the courts. The contractual nature of arbitration agreements suggests that the courts award common contractual damages to restore the breach of such agreements – as with the breach of

464 *Worth Line Ltd v Merinda Marine Co* 778 FSup 158.

465 *Tolaram Fibers Inc v Deutsche Engineering* 1991 US Dist Lexis 3656.

466 *McCauley v Halliburton Energy Services Inc* 413 F.3d 1158 (10th Cir. 2005).

467 *Zenol Inc v Carblox Ltd 334 Fsup 866. Midwest Mechanical Contractors, Inc. v Commonwealth Construction Co.*, 801 F.2d 748, 750 (5th Cir. 1986). "If the issues in a case are within the reach of that [arbitration] agreement, the district court has no discretion under Section 3 to deny the stay."

468 Angelina M. Petti, "Judicial Enforcement Of Arbitration Agreements: The Stay-Dismissal Dichotomy Of FAA Section 3," 2006 *Hofstra Law Review* 565 at 583.

469 *E. & J. Gallo Winery v Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006) (awarding a preliminary antisuit injunction against foreign proceedings to enforce a forum selection clause on the basis that "[w]ithout an anti-suit injunction in this case, the forum selection clause effectively becomes a nullity").

any other contractual promise[470]. The FAA contains two methods of enforcing arbitration agreements: compelling arbitration and staying court proceedings. Characteristically, in order to acquire statutory relief, the moving party must prove a valid agreement to arbitrate, and show that the dispute in question is within the scope of that agreement[471]. Thus, courts intervene to provide statutory relief instead of arbitration. Consequently, if a written arbitration agreement satisfies sections 3 and 4 of the FAA, the court may put into effect the agreement by compelling arbitration and by staying its own proceedings commenced in breach of it. The lack of clear statutory authority to stay proceedings has not deterred the courts from relying on their inherent power to stay proceedings in suitable circumstances. United States courts use the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"[472] to stay their own proceedings, and such power exists to control the docket, conserve judicial resources, and ensure the just determination of disputes[473].

The policy of liberal joinder in maritime cases embodied in FRCP 14(c) does not supersede the statutory right to enforce contractual arbitration guaranteed by the FAA (9 USC. § 3). The arbitration clause is one this court has termed a "broad" agreement because it covers "any dispute" between the parties[474]. As a result, any litigation arguably arising under such a clause should be stayed

470 Daniel Tan, "Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation," 40 *Tex. Int'l L.J.* 623 (2005).

471 *Am. Gen. Life & Accident Ins. Co. v Wood*, 429 F.3d 83, 88 (4th Cir. 2005) ("A party can compel arbitration if he establishes: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute."); *Sharif v Wellness Int'l Network, Ltd*., 376 F.3d 720, 726 (7th Cir. 2004) ("The FAA, however, states that if the parties have an arbitration agreement and the asserted claims are within its scope, the motion to compel cannot be denied."); *Texaco Exploration v AmClyde Engineered Prods. Co*., 243 F.3d 906, 909 (5th Cir. 2001) ("An application for arbitration by either party under section 3 … requires the court to first determine whether there is a written agreement to arbitrate between the parties, and then whether any of the issues raised are within the reach of the agreement.")

472 *WorldCrisa Corp. v Armstrong*, 129 F.3d 71, 76 (2nd Cir. 1997) (staying suit against a non-party pending arbitration despite having no explicit authority to do so under 9 USC. § 3); *Stechler v Sidley Austin Brown & Wood, L.L.P.*, 382 F. Supp. 2d 580, 592 (S.D.N.Y. 2005) ("The Court has the power to grant such a stay [of proceedings] 'pursuant to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'").

473 *Contracting Northwest, Inc. v Fredericksburg*, 713 F.2d 382, 387 (8th Cir. 1983) ("A district court has the inherent power to grant a stay in order to control its docket, conserve judicial resources, and provide for a just determination of the cases pending before it. There is no authority under 9 USC.S. § 3 to stay an action where a litigant was not a party to the arbitration agreement, but stay is permitted under the district court's inherent power to control its docket.").

474 *Texaco Exploration and Production Company and Marathon Oil Company v Amclyde Engineered Products Company, Inc* No. 00-30799 (2001 5th Circuit Court of Appeals).

pending the arbitrator's decision as to whether the dispute is covered[475]. Appellate review of the district court's refusal to stay litigation pending arbitration is *de novo*[476].

Was the FAA intended to be "procedural"? Are state courts obliged by the FAA to stay state court litigation of claims that are subject to a valid arbitration agreement governed by the FAA? As contracts governing business relationships more and more frequently include arbitration clauses, the motion to compel arbitration is becoming an important part of a litigator's repertoire. Both the FAA and state arbitration acts allow courts to stay judicial proceedings and compel an agreement to arbitration. Regardless of whether a clause compels arbitration under a domestic or international regime, a US court with jurisdiction over the reluctant party can compel arbitration. State courts may create exceptions to arbitrate not allowed under the FAA or construe their own state laws so as to defeat the petitioner's motion for arbitration. For example, California courts in *Volt. Info. Sciences, Inc. v Board of Trustees of Leland Stanford Junior Univ*.[477] construed a contract's choice of law clause to invoke the procedures of California's arbitration statute. This statute allowed the court to stay arbitration while the parties were involved in other litigation, something that the FAA would not have allowed. The Supreme Court ruled that the FAA merely enforces the agreement between the parties to arbitrate on certain terms, and since the California court had construed that agreement to elect the California statute, the Supreme Court upheld the ruling. It seems that courts initiate arbitration by staying court proceedings rather than arbitral tribunals.

11 Parties' freedom to choose arbitral procedure

The FAA contains no provision as to how arbitration must be conducted, but does state what must not be done in the course of arbitration proceedings. In particular, arbitration proceedings are highly flexible; in many states, arbitral proceedings can be conducted in almost any way that the parties choose, subject

475 *Sedco, Inc. v Petroleos Mexicanos Mexican Nat'l Oil*, 767 F.2d 1140, 1145 n. 10 (5th Cir.1985); *Mar-Len of La., Inc. v Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985). *Shipping Corp. of India v American Bureau of Shipping*, No. 84 CIV 1920, 1989 WL 97821 (S.D.N.Y. Aug.17, 1989) (an outside party cannot use Rule 14(c) to override an arbitration agreement previously reached between a plaintiff and a third-party defendant.). *General Marine Construction Corp. v United States*, 738 F.Supp. 586 (D. Mass. 1990), the court held that "once a case is properly commenced as an admiralty matter in the District Court, Rule 14(c) governs related claims even if the issues raised by those related claims, standing alone, would otherwise be subject to the CDA [Contract Dispute Act] procedural scheme."

476 *Hornbeck Offshore Corp. v Coastal Carriers Corp*., 981 F.2d 752, 754 (5th Cir. 1993). *Neal v Hardee's Food Systems, Inc*., 918 F.2d 34, 37 (5th Cir.1990). *Midwest Mechanical Contractors, Inc. v Commonwealth Construction Co.*, 801 F.2d 748, 750 (5th Cir. 1986). "If the issues in a case are within the reach of that [arbitration] agreement, the district court has no discretion under section 3 to deny the stay."

477 489 US 468 (1989).

only to mandatory due process requirements of national law[478]. The Fifth and Fourteenth Amendments bar the state and federal governments from depriving a person of life, liberty, or property without due process of law[479]. Nevertheless, particularly in major matters, the contrast between litigation and arbitration can be exaggerated and the procedures of arbitration can assume a fairly "judicial" cast. Tribunals and parties often conclude that complex cases require considerable issue definition, scheduling, and the like, and it is not uncommon in international arbitration to encounter written pleadings, briefs, cross-examination, testimony under oath, verbatim transcripts, and a measure of discovery. Although litigation is compulsory and arbitration is consensual, both are judicial processes of an adversarial character. Indeed, critics of arbitration argue that it has lost the informality and expedition that once characterized it, and urge reforms returning to less judicial procedures.

The principle of party autonomy is qualified only by the mandatory requirements of applicable national law, and, in leading arbitral forums even these requirements are ordinarily minimal. The FAA does not contain any express affirmative recognition of the parties' freedom to select the arbitral procedure. In practice, US courts have generally afforded parties relatively broad freedom to designate procedural rules governing the arbitral process. United States decisions have held that Article V1b requires application of the law of the enforcement state, and that in the US the applicable standards are those of the *due process* clause[480]. Moreover, the fact-finding process in arbitration is usually not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete: the usual rules of evidence do not apply, and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.

478 *Raiford v Merrill Lynch, Pierce, Fenner & Smith, Inc*., 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.").

479 US CONST. amend. V ("No person shall be … deprived of life, liberty, or property, without due process of law …"); US CONST. amend. XIV, § 1 ("No State shall … deprive any person of life, liberty, or property, without due process of law …"). *Hampton v Mow Sun Wong*, 426 US 88, 103 (1976) (stating that the Fifth Amendment requires that a deprivation be accompanied by due process, which in turn demands that there be a legitimate basis for the deprivation). *Cleveland Bd. of Educ. v Loudermill*, 470 US 532, 541 (1985) (emphasizing that "the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures"). *Matthews v Eldridge* 424 US 319 (1976). (First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail) Richard H. Fallon, Jr., "Some Confusions About Due Process, Judicial Review, and Constitutional Remedies," 93 *Colum. L. Rev* 309, 332 (1993).

480 L. Shilston, "The evolution of Modern Commercial Arbitration," 1987 *J Inte'l Arb* 45.

Has the arbitration process been transformed into a parallel civil justice system equal to litigation? Vicki Zick[481] considers that federal courts' efforts to clear their own crowded dockets have transformed the arbitration process into a parallel civil justice system. It is argued that arbitration is used to supplement the over-burdened federal courts. In *McDonald v City of West Branch*,[482] a post-arbitration section 1983 case, the Supreme Court declared that "arbitral fact finding is generally not equivalent to judicial fact finding." Courts provide an integral component in ensuring that arbitrations comply with legal standards, because under the FAA, arbitration decisions are all subject to court review and so courts must also review arbitration awards before the awards can be reduced to judgment[483]. Moreover,

481 Vicki Zick, "Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration," 82 *Marq. L. Rev* 247, 247–48 (1998). Katherine Van Wezel Stone, "Rustic Justice: Community and Coercion under the FAA," 77 *N.C. L. Rev* 931, 958–59 (1999) (reviewing sources that question the validity of overcrowded dockets). *United Steelworkers v Warrior & Gulf Navigation Co.*, 363 US 574, 578 (1960) (distinguishing commercial arbitration ("the substitute for litigation") from labor arbitration ("the substitute for industrial strife"); Charles B. Craver, "Labor Arbitration as a Continuation of the Collective Bargaining Process," 66 *Chi.-Kent L. Rev* 571, 571 (1990) (commenting that arbitration mandated by CBAs is uniquely different than arbitration resulting from "an ordinary commercial agreement"); Rosetta E. Ellis, "Mandatory Arbitration Provisions in CBAs: The Case Against Barring Statutory Discrimination Claims from Federal Court Jurisdiction," 86 *Va. L. Rev* 307, 309–10 (2000) (urging the Supreme Court to find that mandatory arbitration agreements found in CBAs do not preclude employees from filing individual statutory discrimination claims in federal court); Jean R. Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration," 74 *Wash. U. L.Q.* 637, 642 (1996) (cautioning readers to avoid the "pitfall" of failing "to distinguish between unionized labor arbitration and commercial arbitration"). Ronald Turner, "Employment Discrimination, Labor, and Employment Arbitration, and the Case against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum," 49 *Emory L.J.* 135, 198–99 (2000) (arguing that a union may not pursue the interests of minorities in "the face of majoritarian apathy or opposition"). Kelly Burton Beam, "Administering Last Rites to Employee Rights: Arbitration Enforcement and Employment Law In The Twenty-First Century," 2003, *Houston Law Review* 499.

482 466 US 284.

483 *Marsh v First USA Bank*, 103 F.Supp.2d 925 (N.D. Tex. 2000) ("The Court is satisfied that the NAF [National Arbitration Forum] will provide a reasonable, fair, and impartial forum within which Plaintiffs may seek redress for their grievances. In addition, an arbitration award is subject to review by the Court."); *Johnson v West Suburban Bank*, 225 F.3d 366, 378 (3d Cir. 2000) (arbitration procedures did not favor one party over the other in action between individual and bank); *Baron v Best Buy*, 260 F.3d 625 (11th Cir. 2001) (in action between consumer and bank, the National Arbitration Forum provided for all statutory remedies and its fees and costs were reasonable); *Lloyd v MBNA Bank, N.A.,* 2001 WL 194300 (D. Del. 2001) (court found no persuasive evidence that the National Arbitration Forum was anything but neutral and efficient); *Bank One v Coates*, 125 F.Supp.2d 819 (S.D. Miss. 2001) (arbitration fair because any relief available to defendant in a judicial forum was also available in arbitration); *Hale v First USA Bank*, 2001 WL 687371 (S.D.N.Y. 2001) ("Various courts have found the NAF to be an adequate and fair arbitral forum and have upheld arbitration provisions requiring arbitration in the NAF…"); *Garcia v Household Bank,* No. 00-4470-Civ-Huck/Brown (S.D. Fla. filed Aug. 17, 2001) ("The NAF not only sets forth a reasonable fee schedule, but provides that those fees may be awarded to the prevailing party, and permits waiver of fees for indigent litigants."); *Bank One v Williams,* 2002

an award is not considered equivalent to a judgment prior to the review of a court and the recognition by a court, and so an award has to be distilled in order for it to become equivalent to a judgment. The first pole in a legal system is the courts. In order to be the second pole, an alternative dispute system has to render awards directly enforceable. The courts' distil of the award throws arbitration into a second category, an inferior, not independent dispute mechanism with no autonomy.

In the US, the FAA imposes similar requirements of basic procedural fairness, and section 9[484] of the FAA contains the grounds for denying recognition to an arbitral award subject to the domestic FAA. Under the FAA and institutional rules, the arbitral tribunal has very substantial discretion to establish the arbitral procedures in the absence of agreement between the parties. The tribunal's use of this discretion will be influenced significantly by the arbitrators' legal experience, and personal characteristics. Arbitrators with common law backgrounds will most likely approach procedural issues differently from those with civil law, or other non-Western backgrounds[485]. While influenced by their legal training, experienced arbitrators in cases with parties of diverse nationalities will usually seek to arrive at procedural decisions that are "international," rather than reflecting parochial procedural rules in national courts. It could be argued that courts gave full independence to arbitration to follow its own procedures, which according to this author have to maintain some minimum degree of fairness for the parties, deriving from *due process* and a basic internationally outlined procedural formality in order for individuals to know in advance the steps of the procedure. Arbitration procedures should be designed to ensure fairness[486] and guarantee due process to both parties as set out by the California Supreme Court in the case of *Amendariz v Foundation Health Psychcare Services, Inc.*[487]: (1) the arbitrator should be neutral; (2) the procedures should provide for a discovery stage, allowing the parties to acquire evidence and information essential to the development of their cases; (3) the arbitrator should issue a written decision; (4) the remedies available through arbitration should be similar to those available under the relevant EEO legislation;

WL 1013161 (N.D. Miss., April 29, 2002) (arbitration provision was enforceable and procedurally fair). *Forsythe Int'l SA v Gibbs Oil Co* 915 F2d 1017 at 1022 The court held that: "As a speedy and informal alternative to litigation, arbitration resolves disputes without confinement to many of the procedural and evidentiary structures that protect the integrity of formal trials."

484 9 US 9.

485 J. Wetter, "The Conduct of Arbitration," 1985 *J Int'l Arb* 7, *Austern v Chicago Bd. Options Exch., Inc*., 898 F.2d 882, 886 (2nd Cir. 1990) (holding arbitrators absolutely immune from liability for damages for all acts within scope of arbitral process).

486 H. Smit, "Substance and Procedure In International Arbitration: The Development of A New Legal Order," 1991 *Tulane LR* 1309.

487 24 Cal.4 th 83, 6 P.3d 669, 99 Cal. Rptr.2d 745 (Cal. 2000). *Cole v Burns Int. Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). Courts have refused to enforce arbitration agreements where the arbitration procedures are grossly unfair and one-sided, *Hooter of America, Inc. v Phillips*, 173 F.3d 933 (4th Cir. 1999); *Floss v Ryan's Family Steak Houses*, 211 F.3d 306 (2000). *Morrison v Circuit City Stores, Inc*., 2003 WL 193410 (Jan. 30, 2003).

and (5) an employee should not be required to pay unreasonable costs, expenses or arbitrator's fees as a condition of access to the arbitration. National courts will enforce the terms of an arbitration agreement relating to confidentiality[488]. Moreover, a US Federal Court in *US v Panhandle Eastern Corp.* ("*Panhandle*")[489], declined to recognize the existence of a duty of confidentiality in international arbitration. In arbitration, principles of self-determination and party choice permit parties to keep their dispute and its resolution confidential[490]. The public policy favouring settlement assumes primacy, and the public is told that it has no interest in the resolution of these private disputes. It is argued that arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs but criminal justice is strictly a matter for courts[491].

488 M. Collins, "Privacy and Confidentiality in arbitration proceedings," 1995 *Texas Int'l LJ* 121. M. Domke, "Domke on Commercial Arbitrations," par 24:07 West 1999 (the arbitrator should not give out any information about the proceedings). *Ecco Australia v Plowman* 128 *ALR* 391. *United States v Panhandle Eastern Corp*, 118 F.R.D 346.

489 *United States v Panhandle Eastern Corp.,* 118 F.R.D. 346 (D.Del 1988).

490 A number of courts have utilized contract doctrines such as unconscionability and public policy to render confidentiality clauses in arbitration agreements unenforceable. *Ting v AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (finding confidentiality clause unconscionable); *Eagle v Fred Martin Motor Co.*, 809 N.E.2d 1161, 1180–81 (Ohio Ct. App. 2004) (holding secrecy provision of consumer arbitration clause violative of Ohio public policy). Other courts unseal or refuse to seal arbitration decisions and awards filed for confirmation, modification, or vacatur. *Zurich Am. Ins. Co. v Rite Aid Corp*., 345 F. Supp. 2d 497 (E.D. Pa. 2004) (unsealing arbitration award). *Eagle v Fred Martin Motor Co*., 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004) (criticizing private arbitration proceedings because they "prevent the public from discovering … acts and practices" violative of consumer protection statutes); *Kloss v Edward D. Jones & Co*., 54 P.3d 1, 8 (Mont. 2002) (asking whether arbitration proceedings "shrouded in secrecy … conceal illegal, oppressive or wrongful business practices"). John B. O'Keefe, Note, "*Preserving Collective-Action Rights in Employment Arbitration,"* 91 *Va. L. Rev* 823, 826–28, 840 (2005) (proposing "open arbitration" to facilitate "concerted activity for mutual aid" in absence of class arbitrations); *see also Luna v Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (holding that confidentiality clause magnified the unfairness of the class action prohibition). *Baxter Int'l, Inc. v Abbott Labs*., 297 F.3d 544, 548 (7th Cir. 2002) (noting that closed arbitration presents "a sure path to dispute resolution with complete confidentiality"). Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23. *Cardozo L. Rev* 1 (2001) at 20 (citing confidentiality as one of reasons for arbitration's popularity).

491 Llewellyn Joseph Gibbons, "*Private Law, Public 'Justice': Another Look at Privacy, Arbitration, and Global E-Commerce*," 15 *Ohio St. J. On Disp. Resol.* 769, 771 (2000) (indicating that "individuals choose arbitration solely in the hope of keeping some facts private"); at 771 (noting that privacy of arbitral process and award is "one of the elements of alternative dispute resolution that separates it from the public courts"); at 788 (arguing that the private arbitral process shortcuts the "barometer of public need"); Michael Moffitt, "*Pleadings in the Age of Settlement,"* 80 *Ind. L.J.* 727, 755 (2005) (fearing secret settlements may permit public ignorance of "trends that affect public health"); Elizabeth G. Thornburg, "*Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*," 67 *Law & Contemp. Probs.* 253 (2004) (examining arbitration of personal injury claims arising out of contractual relationships) at 272 (contending that privatization of personal injury claims "can result in the public lacking information about important issues of health and safety and product reliability") at 263 n.51 (suggesting that lack of transparency in arbitration impedes fairness and impartiality of process).

12 Discovery and disclosure in arbitration

The precise format for discovery is set forth in an agreement between the parties or by a procedural ruling from the tribunal. Thereafter, each party is free to make requests for additional documents or specified categories of documents. Additionally, section 7 of the FAA permits court-ordered discovery in aid of arbitration from the district court in the district where the arbitrators sit. Some courts have interpreted FAA § 7[492] (which is silent on the subject) as permitting arbitrators to compel pre-hearing discovery from third-party witnesses[493]. If the adverse party does not comply with a party's discovery requests, an application can be made to the tribunal. The tribunal will typically encourage the receiving party to comply with some or all of the requests, depending upon its views as to relevance, burdensomeness, and similar issues[494]. In general, however, tribunals will not order discovery nor seek court assistance to sanction non-compliance. The sanction, of course, for unjustified non-compliance, will be adverse factual inferences drawn by the tribunal. Where it is available in arbitration, tribunal-ordered discovery will ordinarily be limited to document requests. Absent special circumstances, depositions of parties or their employees are seldom requested in international arbitration. It is not uncommon, however, for the tribunal (especially a civil law tribunal) to urge the attendance of a particular individual as a witness at a hearing. Tribunal-ordered discovery will almost always be directed at the parties and their employees or agents. The tribunal will lack authority over third parties, and will virtually never seek to order discovery from such persons by itself. In *Hay Group, Inc. v E.B.S. Acquisition Corp*.[495], the Third Circuit held that, under the FAA, an arbitrator or arbitration panel does not have the authority to issue subpoenas

492 9 US 7.

493 *American Federation of Television and Radio Artists AFL-CIO v WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999). The Fourth Circuit has decided such discovery is available only on a showing of special need or hardship. *Comsat Corp. v Nat'l Sci. Found*., 190 F.3d 269, 278 (4th Cir. 1999). The Fourth Circuit reasoned that parties to an arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes, p. 276. Given the FAA's silence, those courts willing to infer an arbitrator's authority to order pre-hearing discovery must struggle with how the court's subpoena powers can be used to compel a reluctant third-party witness. *Amgen, Inc. v Kidney Ctr. of Delaware County Ltd*., 885 F. Supp. 878, 882 (N.D. Ill. 1995). In *Amgen* an arbitrator in Chicago issued a deposition subpoena to a third party in Pennsylvania. When the third party refused to be deposed, the party seeking the testimony first moved to compel in Pennsylvania federal court, but was rebuffed since the FAA specifies that compliance must be sought where the arbitration is conducted. When the party moved to compel compliance in Illinois federal court, the court decided the party could have its lawyer issue the subpoena under the same of the Illinois enforcement action and then seek compliance, if necessary, in Pennsylvania federal court under FRCP 45.

494 R. Morgan, "Discovery in Arbitration," 1986 *J Intr'l Arb* 9.

495 *Hay Group, Inc. v E.B.S. Acquisition Corp*., 360 F.3d 404 (3rd Cir. 2004). In *re Security Life Ins. Co. of Am*., 228 F.3d 865, 870–71 (8th Cir. 2000) (holding that arbitrators can compel pre-hearing documents from non-parties). *COMSAT Corp. v National Sci. Found*., 190 F.3d 269, 275–78 (4th Cir. 1999) (holding that the FAA's discovery provision does not grant arbitrators the power to compel pre-hearing discovery against non-parties absent a showing of "special need" by the party seeking discovery). The Court of Appeals in *Dynegy v Trammochem* ruled that 9 USC.,

compelling the production of documents without also compelling an appearance by parties not involved in the arbitration proceeding. Arbitrators cannot extend the scope of hearing beyond the scope of the claimant's demands for damages without giving the respondent notice and opportunity to be heard. The opportunity to be heard includes not only the right to present evidence to support or defend a claim, but also the opportunity to present one's case effectively by showing facts that establish the legal elements of a claim or defense and demonstrating the deficiencies in an opponent's case.

The FAA does not provide a specific mechanism by which parties can obtain discovery prior to the commencement of the arbitration hearing. Section 7 authorises arbitrators to issue a summons commanding the production of documents and witnesses at arbitration hearings, and the courts have recognized the discretion granted to arbitrators in this respect by refusing to quash subpoenas. Hence, the arbitrators have to look to the courts for the enforcement of arbitration orders where the parties will not voluntarily comply. Some courts have authorised the use of discovery devices contained in the FRCR and not merely the enforcement of the arbitrator's orders, despite the arbitrability of the underlying dispute. Such relief has been granted in cases involving special circumstances such as the need to preserve testimony or because of the unusual facts of the case[496].

The courts do not allow discovery in aid of arbitration in the absence of an arbitrator's order. A court can order discovery in the absence of an arbitrator's order in exceptional circumstances, which means necessity rather than convenience in order to present a proper case to the arbitrators[497]. For instance, the court found necessity where members of the crew were about to depart the country[498]. The increase in discovery reflects the increasing complexity of cases and the higher stakes involved in present disputes together with the possibility of a post-award attack on the arbitration award based on the refusal to order disclosure[499]. The use of discovery has been increasing and the scope of discovery has extended to the production of documents and the making of depositions of witnesses in appropriate cases. The increase in discovery reflects the escalating intricacy of cases and a tendency to follow more and more means of litigation procedure. It seems that litigation has been established as the procedure of resolving high-stakes disputes[500].

section 7, does not grant nationwide enforcement powers on the district courts with respect to subpoenas issued by arbitrators (Docket No. 05-3544-CV).

496 Penn Tanker Co. v CHZ Rolimpex 199 Fsup 716. In re Application of Medway Power Limited, 985 F. Supp. 402 (S.D.N.Y. 1997). An international arbitration tribunal is not a "tribunal" for purposes of 28 USC. § 1782. Section 1782 authorizes a US court to order discovery of a third party when requested by a "foreign or international tribunal." Unlike a formal tribunal, an arbitrator has no power whatsoever to order persons who have not agreed to his authority to do anything. If evidence is needed from third parties, arbitrators can obtain the assistance of a "real tribunal" such as a British court.

497 *Oriental Commercial & Shipping Co v Rissel* 125 FRD 398.

498 *Koch Fuel Inc v M/V South Star* 118 FRD 318.

499 *Harbor Island Inc v Norwegian American Line* 314 FSup 471.

500 *Flexible MFG Systems v Super Products Corp* 86 F3d 96.

The arbitrators' discretion to control the proceedings before them is constrained by a requirement to provide the parties with fundamentally fair hearings. The arbitrator did not violate the US Arbitration Act when he applied California law, as he was contractually required to do, and stayed the arbitration pending a trial court's determination of the illegality of the entire agreement[501]. The requirement for fair hearings can be enforced *ex post facto* by attacking an award in the courts on the ground of misconduct, based on the arbitrators' failure to hear evidence or failure to adjourn a hearing so as to allow a party to secure evidence. Arbitrators use their discretion to allow the liberal presentation of all types of evidence without the limitations imposed on trials by the judicial model[502]. Judge L. Hand held[503] that "they must content themselves with looser approximations to the enforcement of their rights than those that the law accords them when they resort to its machinery." Arbitrators may determine that one particular issue is distinct from the remaining issues in the case and therefore can be the subject of a partial final award[504]. US courts virtually never overturn final arbitral awards because of evidentiary rulings. They have repeatedly held that the rules of evidence that apply in judicial proceedings are not binding upon arbitrators. The court in *Duche*[505] said that: "The propriety of such admission, even if contrary to our rules of evidence, is not for the courts to review." It is well-settled that arbitrators ordinarily have the power to admit and rely on hearsay evidence and other materials not admissible under rules of evidence applicable in most US judicial proceedings. Under US law, although arbitrators generally avoid applying strict rules of admissibility or relevance, and are not required to do so, there is no bar to their doing so. Arbitrators also have considerable discretion in cutting off repetitious testimony, refusing to examine improperly proffered proof, or refusing to conduct site inspections.

Lower US courts have produced divergent decisions regarding the scope of discovery under section 7. Some courts have held that section 7 does not permit an arbitral tribunal to order discovery, but only to require the production of evidence

501 *Hotels Nevada, L.L.C. v Bridge Banc, L.L.C.*, 30 *Cal. Rptr.* 3d 903, 904 (Cal. Ct. App. 2005).

502 *McDonald v City of West Branch* 466 US 284. As the US Supreme Court has described: "Arbitral fact finding is generally not equivalent to judicial fact finding …. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." A challenge to the unconscionability under normal state contract law of the arbitration provision itself is for the arbitrator to decide. *See Hawkins v Aid Association for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003).

503 *American Almand Products Co v Consolidated Sales Co.* 144 F2d 448 at 451. *New England Homes, Inc. v R.J. Guarnaccia Irrevocable Trust*, 846 A.2d 502, 506 (N.H. 2004) (reviewing the arbitration transcript and determining that the award rendered in arbitration was not supported by evidence); *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of US and Canada Local No. 16 v Laughon*, 12 *Cal. Rptr.* 3d 522, 524 (Cal. Ct. App. 2004) (district court based its finding of no "obvious bias or prejudice" of the arbitrator on an examination of the arbitration transcript); *Cooper v Maytag, Co*., 2004 WL 573663,*1 (Iowa Ct. App. 2004) (plaintiff submitted the transcript from a workman's compensation arbitration as evidence).

504 *Liberian Vertex v Associated Bulk Carriers Ltd* 738 F2d 85.

505 *Duche & Sons v Barras* 191 NYS2d 40.

of a hearing. The duty to determine whether or not the proposed evidence is material[506] is imposed upon the courts. Other courts have been reluctant to second-guess arbitrator's determinations concerning materiality, and have enforced what appear to be discovery orders issued by arbitrators[507]. It could be argued that the FAA can be read as only authorizing arbitrators to require witnesses to attend arbitral hearings as opposed to requiring pre-hearing discovery of documents and depositions. Parties can agree to permit an arbitral tribunal to order broad discovery and so courts can permit a broad discovery. Neither the FAA nor the rules of the AAA give a party an absolute right of demand discovery[508]. The parties' agreement can restrict the scope of discovery available under section 7. Section 7 involves a procedure for the issuance of subpoenas similar to one followed by courts. The materials that are subpoenaed are directed to the arbitrators, who will make them available to the parties. In the absence of a party's agreement about discovery, section 7 appears to provide affirmative authority to a tribunal to order at least some discovery. Therefore, section 7 permits petition for enforcement of arbitrator's subpoenas to the US court in and for the district in which such arbitrators are sitting. In summoning a witness, the arbitrator should issue a summons that should be served in the same way as subpoenas to appear and testify before the court. Arbitrators are empowered to seek judicial assistance in obtaining discovery in aid of arbitration and such assistance may extend to issuing subpoenas to non-party witnesses[509]. Under the FAA, arbitrators may order and conduct such discovery as they find necessary[510]. Some federal courts have held that "implicit in an arbitration panel's power to subpoena relevant documents for production at hearing is power to

506 *Wilkes-Barre Co v Nespaper Guild* 559 Fsup 875.

507 *Stanton v Paine* 685 Fsup 1241.

508 *United Clear Corp v Geberal Atomic Corp* 597 P2d 290.

509 *Mobil Oil v Asamera Oil Ltd* 392 NY2d 614. The court refused to consider action to vacate interim award in which arbitrators confirmed their power to order discovery under ICC rules. Jean R. Sternlight, "Drafting a "Bulletproof" Consumer Arbitration Agreement: Is It Possible?" in *Arbitration Of Consumer Financial Services Disputes* (1999)(courts "are likely to strike down clauses which … deny the consumer access to discovery which is necessary in order for the consumer to have a chance of prevailing.") Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," 72 *Tul. L. Rev* 1, 90 (1996) ("Where, for example, one party has substantially greater access to relevant witnesses and physical and documentary evidence, denying the other party any discovery will essentially deny them the opportunity to prevail in an arbitration."); Paul H. Haagen, "New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration," *40 Ariz. L. Rev.* 1039, 1053 ("More restrictive discovery may leave a plaintiff with a meritorious claim unable to prove it.") *Lackey v Green Tree Financial Corp*., 498 S.E.2d 898, 905 (S.C. Ct. App. 1998)("Green Tree retained the option to use judicial or non-judicial relief to enforce a security agreement relating to the manufactured home, to enforce the monetary obligations secured by the manufactured home, or to foreclose on the manufactured home.") Many major arbitration organizations have promulgated procedures designed to ensure due process in consumer arbitration. Christopher R. Drahozal, "Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System," 9 *Kan. J. of L. & Pub. Pol.* 578 (2000).

510 *Stanton v Paine Webber Jackson & Curtis, Inc*., 855 F. Supp. 69 (1995). 9 USC. §7.

order production of relevant documents for review by party prior to hearing[511]." Besides, the FAA does not give the power to arbitrators to issue subpoenas to non-parties to produce materials prior to the arbitration hearing[512].

US courts have been reluctant to entertain challenges to final awards based on the tribunal's alleged failure to order discovery[513]. Moreover, courts have been unwilling to accept claims that an arbitrator's refusal to order production of vital evidence is misconduct, amounting to a failure to permit a party the opportunity to present its case. A party that wishes to obtain pre-arbitration court-ordered discovery must exercise care to ensure that its efforts are not later deemed a waiver of its right to compel arbitration. Utilizing judicial discovery means acceptance of judicial forum. A party's request that the arbitral tribunal issue subpoenas constitutes a waiver of rights to seek court-ordered discovery. It is argued that court-ordered discovery at a party's request, in aid of arbitration, is improper[514]. The court[515] denied discovery in order to avoid: (a) the risk of judicial interference in the proceedings of the arbitration; and (b) in agreeing to arbitrate the parties impliedly agree to forego the benefits and avoid the costs of judicial discovery. Courts have permitted discovery in aid of arbitration only in exceptional circumstances. In defining the exceptional circumstances, the courts have required a compelling demonstration of need for particular evidence that otherwise will be unavailable. According to Stain[516] discovery under court supervision will not be granted except under extraordinary circumstances and then only where it is shown to be absolutely necessary for the protection of the rights of a party. The discovery and subpoena powers of US courts permit discovery of documents located outside the US. In actions to compel arbitration or stay litigation, under sections 3, 4, and 206 of the FAA, discovery is available under the FRCR as in other civil actions. Some courts held that there is no need for any showing of exceptional circumstances in order to obtain discovery in these cases, provided that the discovery is limited to the issue of arbitrability[517].

It seems that although the arbitral tribunal has freedom in the means of evidence, the support of courts in many instances is essential. Therefore, a fully independent

511 *Security Life Ins. Co. of Am. v Duncanson & Holt, Inc*., 228 F.3d 865 (2000).

512 *COMCAST Corp. v National Science Foundation* 190 F.3d 269 (4th Cir. 1999).

513 *Iron Ore Co v Argonaut Shipping Inc No* 85 Civ 3460 Courts have held that rule 81a3 does not make the FRCR available for court-ordered discovery in aid of arbitration proceedings, but instead deals only with the rules' applicability in judicial proceedings to compel or in aid of arbitration, or to enforce or vacate an arbitral award.

514 *Suarer Valder v Shearson Inc* 845 F2d 950.

515 *Commercial Solvents Corp v Louisiana Fertilizer* 20 FRD 359.

516 Stain Wotman, *The Arbitration Hearing In International Commercial Arbitration In New York*, 1986, McClendon.

517 *Oriental Commercial Co. v Rossel* 609 Fsup 75. *National Broadcasting Inc v Bear Steams* 165 F3d 184. H. Smit, American assistance to litigation in foreign and international tribunals, 1998 *Syracuse J Int'l L & Com*. 1. A foreign private arbitral tribunal is not a "foreign or international tribunal." W. Park, "Determining arbitral jurisdiction: Allocation of tasks between courts and arbitration," 1997 *Am. Rev. Int'l Arb.* 133. *Desideries v National Association of Securities Dealers Inc* 191 F3d 198. *Seus v John Nuveen* 146 F3d 175.

arbitration system needs to have the power to complete evidence without any help from courts.

13 The award-recognition-review and enforcement

The FAA uses the word award in conjunction with finality, and courts go beyond a document's heading—delving into its substance and impact to determine whether the decision is final[518]. There is no deadline imposed by the courts or by the FAA for issuance of an arbitration award. It would seem to be an accepted truth that in the vast majority of cases arbitrators reach a fair and just result in resolving disputes between parties in a somewhat shorter time and at somewhat less expense than would be the case in litigation in court[519]. A final award will dispose of all matters that have been raised in the arbitration but the FAA does not define a final decision with respect to arbitration. For instance, in *Yasuda Fire & Marine Insurance Company of Europe v Continental Casualty Company*[520], the court considered

518 *Publicis Communication v True N. Communications, Inc*., 206 F.3d 725, 728 (7th Cir. 2000) (emphasizing that "the content of [an arbitral] decision – not its nomenclature – determines finality," and noting various interim decisions that courts have considered final). *Bull H/N Information Systems, Inc. v Hutson*, 229 F.3d 321 (1st Cir. 2000). *McGregor Van De Moere, Inc. v Paychex, Inc*., 927 F. Supp. 616, 618 (W.D.N.Y. 1996) (concluding that the parties' decision to bifurcate the issue of liability from damages reflects their agreement that the award on liability will be final). *Strathmore Paper Co. v United Paperworkers Int'l Union*, Local 197, 900 F.2d 423, 427–28 (1st Cir. 1990) (noting that an arbitrator may factor past practice into his decision when the contract does not expressly prohibit it).

519 Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 *Ga. L. Rev* 731, 739 (1996). A judicially-created doctrine for vacating arbitration awards, "manifest disregard" of the law requires an error that is obvious and capable of being readily recognized by any reasonable person qualified to serve as an arbitrator. In addition, the standard implies that the arbitrator was aware of a clearly governing legal principle but chose to ignore it. The judicial inquiry into error is extremely limited and the allegedly ignored governing law must be defined, explicit and clearly applicable. W. Laurence Craig, "Some Trends and Developments in the Laws and Practices of International Commercial Arbitration," *Tex. Int'l Law J.*, vol. 30 (1995), pp. 1, 7 (noting that the vast majority of arbitration proceedings, particularly those administered by an arbitral institution, are completed without the need for any judicial intervention). *First Options of Chicago*, *Inc. v Kaplan*, 514 US 938 (1995); *Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 US 52 (1995); *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 US 614 (1985); and *Prima Paint Corp. v Flood & Conklin Mfg. Co*., 388 US 395 (1967). The tribunal should ensure not only that the award is correct, but also that it is enforceable across international boundaries (ICC art 35). No tribunal can guarantee that its award will be enforceable in whatever state the winner wants to enforce it (LCIA art 32.2, AAA Art 31, ICC Art 26).

520 37 F.3d 345 (7th Cir. 1994). See *Pacific Reinsurance Management Corp. v Ohio Reinsurance Corp*., 935F.2d 1019, 1022–23 (9th Cir. 1991) (arbitral "interim final order" providing temporary equitable relief necessary to make potential final award meaningful found to be final and subject to confirmation); *Island Creek Coal Sales Co. v City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (arbitral "interim order" that finally and definitively disposed of separate, discrete, self-contained issue found to be final and subject to confirmation); *Sperry Int'l Trade v Israel*, 689 F.2d 301, 304 n.3 (2nd Cir. 1982) (appeals court itself did not consider, but noted that

whether "an interim order of security" constituted a final award and thus was subject to being judicially vacated under section 9 USC. Section 10(a)(4). Because the order was necessary to prevent the final award from becoming meaningless, the court decided that the order was final and thus could be immediately challenged. The award of a tribunal can be challenged in the courts of the place of enforcement.

Regardless of Congress's endorsement of arbitration in passing the FAA, courts still preclude parties from fully realizing the benefits of arbitration by issuing ill-reasoned rulings on the subject of *res judicata* in the context of arbitration[521]. The issue of who determines the *res judicata*[522] effect of a prior decision in subsequent arbitration creates problems. Some courts have held that they should decide the issue while others have maintained that the arbitrators should determine whether *res judicata* applies[523]. On the one hand, in *Kelly v Merrill Lynch*[524] and in *re Y & A Securities Litigation*[525] it was held that the court should determine the *res judicata* issue. On the other hand, in *National Union Fire Insurance Co. v Belco Petroleum Corp*.[526] and *Chiron Corp. v Ortho Diagnostic Systems, Inc*.[527] it was held that the arbitrator should decide the *res judicata* issue. The answer appears to vary

district court found arbitral "award" that was final as to severable issues was final and subject to confirmation).

521 *John Hancock Mut. Life Ins. Co. v Olick*, 151 F.3d 132, 137 (3rd Cir. 1998) ("Arbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties."); *Nat'l Union Fire Ins. Co. v Belco Petrol. Corp*., 88 F.3d 129, 133 (2nd Cir. 1996) ("The advantages of arbitration are well-known. Arbitration is 'usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules …"). *Miller Brewing Co. v Fort Worth Distrib. Co. Inc*., 781 F.2d 494, 497 n.3 (5th Cir. 1986) ("Arbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of *res judicata* … [has] probably done more to prevent useless and wasteful litigation than arbitration ever could.").

522 James Wm. Moore *et al.*, *Moore's Federal Practice* § 131.10[1][a] (3d ed. 2000) ("*Claim preclusion* prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action."). § 131.10[1][a] ("*Issue preclusion* prevents relitigation of issues actually litigated and necessary for the outcome of the prior suit, even if the current action involves different claims.").

523 *In* re Y & A Group Sec. Litig., 38 F.3d 380, 382–83 (8th Cir. 1994) (holding that a court should determine the *res judicata* question by focusing on a court's power to defend its judgment but without specifically relating it to the Arbitration Act). At 383 (holding that the court should decide the *res judicata* issue where the prior decision at issue was a judgment of the court because "[t]he district court, and not the arbitration panel, is the best interpreter of its own judgment"). *Consol. Coal Co. v United Mine Workers of Am., Dist. 12, Local Union 1545*, 213 F.3d 404, 407 (7th Cir. 2000) ("The question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide."); *Indep. Lift Truck Builders Union v NACCO Materials Handling Group, Inc.*, 202 F.3d 965, 968 (7th Cir. 2000) ("The preclusive effect of an arbitrator's decision is an issue for a subsequent arbitrator to decide.").

524 985 F.2d 1067.

525 38 F.3d 380 (8th Cir. 1994).

526 88 F.3d 129 (2nd Cir. 1996).

527 207 F.3d 1126 (9th Cir. 2000).

depending on whether the court chooses to emphasize the contractual nature of arbitration, in which case arbitrators will determine the *res judicata* issue, or to focus instead on the need to protect the integrity of the prior decision, in which case the court gets to decide the issue. Jarrod Wong[528] argues that: "An arbitrator should decide the *res judicata* effect of prior decisions on subsequent arbitration, except when the prior decision at issue is the court's own judgment." *Res judicata* applies to arbitration awards with the same force as to judicial judgments[529].

Should arbitration and arbitrators formulate the substantive law? *Chevron* instructed courts that "meaningful deference," which in actual fact mandates "administrative displacement of judicial judgment," was due not only when agencies had been expressly delegated interpretive power but also in situations in which the delegation was simply implied[530]. Delegation of interpretive authority to an agency may be implied from statutory gaps and ambiguities[531]allowing the agency a role in formulating the substantive law.

Is there any problem if the substantive law is formulated by precedents of courts or arbitration? Can substantive law be formulated by both courts and arbitration? Arbitration involves a substitution of forum, not of substantive law. While statutory claims may be arbitrable, the substantive law to be applied in both forums is the same. A difference in the interpretation might occur between arbitration and courts but only court decisions are precedent and influence the

528 Jarrod Wong, "Court Or Arbitrator—Who Decides Whether *Res judicata* Bars Subsequent Arbitration Under The FAA?," 2005 *Santa Clara Law Review 49 at 66.*

529 *Myer v Americo Life, Inc.*, 469 F.3d 731, 733 (8th Cir. 2006); *Boguslavsky v Kaplan*, 159 F.3d 715, 720 (2nd Cir.1998); Restatement (Second) of Judgments § 84 (1982).

530 *Chevron USA., Inc. v Natural Ress. Def. Council, Inc*., 467 US 837, 865–66 (1984). Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?," 99 *Harv L. Rev* 668, 680 (1986) (endorsing arbitration of public law claims when it occurs against a backdrop of clearly defined law). *Toyota Motor Mfg., Ky., Inc. v Williams*, 534 US 184, 194, 202–03 (2002) (finding no need to decide what deference due the EEOC; EEOC's regulations do not address the particular issue before the court). John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 *Colum. L. Rev* 612, 623 (1996) (noting significance of *Chevron*'s *"categorical* presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency"). "*Chevron* is strong medicine. The *Chevron* decision requires courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible."

531 *United States v Mead Corp.,* 533 US 218 (2001). *E. Associated Coal Corp. v United Mine Workers, Dist. 17*, 531 US 57, 65 (2000) (noting that agency regulations are a subset of the positive law created by the statutory scheme); *United States v Haggar Apparel Co*., 526 US 380, 391 (1999) ("Valid regulations establish legal norms."). *Bond v Twin Cities Carpenters Pension Fund*, 307 F.3d 704, 706 (8th Cir. 2002) (noting that ERISA regulations apply to all claim proceedings, including arbitration). *INS v Cardoza-Fonesc*a, 480 US 421, 431–48 (1987), the Court looked to both the "ordinary and obvious meaning" of the statute, as well as to the "traditional tools of statutory construction," including legislative history, to decide whether Congress had expressed itself clearly on the question before the Court. *Sutton v United Air Lines, In*c. 527 US 471 (1999). *Chevron USA., Inc. v Echazaba*l, 536 US 73 (2002).

approach of arbitrators, since previous arbitration awards are not considered as precedent. According to *Rebecca Hanner White*[532]

> When the law is uncertain, and judicial review is limited, how can a reviewing court ensure that arbitration is merely a substitution of forum and not a sacrifice of substantive rights? … a de novo review of the arbitrator's application of *Chevron* ultimately will prove necessary, unless or until the Court develops a consistent approach to *Chevron* that will allow reviewing courts to determine whether the arbitrator's failure to defer is a violation of 'well-defined, explicit and clearly established law.'

Many arbitration awards are unanimous, and are signed by all the arbitrators. Nevertheless, institutional arbitration rules generally permit rendering of an arbitral award by the sole arbitrator or a majority of the arbitrators. The arbitrators are required to sign the award, and should state where it is "made." If an arbitrator refuses to sign, the remainder of the panel may issue the award, usually with a notation explaining the circumstances of the refusal. It is uncommon for arbitrators to issue dissenting or concurring opinions. Most international arbitral awards remain confidential and some are not reasoned. Those awards that are published do not command *stare decisis* respect comparable to that of US common law decisions. Richard E. Speidel[533] argued that the FAA be revised to declare that arbitration agreements are voluntary and arbitrators present written opinions on statutory claims and in any award. In practice, most international arbitration tribunals in significant matters produce reasoned decisions that compare favorably to the opinions of many national courts. Moreover, Richard M. Alderman[534] thinks that "unlike court opinions, which are published, most decisions of arbitrators are kept secret, often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator, or a panel of arbitrators, is in no way binding on any other arbitrator or panel."

Awards should be written and reasoned in order to be regarded as arbitral precedent[535]. Nevertheless, arbitral awards do not command the same sort of *stare decisis* effect that judicial decisions receive in most law systems[536]. It is time for

532 "Rebecca Hanner White, Arbitration and the Administrative State," 2003 *Wake Forest Law Review* 1283, at 1326.

533 Richard E. Speidel, "Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?," 40 *Ariz. L. Rev* 1069 (1998) (urging that the FAA be revised to assure arbitration agreements are voluntary and that arbitrators provide written opinions on statutory claims).

534 Richard M. Alderman, "*Consumer Arbitration: The Destruction of the Common Law*," 2 *J. Am. Arb.* 1, 11 (2003).

535 Christopher B. Kaczmarek, "Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions," 4 *Emp. Rts. & Emp. Pol'y J.* 285, 287–88 (2000) (arguing for written, publicly available opinions in cases involving issues of public law).

536 *Bernhardt v Polygraphic Co*., 350 US 198, 203 (1956) ("Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their

awards to command *stare decisis* as well. Moreover, most arbitral awards remain confidential, both by custom and the requirements of applicable institutional rules. It would be a step for equality of arbitration and courts if the awards are published and produce precedent. Scholars argue that only reasoned awards should be enforced by the courts[537]. Awards do not come out of illegal rules but merely by the arbitrators' interpretation of the same rules applicable by courts based on well established principles of law, because we have a single legislation in every country and not one for courts and another for arbitration. An arbitral award can be made without explanation of reasons and without development of a record, so that the arbitrator's concept of statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply the law. In fact, panels who provide reasoned awards do in fact try to apply substantive law[538]. Consequently, the establishment of the need for a concise written award where the arbitrator may develop the legal foundation of his award will be the basis for the establishment of arbitration precedent. In *Sobel v Hertz*[539] the court held that the extent of an arbitrator's obligation to explain his award is related to the scope of judicial review of it. Justice Story made a distinction between scope of review and the problems created by the presence or absence of a written opinion by the arbitrators in cases where questions of law had been preserved for the court. It is common in US arbitrations for arbitrators to issue unreasoned awards. The lack of any requirement for a reasoned award has been held applicable to claims based on the federal securities laws[540].

proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial – all as discussed in *Wilko v Swan*").

537 Judith Resnick, "Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are At Risk," 81 *Chi. Kent L. Rev* 521, 569 (2006) (applauding legislation and proposed legislation that requires arbitrators of some kinds of disputes to provide reasons for their decisions and make them available to the public). Lynn M. Lopucki, "Court System Transparency," UCLA School of Law, "Public Law & Legal Theory Research Paper Series Research Paper No. 07–28" at 54 "The solution might be for the courts to enforce only arbitration awards obtained in transparent proceedings – on the principle that government should not enforce the decisions of secret tribunals." Cal Civ Proc. Code § 1281.96 (West Supp. 2007) (requiring arbitration providers to publish data on arbitration outcomes).

538 Jennifer J. Johnson, "Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration," 84 *UNC Law Review* 123, 147 n. 123 (2005). Barbara Black, "Do We Expect Too Much from NASD Arbitrators?" *Securities Arbitration Commentator* Vol. 2004, No. 7 at 1–5 (noting the difficulty that lay arbitrators face in handling the complex procedural and substantive issues that arise in securities arbitration).

539 469 F2d 1211. Confirmation of an arbitration award determines, for *res judicata* purposes, only that there was no basis for upending the award, not the merits of the claim that was arbitrated. *Consolidated Coal Co. v United Mine Workers of America, Dist. 12 Local Union 1545 (*Case No. 99–1640), 213 F. 3d 404, (7th Cir. 5-16-2000). *Iran Aircraft v Avco Corp* 980 F2d 141.

540 *John Brady Co. v Form FZE Inc* 623 F2d 261; Barbara Black & Jill I. Gross, "Making It Up As They Go Along: The Role of Law in Securities Arbitration," 23 *Cardozo L. Rev* 991, 999–1001 (2002) (providing example of arbitrators ignoring established law); Lowenfels & Bromberg, "Beyond Precedent, Arbitral Extensions of Securities Law," *57 Business Lawyer* 999, 1017–18 (2002)

May arbitration not be the favored process when there is very little if any judicial precedent? According to William G. Paul[541] if the issue in dispute involves matters of first impression then such issues are best decided by litigation with a trial, a record and subsequent review on appeal, because judicial training and experience perhaps better qualify judges to make such determinations. On the other hand, this author considers that experienced arbitrators are also able to decide matters of first impression. Moreover, if the parties have contracted, either by particular provision or by incorporating a specific code of procedure by reference, that the arbitrator is required to follow the substantive law, the arbitration award should then be expected to parallel the result which would be obtained in litigation. Under federal law, any claims that should have been raised in arbitration were *res judicata*. For instance, the franchisee could not avoid this *res judicata* effect by refusing to assert that the franchisor was liable pursuant to the franchise agreement, since any relief on the franchisee's claims would be inconsistent with the terms of the franchise agreement, which the arbitration award had declared valid. A confirmed arbitration award[542] will render those claims that should have been raised at the arbitration *res judicata*, regardless of whether or not they in fact were raised.

The arbitral process results in an award, which disposes of the parties' respective claims. Enforcement of any arbitration award requires confirmation of the award by a court[543]. Most awards do not require either judicial confirmation or enforcement, because they are voluntarily complied with. In the US an arbitral award is not a judgment of a court, and arbitral awards are not self-executing, as domestic judgments usually are[544]. It is only if an arbitral award can successfully be enforced that a successful claimant can ensure that it will actually recover damages awarded to it. The enforcement of an arbitral award refers to the implementation of coercive measures by national courts. The recognition of an arbitral award refers to the decision of a national court to give preclusive effect to the arbitrators' disposition of the parties' claim[545].

The proper method for seeking to enforce an arbitration award under the Federal Act is to file a motion for confirmation in the appropriate court. That court must grant the motion and enter judgment on the confirmation order unless the opposing party files a timely motion to vacate, modify or correct the award[546]. However, nothing prevents a successful party from seeking to enforce the award immediately

(analyzing awards where arbitrators have expanded accepted legal rules to award damages to investors).

541 William G. Paul, First Annual Energy Litigation Program Co-Sponsored by the Center for American and International Law (CAIL) and by the ABA Section of Environment, Energy and Resources (ABA-SEER) Inter-Continental Hotel Houston, Texas, November 7–8, 2002.

542 *Smith v Denver Food Systems* (ED Pa 1994) CCH BFG ¶10,554.

543 9 USC. § 9.

544 *Fotochrome Inc v Copal* 517 F2d 512, *Tamari v Conard* 522 F2d 778 (an arbitrator's award is not self-executing).

545 *Singer v Jeffries*, 78 NY2d 76, 81; *Flanagan v Prudential-Bache Securities, Inc.*, 67 NY2d 500.

546 9 US 13.

upon its issuance. Under both the Federal and Uniform Acts, a party may seek to modify or correct an award, but only where: (a) there is evidence of a material miscalculation of figures or a material mistake in a description of a person, place or thing referred to in the award; (b) the arbitrators have awarded on a matter not submitted to them (unless the matter does not affect the merits); or (c) there is an error in the form of the award, not affecting the merits. The enforcement of international arbitral awards in the US is governed primarily by principles of federal law. Three sources are important, the NYC, the Inter-American Convention, and the domestic FAA.

The ways in which arbitration awards are enforced vary among jurisdictions, however, many statutes provide for summary procedures, which will ultimately give the award the same effect as judicial judgments. The FAA's venue provisions are permissive, allowing a motion to confirm, vacate, or modify to be brought either in the district where the award was made or in any district proper under the general venue statute[547]. The mere inclusion of the phrase "final and binding" in an agreement to arbitrate does not make the award enforceable under the FAA[548].

The NYC permits non-recognition of an arbitral award if either: (a) the arbitration proceedings violated basic principles of fairness in the enforcing state; or (b) 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. A party that has obtained an award in its favor may seek to confirm the award by commencing an action in federal court according to sections 9, 207, or 304 of the FAA. State law may provide the basis for an action to confirm an arbitral award. To avoid attack under section 10c arbitrators freely grant postponement requests regardless of whether such requests

547 *Cortez Byrd Chips, Inc. v Bill Harbert Construction Co*., laws.findlaw.com/us/000/98-1960.html. A restrictive interpretation would also place §3 – which permits a court to stay a proceeding referable to arbitration pending such arbitration – and §§9 – 11 in needless tension, for a court with the power to stay an action under §3 also has the power to confirm any ensuing arbitration award. *Marine Transit Corp v Dreyfus*, 284 US 263 , 275–76. *Fourco Glass Co. v Transmirra Products Corp*., 353 U. S. 222, 227–228. The FAA provides that a party to arbitration may apply to the court for confirmation of an arbitration award only "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." An explicit enforcement agreement must be present in the relevant written document. *Rennie v Dalton*, 3 F.3d 1100, 1106 (7th Cir. 1993), the finality language in the contract "was sufficient to imply consent to the entry of judgmenton an arbitration award under sec. 9." *Kallen v District* 1119, National Union of Hospital Care Employees, 574 F.2d 723 (2nd Cir. 1978), provided that the "award of an arbitrator hereunder shall be final, conclusive and binding." *Booth v Hume Publishing, Inc*., 902 F.2d 925, 930 (11th Cir. 1990) (holding that finality language in the parties' arbitration clause and the resisting party's full participation in the arbitration process is sufficient to allow judicial confirmation of award); *Pennsylvania Eng'g Corp. v Islip Resource Recovery Agency*, 710 F. Supp. 456, 460–61 (E.D.N.Y. 1989) (holding that finality language and the resisting party's invocation of federal jurisdiction constituted implicit agreement to confirmation).

548 *Pvi v Ratiopharm Gmbh*, laws.findlaw.com/8th/972192p.html. *Oklahoma City Associates v Wal-Mart Stores, Inc.*, 923 F.2d 791, 794 (10th Cir. 1991). *Milwaukee Typographical Union No. 23 v Newspapers, Inc.* , 639 F.2d 386, 389–90 (7th Cir. 1981), *cert. denied* , 454 US 838 (1981).

are supported by sufficient cause and receive any evidence regardless of whether it is material to the controversy. The court could deny confirmation of an award if there is a serious breach of the arbitrators' duties defined by section 10.

A party that has had an award made against it may seek to vacate the award by beginning an action in federal court under section 10 of the FAA. Neither the second nor third chapter of the FAA contains express provisions for vacating arbitral awards. The availability of actions to vacate the FAA's second and third chapters is unsettled. An arbitral award may be relied on in a civil litigation on the merits of a dispute where applicable rules of preclusion permit it to be invoked. An arbitral award need not be judicially confirmed in order to be final and binding[549]. An unconfirmed arbitral award may be used as a basis for a course of action or as the basis for a defense of *res judicata* or collateral estoppel[550].

If a US court confirms an arbitral award then the FAA provides that it becomes a judgment of the confirming court. That judgment has the same effect as any other US civil judgment and may be enforced as such (section 13 FAA). If a party successfully resists confirmation of an award, the award will not be made a judgment of the court. Unless the award is vacated, it will nonetheless continue to exist, notwithstanding non-recognition, and its confirmation can be sought in other jurisdictions. The award may continue to be final and binding, notwithstanding its non-recognition. The consequences of a decision vacating an arbitral award differ significantly from those of a decision refusing to recognise an arbitral award. The award ceases to have legal effect and cannot be confirmed or otherwise relied on in the forum. A properly vacated award need not be enforced under the NYC and cannot be enforced elsewhere. If an award is vacated in the arbitral forum, it is unlikely that it will be recognised and enforced elsewhere. Nevertheless although it occurs infrequently, it can still be enforced in other states. When a court vacates an arbitral award on one of the grounds (other than non-arbitrability) set forth in section 10, it may not also resolve the merits of the parties' dispute. That dispute remains subject to the parties' arbitration agreement and cannot be litigated. Even when an arbitrator's procedural aberration rises to the level of affirmative misconduct, the court must not foreclose further proceedings by setting the merits according to its own judgment of the appropriate result, since this action would substitute a judicial determination for the arbitrator's decision. The court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. At the end, the court has the authority to remand for further proceedings when this step seems appropriate[551].

Recognition and enforcement of an arbitral award may be refused because the award has been set aside by the country in which or under the law of which, that award was made. The court in *International Electric Corp. v Bridas Petrolera*[552]

549 *Oriental Shipping Co. v Rossel* 1991 WL 135940.

550 *Floraspnth Inc v Pickholz* 750 F2d 171.

551 *Foster v Turley* 808 F2d 38. C Kessedjian, "Court Decisions on Enforcement of Arbitration Agreements and Awards," 2001 *Journal of International Arbitration* 1.

552 745 Fsup 172, [Model law Art 16.3 30 days].

held that since the *situs* of the arbitration was Mexico, and the applicable law that of Mexico, only Mexico's courts had jurisdiction under the NYC to vacate the award. When a challenge to an award is being considered, this should be done within a short time following publication of the award. The effects of a successful challenge depend on the grounds of the challenge, the applicable law and the decision of the court that dealt with it. The court can decide: to confirm the award, to refer it back to the tribunal for re-consideration, to vary the award or to set it aside in whole or in part. Unlike a national court, an arbitral tribunal has no role to play in the enforcement of its decision. Thus, when a tribunal has made a final award, corrected or interpreted its award, its work is done and the tribunal is *functus officio*. If the losing party fails to carry out an award, the winning party needs to take steps to enforce performance of it. The party can invoke the powers of the state, exercised through its national courts, in order to obtain a hold on the losing party's assets. The award can be deposited or registered with a court and so it can be enforced as if it is a judgment of the court. Hence, this action shows that states accept that only awards in the form of a judgment can be enforced.

Is jurisdiction to confirm an arbitration award limited to the district where the award is made[553]? Two recent opinions – *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc.*,[554] and *Chromalloy Aeroservices v Egypt*[555], have considered applying the "manifest disregard" test to arbitral awards governed by the convention, one finding authority for doing so under Article V(1)(e) of the convention and the other under Article VII. Although "manifest disregard" has long been recognized as an additional ground for vacatur of an arbitration award governed by chapter 1 of the Arbitration Act, the Second Circuit's decision in *Toys "R" Us* provides authority for arguments that, under Article V(1)(e), the manifest disregard standard should also be applied by US courts to cases falling under the convention, so long as the award in question was rendered in the US. If the award is rendered in a foreign country, under the reasoning of the *Toys "R" Us* decision, the grounds for vacation of the award are limited to those expressly set forth in Article V of the convention. The *Chromalloy*[556] confirms an arbitral award that had been vacated in the country where the award was made. US courts have construed the all-pervasive "final and binding" language to preclude courts from only undertaking a *de novo* review of the merits of an award but not to bar consideration of the standard defenses to enforcement set forth in the convention[557].

553 *Sunshine Beauty Supplies Inc v US Distr Court* 872 F2d 310.

554 1997 WL 560044 (2nd Cir. Sept. 10, 1997).

555 939 F. Supp. 907 (D.D.C. 1996).

556 191 F3d 194. The court rejects the notion that a party can see enforcement of an annulled foreign award in the US when the parties' agreement makes no reference whatever to US law.

557 *Spier v Calzatarifico Technica* 77 Fsupp2d 405 (denying motion to reargument). *Dean v Sullivan* 118 F3d 1170, *UHC management Co. v Computer Sciences Corp* 148 F3d 992, *Dick v Dick* 534 NW2d 185, *Brucker v McKinlay Transport Inc* 557 NW2d 536, *Tea Scandia Inc v Greco* 6 Fsup2d 795, J. Paulsson, "Enforcing Arbitral Awards Notwithstanding a local Standard Annulment," *ICC International Court Of Arbitration Bulletin* Vol. 9 No 1.

By contrast in both the *Baker Marine*[558] and *Spier*[559] cases the court refused to enforce arbitral awards that had been set aside in the country of origin.

In general, US courts have enforced portions of arbitration awards relating to costs. This is true where the parties' agreement specifically provides for the tribunal to award costs, although matters are less clear where only implied authority exists[560]. It is unclear what result will obtain where the parties have not agreed to institutional rules that grant the tribunal the authority to award costs, or where the parties have subjected their dispute, or the arbitration, to a national law that does not provide for fee-shifting. It could be said that an arbitral tribunal that makes its award in a particular jurisdiction is bound to apply that jurisdiction's rules with respect to costs in local judicial proceedings. This raises complex choice of law issues – in particular, what law governs costs in arbitration, whether the forum's law concerning judicial proceedings is applicable to international arbitral proceedings, and whether the parties' selection of an arbitration institution's rules modifies what might otherwise be applicable law. Where a court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available. A court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it. Enforcement of an award means applying legal sanctions to compel the party against whom the award was made to carry it out. Court proceedings are necessary to obtain title to a defaulting party's assets and these proceedings are taken in the state in which the property of the losing party is located. The winning party should take into account the attitude of the local courts to requests for recognition and enforcement of foreign awards. The immediate consequence of a failure to enforce an award is that the winning party fails to get what he wants.

Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed? Expanding review provisions frustrates the congressional purpose of enhancing finality of arbitration awards and so further involvement of courts. The ability of courts to set aside final arbitration awards is severely limited. There is no statute authorizing the parties to determine the scope of judicial review. Although this concept is expressed in various ways in the cases arising under the applicable federal and state statutes, the general principle is that arbitration awards will be set aside only where the award is illegal or has been the result of fraud, misconduct or palpable or gross error[561].

558 *Baker Marine Ltd v Chevron* 191 F3d 194.

559 *Spier v Calzaturificio Tecnica Spa* 71 Fsupp2d 279. D Freyer, "United States Recognition and Enforcement, and foreign arbitral awards," 1999 *Journal of International Arbitration* 2.

560 *Management & Technical Consultants v Parsons Jurden International Corp* 820 F2d 1531 *Bergesen v Joseph Muller* 710 F2d 928, *Dallal v Bank Mellat* [1986] QB 441 In *Dallal* the court held that the award was not enforceable under NYC but should be recognised as the valid judgment of a competent tribunal.

561 *Bureau of Engraving, Inc. v Graphic Commc'n Int'l Union*, Local 1B, 284 F.3d 821, 824 (8th Cir. 2002) (stating that the award will be confirmed even if the arbitrator did commit a serious error,

Parties wishing to expand the "default" scope of review set forth in the FAA and similar state laws and those who want more judicial review and oversight of arbitration awards should look at defining the scope of review in the terms of the arbitration agreement itself[562].

Does "broadening" the FAA's vacatur standards by contractual agreement support the fundamental objective of the FAA itself? According to Margaret M. Maggio & Richard A. Bales[563] expanded judicial review of arbitrator decisions "are consistent with the FAA's purpose to ensure enforcement of parties' arbitral agreements." Courts examining the FAA acknowledge the importance of giving effect to arbitration agreements as they are written based on the notion of freedom to contract[564]. Courts have reviewed and upheld arbitration contracts where the parties expanded judicial review in the arbitration clause[565]. Moreover, there is no indication in sections 10 and 11 that the parties could alter the grounds on which the court can act. Nevertheless, the court in *Fils et Cables v Midland Metal*

so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority….").

562 *Bavarti v Josephthal, Lyon & Ross, In*c., 28 F.3d 704 (7th Cir.1994). "parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 *Ga. L. Rev* 731, 814 (1996) (asserting that a standard allowing a court to review the merits of an arbitral award "is not legitimate" and is "inconsistent with the public policy underlying section 10(a) of the FAA"); Edward Brunet & Charles B. Craver, *Alternative Dispute Resolution: The Advocate's Perspective* 411–12 (1997) (arguing that courts do, indeed, have the authority to vacate awards when the arbitrator has failed to apply a mandatory rule).

563 Margaret M. Maggio & Richard A. Bales, "Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards," *18 Ohio St. J. on Disp. Resol*. 151 (2002) (arguing that the FAA's vacatur standards are default standards unless parties agree to another standard of judicial review); *at* 152 (observing potential litigants' favoritism of simple, speedy alternate dispute resolution process); *Cynthia A. Murra*y, "Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the FAA," *76 St. John's L. Rev* 633, 655 (2002) at 634 ("Allowing parties to agree to expand judicial review efficiently promotes the congressional intent underlying the FAA, which is to require that the parties be free to place contractual restrictions on arbitral power"). Stephen P. Younger, "Agreements to Expand the Scope of Judicial Review of Arbitration Awards," 63 *Alb. L. Rev* 241 (1999) (who, while agreeing in principle that parties may contractually expand court review of arbitration awards, addresses a somewhat different issue, whether the efficiency and economy of the arbitration process should and may be sacrificed on the altar of judicial review).

564 *Volt Information Sciences Inc. v Board of Trustees of Leland Stanford Junior Univ.,* 489 US 468, 479 (1989).

565 *Watts and Sons, Inc. v Tiffany & Co. 248 F.3d 577 (7th Cir. 2001)* "What the parties may do, the arbitrator as their mutual agent may do. *People who want their arbitrators to have fewer powers need only provide this by contract* …. An arbitrator's disregard of such a command would be reviewable under 9 USC. §10(a)(4)." In *Gateway Techs., Inc. v MCI Telecomms. Corp*, (*64 F.3d 993 (5th Cir. 1995))* the Fifth Circuit Court of Appeals held that contractual modification of the availability and scope of judicial review was enforceable because "arbitration is a creature of contract," and the FAA dictates that courts give effect to the intent of the parties to a contract.

Corp.[566] reviewed the arbitration award under the broader standard chosen by the parties rather than the standard prescribed by the FAA. In *La Pine Technology Corp. v Kyocera Corp*.[567] the court held that the role of federal courts should not be subverted to serve private interests and therefore judicial review in accordance with the provisions of the FAA should be followed. On appeal the court said "the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements' terms." This comes into terms with the parties' power to limit by contract the issues on which they want to arbitrate and to specify by contract the rules under which their arbitration will be conducted[568]. On the one hand, the parties can dictate how the arbitrators conduct their business. On the other hand, the parties cannot tell the courts how to conduct their actions. Thus, it is submitted that a more rigorous judicial review undermines the efficiency of arbitration and transforms arbitration into a rigorous litigation. In the US, the circuits are divided over whether parties to arbitration may contractually alter the scope of judicial review. The seventh circuit has taken the view that federal court power to review arbitral awards cannot be created by contract[569]. In *Kyocera Corp. v Prudential-Bache Trade Servs., Inc*.[570]. The court overruled *LaPine I*, affirming the district court's 1995 conclusion and holding that a "federal court may only review an arbitral decision on the grounds set forth in the FAA."

In the Seventh Circuit decision Judge Richard A. Posner, writing for a unanimous panel, stated that "if the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award." But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract."[571] This author behaves that the suggestion of Judge Posner for an appellate arbitration panel to review awards should become the rule if we consider arbitration to be a significant

566 584 Fsup 240. The contract called for AAA arbitration. *Gateway Technologies Inc v MCI Telecommunications Corp* 64 F3d 993. The court held that "the parties may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted."

567 130 F3d 884 at 888.

568 *Mastrobouno v Shearson Lehman Hutton* 115 SCt 1212. *New England Utilities v Hydro-Quebec* 10 Fsup2d 53, *Flexible Systems Ltd v Superproducts Corp* 86 F3d 96. *Bowen v Amoco Pipeline Co*., 254 F.3d 925, 933 (10th Cir. 2001). In fact, in *Bowen v Amoco Pipeline Co.* the court said that "the purposes behind the FAA, as well as the principles announced in various Supreme Court cases, do not support a rule allowing parties to alter the judicial process by private contract." Hans Smit, "Contractual Modification of the Scope of Judicial Review of Arbitral Awards," 8 *Am. Rev Int'l Arb.* 147, 148 (1997).

569 *Chicago Typographical Union v Chicago Sun-Times*, 935 F.2d 1591 (7th Cir. 1995).

570 341 F.3d 987, 1000 (9th Cir. 2003) (en banc). Several federal circuits do not allow any contractual variations of judicial review, and courts are less probable to permit restrictions on judicial review than expansions. *Hoeft v MVL Group, Inc.*, 343 F.3d 57 (2nd Cir. 2003).

571 In earlier cases, the Fifth Circuit had concluded that the courts should enforce parties' contractual agreements for expanded review, but the Seventh Circuit had observed that the courts lack the power to go beyond the grounds set forth in §10 of the FFAA. *Chicago Typographical Union,* 935 F.2d 1501 at 1505, *LaPine Technology Corp. v Kyocera Corp.*, 909 F. Supp. 697, 705 (N.D. Cal. 1995), *rev'd*, 130 F.3d 884 (9th Cir. 1997). *Indocomex Fibres Ltd v Cotton Co* 916 F Sup 721.

part of the civil justice system, achieving equality, alternativity and independence and consequently all the advantages for which arbitration was introduced in the first place.

Can federal jurisdiction be created or expanded by contract? Courts vacate arbitral awards and judicial scrutiny regarding arbitral awards falls well short of that involved in judicial appellate practice. In *Chicago Typographical Union v Chicago Sun-Times Inc*.[572] the court held that parties cannot contract for judicial review but they can agree for an appellate arbitration panel to review the arbitrator's award[573]. This author considers that an award should be reviewed by an arbitral tribunal in the second-degree. To that extent in *UHC Management Co. v Computer Sciences Corp*.[574] the court held that a party's agreement cannot cast aside sections 9, 10, 11 of the FAA. Hence, the normal limited scope of the FAA review should be applied. The parties' agreement cannot dictate a role for public institutions[575]. There are a great number of court cases dealing with the party's autonomy to expand or restrict judicial review[576]. Moreover, scholars also argue for the expansion or

572 935 F2d 1501 In *Bowen v Amoco Pipeline Co*., *254 F.3d 925, 935 (10th Cir. 2001)* strictly construed the FAA, stating that "no authority clearly allows private parties to determine how federal courts review arbitration awards," beyond those enumerated circumstances established by Congress in the FAA. *Fils et Cables v Midland Metals Corp* 584 Fsup 240 reviewed the arbitration award under the broad standard chosen by the parties, *Collins v Blue Cross* 916 Fsup 638, 103 F3d 35, 228 Mich. App 560. *Accord Hoeft v MVL Group, Inc*., 343 F.3d 57 (2nd Cir. 2003) ("This balance (between the importance and flexibility of private resolution mechanisms and barring federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct) would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts." Eric van Ginkel, "Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur," 3 *Pepp. Disp. Resol. L.J.* 157, 206–08 (2003). Court Enforces Arbitration Clause Provision Limiting Parties' Rights to Appeal (*Mactec Inc v Stephen Gorelick, Case Nos 03–1290 & 03–1378, United States Court of Appeals for the Tenth Circuit* 26 October 2005).

573 *United States v Foxteorth* 8 F3d 545.

574 148 F3d 992. Additionally, the court quoted from the dissent in LaPine, indicating some skepticism of enhanced judicial review. Furthermore, there is another court that has approved of enhanced judicial review of awards, pursuant to an arbitration agreement calling for the same. (*Syncor Int'l Corp. v McLeland*, 120 F.3d 262 (4th Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998)). Finally, there also is another court in dictum that has criticized the notion of such expanded judicial review. (*Chicago Typographical Union v Chicago Sun-Times Inc.*, 935 F.2d 1501 (7th Cir. 1991) (Posner, J.)

575 *Brucker v Mckinlay Transport* 557 NW2d 536, *Dick v Dick* 534 NW2d 185. *MCI Telecommunications Corp v Exalon Industries Inc* 138 F3d 426.

576 Compare *Kyocera Corp. v Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. denied*, 540 US 1098 (2004) (holding that contractual provisions that expand scope of judicial review under the FAA are invalid), *Bowen v Amoco Pipeline Co.,* 254 F.3d 925, 937 (10th Cir. 2001), and *Hoeft, III v MVL Group, Inc*., 343 F.3d 57 (2nd Cir. 2003), with *Gateway Techs., Inc. v MCI Telecomms. Corp*., 64 F.3d 993, 997 (5th Cir. 1995) (holding that parties to a contract may opt out of the FAA's vacatur standards and fashion their own); *Harris v Parker Coll. of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002) (following *Gateway*); *Hughes Training Inc. v Cook*, 254 F.3d 588, 590, 593 (5th Cir. 2001) (following *Gateway*); *Roadway*

reduction of judicial review[577]. This means that there is a further need for the contracting parties to rely on courts in order to finally accept the award. Hence, courts, not arbitral tribunals, have the final word concerning the authorisation and enforcement of awards. The drafting of Arbitration Acts is based on the role of the courts as the pillars for the authorization of arbitration awards, which means that courts are the institutions that can guarantee justice. In fact, judicial review under the FAA is appropriate even where the parties have agreed that the award

Package Sys., Inc. v Kayser, 257 F.3d 287, 293 (3rd Cir. 2001); *Syncor Int'l Corp. v McLeland*, No. 96–2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997); *Dep't of the Air Force v Fed. Labor Relations Auth*., 775 F.2d 727 (6th Cir. 1985) (stating in dicta that parties may completely eliminate all judicial review); *Fils et Cables D'Acier de Lens v Midland Metals Corp*., 584 F. Supp. 240 (S.D.N.Y. 1984) (holding that parties may expand judicial review by contract). *See* also *Puerto Rico Tele. Co. v US Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005) (holding that judicial review provisions of the FAA can only be displaced if the contract contains explicit language evincing a clear intent to subject any arbitration award to a different standard). Additionally, several federal circuits have either expressed skepticism as to the enforceability of such clauses or stated in dicta that the clauses are not enforceable. *Schoch v Info USA, Inc*., 341 F.3d 785, 789 n.3 (8th Cir. 2003) (expressing skepticism as to whether parties can contract for heightened judicial review); *UHC Mgmt. Co. v Computer Scis. Corp*., 148 F.3d 992, 997 (8th Cir. 1998); *Chi. Typographical Union No. 16 v Chi. Sun-Times, Inc*., 935 F.2d 1501 (7th Cir. 1991) (stating in dicta that judicial review of a labor arbitration award cannot be altered by contract). *MACTEC, Inc. v Gorelick*, 427 F.3d 821 (10th Cir. 2005) (stating that parties may not contractually expand judicial review, but may limit the right to appeal from a district court's judgment so long as the intent to do so is clear and unequivocal); *Hoeft, III v MVL Group, Inc*., 343 F.3d 57 (2nd Cir. 2003) (taking no position on enforceability of agreements to raise the level of judicial review; noting that there is a distinction between increasing judicial scrutiny and eliminating it; and holding that parties may not contractually divest courts of their statutory and common law authority to review arbitration awards).

577 Samuel Estreicher & Steven C. Bennett, "Arbitration," *N.Y. L.J.,* Mar. 12, 2004, at 3 (stating that in recent years several courts have addressed the issue of whether judicial review can be expanded or eliminated under the FAA); Ilya Enkishev, Comment, "Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review," 3 *J. Am. Arb.* 61 (2004) (arguing that private contractual expansion of arbitration violates principles of constitutional law); Anthony J. Longo, Comment, "Agreeing to Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA," 36 *J. Marshall L. Rev* 1005 (2003) (arguing that parties should be able to expand judicial review by contract so long as public policy is not offended); Lee Goldman, "Contractually Expanded Review of Arbitration Awards," *8 Harv Negot. L. Rev* 171 (2003) (arguing that clauses expanding judicial review should be honored in individually negotiated contracts but not in contractual form agreements); Kevin A. Sullivan, Comment, "The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the FAA," 46 *St. Louis U. L.J.* 509, 555–60 (2002) (arguing that parties cannot alter judicial process); Karon A. Sasser, Comment, "Freedom to Contract for Expanded Judicial Review in Arbitration Agreements," 31 *Cumb. L. Rev* 337 (2001) (arguing that parties should be permitted to contract for expanded judicial review under the FAA); Stephen P. Younger, "Agreements to Expand the Scope of Judicial Review of Arbitration Awards," 63 *Alb. L. Rev* 241 (1999) (arguing that parties should be able to expand the scope of judicial review); Laurence Franc, "Contractual Modification of Judicial Review of Arbitral Awards: The French Position," 10 *Am. Rev Int'l Arb.* 215 (1999) (arguing, by comparing French law on the issue, that courts have gone too far in allowing parties to contractually expand the scope of judicial review); Tom Cullinan, Comment, "Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements," 51 *Vand.*

shall be final, binding and non-appealable[578]. Even in arbitration under ICC Rules the award can be challenged under the FAA[579]. Hence, the losing party can go to the court and have the award vacated if he can prove one of the grounds listed in section 10 of the FAA. Thus, the FAA prescribes limited judicial review of arbitration awards, and as a result it is within the domain of the legislatures, not that of courts and private parties, to vary such review. The Supreme Court has stated that arbitration should be free from substantive judicial oversight, and that courts should interpret the FAA in a manner that gives meaning to all its provisions, which apparently would include the Act's limited review prescriptions[580]. Peter Bowman Rutledge[581] argues that legislatures should decide for review of arbitral awards for errors of law which will bring a total transfer of the reasons for an appeal against a judgment into arbitration.

Merely because an arbitrator's decision is not based on an agreement's express terms does not mean that it is not appropriately derived from the agreement;

L. Rev 395 (1998) (arguing that parties have the right to contractually alter the judicial role in reviewing arbitration agreements); Alan Scott Rau, "Contracting Out of the Arbitration Act," 8 *Am. Rev Int'l Arb.* 225 (1997) (arguing that courts have the obligation under the FAA to give effect to an arbitral award that the parties intended, whether the court acts by conducting an expanded review or otherwise); 256–61 (supporting enforcement of expanded review provisions under the Arbitration Act); Hans Smit, "Contractual Modification of the Scope of Judicial Review of Arbitral Awards," 8 *Am. Rev Int'l Arb.* 147 (1997) (arguing that judicial review of arbitral awards is not subject to contractual modification in any respect); 147–52 (opposing expanded review as "wholly incompatible with the essence of arbitration"). Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tul. L. Rev* 39, 39–41, 45–52 (1999) (proposing that "contract model" of arbitration should replace "folklore model," allowing parties to define arbitration as masters of their contracts); Tom Cullinan, Note, "Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements," 51 *Vand. L. Rev* 395, 428 (1998) (finding that expanded review of arbitration would sacrifice benefits of avoiding litigation, but nonetheless relying on contractual liberty to conclude that expanded review contracts should be enforced under arbitration law). Kenneth M. Curtin, "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards," 15 *Ohio St. J. On Disp. Resol.* 337, 339 (2000) (focusing on goals of arbitration law to reject enforcement of agreements attempting to expand judicial review of arbitration awards); Di Jiang-Schuerger, Note, "Perfect Arbitration = Arbitration Litigation?" 4 *Harv Negot. L. Rev* 231, 232 (1999) (suggesting in title, but not exploring or explicitly concluding, that expanded review procedures are not arbitrations governed by the FAA).

578 *Dean v Sullivan* 118 F3d 1170, *Team Scandia Inc v Greco* 6 Fsup2d 795.

579 *Lander Co. v Mine Investments Inc* 107 F3d 476, *Bay Networks Corp v Willemen US Dist Lexis* 14827.

580 *E. Associated Coal Corp. v United Mine Workers of Am.,* 531 US 57, 161 (2000) (reiterating that awards must be confirmed "as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," and "the fact that a court is convinced he committed serious error does not suffice to overturn his decision"); *Circuit City Stores, Inc. v Adams*, 532 US 105, 112–15 (2001).

581 Peter Bowman Rutledge, "On the Importance of Institutions: Review of Arbitral Awards for Legal Errors," 19 *J. Int'l Arb.* 81, 81–2, 113–16 (2002) (discussing limited judicial review as "distinctive feature of arbitration" and concluding that "legislatures, rather than courts or parties, should decide whether (and to what extent) courts should review arbitral awards for errors of law").

neither misapplication of principles of contractual interpretation nor erroneous interpretation of the agreement in question constitutes grounds for vacating an award[582]. In *United Steelworkers of America v Enterprise Wheel & Car Corp.*[583], held that "courts have no business overruling him because their interpretation of the contract is different from his." Even a mistake of fact or misinterpretation of law by an arbitrator provides insufficient grounds for the modification of an award[584]. If the parties have decided that the arbitrator's power is constrained by the law, the court could not confirm an award that exceeded that power[585]. To that extent, it challenged to enforcement of an arbitral award on grounds that enforcement of an award rendered by a corrupt tribunal would violate the public policy of the US[586]. Habitually, judicial review of arbitration awards has been very limited, in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation[587].

582 *Harry Hoffman Printing, Inc. v Graphic Communications Intern. Union, Local 261*, 950 F.2d 95 (2nd Cir. 1991).

583 363 US 593 (1960). ([T]he question of interpretation of the CBA is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract).

584 *Amicizia Societa Navegazione v Chilean Nitrate and Iodine Sales Corp*., 274 F.2d 805 (2nd Cir. 1960). New *England Utilities v Hydro-Quebec* 10 Fsup2d 53, *Generica Ltd. v Pharmaceutical Basics Inc.,* 125 F.3d 1123 (7th Cir. 1997) (arbitrator's refusal to permit continued cross-examination of a nonparty witness that the arbitrator deemed immaterial to the proceeding did not deny a party due process). *Pegasus Construction Corp. v Turner Construction Co*., 929 P.2d 1200 (Wash. Ct. App. 1997) (no misconduct found where the arbitrator refused to conduct a full hearing after making the dispositive ruling that neither party complied with the claims procedures required by their contract). *Alberti v Dean Witter Reynolds Inc.*, 205 F.3d 1321 (2nd Cir. 2000). *In Lapine Tech. Corp. v Kyocera* the court upheld the parties' agreement providing for vacatur where the arbitrator's findings of fact were not supported by substantial evidence or where the arbitrator's conclusions of law were erroneous. *130 F.3d 884, 886–87 (9th Cir. 1997).*

585 9 USC. § 10; U.A.A. § 12. *Metro Waste Comm'n. v City of Minnetonka,* 242 N.W.2d 830, 832 (Minn. 1976) "Where the arbitrators are not restricted by the submission to decide according to the principles of law, they may make an award according to their own notion of justice, without regard to the law …. Where the arbitrators are restricted, however, they have no authority to disregard the law and the … rules which they were directed to interpret and implement."

586 *AAOT Foreign Economic Assoc. Technostroyexport v International Dev and Trade Services, Inc.*, No. 97-9075 (2nd Cir. Mar. 23, 1998). Second Circuit held that law precludes attacks on qualifications of arbitrators on grounds previously known by party but not raised until after award has been rendered. By remaining silent during arbitral proceeding despite knowledge of possible corruption, party waived right to object to award at enforcement stage. *Apex Plumbing Supply, Inc. v US Supply Co.*, No. 97–1368 (4th Cir. Apr. 22, 1998). Section 9 of the FAA provides that application for confirming award, in absence of agreement between parties, "may be made in the US court in and for the district within which such award was made." Fourth Circuit held that section 9 confers permissive rather than mandatory venue upon district courts in and for the district in which arbitration award was made. James T. Peter, "Med-Arb in International Arbitration," 8 *Am. Rev Int'l Arb.* 83, 86 & n.21 (1997) (noting that some civil law systems treat unreasoned awards as unenforceable violations of public policy).

587 Stephen P. Younger, "Agreements to Expand the Scope of Judicial Review of Arbitration Awards," 63 *Alb. L. Rev* 241, 248–53 (1999) "arbitration poses a danger of an excessive or irrational award which cannot, in the vast majority of cases, be set aside on appeal." Margaret Moses,

It could be argued that if parties were allowed to disregard the statutes and draft their own rules as to judicial review, the role of the courts and the arbitration process would be negatively impacted in several noteworthy ways[588]. Firstly, unpredicted judicial review factors undermine the expected predictability of outcomes in award enforcement proceedings. Secondly, setting the boundaries of judicial review by agreement extends the duration, scope and expense of reaching a resolution to the dispute presented and so reduces the value of arbitration as an effective means of extrajudicial dispute resolution. Thirdly, expanded review would violate specific statutory provisions of the FAA and the grounds for review mentioned in the FAA are the exclusive grounds available to a reviewing court in examining arbitral awards, and congressional intent in this matter was to specifically preclude any review under differing, more expansive, standards.

Article 5 reflects one of the most important objectives of the Model Law[589], limiting the interference of national courts in the arbitral process, by exclusively holding that courts could intervene only in particular circumstances and so prohibiting interference by the courts in situations not specifically listed in its

"Party Agreements to Expand Judicial Review of Arbitral Awards," *Journal of International Arbitration* 20(3): 315–23, 2003.

588 On the one hand, the Seventh and Tenth Circuits have refused to allow expanded judicial review out of concern for the integrity of the judicial system. On the other hand, the Fifth and Ninth Circuits have taken a freedom of contract approach and have chosen to move away from a restrictive interpretation of statutory language, allowing expanded review of arbitration agreements. In favor of expansion of review, see *LaPine Technology Corp. v Kyocera Corp*., 130 F.3d 884 (9th Cir. 1997); *Gateway Technologies, Inc. v MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995). Opposed to expansion of review, *see Bowen v Amoco Pipeline Co*., 254 F.3d 925 (10th Cir. 2001); *Chicago Typographical Union No. 16 v Chicago Sun–Times, Inc*., 935 F.2d 1501 (7th Cir. 1991), and, most recently, *LaPine Technology Corp., v Kyocera Corp.*, 2003 WL 22025130 (9th Cir. 2003). Tom Cullinan, "Contracting for An Expanded Scope of Judicial Review in Arbitration Agreements," 51 *Vand. L. Rev* 395, 407 (1998). Edward C. Okeke, "Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondogle?" 10 *N.Y. Int'l L. Rev* 29, (1997) (stating that the "role of the judiciary in arbitral process admits of no controversy; this, perhaps, accounts for the paucity of decisional law on the subject"). James B. Hamlin, "Contractual Alteration of the Scope of Judicial Review – The US Experience," 15 *J. Int'l Arb.* 47, 56 (1998). Leonard Riskin & James Westerbrook, 228 (2nd ed. 1998) ("Arbitration is a contractual process. With few exceptions, parties arbitrate because they have agreed to do so, either in a contract entered into before the dispute arose or in an ad hoc agreement after the dispute arose."). Morris R. Cohen, "The Basis of Contract," 46 *Harv L. Rev* 553, 559 (1933) ("free contract assures the greatest amount of liberty for all.").

589 UNCITRAL Model Law on Int'l Commercial Arbitration, UNICTRAL Model Law, *available at* http://www.uncitral.org/en-index.htm. Sarah R. Cole, "Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution," 51 *Hastings L.J.* 1199, 1258 (2000) (stating that interpreting the statute as a default scheme is preferable "given the importance of freedom of contract and the presumption in favor of finding that the FAA creates a set of default rules."). Kenneth M. Curtin, "*Judicial Review of Arbitral Awards*, 55 *Disp. Resol. J.* 57 (2001) (discussing cases in which the Supreme Court has sanctioned arbitration as a means of dispute resolution where the subject matter of the dispute implicated fundamental issues of public policy, such as securities violations, RICO claims, anti-trust causes of action, employment discrimination and civil rights cases.)

provisions. It also seems to exclude any residual powers which the courts may have had. According to *Dan C. Hulea*[590]

> However, when presented with the issue the Supreme Court will most likely support the freedom of contract viewpoint and allow for expanded judicial review. In the past the Supreme Court has recognized the importance of the public policy protecting the provisions of agreements to arbitrate, and has therefore granted parties wide deference in establishing the ground rules for arbitration.

Besides, this author considers that there is no need for a party to choose arbitration and further judicial review of the award. Otherwise arbitration becomes more than litigation and so fails to meet the advantages of its existence. Moreover, a tendency is observed not to repeal all the terms of review by courts and to place the review of awards under the authority of an appellate arbitral tribunal under terms specified and established by arbitration precedent regardless of the fact that, as mentioned earlier, Judge Posner mentioned that parties could go for a review by an appellate arbitral tribunal.

Awards made outside the US will be subject to review only where they were made, and not in US courts. The court in *Cortez Byrd Chips, Inc. v Bill Hartbertconstr Co.*[591] raises the issue of whether the venue provisions of the FAA are restrictive, allowing a motion to confirm, vacate, or modify an arbitration award to be brought only in the district in which the award was made, or are permissive, permitting such a motion either where the award was made or in any district under the general venue statute. There is a split among the Courts of Appeals over the permissive or mandatory character of the FAA's venue provisions[592]. Section 10[593](a), governing motions to vacate arbitration awards, provides that "the US court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration [in any of five enumerated situations]."

And under §11, on modification or correction: "the US court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration."

590 *Dan C. Hulea,* "Contracting To Expand the Scope Of Review Of Foreign Arbitral Awards: An American Perspective," 2003 Brook. *J. Int'l L. 313, at 367.*

591 169 F.3d 693.

592 Compare *In re VMS Securities Litigation*, 21 F.3d 139, 144–45 (CA7 1994) (§§9 and 10 permissive); *Sunshine Beauty Supplies, Inc.*, *v United States District Court*, *Central Dist. of Cal.*, 872 F.2d 310, 312 (CA9 1989) (§§9 and 10 mandatory).

593 *Tempo Shain Corp. v Bertek, Inc*., 120 F. 3d 16, 19 (2nd Cir. 1997). These include circumstances "[w] here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy." 9 U. S. C. § 10(a)(3). *Pike v Freeman*, 266 F. 3d 78, 86 (2nd Cir. 2001). "Federal court review of an arbitral judgment is highly deferential; such judgments are to be reversed only where the arbitrators have exceeded their authority or made a finding in manifest disregard of the law."

It is argued that the purpose of challenging an award before a national court is to have it modified by the relevant court. If an award is disregarded by the relevant court, it will be treated as invalid by national courts elsewhere (NYC Art. V1, Model law Art. 36.1). If there is no valid agreement to arbitrate or the matters submitted to arbitration do not fall within the agreement, whether for reasons of public policy or otherwise, there cannot be a valid arbitration and consequently a valid award. In international commercial arbitration it is becoming common for a party to object to the jurisdiction of the arbitral tribunal in an attempt to defeat the arbitration agreement and so the claimant will have to pursue its claim by litigation before the national court in the defendant's country. A party can challenge jurisdiction at the outset of arbitration or he/she can wait until the award is made and then challenge it or resist enforcement on the basis that the tribunal had no jurisdiction, and so its award is void. Each country that has a law governing arbitration has its own grounds for challenge of an award. An award may be challenged on either procedural grounds (failure to give proper notice) or substantive grounds (mistake of law)[594].

The composition of the tribunal and the procedure adopted in the arbitration must be in conformity with the agreement of the parties[595]. An arbitral award can be set aside if the court of the place of arbitration finds that the claim is not capable of settlement by arbitration under its own law. As discussed earlier an award can be set aside if a national court of the place of arbitration finds that the award is in conflict with the public policy of its own country. Every country has its own concept of what is required by its public policy, which means that different states have different concepts of their own public policy and there is a risk that one country may set aside an award that other countries would regard as valid. National public policy binds individuals, and thereby restricts contractual freedom within territorial limits. Domestic public policy is a ground for challenging an award and also for refusing recognition and enforcement an award[596]. The court is not called on to review an award as a whole but the court only has to deal with a particular issue, for instance, the composition of the tribunal was not in accordance with the parties'

594 *Parsons & Whittemore Co. v Societe*, 508 F2d 969, *Iran Aircraft v AVCO Corp*., 980 F2d 141. The model law (Art. 34) states that an action for setting aside can only be brought in respect of an award made within the territory of the state concerned. It has to be brought before the designated court in the state and it can be brought on the grounds set out in the model law that are taken from Article V of the NYC (invalid agreement to arbitrate, lack of due process, issues of jurisdiction).

595 *Dalmia Dairy Industries Ltd v Pakistan* [1978] 2 LR 223. Enforcement of Award Denied for Improper Constitution of Arbitral Tribunal. The Court agreed that the arbitral award was not enforceable because the arbitral panel was not composed in accordance with the Parties' arbitral agreement. On the other hand, the Court held that the District Court's order dictating how the parties should proceed after enforcement was denied was beyond the authority of that Court. *Encyclopaedia Universalis S.A. v Encyclopaedia Britannica, Inc., Case No 04-0288-cv of the United States Court of Appeals for the Second Circuit*.

596 *American Safety Corp v JP Maguire* 391 F2d 821, *Mitsubushi Motors v Soler Crysler-Plymouth* 473 US 614, *Scherk v Alberto-Calver Co* 417 US 506. R Fox, "Premption of state law under the FAA," 1985 *Baltimore LR* 129, A Brunel, "Model Law on Internaitonal Arbitration," 1990 *Texas ILJ* 46.

agreement. There is a tendency to favour reviewing of arbitration decisions in order to guard against mistakes of law, because different tribunals might come up with inconsistent decisions concerning the same point. For instance, the interpretation of a standard form clause in a widely used contract, which could also happen in litigation. A party may find itself brought unwillingly before national courts that hold their hearings in public, thereby defeating and the appeal process may be used to postpone compliance with the award speedy resolution of international commercial disputes. A balance must be achieved between the need for privacy, speed and finality in the arbitral process and the wider public interest in some measure of judicial control. Where a challenge to the validity of an award is possible, it must be addressed to a national court of competent jurisdiction. An award might be challenged under the law of a state other than the one in which the award was made.

The time limits in section 12 of the FAA for filing a motion to vacate, modify or correct an award do not prevent a party who did not participate in an arbitration proceeding from challenging the validity of the award at the time of its enforcement on the basis that no written agreement to arbitrate existed between the parties. If a party fails to arbitrate, the claimant may petition the court to compel arbitration. It may not, however, proceed straight to arbitration, secure a default judgment, and then argue at the enforcement stage that the non-appearing party is without recourse for failure to file a motion to vacate within three months of the arbitration award[597].

The Second Circuit ruled[598] that the fact that the arbitration itself concerns issues of federal law does not, on its own, confer subject matter jurisdiction on a federal district court to review the award, but federal jurisdiction may lie where the petitioner seeks to vacate the award primarily on the ground of manifest disregard of federal law. Since this was indeed the petitioner's claim, the court proceeded to the merits of the claim. Arbitration awards are only reviewable for manifest disregard of the law[599], and the informal procedures, which make arbitration so desirable in the context of a private dispute, often mean that the record is so

597 *MCI Telecommunications Corp. v Exalon Indus., Inc*., No. 97–1735 (1st Cir. Mar. 11, 1998) 138 F3d 426.

598 *Greenberg v Bear, Stearns & Co., No.* 99–9041 (2nd Cir. Aug. 7, 2000). At http://www.law.pace.edu/lawlib/legal/us-legal/judiciary/second-ircuit/test3/99-9041.opn.html.

599 9 USC. 10, 207, Stephen L. Hayford, "Reining in the 'Manifest Disregard' Standard: The Key to Restoring Order to the Law of Vacatur,": *J. of Dispute Resolution* (1998), pp. 117, 122 (courts have "failed to produce a unitary, clearly articulated mode of analysis," which has resulted in "disarray" in application of the "manifest disregard" standard); Brent S. Gilfedder, " 'A Manifest Disregard of Arbitration?' An Analysis of Recent Georgia Legislation Adding 'Manifest Disregard of the Law' to the Georgia Arbitration Code as a Statutory Ground for Vacatur," 39 *Ga. L. Rev* 259, 260 (2004) Mr. Gilfedder points out that Georgia became the very first state to add "manifest disregard of the law" as an additional ground to vacate arbitration awards in 2003 pointing out that manifest disregard of the law usually means the award conflicts with public policy or it is arbitrary or capricious. *Puerto Rico Tel. Co. v US Phone Mfg. Corp*., 427 F.3d 21 (1st Cir. 2005) (defining "manifest disregard" as case where arbitrators knew law and explicitly disregarded it and resulting award is unfounded in reason and fact, or where arbitrators appreciated existence of governing legal rule but willfully decided not to apply it); *Bear, Stearns & Co. v 1109580 Ontario, Inc.,* 409 F.3d 87, 90 (2nd Cir. 2005) (reviewing court must find that arbitrators knew of governing legal

inadequate that the arbitrator's decision is virtually unreviewable. The court held that, to vacate an award on the ground of manifest disregard, a reviewing court must find both that the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. An award should not be set aside under the "manifest disregard" standard unless the court finds the arbitrator committed misconduct by ignoring what she/he knew to be the law and section 10(a)(4) permits vacatur only if the arbitrator decided an issue he was not given authority to resolve[600]. The D.C. Circuit's decision in *Cole v Burns International Security Services*[601], declared that judicial review under the "manifest disregard"

principle yet refused to apply it or ignored it all together, and law ignored by arbitrators was well-defined, explicit, and clearly applicable to the case); *Dluhos v Strasberg*, 321 F.3d 365, 370 (3rd Cir. 2003) (distinguishing between manifest disregard for law and erroneous interpretation of law, and suggesting that a court's application of this standard is generally to affirm easily the arbitration award under this extremely deferential standard); *Upshur Coals Corp. v United Mine Workers of Am., Dist.* 31, 933 F.2d 225, 229 (4th Cir. 1991) (adopting 9th Circuit approach that permits vacatur where arbitrators understand and correctly state the law, but proceed to disregard it); *Kergosien v Ocean Energy*, 390 F.3d 346, 355 (5th Cir. 2004) (adopting 2nd Circuit approach to manifest disregard for the law, namely more than error or misunderstanding with respect to law, including error that is obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; term "disregard" implies that arbitrator appreciates the existence of a clearly governing principle, but decides to ignore it); *Jacada (Europe), Ltd. v International Mktg. Strategies*, 401 F.3d 701, 713 (6th Cir. 2005) (award must fly in the face of clearly established legal precedent; arbitrators act in manifest disregard if the applicable legal principle is clearly defined and not subject to reasonable debate and arbitrators refuse to heed legal principle); *McGrann v First Albany Corp.,* 424 F.3d 743, 749 (8th Cir. 2005) (award manifests disregard for the law when an arbitrator clearly identifies the applicable, governing law, but then ignores it); *Carter v Health Net of Calif*., 374 F.3d 830, 838 (9th Cir. 2004) (defining manifest disregard of the law as something more than error in the law or failure on the part of the arbitrators to understand or apply the law; record must show that the arbitrators recognized the applicable law and then ignored it); *US Energy Corp. v Nukem, Inc*., 400 F.3d 822, 830 (10th Cir. 2005) (summarizing the standard as willful inattentiveness to the governing law); *University Commons-Urbana, Ltd. v Universal Constructors Inc*., 304 F.3d 1331, 1337 (11th Cir. 2002) (to manifestly disregard the law, arbitrator must be conscious of the law and deliberately ignore it); *LaPrade v Kidder, Peabody & Co*., 246 F.3d 702, 706 (D.C. Cir. 2001) (to vacate on manifest disregard grounds, court must find that arbitrators knew of a governing legal principle yet refused to apply it and law ignored by arbitrators was well-defined, explicit, and clearly applicable to the case).

600 Stephen L. Hayford, "A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur," 66 *Geo. Wash. L. Rev* 443, 466–70 (1998) (surveying circuit courts and finding "the case law indicates consensus among the federal appeals courts as to the general nature of the judicial inquiry called for in applying this nonstatutory ground for vacatur"). *EEOC v Waffle House, Inc*., 534 US 279, 295 (2002) (stressing arbitration is "effectively a forum selection clause," not a waiver of substantive statutory rights).

601 105 F.3d 1465 (D.C. Cir. 1997). "nonetheless, there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." Robert N. Covington, "Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?," 15 *Hofstra Lab. & Emp. L.J.* 345, 351–52 (1998) (noting the *Gilmer* decision has been "the subject of commentary in well over a hundred law review Articles, and has been chewed over in countless academic conferences, after-dinner speeches, and briefings for managers"); Professor Covington favors more aggressive judicial review when the arbitrator's award "infringes the

standard permits fundamentally *de novo* judicial review of "novel or difficult legal issues," if the court were free to supply its own interpretation of the statute, an arbitrator may do so as well and a court would not set the award aside because it would not have reached the same result if the arbitrator's legal reasoning[602] was sound, otherwise there is no need to have arbitration as an alternative dispute system. Moreover, the arbitrator should not condemn business practices under the antitrust laws that are efficient in a free competitive market[603].

protections provided by public law to those who are not parties." (Citing recommendations for written opinions in at least some types of arbitrations); *United States v Haggar Apparel Co*., 526 US 380, 391 (1999) (The court held that *de novo* trial proceedings do not deprive regulations of *Chevron* deference. "Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents."). p. 392. ("The whole point of regulations … is to ensure that the statute is applied in a consistent and proper manner. Deference to an agency's expertise in construing a statutory command is not inconsistent with reaching a correct decision.") *Cytyc Corp. v Deka Prods. Ltd.,* 439 F.3d 27, 35 (1st Cir. 2006). "A party seeking to establish manifest disregard of the law sufficient to warrant setting aside an arbitral award must demonstrate that the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it." *Puerto Rico Telephone Co. v US Phone Mfg. Corp.,* 427 F.3d 21, 32 (1st Cir. 2005) ("Thus, a mere mistake of law by an arbitrator cannot serve as the basis for judicial review. Rather, 'manifest disregard' means that arbitrators knew the law and explicitly disregarded it."). William W. Park, "Procedural Evolution In Business," *Arbitration* 9 (2006) ("courts intervene *only* to monitor arbitration's basic procedural integrity, by assuring: (i) the basic procedural fairness of an arbitration (lack of bias, right to be heard, and equality of arms); and (ii) respect for limits of arbitral jurisdiction"). James M. Gaitis, "Unraveling the Mystery of *Wilko v Swan*: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy," 7 *Pepp. Disp. Resol. L.J.* 1, 4–5 (2007). Michael A. Scodro, "Deterrence and Implied Limits on Arbitral Power," 55 *Duke L.J.* 549, 581 (2006). Alan Scott Rau, "The Culture of American Arbitration and the Lessons of ADR," 40 *Tex. Int'l L.J.* 449, 525 (2005) ("It is true that as disputes arising from mandatory law are increasingly swept into arbitration, courts naturally have come under increasing pressure to ensure that statutory policy is being vindicated …. As a consequence they may think it necessary – as Judge Edwards suggested in *Cole* – to breathe new life into the 'manifest disregard of law' standard …."). Lucy Reed & Phillip Riblett, "Expansion of Defenses to Enforcement of International Arbitral Awards," 13 *Sw. J.L. & Trade Am.* 121, 133 (2006) ("It is difficult to imagine an international arbitrator writing an award in which he or she painstakingly sets out an applicable legal principle and then defiantly ignores it or states that he or she will not apply it."). *Patten v Signator Ins. Agency*, 441 F.3d 230, 235 (4th Cir.) ("the arbitrator disregarded the plain and unambiguous language of the governing arbitration agreement"), *cert. denied*, 127 S. Ct. 434 (2006).

602 *Dawahare v Spencer*, 210 F.3d 666 (6th Cir. 2000) (arbitrators not required to explain decisions to avoid manifest disregard of law); *Raytheon Co. v Automated Bus. Sys*, 882 F.2d 6 (1st Cir. 1989) (award could not be set aside merely because arbitrators did not provide reasoning); *Merrill Lynch, Pierce, Fenner & Smith v Burke,* 741 F. Supp. 191 (N.D. Cal. 1990)(absence of reasoning does not support conclusion that arbitrators disregarded law). But see *Halligan v Piper Jaffray, Inc.,* 148 F.3d 197 (2nd Cir. 1998) (absence of explanation for award may reinforce reviewing court's conclusion that arbitrators engaged in manifest disregard of law).

603 *Northwest Wholesale Inc v Pacific Stationery Co* 472 US 284. The court held that "manifest disregard of the law must be something beyond and different from a mere error in law or failure on the part of the arbitrators to understand or apply the law" such as the case when arbitrators

Is disposition of more and more cases without a public justice system resolution harmful? There is no ultimate Supreme Court case law speaking to the preemptive effect[604], if any, of issues involving standards and procedure for vacatur, confirmation and modification of arbitration awards. Supplementarily, the various US Circuit Courts of Appeals have held that FAA §10(a) standards are not the exclusive grounds for vacatur, with such case law-based grounds as "manifest disregard of the law[605]" and "violation of public policy" having been added to the FAA statutory grounds. Many of the FAA provisions are directed explicitly to federal courts, such as the provisions on court stays and orders to arbitrate and the standards for the review and enforcement of arbitral awards. These show a serious and deep involvement of courts in the whole arbitration process. Other provisions deal with court procedures that are uniquely federal, such as the appealability of arbitration orders under the federal "final judgment rule." Where the arbitrators granted unlimited powers by the parties, the general rule applies and judicial review is narrow and limited and so the court's involvement is not avoided. But where the parties' contract for rules or provisions governing arbitration which require the arbitrator to follow the substantive law, a reviewing court will vacate the award if it finds that the arbitrator failed to follow the law and the rationale is that the arbitrator has exceeded the authority granted[606].

According to Monica J. Washington[607] "judicial review of an arbitral decision in a statutory employment dispute should be more rigorous than either statutory or common law currently permits. She further maintains that when broader judicial review proceeds within a clearly articulated frame-work, it may foster increased recourse to arbitration by ensuring an impartial forum for the vindication of statutory rights." Indeed, in the US, the practice of issuing an award without a reasoned opinion is often adopted specifically to avoid giving the loser any grounds upon which to challenge the award. The role of an arbitrator is often analogized to that of a judge.

understand and correctly state the law but proceed to disregard the same by making a conscious decision to ignore it in fashioning the award.

604 David S. Schwartz, "State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law," 2004 *Journal of Law & Policy* 129.

605 *Brabham v A.G. Edwards & Sons, Inc.,* 376 F. 3d 377 (5th Cir. 2004) Under the learning of this decision, the Appellate Division, in its first decision in the case, had already ruled the arbitral award invulnerable under the narrower manifest disregard of the law standard. The point I make is that the "arbitrary and capricious" standard is at least co-extensive with the manifest disregard of the law standard.

606 *Watts & Sons, Inc. v Tiffany & Co.,* 248 F.3d 577 (7 th Cir.2001). *Totem Marine Tug & Barge Inc v North America Towing* 607 F2d 649. *Willemijn v Standard Microsystems Corp* 103 F3d 9. *Montes v Shearson Lehman* 128 F3d 1456. *Daily News v Newspaper & Mail Deliveries* 1999 WL 1095613.

607 Monica J. Washington, "Compulsory Arbitration of Statutory Employment Disputes: Judicial Review without Judicial Reformation," 74 *New York University Law Review* 844. Louis A. Russo, "The Consequences of Arbitrating A Legal Malpractice Claim: Rebuilding Faith In The Legal Profession," 2006 *Hofstra Law Review* 327.

Is there any alternative mechanism of appeal concerning arbitration awards? Is judicial review of arbitration conducted on *de novo* standards under the FAA? The FAA favours arbitration by assuring that appellate courts quickly review orders denying arbitration, so that parties may proceed promptly to the arbitrator if the district court has erred[608]. A court's authority to vacate awards made pursuant to the FAA is read narrowly[609]. Congress, by statute, has indicated a reluctance to upset an arbitrator's awards by allowing narrow grounds for review. Although review of a district court's analysis under section 9 USC. § 10 is *de novo*, that review is strictly limited and does not generally examine the arbitrator's interpretation of law or findings of fact[610]. Limitation of judicial review is based on the intention that arbitration is an efficient way of handling disputes with a minimum of procedure and a finality[611] of result in a minimum of time. Have these aims been achieved? The US Supreme Court's test in *Wilko v Swan*[612] created the only judicial standard of review.

There is no form of review within the arbitration process itself, that is, there is no appellate board or committee of arbitrators. Grounds for setting aside the arbitration award are neither designed to dilute the general advantage of speedy and effective resolution of disputes by arbitration, nor to weaken the traditional

608 *Naplefon v General Motors Corp* 138 F3d 1209, 9 USC 16.

609 *Blue Tee Corp v Koehring Co* 754 F Sup 26.

610 See *Bowles Fin. Group, Inc. v Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir. 1994). *Denver & Rio Grande W. R.R. v Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997). *Julian J. Moore, "*Arbitral Review (Or Lack Thereof): Examining The Procedural Fairness Of Arbitrating Statutory Claims," 100 *Colum. L. Rev* 1572 (2000).

611 *Hart Surgical, Inc. v Ultracision*, Inc. 2001. www.supremecourts.gov. *Hart Surgical, Inc. v UltraCision, Inc.*, No. 97-594-T (D. Mass. Apr. 25, 2000). According to the court, a "final" arbitral award is one that resolves all of the claims submitted to the panel." *El Mundo Broad. Corp. v United Steel Workers of America*, AFL-CIO CLC, 116 F.3d 7, 9 (1st Cir. 1997). "it is essential for the district court's jurisdiction that the arbitrator's decision was final, not interlocutory." *Fradella v Petricca*, 183 F.3d 17, 19 (1st Cir. 1999) "normally, an arbitral award is deemed 'final' provided it evidences the arbitrators' intention to resolve all claims submitted in the demand for arbitration."

612 346 U.S 427). "Effectiveness in application [of Securities Act provisions advantageous to the buyer are] lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" cannot be examined. [Moreover], power to vacate an award is limited." *Halligan v Piper Jaffray Inc* 1998 US App. LEXIS 15193 (2nd Cir July 9, 1998), *George Watts & Son, Inc. v Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001) (holding that the manifest disregard standard does not allow an award to be set aside even for clear legal error). Since arbitration is not a forfeiture of substantive rights, the arbitrator is bound to follow the law. Moreover, "no one expects that the parties intended to vest in that agent the power to ignore statutory law willy-nilly and decide the fate of the parties at her whim or caprice." *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 478–79 (1989). "to the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

reluctance with which courts view efforts to re-examine awards[613]. On review of an arbitration award, it is not the court's role to establish rules of law to serve as a binding precedent in all future arbitrations[614].

An award may be modified if the award either manifestly disregards the law or is irrational[615]. Besides, the misapplication of rules of contract interpretation does not raise the statute of manifest disregard of law. Whether the arbitrators misconstrued a contract is not open to judicial review[616]. As long as arbitrators do not reach an irrational result, they can interpret the law to fit the factors before them and their award will not be set aside because they erred in the application of the law[617]. To that extent, introducing an appellate arbitral tribunal dealing with the review of awards will minimize the cost of making mandatory rules default rules[618]. There is currently no judicial review corresponding to review of court decisions[619]. For instance, the arbitral court may improperly interpret the substantive protections of Rule 10b-5, and if it does, its error will not be reviewable as would the error of a federal court.

Both federal and state courts have added grounds, but all of them provide for relief only from extremes of error or misconduct. While it is clear that manifest disregard of the law is a federal concept derived from a US Supreme Court[620] case,

613 *Dole Ocean Liner Exp v Georgia Vegetable Co* 84 F3d 772. *Gulf Coast Ind v Exxon Co* 70 F3d 847. William W. Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration," 12 *Brook. J. Int'l L.* 629, 630 (1986) (arguing that arbitral awards should be enforced without significant judicial review, even at the cost of making mandatory rules default rules).

614 *St. Luke's Hosp. v SMS Computer Systems Inc* 785 F Sup 124.

615 *Wilko v Swan* 346 US 427, *Marcy Lee Co v Cortley Fabrics Co* 354 F2d 42.

616 *Bernhard v Polygraphic* 350 US 198.

617 *Marcy Lee Co. v Cortley Fabrics Co* 354 F2d 42. William W. Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration," 12 *Brook. J. Int'l L.* 629, 630 (1986) (arguing that arbitral awards should be enforced without significant judicial review, even at the cost of making mandatory rules default rules).

618 Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law through Arbitration," *1999 Minnesota Law Review* 703, at 711 "The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law", at 754 "Arbitration privatizes the creation of law." Stephen J. Ware, "The Case for Enforcing Adhesive Arbitration Agreements – With Particular Consideration Of Class Actions And Arbitration Fees," 5 *J. Am. Arb.* 251 (2006) (enforcement of adhesive arbitration agreements benefits society by reducing process costs, thereby benefiting consumers, employees and other adhering parties).

619 G. Contini, "International Commercial Arbitration," 8 *Am J Comp. L* 283, Comment, "The nonarbitrable subject matter defense," 9 *Den J. Int'l & Pol'y* 119.

620 *Wilko v Swan*, 346 US 427, 436–37 (1953), overruled on other grounds, *Rodriguez de Quijas v Shearson/American Express Inc.*, 490 US 477 (1989). *Montes v Shearson Lehman Brothers, Inc*., 128 F.3d 1456 (11th Cir. 1997). The Eleventh Circuit vacated the arbitration award where the arbitral panel manifestly disregarded the law. Because the arbitral panel was urged to deliberately ignore the law and there is no indication that the panel did not heed this plea, the court held the panel did not merely erroneously interpret the law, it manifestly disregarded the law. Such manifest disregard of the law – unlike misinterpretation, misstatement or misapplication of the law – can constitute grounds for vacation under the FAA. *New England Util. v Hydro-Quebec*, 10 F.Supp.2d 53 (D. Mass. June 15, 1998). An arbitration clause stated that award "shall be final and binding …, except that any party may petition a court … for review of errors of law." This

it is not always clear, nor does it necessarily matter, whether judicially-created standards are derived from federal or state law[621]. In any case, before *Halligan*[622] the collection of judicially-created grounds in the Second Circuit and in New York were manifest disregard of the law, manifest disregard of the contract, compelling a violation of law, violation of strong public policy and total irrationality[623]. Now, after *Halligan*, manifest disregard of the evidence should be regarded as a further reason of violation of public policy. The case of *Montes v Shearson Lehman Brothers*[624] and the doctrine of manifest disregard of the law, upon which it rests, hold the decided potential for more formal, intensely litigated arbitrations and for more ingenious efforts to gain review of the results of those arbitrations.

provision is valid and enforceable, thereby requiring an expanded scope of review of the award beyond that required by the FAA. *US West Fin. Servs. Inc. v Buehler Inc*., 150 F.3d 929 (8th Cir. July 31, 1998). Affirmance of dismissal of action by assignee on *res judicata* grounds by reason of an arbitration award against the assignee. The court reiterated the well-established rule that a final arbitration award, unless set aside, has the same preclusive effect as a court judgment. The key issue was whether the defendant in the assignee's suit had been a party to the arbitration. The court found that there was no error in the district court's finding that the defendant had been a party to the arbitration even though the record was ambiguous. *M.C. Constr. Corp. v Gray Co*., 17 F.Supp.2d 541(W.D. Va. July 30, 1998). The federal court had no power to order parties to arbitrate in another state as set forth in the arbitration clause in dispute, or to arbitrate in the forum state, which the parties had not agreed to. *ECC Property Co. v Kaplan*, 578 N.W.2d 381 (Minn. Ct. App. May 12, 1998). An arbitrator under a broad-scope arbitration clause did not exceed his powers by ordering mandatory buyout of the interests of two partners in a six-member partnership upon a finding of waste of assets.

621 David S. Schwartz, "State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law," 2004 *Journal of Law & Policy* 129.

622 *Halligan v Piper Jaffray Inc*., 148 F.3d 197 (2nd Cir. July 9, 1998), where a reviewing court is inclined to find that the arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard. Kenneth R. Davis, "When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards," 45 *Buff. L. Rev* 49, 89 (1997) ("Nearly all courts that apply [the manifest disregard] standards require more than mere legal error. Misapplying law is not a ground for vacating an award."). *George Watts & Son, Inc. v Tiffany & Co*., 248 F.3d 577, 578 (7th Cir. 2001) (noting that the manifest disregard standard sometimes falls within the FAA's section 10(a)(4)).

623 *Merrill Lynch, Pierce, Fenner & Smith Inc. v Bobker*, 808 F.2d 930 (2nd Cir. 1986). *Yusuf Ahmed Alghanim & Sons, W.L.L. v Toys "R" Us Inc*., 126 F.3d 15, 25 (2nd Cir. 1997), *cert. denied*, 118 S. Ct. 1042 (1998). *Mulder v Donaldson, Lufkin & Jenrette*, 1996 N.Y. App. Div Lexis 9920 (Oct. 8, 1996).

624 128 F3d 1456 (11th Cir. 1997). Judge Jose A. Cabranes "Arbitration and US Courts: Balancing Their Strengths," *New York State Bar Journal.* Vol. 7, No. 3 (March/April, 1998) at 22. 9 USC §10(a)(1)–(4). *Ainsworth v Skurnick* 960 F2d 939, 941 (11th Cir. 1992) *cert denied*, 113 S.Ct. 1269 (1993) (an award may be vacated if it is arbitrary and capricious); *Delta Airiines Inc. v Air Line Pilots' Association* 861 F2d 665, 671 (11th Cir. 1988) *cert denied*, 110 S.Ct. 201 (1989) (an award may be vacated if contrary to public policy). Even with the pre-existence of these judicial grounds for vacatur in the Eleventh Circuit, adoption of the better known manifest disregard standard with its more cognizable "legal content" has special significance in adding another dimension for creative and zealous advocacy. *Rodriguez de Quijas v Shearson/American Express Inc.* 490 US 477 (1989).

Both the FAA and the CPLR sharply limit the grounds on which a court may overturn an award[625]. Because these statutory grounds do not include legal error, courts routinely confirm awards even when the award appears to misapply the law. Although courts may vacate awards which are in manifest disregard of the law, the burden of proving manifest disregard is so onerous that the court must confirm the award "if there is 'even a barely colorable justification for the outcome reached[626].'"

As mentioned above, the grounds for vacating both foreign and non-domestic awards are set forth in Article V of the convention. The convention contains no "manifest disregard" ground for refusing recognition of an award. Contrary to what they may have seen fit to do with respect to the Arbitration Act – which similarly contains no express "manifest disregard" standard – US courts have generally ruled that the convention contains no implied standard for vacating an arbitration award that was rendered in "manifest disregard of the law[627]."

Moreover, in *Halligan v Piper Jaffray, Inc.*[628] the Second Circuit reversed a lower court judgment confirming an arbitral award appearing to be de novo review of the evidence. The arbitral panel was under no obligation to explain its award. When courts amend arbitral agreements or alter their background resumptions, they are in effect undermining the integrity of arbitration and apparently ad hoc judicial

625 9 USC. §§ 1 et seq., § 10; CPLR 7511(b)(1). *Vacatur of Awards: Commonwealth Coatings Corp. v Continental Causulty Co.*, 393 US 145 (1968) (corruption, fraud, or undue means) *Gianelli Money Purchase Plan & Trust v ADM Investor Services, Inc*., 146 F.3d 1309 (11th Cir. 1998); (evident partiality or corruption in the arbitrators) *Castleman v AFC Enters., Inc.,* 995 F. Supp. 649 (N.D. Tex. 1997); (fundamental fair hearing) *Orion Shipping & Trading Co. v Eastern States Petroleum Corp*., 312 F.2d 299 (2nd Cir. 1963); (the arbitrator exceeded his powers) *United Paperworkers Int'l. Union v Misco, Inc*., 484 US 29 (1987), (contrary to public policy-manifest disregard of the law) *PaineWebber, Inc. v Argon,* 49 F.3d 347 (8th Cir. 1995); 128 F.3d 1456 (11th Cir. 1997).

626 *Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F.3d 9, 13 (2nd Cir. 1997) (quoting *Andros Compania Maritima, S.A. v Marc Rich & Co., A.G*., 579 F.2d 691, 704 (2nd Cir. 1978)). Jennifer J. Johnson, Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration, 84 N. Car. L. Rev 123, 140–429 (2005)(discussing limited grounds for judicial review under the FAA); Norman S. Poser, "Judicial Review of Arbitration Awards: Manifest Disregard of the Law," 64 *Brook. L. Rev* 471, 473–74 (1998) (explaining that current standard of judicial review is inadequate to protect statutory rights). Courts should not review arbitrators' interpretations of contracts even if they are "wacky," so long as the arbitrator attempted to "interpret the contract at all." *Wise v Wachovia Securities, Inc*., 450 F.3d 265, 269 (7th Cir. 2006).

627 A foreign award for purposes of the convention is an award rendered in another country. A non-domestic award for purposes of the convention is an award rendered in the US that involves a dispute between (i) parties one of which is domiciled or has a principal place of business outside the US; or (ii) US parties concerning property located abroad, contractual performance abroad or some other relationship with a foreign state. 9 USC §201; *Bergesen v Joseph Muller Corp.*, 710 F2d 928, 932 (2nd Cir. 1983). See also Newman and Burrows, "Non-Domestic Arbitral Awards and the NYC," *New York Law Journal,* July 29, 1996.

628 148 F.3d 197 (2nd Cir. 1998). The court recognized its power to remand the case to the arbitrators for an explanation of their decision (citing *Siegel v Titan Indus. Corp*., 779 F.2d 891, 894 (2nd Cir. 1985)) but it remanded the case to the district court for further proceedings instead.

review of arbitral awards could discourage the use of speedy dispute resolution mechanisms because parties will doubt their finality.

Arbitration awards could not be set aside merely because commercial arbitration chose not to provide parties with reasons for their decision[629]. An arbitrator's failure to issue written findings was not abuse of powers, or such imperfect execution that a mutual, final and definite award was not made[630]. The court[631] found that the arbitration panel's refusal to continue hearing certain evidence amounted to fundamental unfairness and misconduct sufficient to vacate the arbitration award under the FAA. According to the court, this means that except where fundamental fairness is violated, arbitral determinations will not be opened up to evidentiary review and arbitrators must give each of the parties to the dispute an adequate opportunity to present its evidence and argument. A federal court may modify an arbitration award only if a ground specified in section 11 is found to exist[632]. The power of a court to review legal issues is governed by the contract language used by the parties[633]. So, parties may agree that an award will be reviewed under the same legal standards applicable to any court judgment. An arbitration award should be enforced, despite the court's disagreement with it on merits, if there is barely justification for decision reached by arbitrators, even if the ground for the decision is based on an error of fact or error of law[634].

629 *Raytheon Co. v Automated Business Systems* 882 F 2d 6. An arbitration clause requiring arbitration of the consumer's claim that the lender violated the truth in lending act was not unenforceable as unconscionable or in violation of public policy because it failed to specify who was to pay the costs of arbitration. However, in an appropriate case, the costs of arbitrating could be prohibitive, rendering the arbitration clause unenforceable. *Green Tree Financial v Randolph*, 121 S.Ct. 513, An arbitration award reinstating a union employee who tested positive for illegal drugs on more than one occasion was confirmed notwithstanding the employer's contention that the award exceeded the arbitrator's authority because it violated public policy. The district court found that there was no well defined and dominant public policy which prohibited reinstatement of an employee, whose drug use was found to be occasional and not likely to recur, to a position which was not safety sensitive. The fourth circuit affirmed in a unpublished opinion. The US Supreme Court affirmed. *Eastern Associated Coal Corporation, et al., v United Mine Workers of America, District 17*, *et al.*, 66 F. Supp.2d 796 (S.D.W.Va. 1998); affirmed, 188 F.3d 501 (4th Cir. 1999); 121 S.Ct. 462. *University Commons-Urbana, Ltd. v Universal Constructors, Inc*., 304 F.3d 1331, 1337 (11th Cir. 2002) (in the face of unreasoned awards, it is nearly impossible for the court to determine whether arbitrators acted in disregard of the law"); *Merrill Lynch, Pierce, Fenner and Smith v Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (party seeking to vacate arbitration award faces tremendous obstacle when panel does not explain award).

630 *Associated Const Co. v Moliterno Stone* 782 F Sup 15.

631 *Tempo Shain Corp. v Bertek Inc*. 120 F3d 16 (2nd Cir. 1997).

632 *US Postal Service v American Postal Workers Union* 564 F Sup 545.

633 *Bay Cities Paving v Lawyers Co* 21 Cal Rprt 2d 691.

634 *Claredon Nat. Ins. Co. v TIG Reinsurance Co* 990 F Sup 304. *Softkey, Inc. v Useful Software, Inc*., 756 N.E.2d 631, 635 (Mass. App. Ct. 2001) (restating error of law not subject to review) *Grobet File Co. of Am., Inc. v RTC Sys., Inc.*, 524 N.E.2d 404, 406 (Mass. App. Ct. 1988) (excluding even grossly erroneous arbitral findings from judicial review). Tr. of the *Boston & Me. Corp. v Mass. Bay Transp. Auth*., 294 N.E.2d 340, 343 (Mass. 1973) (recognizing binding nature of grossly erroneous conclusion). Courts should not review arbitrators' interpretations of contracts even if they are "wacky," so long as the arbitrator attempted to "interpret the contract at all." *Wise v*

Accepting erroneous evidence and miscalculation of damages are not among the narrow grounds on which a court may vacate rather than confirm an arbitration award.

Where dealings between an arbitrator and a party to arbitration proceedings might create the impression of possible bias, the arbitrator must disclose them[635]. In *Olson v Merrill Lynch, Pierce, Fenner & Smith*, *Inc*.[636] the court held that an arbitrator has to disclose any relationships between the arbitrator and either of the parties, particularly if the arbitrator has a "substantial interest" in the business of the party or the failure to disclose such a relationship to constitute partiality[637] and so implying overt bias stemming from direct relationships avoiding even the appearance of bias. A party seeking to vacate an award must show that a reasonable person would have to conclude that the arbitrator was partial to one party[638]. Failure to disclose dealings that might create an impression of possible bias is grounds for vacating an award[639]. A court must ascertain whether the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness[640]. Where a party was aware that the corporation from whom an arbitrator was employed had business contacts with the opposing party this constituted sufficient disclosure[641]. For instance, use of arbitrators with insurance industry experience also carries with it the possibility of partiality in favour of or against certain individuals, companies

Wachovia Securities, Inc., 450 F.3d 265, 269 (7th Cir. 2006). The US Supreme Court held that "courts are not authorized to review the arbitrator's decision on the merits" even if the arbitrator's fact finding was "silly." *Major League Baseball Players Ass'n v Garvey*, 532 US 504, 509 (2002).

635 *Sanko Co. v Coke Industries Inc* 495 F2d 1260.

636 51 F.3d 157 (8th Cir. 1995). *Commonwealth Coatings Corp. v Continental Casualty Co*., 393 US 145 (1968). *Remmey v Paine Webber, Inc*., 32 F.3d 143 (4th Cir. 1994) (denying motion to vacate award based on claims of arbitrator's bias); *Smith v Prudential Sec., Inc*., 846 F. Supp. 978 (M.D. Fla. 1994).

637 Kenneth R. Davis, "When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards," 45 *Buff. L. Rev* 49, 85 (1997) (noting that "the FAA restricts the statutory grounds for vacating an arbitration award essentially to partiality and procedural unfairness, matters not directly involving the legal correctness of the award").

638 *Ct Shipping Ltd v DMI Ltd* 774 F Sup 146. *Standard Tankers (Bahamas) Co. v Motor Tank Vessel, Akti*, 438 F. Supp. 153, 160 (E.D.N.C. 1977) ("To constitute evident partiality, some overt misconduct or demonstration of partiality is required."). *Lafarge Conseils et Etudes, S.A. v Kaiser Cement & Gypsum Corp*., 791 F.2d 1334, 1339 (9th Cir. 1986) (holding that, in order to vacate an arbitration award on the basis of fraud, a movant must show "that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence"). *Allendale Nursing Home, Inc. v Local 1115 Joint Bd*., 377 F. Supp. 1208, 1214 (S.D.N.Y. 1974) (holding that the refusal of an arbitrator to grant the requested adjournment when the arbitrator was clearly aware of the bona fide and serious illness of a party's key witness was sufficient to vitiate the arbitrator's award); *Riko Enters. v Seattle Supersonics Corp*., 357 F. Supp. 521, 526 (S.D.N.Y. 1973) (vacating the award granted by a commissioner of a professional basketball league who was acting as an arbitrator where testimony showed that he "conducted no hearing and did not allow … [the party charged] to submit any evidence to rebut the charges").

639 *Graphics Arts v Haddon Inc* 489 F Sup 1088.

640 *Amerada Corp v AFL* 385 F Sup 279.

641 *UCO Terminals Inc v Apex Oil Co* 583 Fsup 1213.

or positions[642]. One of the earlier tests for "evident partiality" addressed the following factors: (1) the arbitrator's financial interest in the arbitration proceeding; (2) the directness of the alleged relationship between the arbitrator and the party to the dispute; and (3) the timing of the relationship. A court will set aside an award on the basis of partiality if the arbitrator's interest is direct, definite and capable of demonstration rather than remote, uncertain or speculative.

Misinterpretation of contracts will not, in itself, vacate an arbitration award[643]. Arbitrators exceed their authority in refusing to make findings of fact and conclusions of law in face of the arbitrating parties' contract calling for such findings and conclusions[644]. Arbitrators should limit their rulings to those issues that parties have submitted for arbitration[645]. A court may not interfere with an award as long as there is reasonable basis for the arbitrator's refusal to grant postponement[646]. Thus, courts follow precisely the demands of the contracting parties. According to Monica J. Washington[647] the limited scope of the FAA constrains the federal courts in their efforts to police inequitable arbitral awards. David Luban[648] considers that arbitration undermines the power of courts as trustworthy resolvers of disputes, which comes back to the original hostility of the courts before the FAA was introduced in order to overcome the non-recognition of arbitration as an alternative dispute system. If the previous views are accepted, then how do we maintain the usefulness of arbitration, instead of establishing more courts and employing more judges? Thomas E. Carbonneau[649] considers that arbitration is being exploited as a device by which to accomplish a furtive reduction of justice services in society rather than arbitration being established as

642 *Bole v Nationwide Ins. Co.*, 352 A.2d 472, 473 (Pa. Super. 1975) *Land v State Farm Mutual Ins.*, 600 A.2d 605, 607 (Pa. 1991). *Metropolitan Prop. & Cas. Co. v J.C. Penney Cas. Co.*, 780 F. Supp. 885, 887–88 (D.R.I. 1991) (potential arbitrator's extensive *ex parte* communications with party and evaluation of evidence prior to appointment constituted active partiality); *but see, Tri-City Jewish Center v Blass Riddick Chilcote*, 440, 512 N.E.2d 363, 366 (Ill. Ct. App. 1978), *appeal denied*, 520 N.E.2d 393 (Ill. 1988) ("too little or excessive damages in itself is insufficient to raise a presumption of fraud, corruption or undue means on the part of the arbitrators").

643 *Federated Dep v JVB Industries* 894 F2d 862.

644 *Columbia Aluminum Corporation v United Steel Workers of America* 922 F Sup 412.

645 *International Union of Operating Engineers v Murphy Co* 82 F3d 185.

646 *CT Shipping Ltd v DMI* 774 F Sup 146.

647 Monica J. Washington, "Compulsory Arbitration of Statutory Employment Disputes: Judicial Review without Judicial Reformation," 1999 *New York University Law Review* 844. p. 885–86 "When statutory civil rights are in question, courts routinely should scrutinize arbitral decisions for the presence of consent, procedural adequacy, and fairness of the arbitral process. In the absence of procedural guarantees, courts should vacate the award. However, if procedural guarantees are in place, a reviewing court should defer to an arbitrator's findings of fact, vacating an award only for clear error or repugnance to the purposes of the act in question."

648 David Luban, "Settlements and the Erosion of the Public Realm," 83 *Geo. L.J.* 2619, 2625–26 (1995) (arguing that arbitration undermines the authority of courts as "an authoritative resolver of controversies").

649 Thomas E. Carbonneau, "Arbitral Justice: The Demise of Due Process in American Law," 70 *Tul. L. Rev* 1945, 1967 (1996) (arguing that arbitration "is being exploited as a tool by which to achieve a surreptitious reduction of justice services in our society").

an equivalent and independent dispute resolution system. This author believes that arbitration was not introduced merely as a second class dispute resolution system but as a new, justifiable equivalent to courts and a quicker way of resolving disputes that could have been solved equally by courts, but, in a longer time and probably more expensively.

As mentioned earlier, courts are generally prohibited from vacating an arbitration award on the basis of mere errors of law or interpretation[650]. Ignorance of the applicable law is not grounds for vacating an award, but literal application of a disregard of the law should presumably compel vacation of the award[651]. Misconduct must amount to a denial of fundamental fairness of the arbitration proceedings. A claimant must establish specific facts that indicate improper motives on the arbitrator's part[652]. Grounds for vacating arbitral awards are[653] fraud or coercion. Courts will not enforce an award that is incomplete, ambiguous or contradictory[654]. Action to vacate an award pursuant to the FAA should be brought in a court for the district wherein the award was made[655]. Thus, a court, on the motion of a party, may vacate an award only where there is fraud, corruption, partiality, or prejudicial misbehaviour by an arbitrator. The burden is on the party seeking to vacate the arbitration award to establish one of the statutory grounds for that relief under the FAA.

Fairness[656] connotes something more than a lack of arbitrators' decision-making in individual cases and suggests the notion of equality, which means that persons in similar situations should be treated in the same manner. Unlike the judicial process, the doctrine of *stare decisis* is not applied to arbitration awards even when they are published with reasons, but publishing reasoned awards decreases the likelihood of inconsistent awards. The issuance of reasoned awards and the willingness of arbitrators to be guided by precedent, promote the efficiency of arbitration. Consequently, arbitration should accomplish the goals of fairness and efficiency informally through custom and practice rather than by a formal structure and legal sanction.

The FAA does not authorize the arbitrators to make corrections once the panel has issued its award. There is no form of review within the arbitration process

650 *Employers Ins v National Union Fire* 933 F2d 1481.

651 *Merrill Lynch v Jaros* 70 F3d 418, Daniel M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations," 22 *Int'l Law.* 693, 701 (1988) (concluding that "the US courts have adopted a very strict reading of the grounds for vacating an arbitration award").

652 *Al-Habri v Citibank N.A.* 85 F3d 680.

653 *Dogherra v Safeway Stores* 679 F2d 1293.

654 *Bell Aerospace Co. v Implement Workers of America* 500 F2d 921.

655 *Enserch Intern Exploration v Attock Oil Co* 656 F Sup 1162.

656 NASD compares "fairness" with fair procedures and the occurrence of neutral, non-biased arbitrators. Steven A. Ramirez, "Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as well as the Frivolous," 40 *Wm. & Mary L. Rev* 1055, 1102 (1999) (describing studies of arbitrator bias that conclude that securities arbitration in broker-customer disputes is fair).

because there is no appellate board or committee of arbitrators. Is there a need for an appellate arbitral tribunal? Courts will not set aside an award because they disagree with it[657]. The court has repeatedly reiterated its view that questions of law and fact are solely for the arbitrators and may not be reviewed by the courts. Moreover, in *Sea Dragon Inc. v Cerb Van Weelde*[658] the court held that the arbitrators had acted in manifest disregard of applicable law and the award was contrary to public policy because it directed the charterer to violate a Dutch decree and it was contrary to the doctrine of "Comity." Bauer[659] suggested that in big cases there ought to be a right of appeal to the courts on questions of law. Consequently, where the case involves a large amount of money or where the result is important to a whole industry, a proper legal result is more important than an expeditious one. The grounds upon which an award can be vacated in the FAA are based on the misconduct of the arbitrators. Appellate review exists primarily to review procedural errors rather than the merits of an award. For instance, inadequate disclosures by arbitrators at the outset of the hearings can be subsequently challenged as misconduct in the courts. Undue limits on the introduction of evidence and failure to order the production of evidence can be deemed misconduct. In *Compania Chilena v Norton, Lilly & Co*.[660] the court stated that the arbitrators did not commit misconduct in failing to grant a time extension because their action did not result in prejudice.

An arbitrator did not exceed his authority by refusing to postpone arbitration between a restaurant franchisor and two franchisees[661] or by dismissing the franchisees' request for a continuance to prepare their case. A mere error committed by the arbitrator as to questions of fact or law is insufficient to establish that excess of power necessary to vacate the award. When an arbitrator makes an award, which on the face of it, and without express mention of the fact, ignores an express provision of the contract limiting damages, he is guilty of mere error or simply exceeding his powers. In some instances, it is clear from the award itself or from an examination of the calculation made by the arbitrator that the arbitrator has

657 *Wilko v Swan* 346 US 427, *Saxis Co. v Multifacs Inc* 375 F2d 577.

658 574 Fsup 367.

659 R. Bauer, Some suggested changes to the FAA, 5th Intl. Cong. Mar. Arb 7.

660 652 Fsup 1512, In *Wallace v Buttar*, 378 F. 3d 182, 193 (2nd Cir. 2004), the Second Circuit stated explicitly that the FAA "does not recognize disregard of the evidence as proper ground for vacating an arbitrator's award (citation omitted)," and affirmed that "We recognize only the doctrine of manifest disregard of the law"; on the contrary, "whatever the weight of the evidence considered as a whole, '[i]f a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed (citation omitted).'"

661 *American Dairy Queen, Inc. v Fahey* (Minn Dist Ct 1995) CCH BFG ¶10,653. The franchisees, who failed to appear at the arbitration proceedings, had six months to prepare for arbitration and were represented by counsel. Moreover, the franchisees were the parties who had initially raised the issues addressed in the arbitration and had participated in the selection of the arbitrator and the scheduling of arbitration. A continuance was unjustified, since the franchisees clearly were on notice of the issues for arbitration and could not reasonably expect the arbitrator to grant them additional time once their claim that the issues were not ripe for arbitration was rejected. *Amin v Lammers* (ED Pa 1995) CCH BFG ¶10,666.

included an element of damages specifically excluded by the contract pursuant to which he obtained his authority to act. The manner in which the amount of interest payable was determined by the arbitrators is not grounds for vacation under section 9 USC 10.c,d.

The language of the second chapter of the FAA says that only the Convention's defenses will be recognized (9 USC 207) and a court shall confirm the awards unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the NYC[662]. Arbitrators may draw on their own personal knowledge in making an award. Article V.2b of the NYC provides that enforcement of an award may be refused if its enforcement would be contrary to the public policy of the country where enforcement is sought. Enforcement of foreign arbitral awards may be denied on the basis of public policy only where enforcement would violate the forum country's most basic notions of morality and justice[663]. Most private international law treaties, domestic legislation and judicial decisions contain public policy exceptions, which serve to protect the fundamental legal and other precepts of national legal orders. US courts have strongly favored the enforcement of international arbitral awards, based on the general federal policy of encouraging arbitration of international commercial disputes. Hence, courts have adopted very narrow views of Article V.2B's public policy exception. For example, failure to choose US law to govern a dispute is not a violation of public policy. The public policy defense must be characterised as defense without meaningful definition[664]. International public policy means that a court may consider local public policy, but only if it is consistent with international principles recognized in various nations as constituting vital public policies. Moreover, the requirement that a policy be intended to have international application might contemplate a conflict of policies analysis, in which the appropriate scope of each policy is determined and any true conflicts resolved in an interest analysis derived from conflict of laws contexts. It is not clear under the domestic FAA whether federal or state law governs issues of public policy. Although the domestic FAA provides no statutory basis for declining to enforce awards on public policy grounds, it is well-established that such an exception exists[665]. Under the FAA, the public policy exception does not sanction a broad judicial power to set aside arbitration awards as against public policy. In order for a public policy to provide a basis for overturning an award, the policy must be explicit, well-defined and dominant[666]. Public policies may be derived by reference to the laws and legal precedents and not from general considerations of supposed public interests. In general, US courts have rejected public policy defenses to the enforcement of arbitral awards under the FAA. Additionally, there is little reasoned analysis of the respective roles of federal and state public policies under the FAA. It should be clear that the FAA preempts state

662 *National Oil Corp v Libyan Sun Oil* 733 Fsup 800.
663 *Parsons Overseas Co. v Societte* 508 F2d 969.
664 *Waterside Ocean Co. v International Navigation* 737 F2d 150.
665 *Misco Inc v United Paper* 484 US 29.
666 *W.R. Grace v Local* 484 US 29.

public policies that single out arbitration awards for special disfavor, as compared to judicial judgments. A state public policy forbidding enforcement of arbitral awards for future disputes should be preempted. It is not clear whether the public policy exception in the US requires proof that enforcement of the arbitral award itself would violate applicable public policy or compel conduct that would violate a public policy. The public policy exception is implicated where the substantive claim on which the award is based is contrary to applicable public policy. If a party arbitrates a claim that is otherwise non-arbitrable under Article II.1, participation in the arbitration may render Article V.2a inapplicable because the participation may constitute an agreement to arbitrate an existing dispute. United States courts held that decisions by arbitrators on issues of public policy would be reviewed *de novo*. The Supreme Court declared that the question of public policy is ultimately one for resolution by the courts[667]. When public policy is asserted as the basis for vacating an arbitration award, the court is required to make its own independent evaluation[668].

Every developed legal system demands certain minimum levels of procedural regularity and fairness from the arbitration process. The FAA permits non-recognition of arbitration awards because of serious, prejudicial procedural defects. In general, courts have been reluctant to deny recognition of an award on the grounds of procedural irregularity. In *Parsons & Whittemore Co.*[669] the court refused to use the defense to bar enforcement based on an arbitral tribunal's refusal to accommodate a key witness' exclusion. Katherine V.W. Stone[670] argued that courts have to refuse enforcement of awards considering parties in unequal power relationships. A party was not denied the opportunity to present its defenses under Article V.1b when it had notice of arbitration, but chose not to respond. A panel can choose not to rely on invoice summaries in determining whether to grant it an award. There are cases where an arbitration hearing is cut short and not completed before an award was rendered or of a panel's outright refusal to hear certain relevant evidence at all[671]. The NYC does not specify what nations' laws or what international standards apply in determining whether Article V.1b's exception is met. The law of the forum where enforcement is sought should be applied to determine whether a party was given proper notice or was unable to present his case[672].

Does Article V.1b refer to the due process standards of the law governing the parties' arbitration agreement, or of the arbitral *situs*? Courts have concluded that arbitral awards falling under the NYC are subject to scrutiny under due

667 W.R. Grace & Co v Rubber 461 US 766.

668 *Botany Indus Inc v New York Board* 375 Fsup 485.

669 508 F2d 975.

670 Katherine V.W. Stone, "Rustic Justice: Community and Coercion under the FAA," *77 U. N. Car. L. Rev* 991 (1999) (arguing that courts should impose higher scrutiny before enforcing arbitral awards when they arise from parties in unequal power relationships).

671 *Cofinco Inv v Bakrie & Bros*. 395 Fsup 613, *Harvey Inc v United Steelworkers* 263 Fsup 488.

672 *Essex Cement Co. v Halmore* 763 Fsup 55.

process standards of the Fifth and Fourteenth Amendments to the US Constitution. As discussed earlier, due process consists of notice and opportunity to be heard[673]. Section 10c of the FAA permits awards to be vacated for the arbitrator's procedural misconduct. Standards of procedural regularity applicable under section 10c are federal ones, and they preempt state procedural rules[674]. Decisions under Article V.1b and section 10c emphasize the procedural informality and flexibility of arbitration. Although arbitration hearings are of a quasi-judicial nature, the prime nature of arbitration is its informality, so it would be inappropriate for courts to mandate rigid compliance with procedural rules[675]. The enforcing court will not sit in *de novo* review of procedural decisions of the arbitral panel. US courts accord international arbitrations broad discretion in their conduct of proceedings[676]. Decisions under section 10c[677] reflect strong judicial reluctance to overturn awards based on procedural deficiencies by the arbitrators. An arbitrator enjoys wide freedom in conducting an arbitration hearing and so arbitration hearings are not constrained by formal rules of procedure or evidence[678]. The burden of proof is on the party alleging procedural irregularities.

Arbitrators are allowed substantial discretion in permitting or excluding the introduction of new claims. For example, in *Peters Fabrics Inc. v Jontzen Inc*.[679] the court upheld the award where the arbitrator refused to allow a counterclaim submitted one week before the hearing. An award is not valid where the arbitration permitted a party to assert a claim not made in the request for arbitration. Scheduling hearings is a difficult task in international arbitrations, because the arbitrators and witnesses are located in different countries. The use of cyberspace in order to contact hearings electronically should be a step towards speedy arbitration procedures minimizing costs of procedure and time. Under the FAA, arbitrators are accorded substantial discretion in scheduling and adjourning hearings. By contrast in *Allendale Nursing v Local*[680] the court vacated the award because of failure to adjourn the hearing when a crucial witness became ill. Another reason for vacating an award was the fact that the tribunal scheduled the hearing on the date that one party could not attend and the parties had mutually agreed on another date[681]. A number of decisions have overturned awards where there was no meaningful

673 *Biotronik v Medford Hospital Co* 415 Fsup 133.
674 *Robbins v Day* 954 F2d 697.
675 *Legion Ins Co. v Insurance General Agency Inc* 822 F2d 541.
676 *CT Shipping Ltd v DMI Ltd* 774 Fsup 146.
677 9 US 10.
678 *Smith Co. v Wal-Mart Stores* 891 F2d 1177, *Pompano v Bear Sterns* 794 Fsup 1265.
679 582 Fsup 1287 *Foto Chrome Inc. v Copal Co. Ltd*., 517 F. 2d 512; Laminoirs Sav Southwire Co., 484 F. Sup. 1063. *Ministry of Defense of Islamic Republic of Iran v Gould Inc*., (1992) 969 F. 2d *764 Sedco Inc. v Petroleuos Mexicanos,* 767 F. 2d 1140 *York Hannover Holding Aaf. v. American Arbitration* (1992) 794 F. Sup. 118, *Filanto v Chilewich Intern. Corp.* (1992) 789 F. Sup. 1229.
680 377 Fsup 1208.
681 *Tube & Steel Corp v Chicago Carbon* 319 Fsup 1302, *St. Luke's Hospital v SMA Computer Systems* 785 Fsup 1243.

participation among all the tribunal members. An award, which was issued by two arbitrators, after the third arbitrator was disqualified, was not valid[682].

14 Enforceability and the NYC

The basic feature of the NYC is that signatory states agree to recognize and enforce agreements in writing to submit issues to arbitration, and to enforce arbitral awards based upon those agreements. A party need not go to the court at the seat of the arbitral tribunal in order to have an arbitral award recognized in a judgment. Rather, the party in transit need supply only the award and the agreement upon which it was based, and fulfil certain authentication and translation requirements for those documents in the jurisdiction in which recognition or enforcement is sought. The Convention also severely limits the reasons for which recognition and enforcement of an arbitral award may be refused. These reasons include: a party lacked capacity under applicable law, the agreement to arbitrate was invalid under the law chosen by the parties or the law of the country where the award was made, parties were not given proper notification of the arbitral proceeding, the arbitration was not conducted in accordance with the arbitration agreement or with applicable law, the award addressed matters beyond the scope of the agreement to arbitrate, the subject matter of the dispute could not be settled by arbitration in the enforcing country, or the recognition and enforcement of the award would violate the enforcing country's public policy.

Three aspects of the scope of the Convention must be mentioned. First, the Convention, as implemented by the US, applies both to: (a) arbitral awards made outside of the US; and (b) awards made in the US, but which either do not arise out of a relationship entirely between US citizens, or involve a legal relationship involving property located abroad or performance abroad, or which has some other reasonable relation to one or more foreign countries. Second, many countries, including the US, have made both the "commercial" and "reciprocity" reservations to the Convention, meaning that the Convention applies only to awards defined as commercial by the enforcing state, and made in another state party. Finally, the Convention applies to both "recognition" and "enforcement" of foreign arbitral awards. "Enforcement" of an award involves the taking of an award by a successful claimant into national courts, whereas a successful defendant in an arbitration proceeding may have the arbitral award "recognized" in other jurisdictions in order to prevent further court claims by the losing arbitration claimant.

US courts have generally interpreted the Convention in keeping with its goals, thus making the enforcement of international arbitral awards quicker and easier than before. Some courts merely dismiss or stay proceedings, rather than directly referring or ordering the parties to engage in arbitration[683]. In an earlier decision,

682 *Szuts v Dean Reynolds Inc* 931 F2d 830.

683 NYC Article II(3). Van de Berg "Consolidated Commentary NYC" *YB Com*. Arb Vol XVI 1991, pp. 463–64.

Iran Aircraft Industries v Avco Corp.[684] the Second Circuit affirmed the District Court's refusal to enforce the award pursuant to Article V(1)(b) of the NYC because defendant Avco was not afforded an opportunity to present its case. The dispute involved a series of contracts pursuant to which Avco was to repair and replace helicopter engines and related parts. However, the Seventh Circuit recently ruled in *Generica Ltd. v Pharmaceutical Basics Inc*.[685] that the arbitrator's refusal to permit continued cross-examination from a witness that the arbitrator deemed immaterial to the proceedings at issue, did not deny the party *due process*. The Third Circuit held that a court confirming a foreign award under the NYC has to stick as closely as possible to the terms of the award in formulating its judgment – even if changed circumstances may necessitate some modification of the details of execution – and has to refer any post-award disputes to the tribunal[686].

The basic thrust of the NYC was to liberalize the procedures for enforcing foreign arbitral awards[687]. The NYC permits actions to vacate to be brought in either the arbitral *situs* or the country under whose laws the award was made. The NYC is held to permit an award to be vacated for any reason whatsoever, including reasons not contained in Article V. In the US, an action to vacate could be brought on any ground permitted under section 10 of the FAA, even if Article V's exceptions did not apply. Besides, in other forums, outside the country of origin, an award cannot be vacated and can only be denied recognition if one of Article V's exceptions is satisfied.

Some US decisions suggest that participation in the arbitration of non-arbitrable claims will not produce an enforceable award[688]. Besides, parties may enter into enforceable agreements to arbitrate existing claims even if those claims are ordinarily non-arbitrable[689]. In *Bergesen v Joseph Muller Corp*.[690] the court held that the NYC can be applicable to an award made in the US. The NYC did not define non-domestic awards and the definition appears to be left out in order to

684 980 F2d 141 (2nd Cir. 1992).

685 125 F3d 1123 (7th Cir. 1997). *Sunshine Mining Co. v United Steelworkers*, 823 F2d 1289, 1295 (9th Cir. 1987). *Hoteles Condado Beach v Union De Tronquistas*, 763 F2d 34.

686 *Admart AG v Stephen & Mary Birch Found*., 457 F.3d 302 (3rd Cir. 2006). Arbitrability to be determined under United States Arbitration Law before Enforcing Foreign Award – On 14 April 2005 the Court held that although the District Court had subject matter jurisdiction over the petition, it should not have enforced the award without determining whether Oracle had agreed to arbitrate. According to the Court, that determination had to be based upon United States' federal arbitration law. *Sarhank Group v Oracle Corporation*, Case No 02-09383 of the United States Court of Appeals for the Second Circuit.

687 *International Standard Corp v Bridus S.A.* 745 Fsup 172. The NYC applies to awards if they:
- arise from commercial and defined legal relationships;
- arise from agreements concerning subject matter that is capable of settlement by arbitration;
- qualify as foreign or non-domestic awards under the Convention;
- satisfy the Convention's reciprocity requirements; and
- satisfy the Convention's requirement for binding awards.

688 *Alexander v Gardner-Denver* 415 US 36.

689 *Mitsubishi Motors v Soler Inc* 473 US 614, *Gardner v Shearson* 433 F2d 367.

690 710 F2d 929.

cover as wide a variety of awards as possible, while permitting the enforcing authority to supply its own definition of non-domestic awards in conformity with its own national law. The court adopted the view that awards not considered as domestic are awards which are subject to the Convention not because they were made abroad, but because they were made within the legal framework of another country (pronounced in accordance with foreign law or involving parties domiciled or having their principle place of business outside the enforcing jurisdiction). This coincides with the purpose of the Treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

Section 202 of the FAA indicates that it was intended to ensure that an agreement or award is enforceable under the NYC in US courts if it has a reasonable relation with a foreign state, making clear that where the matter is solely between citizens of the US it will fall outside the NYC unless there is a reasonable relation with a foreign state. The consequences of a conclusion that an award is foreign or non-domestic can be significant. If an award is foreign or non-domestic then it may be enforced pursuant to 207 of the FAA. Section 207 provides an independent basis for federal subject matter jurisdiction, thereby ensuring a federal forum for enforcement. Moreover, FAA § 207 preempts FAA § 9's consent to confirmation requirement for cases falling under the NYC[691]. When an award made in the US is deemed non-domestic, it becomes subject to an action to vacate under section 10 of the FAA and action to recognise and confirm the award under the NYC and section 207 of the FAA[692]. The Third Circuit in *Telcordia Tech Inc. v Telkom SA Ltd*.[693], made clear that dismissal of an enforcement case under Article VI of the NYC because of a pending annulment challenge at the arbitral seat was unavoidably without prejudice and permitted a party to resume the enforcement suit later if it effectively defended the award, and so the Third Circuit ruled that the District Court for the District of New Jersey should not have enabled the losing party in the arbitration "to piggyback a dismissal without prejudice into a dismissal with prejudice."

As discussed earlier, section 10 permits actions to vacate awards made in a particular district to be brought in that district with the grounds on which the award can be vacated set out in section 10. Section 207 of the FAA permits actions to confirm awards to which the NYC applies, subject only to the exceptions set forth in Article V. Actions under section 10 would result in an award being vacated and at the same time actions under section 207 would result in an award being confirmed. Because the exceptions contained in Article V and 10 are not identical, conflicting results could be possible. In *Tesoro Petroleum Corp. v Asamera Ltd*.[694]

691 *Phoenix Aktiengesellschaft v Ecoplas, Inc*., 391 F.3d 433 (2nd Cir. 2004).

692 *Workin-Cosel Inc v Avraham* 728 Fsup 156, *Transmarine Corp v Marc Rich* 480 FSup 352, *Brier v Northstar Marine Ins* 1992 WL 350292.

693 458 F.3d 172 (3rd Cir. 2006) at 179.

694 798 Fsup 400. E. Gary Spitko, "Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration," 49 *Case W. Res. L. Rev* 275 (1999). Stephen J. Ware, "Arbitration and Unconscionability After Doctor's Associates,"

the court held that section 10, but not FAA's second chapter, provides the basis for actions to vacate Convention awards.

Besides, section 208 permits application of the FAA's first chapter only to the extent consistent with the NYC. If section 208 and the NYC are read to deny any rights to vacate under section 10, they preempt state statutes permitting actions to vacate. The exact scope of awards rendered in the US that will be deemed not domestic under section 202 is not entirely settled. Section 202 of the FAA provides that, if US arbitration involves only US citizens, the NYC may be applicable, but only if the parties' relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. This reasonable relationship standard is not precise even in cases involving US citizens[695]. It could be said that section 202's reasonable relationship standard was derived from UCC1–105. Section 1–105 requires that the law chosen be reasonably related to the parties' transaction. If an arbitral award was made in the US in an arbitration that involved one or more foreign parties, the application of section 202 is unclear[696]. No greater reasonable relation should be required under section 202 for foreign parties than that necessary to render the NYC applicable to US arbitration involving only US citizens.

If Article III applies, the manifest disregard exception to enforcement under the domestic FAA is arguably not available because it is not contained in Article V's exceptions to enforceability. Some lower US courts have concluded that only Article V grounds are available in actions to vacate non-domestic awards made in the US[697]. Besides, an arbitral award is subject to an action to vacate under the NYC only in either the place where it was made or under whose laws it was made[698]. Thus, Article V.1e impliedly permits actions to vacate an award in its country of origin on any grounds. Moreover, in *CT Shipping Ltd. v DML*[699] the court held that section 10's grounds are available for vacating a non-domestic award made in the US. Section 10's grounds for vacating an award are similar to those of Article V but would permit challenges based directly on manifest disregard for law, arbitrator bias, and fraud.

When will an award be foreign? US courts have interpreted Articles I and 202 as applying the NYC to all arbitral awards rendered outside the US. So, the NYC is applicable to agreements between two US citizens to arbitrate a dispute occurring

Inc. v Casarotto, 31 Wake Forest L. Rev 1001, 1018–19 (1996) Ronald J. Krotoszynski, Jr., "The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making," 77 *Wash U. L.Q.* 993, 1041-42 (2000). *Graham v Scissor-Tail, Inc.,* 623 P.2d 165 (Cal. 1981). Mark E. Budnitz, "Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection," 10 *Ohio St. J. On Disp. Resol.* 267 (1995).

695 *Wilson v Lignotock Inc* 709 Fsup 797.

696 *Dworkin Cossel Inc v Aurahon* 728 FSUp 156.

697 *Avraham v Ahigar Express Ltd* 1991 US Dist Lexis 12267, *Fiat Spa v Ministry Of Finance* 1989 US Dist Lexis 11995.

698 *International Stnadard Corp v Bridas S.A.* 745 Fsup 17.

699 774 Fsup 146, *Intercarbon Bermuda Ltd v Calfex Trading* 146 FRD 64.

in US waters in London under English law[700]. The statutory language provides that, in cases involving US citizens, a reasonable relation with a foreign state is required for an award to be subject to the NYC. In *Wilson v Ligntock Inc.*[701] the court held that, under section 202, the NYC was not applicable to an agreement to arbitrate in Switzerland between a US company and its US employee, where the parties' underlying contract was to be entirely performed in the US. The Inter-American Convention does not contain any limitations to foreign or non-domestic awards. Besides, section 304 provides for the enforceability of awards only if they were made in the territory of a foreign state that has ratified the NYC.

The NYC permits reciprocity reservations and the US has made reciprocity reservations. The US reservation provides that the US will apply the NYC on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting state (9 USC 201). The reciprocity reservation has been determined by reference to the place where the arbitration is conducted and the award is made, not by the parties' nationalities. The principle of reciprocity is concerned with the forum in which the arbitration will occur and whether that forum state is a signatory to the NYC, not whether both parties to the dispute are nationals of signatory states. The NYC adopts the territorial rather than national approach[702].

The reciprocity reservation presumably rests on a judgment that it is both unjust and impolitic for US courts to apply the Convention's pro-enforcement provisions to an arbitral award made in a foreign country that would not apply to the Convention to enforce a US award. There is no correlation between the nation where a foreign award is made and the nationality of the losing party to the arbitration. Foreign court judgments against a US national would only be enforced in favour of a national of the foreign forum if the foreign forum's courts would recognize a US judgment against citizens of the forum. A party can seek to enforce an arbitral award rendered in a non-Convention signatory in the US under section 9 of the FAA. US courts would only enforce foreign court judgments on the basis of reciprocity. It is important that parties not agree to arbitration being conducted in a nation that is not a signatory to the NYC.

Article III requires that binding awards be enforced, while Article V.1e permits non-recognition of an award if it is not binding or if it has been set aside where it was made. Once an award becomes binding it is enforceable in any signatory state, notwithstanding the fact that it has not been confirmed in the courts of the state where it was made.

A foreign arbitral award is binding even if it can be appealed to a court, or is actually under appeal, in the jurisdiction where it was rendered. The fact that recourse may be had to a court of law does not prevent the award from being binding. Some courts have suggested that arbitral awards are binding and will be

700 *Jones v Sea Tow Inc* 828 Fsup 1002, *Fertilizer Corp v IDI Magt Inc* 517 Fsup 948.
701 709 Fsup 797.
702 *Compare Audi v Overseas Motors Inc* 418 Fsup 982 (considering parties' nationalities).

enforced in the US even if they would not be enforced in the foreign forum where the award was rendered[703]. There is a difference between *de novo* judicial review of the merits of an award under local law, which will prevent the award from being binding, and more limited judicial review permitted by the FAA, which will not.

15 Conclusions

The primary attraction of arbitration is to avoid delays, expenses and the vexation of ordinary litigation[704]. There is criticism that arbitration is too much like litigation. Today, complex commercial and maritime arbitration can involve dozens of witnesses, weeks of testimony, and thousands of exhibits. An answer to this is effective arbitration management. There is an ever-present need to prevent "judicialization" of the arbitral process, which involves courts over-exerting their control. Public supervision and control is not needed in order to guard broader social interests because private arbitrators will not ignore or jeopardize them.

Congress intended the FAA to both substantively validate and provide procedural autonomy for arbitration as an alternate remedial mechanism to courts for the adjudication of contractual disputes involving commerce. Arbitration is in spirit the product of written consent to submit to an agreed-upon choice of remedy that substitutes for judicial adjudication, and is legally binding and final, based upon an underlying common law concept of parties' freedom to contract. Neither Congress nor courts have established arbitration as a full substitute for judicial adjudication by creating two co-equal and independent dispute mechanisms in a single legal system.

The US Supreme Court[705] has shown primarily that the court will decide certain gateway matters such as the validity of the arbitration agreement and arbitrability, staying of proceedings, while matters of arbitration proceedings and merits of the dispute are for the arbitrators to decide. This analysis has shown the courts' involvement in all stages of arbitration and the many occasions where matters of a dispute referred to arbitration are decided by courts, not mentioning the review and enforcement of the award. The federal courts of appeal publish more than 100 cases per year dealing substantially with arbitration[706]. Moreover, in *Lloyd v Hovensa LLC*,[707] the court held that even in instances where parties are ordered

703 *Rhone Mediterrane v Achille Lauro* 555 Fsup 481 *Hugo Marom Aviation v Recon* 1991 US Dis Lexis 8877.

704 *McKenna v Shearson Lehman Hutton Inc* 592 A2d 980.

705 *Green Tree v Bazzle* 351 SC 244.

706 Stephen K. Huber, "The Arbitration Jurisprudence of the Fifth Circuit," 35 *Tex. Tech L. Rev* 497, 499 (2004).

707 369 F.3d 263 (3rd Cir. 2004). At 270 ("The District Court has a significant role to play under the FAA even in those instances in which the District Court orders the arbitration of all claims. Even in those instances, the parties are entitled to seek the Court's assistance during the course of the arbitration."); at 271 "a literal reading of section 3 of the FAA not only leads to sensible results, it also is the only reading consistent with the statutory scheme and the strong national policy favoring arbitration."

to arbitrate all claims, such parties are still entitled to seek the court's assistance during the course of the arbitration, adds to which the role of courts. Issuing a stay would permit the parties to proceed directly to arbitration without the delay of an appeal. It is argued that should the arbitrators fail to resolve the entire controversy, a stay would spare the parties the burden of a second litigation. A fully independent arbitration with a second-degree arbitral tribunal will solve any dispute without any problem and will be a fully alternative dispute mechanism.

Legislative policies embodied in the FAA are frustrated when federal courts determine that they, and not arbitrators, should decide the issue. This means that the courts impose a judicial resolution process that the parties did not bargain for and so increased and needless judicial intervention effectively denies parties their freedom to contract, with the result that arbitration is not independent and co-equal to courts[708].

Has modern commercial arbitration achieved independence from control by the national courts? A party who decides to refer disputes to arbitration instead of courts chooses a private system of justice and this raises issues of public policy. The state prescribes the limits of arbitration and enforces these limits through its courts, showing that the leading institution for legal order is the courts. National courts exist without arbitral tribunals. Can arbitral tribunals exist without the courts? It becomes clear that courts, under the FAA, play a fundamental role in arbitration. As it has been shown above, courts are involved throughout the whole arbitral process. However, courts do not relieve parties from their deliberate choice even if the parties' decision to agree in advance to arbitrate all disputes was reckless[709]. Although the arbitrator is empowered by the court that confirms the validity of the arbitration agreement, prior to commencement of the arbitration a claimant often needs judicial assistance to have the dispute referred to arbitration.

Courts, encouraged by the adoption of the FAA by Congress, have approved the use of arbitration as a means for resolving future disputes in practically every aspect of modern contracts. On the other hand, courts have not endorsed a view that courts should not get involved in arbitration in any way even by judicial review of awards, and courts still get involved in some stage of the arbitration procedure.

708 *Prod. & Maintenance Employees' Local 504 v Roadmaster Corp*., 916 F.2d 1161, 1163 (7th Cir. 1990) (en banc) ("Arbitration clauses are agreements to move cases out of court, to simplify dispute resolution, making it quick and cheap …. Arbitration will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and a suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once. Reluctance to see the benefits of arbitration smothered by the costs and delay of litigation explains the tendency of courts to order a party feebly opposing arbitration (or its outcome) to pay the winner's legal fees. Anything less makes a mockery of arbitration's promise to expedite and cut the costs of resolving disputes."

709 *Canadian Gulf Line* 98 F2d 714. T. Antoine, "The changing role of labor arbitration," 2001 *Indiana Law Journal* 83.

It has to be accepted that there is a great deal of freedom to be given to arbitrators in order to have more efficient arbitration as an alternative dispute system, but not a co-equal to litigation system. The capacity of the parties to readdress any dispute before the courts means that arbitration is not an independently and equitably alternative dispute system. There is a clear disagreement observed regarding many matters including the powers of arbitrators by courts. Alan Scott Rau[710] argues that in order for arbitration to function as an effective process of private dispute resolution, litigation challenging the arbitral process has to be minimized. Besides, this author thinks that in order for arbitration to function as an efficient and effective process of private dispute resolution, litigation challenging the arbitral process must not only be minimized, but also prohibited, in order for arbitration to be a fully alternative dispute mechanism.

710 Alan Scott Rau *et al.*, *Arbitration* 134 (2d edn. 2002).

4 The role of courts in commercial–maritime arbitration in English law

1 Introduction

Arbitration is a contractual means of settling disputes and must originate in an agreement between the parties. A party entering into a contract has a free choice between arbitration and judicial litigation. Arbitration is achieving widespread recognition as a private mechanism for adjudicating transnational maritime disputes. An arbitration agreement could be framed in such a manner as to prevent any right to court proceedings from accruing under the contract until an award was made (*Scott v Avery* clause). The relative informality of arbitration proceedings and the ability in many cases for the arbitrators to act as conciliators ("*amiable compositeurs*") encourages quick resolution of disagreements with a minimum of damage to the business relationship. The benefits of using arbitration cannot be obtained if one party can force the dispute back into the courts of its home country, or if the arbitration decision cannot be enforced. Arbitration is essentially a consensual process by contrast with the jurisdiction of the courts, which stems from the sovereign power of the state. It has to be taken into account that the state has placed the background upon which parties can base their freedom to conclude an arbitration agreement and it could be said that the jurisdiction of arbitration stems from state sovereignty as well. An arbitrator's authority to determine disputes is founded on the parties' agreement. It is argued that there is a shift in favor of parties submitting to ADR in an attempt to resolve their disputes and avoid costly and timely litigation[1].

There is a long history to arbitration in England, going back to the first arbitration statute in 1698. Arbitration clauses have been written into bills of lading, charter parties and related contracts for as long as these have been brooked on City trading floors. The English courts have accepted the merits of arbitration for over four centuries. Has arbitration been accepted as a new independent system and are courts involved at all in arbitration? Arbitration allows the parties to keep the details of their dispute private. The parties can choose their own rules of procedure

1 *Dunnett v Railtrack plc* [2002] EWCA Civ 303; *Burchell v Bullard* [2005] EWCA Civ 358. *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 "strong cause … before [it] could be justified in declining to enforce such an agreement".

but the arbitrators apply the same substantive law as the courts and there is greater scope for minimizing acrimony as well as keeping costs low and electing the times and places at which hearings may be held. The ability of the parties to choose their own judge permits the choice of an expert in the field who may have knowledge not possessed by the courts and who is more able to view the dispute in its commercial setting. Will a court's involvement in arbitration add to the efficiency of arbitration when it is well known that courts appoint experts for specific evidence in order for judges to be able to arrive at a judgment? The arbitrator can obtain greater insights than might be possible otherwise. Arbitrations can be conducted under institutional rules and in some cases the procedure and other formalities may be as rigid as those established by courts. The costs of arbitration may in complex cases be no less than those that might have been incurred in judicial proceedings. There is no guarantee that time will be saved, because arbitrators do not have the same enforcement powers as those possessed by the courts, and so there may be greater opportunities for the defaulting party to prolong matters. Will it be a solution to give the same status as judges to arbitrators during arbitration and for its authority to conduct the specific arbitration? Has the court's involvement in accordance with law added to the efficiency of arbitration? The flexibility or inflexibility, of arbitration is in the hands of the parties, but on many occasions the law allows reference back to courts regardless of the parties' original arbitration agreement.

The Arbitration Acts of 1950, 1975 and 1979 and the Consumer Arbitration Agreements Act 1988 along with other provisions relating to arbitration have been repealed and replaced by the AA 1996. The Act came into force on 31 January 1997 and applies to arbitrations commenced on and after that date, irrespective of the date of the arbitration agreement. The new Act permits the parties to exclude access to the courts, which is a different approach from the previously recognized principle that any attempt to exclude the court's jurisdiction is contrary to public policy. Hence, the 1996 Act aims to both restate and to improve the law relating to arbitration. The aim of the Act is to provide a comprehensive statement of the principles and practice of arbitration together with a number of important changes. The drafting of the new Act restates the previous legislation on arbitration but it improves the law in order to increase the efficacy of arbitration as a more complete method of dispute resolution, and to reinstate London as the centre of arbitration. So, the first goal of the Act is to ensure that arbitration is a desirable alternative to litigation. The Act is divided into four parts: Part I sets out the law of arbitration in its new form. Part II deals with consumer arbitration agreements, county court small claims and judge arbitrators and statutory arbitrations. Part III re-enacts the provisions for recognition and enforcement of foreign arbitration awards contained in the Arbitration Acts of 1950 and 1975. Part IV contains general provisions.

Party autonomy and judicial non-intervention was the main scope of the introduction of the 1996 Act and means that the role of the courts in arbitration has been reduced. Hence, a general supervisory jurisdiction remains in respect of any matters relating to arbitration, which do not fall within Part I of the 1996 Act. Can a fully-fledged arbitration system not be an effective mechanism

for guaranteeing the legitimacy within the state's jurisdiction? At present, national courts play a role in securing the integrity of arbitrations conducted within their jurisdiction. This author supports the view that judicial intervention in arbitration is not inconsistent with the parties' interests, as courts provide useful assistance that guarantees both the effectiveness and efficiency of the arbitral process. Judicial intervention has been seen as a means of both providing assistance to the arbitral process and securing the fairness and legitimacy of the system[2]. Will the absence of any court's involvement means that the arbitral process will not be fair and legitimate? The problem is striking a balance between the wishes of the parties to use a private system of dispute resolution and the interests of the state in superintending the process. Is there a need for superintending a dispute system such as arbitration, which is supposed to be introduced as an alternative dispute system? Has this conflict driven arbitration towards copying litigation proceedings in order to be closer to litigation and so achieve legitimacy and integrity?

The relationship between the parties inter se to a domestic arbitration is clearly based on contract. Mustill and Boyd[3], however, seem to be of the opinion that the relationship between the parties and the arbitrator is *sui generis*, based on status stemming directly from the law, and comprising rights and obligations to the benefit and the burden of the arbitrator. This author considers that law allows parties to refer a dispute to arbitration after an agreement. Parties appoint arbitrators and the law contributes the status of playing the role of a judge for arbitration. These rights and duties arise by virtue of the fact that the arbitrator merely holds the position of arbitrator. Thus there is a degree of permanent status. In this instance the arbitrator's rights and duties arise by virtue of public policy. In accordance with section 1(1)(b) of the 1996 Act, the parties are free to agree how the tribunal will proceed in resolving their dispute, and how the various arbitrators on the tribunal will interact with each other. The parties' power to reach agreement is only limited to the extent that it cannot conflict with public policy.

One of the underlying aims of the Act is to explode the myth that arbitration is or should be a carbon copy of court proceedings. The Act moves arbitration away from the procedures and rules of the courts, and acknowledges its uniqueness. Will it be more orthodox to have arbitral tribunals act alone in the whole arbitration procedure and have a second-degree of arbitral tribunals for assistance and safeguarding of legitimacy? Excessive court involvement defeats the goals and purposes of the parties' initial decision to arbitrate their differences. They lose the advantage of confidentiality. The extra proceedings result in greater costs. Most importantly, parties who sought to avoid the courts by entering into an arbitration agreement are required to deal with a foreign legal system and rules of procedure with which they are not familiar.

2 DAC, Report on the Arbitration Bill, 1997 *Arbitration International* 3.

3 M. Mustill & S. Boyd, *The Law And Practice Of Commercial Arbitration In England*, 1989 Butterworths.

An agreement to arbitrate can either be contained in a contract to be activated where a dispute arises under that contract or it can be reached after a dispute has arisen between the parties. Arbitrations are associated with disputes arising under or in connection with contracts and with dispute resolution under statute. Non-contractual disputes may be the subject of arbitration agreements. For instance, a company is bound by an agreement entered into on its behalf even though it relates to a contract outside the capacity of the company[4]. By contrast, a statutory arbitration is one that arises not where the parties have agreed to arbitrate their disputes, but where an Act or other piece of legislation provides that certain types of dispute arising within its remit should be referred to arbitration (section 94). The term "disputes" has to be regarded in the widest possible context. The Act applies to private arbitrations and county court arbitrations are outside the 1996 Act (section 92).

It is worth mentioning that the 1996 Act moves English law closer to the UNCITRAL model law. The differences between them are the following: (1) The 1996 Act applies to all kinds of arbitration, whereas the model law is limited to international commercial arbitration. (2) The Model law (Article 7.2) requires an arbitration agreement to be signed. There is no provision in the 1996 Act. (3) The English court can stay its own proceedings but the Model Law (Article 8.2) requires the court to refer the matter to arbitration. (4) Under Model Law a party can oppose the appointment of an arbitrator within 15 days (Article 13). Under the 1996 Act, a challenge can be made at any time, subject to principles of waiver. (5) The Model Law (Article 19) allows the parties to choose the procedure for the arbitration while under the 1996 Act the arbitrators have this right subject only to contrary agreement by the parties. (6) The Model Law lays down strict rules for the exchange of pleadings and there is no comparable provision in the 1996 Act[5].

Section 1 of the Act sets out three general principles, the first of which states that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. The second principle is that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest, and the third, that the court is to intervene only in prescribed circumstances. It is unusual for a statute to formulate its founding principles in this way. The aim for fair resolution of disputes by an impartial tribunal is taken up at section 33 where positive obligations are placed on the tribunal to adopt procedures which provide a fair means for the resolution of the matters to be determined. The principle of

4 Companies Act 1985 section 35, 1989 section 108.

5 The AA 1996 is less prescriptive than the UNCITRAL Model Law. The 1996 Arbitration Act does not include the detailed stipulations about Statements of Claim or Defences at Article 23 of the UNCITRAL Model Law. In addition, the detailed provisions relating to experts appointed by the arbitral tribunal at Article 26 of the UNCITRAL Model Law are completely absent from the Arbitration Act. The Arbitration Act enunciates mandatory duties that apply in all arbitrations seated in England.

non-intervention is restricted to Part I and does not apply to consumer arbitration agreements.

What happens if the mechanism for appointing the tribunal breaks down? What happens if a vital piece of evidence is in the hands of a third party or the subject matter of the dispute is in third party hands and is about to be destroyed? The arbitrator has no jurisdiction over strangers to the contract and is, therefore, powerless. Only the court could intervene. The distinction between domestic and non-domestic arbitrations was challenged as being discriminatory between English and EU nationals and so illegal under Article 6 of the Treaty of Rome[6]. A new arbitration law was regarded as an important mechanism for keeping disputes out of courts, leaving the courts free to deal with those matters not appropriate for resolution by private means.

Many provisions of the AA1996 cannot be applied by agreement. Section 4.1 introduces Schedule 1 to the 1996 Act and so a series of provisions are stated to be mandatory and cannot be contracted out by the parties[7]. That category comprises the English court's powers to stay English proceedings where there is an arbitration agreement covering the dispute, the court's power to grant leave for an award to be enforced as if it were a judgment of the court and the power to grant subpoenas. Those are absolute powers always available to the English court irrespective of any contrary agreement and wherever the legal place of the arbitration. The problem is that most of the mandatory provisions involve the court's intervention. Once again the court is regarded as the means of safeguarding and avoiding denial of justice in accordance with the definition and construing of the content of public interest as the courts have established it.

Can the parties nominate as the seat of their arbitration a place, which is outside any court's jurisdiction? Have all the problems caused by the court's power to intervene in the arbitral process been solved by the introduction of the new Act? Is there any need of assistance by the courts? Why does an arbitral tribunal not assist litigation? Can arbitrators not protect public interest like judges? Has the legislator abolished the sovereign power of the state by creating a fully independent legal

6 *Philip Alexander Securities v Bamberger, The Times*, 22 July 1996. *Cowan v Tresor Public* [1989] ECR 195, *Commission v Spain* [1994] ECR I-911, *Alpine Investments* [1995] ECR I-1141.

7 The mandatory provisions of Part I of the Act are listed in Schedule I to the Act, and they relate to the following: sections 9–11 (stay of legal proceedings); section 12 (power of the court to extend agreed time limits); section 13 (application of Limitation Acts); section 24 (power of the court to remove arbitrators); section 26(1) (effect of death of an arbitrator); section 28 (liability of parties for fees and expenses of arbitrators); section 29 (immunity of arbitrators); section 31 (objection to substantive point of jurisdiction); section 33 (general duty of tribunal); section 37(2) (items to be treated as expenses of arbitrators); section 40 (general duty of parties); section 43 (securing the attendance of witnesses); section 56 (power to withhold award in case of non-payment); section 60 (effectiveness of agreement for payment of costs in any event); section 66 (enforcement of awards); sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity); and sections 70 and 71 (supplementary provisions; effect of order of court so far as relating to those sanctions); section 73 (loss of right to object); section 74 (immunity of arbitral institutions, etc.); and section 75 (charge to secure payment of solicitors' costs).

process, such as arbitration, alternative of litigation? In this chapter the role of courts in arbitration proceedings in English law is investigated in order to show that arbitration is co-equal to the courts as a dispute mechanism. In other words it will be proven whether an arbitral tribunal or a court[8] has the final say upon parties' differences.

2 Arbitrability

The English Act refers to the area of arbitrability matters that are 'capable of settlement by arbitration', leaving it up to the English common law to define this area[9]. Thus, the 1996 Act does not define or describe those matters that are capable of settlement by arbitration (i.e., arbitrable) but it simply preserves the common law position in respect of arbitrability. Nevertheless, the 1996 Act expressly applies to non-contractual as well as contractual disputes (section 6(1)). The arbitrability of a dispute regarding the existence of an agreement to which an arbitration clause relates is beyond any doubt in accordance with section 7. The 1996 Act does not preclude parties from agreeing that matters, which are objectively not arbitrable, should be determined by arbitration. Redfern[10] and Hunter argue that arbitrability involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. Besides, it could be argued that arbitrability should include the determination of whether a particular dispute is arbitrable in the sense that it falls within the parties' agreement because the parties' agreement determines which matters have been referred to arbitration by the parties. In principle any dispute should be just as capable of being resolved by arbitration as by the judge of a national court but because arbitration is a private proceeding with public consequences some types of disputes are reserved for national courts whose proceedings are in the public domain. Arbitrability refers to the specific dispute of the parties as well as whether in general the disputes coming out from specific relations can be arbitrated. Disputes outside the scope of the parties' arbitration clause should not be referred to arbitration and so there is no arbitrability. Thus, it should be examined whether the dispute is related to the parties' arbitration agreement. It must be taken into consideration that an arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate the specific disputes but is also the basic source of the powers of the arbitral tribunal.

8 The commercial court took the lead in 1993 by issuing a statement requiring parties to tell the court at both the summons for directions and the pre-trial review stages whether they had considered using alternative dispute resolution (ADR). In 1995 the other divisions of the High Court introduced the same ADR questions into their pre-trial review questionnaires. The decision as to whether ADR might be appropriate is at discretion of the judge. The judge has the power to adjourn the proceedings while ADR steps are taken.

9 English AA, section 81(1)(a).

10 A. Redfern & M. Hunter, "Law and Practice in International Commercial Arbitration," 1999 Sweet & Maxwell at paragraphs 3–21, *Porter Hayden Co. v Century Idem Co.* 136 F3d 380. *Spear, Leeds & Kellong v Central Life Co.* 85 F3d 21.

3 The arbitration agreement

Can all parties be compelled to arbitrate their disputes? Parties cannot be compelled to arbitrate disputes under the 1996 Act unless they have agreed to do so. An assignee of a party's rights under a contract containing an arbitration clause can become party to an arbitration, which has already commenced after he notifies the other party at the tribunal[11]. Section 6(1) defines the term of arbitration agreement as meaning an agreement to submit to arbitration present and future disputes whether they are contractual or not. What constitutes writing? There is no express reference to the need for writing, but it is made clear by Section 5.1 that the legislation applies only to an arbitration agreement that is in writing. References in Part 1 of the Act to anything being written or in writing include its being recorded by any means (Section 5(6)). An arbitration agreement, which is not in writing, is outside the Act, but remains enforceable at common law (Section 81). Thus, the parties could make an oral agreement, which incorporates by reference the terms of a written form of agreement containing an arbitration clause. An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement (Section 5(4)). Thus, an oral agreement could become an agreement in writing by being recorded at any stage. An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another and not denied by the other in his response constitutes an agreement in writing to the effect alleged (Section 5(5)). It should be noted that it is not enough for one party to allege in a written submission that there is an arbitration agreement and for the other party to simply fail to respond. Such a result would be unfair in that it would place an obligation on a party to take the active step of serving a written submission in order to deny the allegation. The obligation to arbitrate is distinct and will not be carried by general words of incorporation unless the wording and intention are clear[12]. The Court of Appeal declared the requirement for a more liberal approach to the construction of arbitration agreements[13].

In various jurisdictions, a number of legal theories (e.g., agency, *alter ego* principles and the group of companies' doctrine) have been advanced to seek to bind non-signatories to arbitration agreements. While in limited circumstances

11 *Bayfur v Finagro Holdings S.A.* [1992] 1 QB 610.

12 *Jardine Birshe Ltd v Cathedral Works Ltd* [1996] ADRLN 14. Final Award in Case No. 6784 (1990) reprinted in *ICC International Court of Arbitration Bulletin*, vol. 8/no 1 (May 1997) at 53. Request for arbitration sent by facsimile is permitted under Article 3 of the ICC Rules.

13 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 ("For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context.… Any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words 'arising out of' should cover every dispute except a dispute as to whether there was ever a contract at all."). *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC 195 (Comm).

English courts have permitted the piercing of the corporate veil[14] there has been a general refusal to accept the group of companies' doctrine in the absence of consent on the part of the third party or possibly an estoppel[15]. In *Peterson Farms Inc. v C&M Farming Ltd*[16], the court set aside an award in which that doctrine had been recognised, stating, *inter alia*, that it "forms no part of English law".

In accordance with section 6.1 of the 1996 Act, which applies for all purposes (section 100.2) including the NYC cases, an arbitration agreement is an agreement to submit to arbitration any present or future dispute. The definition of the 1996 Act reflects the more elaborate definition in Article 7.1 of the Model Law. The doctrine of separability is the principle that an arbitration agreement is a separate contract, not necessarily affected by the invalidity, ineffectiveness or non-existence of the main contract. The doctrine is recognised in most jurisdictions and is enshrined in the leading arbitral rules (LCIA, ICC and UNCITRAL). An arbitration agreement is a distinct legal obligation and the principle of separability was recognized by English law and was given statutory force by section 57 of the 1996 Act[17]. *Fiona Trust*[18] confirms the doctrine of separability of the arbitration clause from the

14 *Roussel-Uclaf v GD Searle & Co.* [1978] 1 Lloyd's Rep. 225.

15 *Bay Hotel v Cavalier* [2001] UKPC 34.

16 [2004] AllER (D) 50.

17 *Harbour Assurance Ltd v Kansa Insurance Ltd* [1993] 1 Lloyd's Rep 455. In *Harbour Assurance Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and others* [1993] 3 AllER 897 it was decided that the arbitration clause applied to a dispute regardless of whether the agreement in which it was embedded was void for initial illegality.

18 *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others* [2007] EWCA Civ 20. The Court of Appeal held that it would be for the arbitrators first to consider whether they have jurisdiction to determine the dispute and not the courts. If the court was faced with conflicting applications to stay court proceedings under section 9 of the Act in favour of arbitration and an application for a declaration that there is no arbitration agreement under section 72, the application under section 9 is the first matter that their arbitrators should decide. Daniel Eliasson, "Separability of arbitration clauses – support for international arbitration" 11/07/07 www.twobirds.com . *Fiona Trust v Privalov* [2007] AllER (D) 169 (January), The case concerned allegations by ship owners that charter parties highly favorable to the charterers had been obtained through bribery. The charterers commenced arbitration in London. The ship owners responded by applying to the court for an order restraining the arbitration on the ground that they had rescinded the contracts containing the arbitration agreements due to the bribery, relying on section 72(1)(a) of the Arbitration Act 1996. This section provides that an alleged party to arbitration proceedings who takes no part in them may question in court whether a valid arbitration agreement exists. The charterers then sought a stay of litigation pursuant to section 9 of the 1996 Act, which provides for a stay in favor of arbitration unless the arbitration agreement is ineffective. The court granted an interlocutory injunction, restraining the arbitration proceedings pending trial of the court action. The Court of Appeal reversed this decision and so, technical arguments based on the wording of the arbitration clauses and whether disputes had arisen "under" or "out of" the contract are unlikely to attract sympathy. Any arbitration clause in an international commercial contract should be construed liberally. Finally, as the court had already concluded that the arbitration clause was not impeached by the allegation of bribery, section 72 did not apply here. The Court of Appeal acknowledged that section 7(1) of the AA – which parallels Article 16(1) of the UNCITRAL Model Law – had given express statutory recognition to the severability principle. The court then considered that, in applying the severability principle, a "liberal construction" and a "presumption of one-stop

main contract, even in situations where that contract was procured by bribery. The separability of an arbitration agreement means that alleged bribery affecting the whole contract is not enough to impeach an arbitration agreement contained within it unless there is a specific argument for saying that the bribery impeaches the arbitration clause in particular. If a party argues that a contract as a whole is invalid (for reasons of illegality, for example), the validity of the contract as a whole is a question properly decided by arbitrators, unless the invalidity relates specifically to the arbitration clause which comes in line with the view held in the *Buckeye Check Cashing v Cardegna*[19] case of the US Supreme Court. On the other hand, it is questionable if a contract that never came into existence according to basic contractual principles could still produce a binding agreement to arbitrate because there is no basic agreement in order to arbitrate conflicts arising from the basic agreement.Where there is an apparent conflict between secton 9 and secton 72(1)(a) of the 1996 Act, the UK's treaty obligations under the NYC on the Recognition and Enforcement of Foreign Arbitral Awards mean that an application for a stay under Section 9 should always be heard before one for a declaration of invalidity under Section 72. If there is a valid arbitration agreement, no proceedings can be launched under Section 72[20].

A clause can qualify as an arbitration agreement even though it does not provide for immediate reference to arbitration[21]. A clause under which the parties confer upon each other an option to arbitrate was regarded to be an arbitration agreement and is to be treated in the same way under the 1996 Act[22]. If the clause in the

arbitration" should be adopted. A similarly pro-arbitration approach to questions of severability and the scope of the agreement to arbitrate was adopted in *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192.

19 *Buckeye Check Cashing v v Cardegna*, 546 U.S. 440 (2006) (federal rule on separability trumps state law of contract formation). Syllabus, *Buckeye Check Cashing, Inc. v Cardegna et al.* "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator". In this regard, the approach of the English courts parallels the pro-arbitration stance adopted by the US Supreme Court in recent decisions including *Prima Paint Corp v Flood & Conklin Mfg Co*., 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc. v Cardegna*, 126 S.Ct. 1204 (2006), and the Federal Court of Australia in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1152.

20 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20.

21 *Channel Tunnel Ltd v Balfour* [1993] 1 All ER 664. Arbitration agreements have been treated similarly, and the English courts have always emphasized that an arbitration clause is an agreement within an agreement, and when parties have freely negotiated an agreement to arbitrate in England, they should be held to that bargain and one party should not be allowed to breach it. *XL Insurance Ltd.* v *Owens Corning,* [2000] 2 Lloyd's Rep. 500; *The Angelic Grace* [1995] 1 Lloyd's.

22 *The Messiniaki Bergen* [1983] 1 AllER 382. In *Hill Harmony* ([1999] 2 Lloyd's Rrp 209) the master's choice of route resulted in the voyage taking longer and more bounkers being consumed. The arbitration held that the charterer's instructions were orders as to employment on the ground that the charterers had the right to employ the vessel in the most commercially advantageous way. Clarke J held that these instructions were not orders as to the employment of the vessel but rather orders as to its navigation, the latter being a matter for the master to decide. The arbitrators had erred in law in holding that charterer's instructions were orders as to the employment of the vessel.

parties' agreement is headed "arbitration", but refers to a consultant who shall act as an expert and not an arbitrator, then the agreement provides for an expert determination rather than arbitration[23]. Section 6(2) does not allow unqualified recognition of arbitration clauses incorporated by reference[24]. Specific reference to the arbitration clause seems to be necessary[25]. The case law on Article II NYC seems to suggest that domestic courts are inclined to uphold the validity of incorporation of arbitration clauses to which the parties have made express reference (*relatio perfecta*)[26].

An arbitration agreement is within the English law only if it has been reduced to writing and an agreement in writing is binding whether or not the parties have signed it, as long as an intention to be bound can be ascertained from the surrounding circumstances[27]. Moreover, any other agreements between the parties as to any matter must be in writing to be effective, but an agreement to terminate an arbitration agreement need not to be in writing (Section 23.4). Besides, Section 5.6 defines that 'by writing' means recorded by any means such as email and electronic recordings. It could be said that the writing requirement is not a precondition to the validity of the agreement to go to arbitration but to the applicability of Part I of the 1996 Act. A partly written and partly oral agreement falls within the Act either because it is made in writing or because it is evidenced in writing. Hence, written agreements incorporating written arbitration terms are to be construed as arbitration clauses for the purposes of the Act[28]. An arbitration clause is to be regarded as incorporated from one contract into another by general words of incorporation. The entire agreement must be contained in the exchange of communications and it is sufficient for consensus on the principle of arbitration to appear in the exchange of communications. For example, a letter written by the respondent to a local court in which the existence of an arbitration clause was asserted in order to obtain a stay of proceedings commenced against it in the court[29]. Section 5.2c covers those agreements not committed to writing but for which there is some evidence in other communication. Hence, it is open to a court to conclude, if there is some oral and some written evidence, that if there is no agreement made in writing, then there is at least an agreement evidenced in writing.

Thus, there is a court's intervention for a clear view of the arbitrators. Moreover, the House of Lords reinstated the decision of the arbitrators that the orders to take the shorter Great Circle route were orders as to the employment of the vessel with which the owners were bound to comply. Can a view of the arbitrators stand without a court's intervention? *The Hill Harmony* [2001] 1 Lloyd's Rep 147.

23 *Cott UK Ltd v Barber* [1997] 3 AllER 540.

24 Bruce Harris, Rowan Planterose & Jonathan Tecks, *The Arbitration Act 1996: A Commentary* 77 (2003).

25 *Cigna Life Insurance v Intercaser* [2002] 1 All E.R. (Comm.) 235.

26 Domenico Di Pietro, *Incorporation of Arbitration Clauses by Reference, Journal of International Arbitration* 21(5): 439–452, 2004.

27 *The St. Raphael* [1985] 1 Lloyd's Rep 403, *Baker v Yorkshire Insurance Co.* [1892] 1 QB 144.

28 *The Nerano* [1996] 1 Lloyd's Rep 1, *Falem & Co. v March Yemen Co.* [1997] 2 Lloyd's Rep 738, *The Sargasso* [1994] 1 Lloyd's Rep 162.

29 *Jiangxi Provincial Metal v Sulanser Co. Ltd* [1996] ADRLJ 249.

The enforceability of an arbitration clause in a contract with a minor depends upon the validity of the contract itself[30]. An agreement to arbitrate is independent of any contract to which the arbitration agreement relates, so that termination of the former will not terminate the agreement to arbitrate[31]. There must be an agreement to terminate the agreement to arbitrate and there is need for an offer to terminate and acceptance of that offer. A letter suggesting the appointment of another arbitrator could not be construed as an offer to terminate the proceedings[32]. Have the parties, by their inactivity, agreed to bring the agreement to an end? The respondent's own lack of movement cannot of itself be regarded as acceptance of the claimant's offer not to be bound by the arbitration clause[33]. An agreement for a non-binding agreement could not supersede the arbitration agreement[34]. The death or unwillingness of the arbitrator does not itself frustrate the arbitration agreement and the court can appoint a replacement if the parties themselves cannot do so (section 27). Delay is within the control of the parties and cannot be regarded as an independent frustrating event[35].

At common law, the death of a party to an arbitration agreement has the effect of discharging the agreement. Any action which survives the death of a person and which vests in his personal representatives (PRs) may be referred to arbitration by them even in the absence of an arbitration clause in the original agreement. The bankruptcy of a person who had earlier entered into an arbitration agreement does not have an automatic discharging effect upon the arbitration agreement. A trustee in bankruptcy has a power to affirm or to disclaim a contract to which an arbitration clause relates and will determine the fate of the clause (Schedule 3 paragraph 46). The trustee in bankruptcy can, with the court's permission, enter into an arbitration agreement regarding outstanding claims against the bankrupt (Insolvency Act 1986 section 314). Where proceedings on a bankruptcy petition are pending, the court is entitled to stay any outstanding proceedings against the bankrupt, including arbitration proceedings, and so the court gives the control to arbitration and not arbitrators. The liquidation of a company has consequences for arbitration similar to those flowing from the bankruptcy of an individual. The court in *Shayler v Woolf*[36] held that the existence of an arbitration clause in a contract, which is by its nature assignable, would not prevent assignment of the entire contract, including its arbitration provisions. Section 82.2 states that references to a party to an arbitration agreement include any person claiming "under or through a party to the agreement", and an assignee is a person claiming under a party to an arbitration agreement[37]. An assignee is an appropriate person to seek a stay

30 *Slade v Metrodent* [1953] 2 QB 112.
31 *Crester Ltd v Carr* [1987] 2 FTLR 135 *Harbour Assurance v Kansa General International Insurance* [1993] QB 701.
32 *The Villa* [1998] 1 Lloyd's Rep 195.
33 *The Maritime Winner* [1989] 2 Lloyd's Rep 506.
34 *The Frotanorte* [1995] 2 Lloyd's Rep 254.
35 *The Hannah Blumenthal* [1983] 1 AllER 34.
36 [1946] Ch 320 *Cottage Club v Woodside* [1928] 2 KB 463.
37 *The Leage* [1984] 2 LR 259, *The Felicie* [1990] 2 LR 21.

of judicial proceedings brought in contravention of an arbitration clause (Law of Property Act 1925 section 136). An arbitration clause is assignable even after arbitration proceedings have commenced[38]. A person claiming subrogation rights has the option of proceeding arbitration in his own name. If the party exercising subrogation rights proceeds in the name of the original party there is no change of party and no issues arise[39]. If notice to the arbitrator is not given within a reasonable time, the assignee loses the right to participate in the proceedings and so the arbitration agreement lapses[40]. For instance, in the *Phoenix* case[41] the provisions of clause 17.3 constitute an arbitration agreement within section 6 AA 1996, separable from the other provisions of Concorde as provided for by section 7, to which Phoenix, as the assignee of PGP, is a party in accordance with section 82(2). Section 82(2) treats as a party to the arbitration agreement, a person claiming under or through such a party. Accordingly, were the roles to be reversed, Phoenix, as a party to an arbitration agreement, would be entitled to apply for a stay of proceedings under Section 9(1). Section 9 does not stipulate that the proceedings to be stayed must be brought by another party to the arbitration agreement. But if such a requirement is to be implied, Section 82(2) provides that for the purposes of the Act Phoenix is a party.

Dispute includes any difference, which does not only have to be of a contractual nature, and it can be founded in tort as well[42]. Section 6.1 covers an agreement to refer present disputes to arbitration. The power of the court (Section 12) to extend the contractual time for the making of a reference to arbitration applies only to agreements to refer future disputes. An agreement to go to arbitration, made after the dispute in question has arisen, is treated by the 1996 Act in the same way as an agreement to refer future disputes to arbitration. Where the parties to an arbitration agreement refer to arbitration as a matter that falls outside the strict terms of their original agreement, the reference will take place on the terms of the original agreement. A particular reference to arbitration can be discharged by frustration without bringing to an end the possibility that future disputes may yet arise and be referred to arbitration.

38 *The Jordan v Nicolov* [1990] 1 LR 11.

39 *Dettev von Appen v Voest Alpine* [1997] 2 LR 279.

40 *Baytur Sa v Finagro Holdings S.A.* [1991] 4 AllER 129.

41 *Phoenix Finance Limited v Federation Internationale De L'automobile* [2002] EWHC 1028 (Ch). *Azov Shipping Co. v Baltic Shipping Co.* [1999] 1 Ll.L.R. 68; *Birse Construction Ltd v St David Ltd* [2000] BLR 57 *and Al-Naimi v Islamic Press Agency Inc.* [2000] 1 Ll.L.R. 522. In those circumstances they rely on section 9(4) AA 1996 which provides that: "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

42 There appears to be no juridical difficulty about resolving a probate dispute by arbitration. A possible way of enforcing an award in probate arbitration will be either an application to be made in the probate registry for a grant of probate to be issued in accordance with the award and the district judge will refer to a judge of the family division or ask the Attorney General to be represented as amicus or a probate action can be brought in the chancery division by writ after the parties have in fact reached agreement.

Whether or not the parties have agreed to refer an existing dispute to arbitration is a matter of fact and the court must look for the final position adopted by them on the issue and has to disregard any provisional agreements to refer, reached but discarded during the course of negotiations[43]. A difficulty arises where the agreement to refer to future disputes is in writing and where the dispute itself falls outside that agreement but is assumed by the parties to fall within it and they proceed to arbitrate the matter. The question that arises is that there may not be sufficient writing to bring the reference within the legislation, especially the NYC[44]. There must be a definite assertion that an arbitration agreement exists. If the other party does not respond at all, section 5.5 cannot operate. Not every exchange of communications amounts to a submission. Will English courts enforce a submission agreement where the law is applicable to the substantive agreement providing for English proceedings? Where the seat of the arbitration is in England but the submission agreement itself is governed by a law under which it is unlawful, the fact that under section 7 of the 1996 Act the main agreement and the submission agreement are to be treated as severable would appear to be an inadequate basis for disregarding the applicable law. In a number of cases the parties have proceeded to arbitration in respect of a dispute, which they mistakenly assumed to fall within an arbitration clause in their agreement[45].

Courts are prepared to enforce a written agreement that indicates in the vaguest terms that the parties intend to refer disputes to arbitration[46]. Moreover, it has to be taken into account that in the absence of any indication in the contract as to whether present or future rules of an institution are referred to, the court will assume

43 *The Island Archon* [1993] 2 LR 388.

44 *Altco Ltd v Sutherland* [1971] 2 LR 515 section 5.5 states that "an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged".

45 *The Almare Prima* [1989] 2 LR 376, *Allied Vision Ltd v VPS Film* [1991] 1 LR *393 Sun Life Assurance Company Of Canada v Cx Reinsurance Company Limited* [2003] EWCA Civ 283. Only a mistake of fact can vitiate a contract for common mistake. No arbitration agreement had been concluded between the parties and that the agreement relied on by CNA was thus "null and void" within the meaning, and for the purposes, of section 9(4) of the 1996 Act.

46 *Tritonica Shipping Inc v South Nelson* [1966] 1 LR 114, *Swiss Bank v Novorissiyk Shipping* [1995] 1 LR 202*, Evgeros Naftiki Eteria v Cargill plc.* [1997] 1 LR 35 *Lucky-Coldster Ltd. v Moo Kee Ltd.* [1994] ADRLJ 49, *Mangist Oil v United World Inc.* [1995] 1 LR 617. *Paul Smith Ltd v International Holding Inc.* [1991] 2 LR 127. If the obligation to go to arbitration, while clear in itself, is inconsistent with the remainder of the contract, then the court will give priority to the obligation to arbitrate. Standard form clauses are found in a variety of commercial contracts, arising from a desire to adopt institutional or other arbitration rules. It is worth mentioning that an arbitration clause contained in another document will be binding only if four requirements are fulfilled: (1) There must be an express reference in the main contract under which the dispute has arisen to the other document containing the arbitration clause. (2) Any words of incorporation must be appropriate to include the arbitration clause. (3) The terms of the clause must be appropriate to disputes arising under the contract into which it has been incorporated. (4) The clause must not be repugnant to the main contract.

that the parties intended to refer to the rules as they stand when the arbitration is commenced[47]. The courts will refuse incorporation if the clause is repugnant to the contract. In cases of conflict between incorporated clauses the court can enforce the most appropriate arbitration clause[48]. Furthermore, the fact that a contract has been terminated did not prevent reliance on the arbitration clause and so an arbitration clause survives the contract itself[49].

Exchange of written submissions in court proceedings in which an oral agreement is alleged by one party and not denied by the other party in his response constitutes an agreement in writing[50]. The wording of section 6.2 does not give an answer to the conflict between charter-party cases in which it has been stated that it is sufficient for incorporation of an arbitration clause by reference if there is reference to a document containing an arbitration clause[51]. Moreover, the DAC Report clearly stated that this kind of conflict was a matter for the courts to resolve. Thus, the court will decide the existence of a valid contractual agreement to arbitrate. In fact the DAC refers to the court in construing different provisions of the Act and in accordance with the decision in the *Perrer v Hart* case[52]. In *Roche Products v Freeman Process Systems*, the unreported case stated that the test of intention would be relevant in deciding the inclusion of the clause[53]. Besides, in *Trygg Hansa v Equitas*[54] the court held that in the absence of special circumstances, general words of incorporation are not to be treated as effective for the purposes of section 6(2) of the 1996 Act. The court based its decision upon a judicial precedent rather than upon an interpretation of the provision of the Act. Moreover, the court decides the matter rather than the arbitrator himself. Therefore, courts are involved in commencement of arbitration by examining the validity of the arbitration agreement and all matters referring to conclusion of an arbitration agreement.

In common law, if the contract is illegal then the arbitration clause cannot exist[55]. The power of the court to not only stay court proceedings but also to injunct foreign legal proceedings brought in breach of an arbitration clause is preserved by the new Act. Standard forms of wording do not seek to confer upon arbitrators the jurisdiction to determine the initial legality of the underlying agreement. Before the introduction of the 1996 Act it was established the view that an allegation of validity did not deprive the arbitrators of jurisdiction over the dispute, provided

47 *China Corporation v Balli Trading* [1997] 5 CL 32.

48 *Central Meat Products Lt. v McDaniel Ltd* [1952] 1 LR 562.

49 *Harbour Assurance Ltd. v Kansa General Ltd* [1992] 1 LR 81, [1993] 1 LR 455.

50 *Dew Group Ltd. v Costain Building and Civil Engineering Ltd* (1996) *The Times* 20 December 1996. The court held that the parties had agreed upon a person who might be approached to act. Once that had happened the agreement was binding and the declaration sought by the plaintiffs would be granted accordingly.

51 *Aughton v MF Kent Services* [1991] 57 BLR 1.

52 [1993] AC 593.

53 Official Referees' Business 11 June 1996.

54 [1998] 2 Lloyd's Rep 439.

55 *Dalmia Dairy Ltd v National Bank of Pakistan* [1978] 2 LR 223.

that the language of the clause was suitable[56]. It is important to distinguish between the seat of the arbitration and the place in which it is physically held. On the one hand, the seat is the judicial focus of the arbitration, as designated by the parties, the arbitrators or by the court and there is no necessary connection between the seat and the physical location of the arbitration. On the other hand, the seat is relevant for determining the application of the 1996 Act and for fixing an award as an English award or a foreign one for the purposes of its enforcement in England. The place has no real significance for the application of the law[57].

Rectification and related matters fall within terms such as "in relation to", "in respect of", and "in connection with" the contract[58]. An arbitration clause remains effective despite the termination of the underlying contract. The House of Lords decided that an arbitration clause survives the termination of the underlying contract and the purposes of the contract might have failed, but the arbitration clause is not one of the purposes of the contract[59]. A different view was expressed in *Jureidini v National British Insurance Ltd*[60] where the House of Lords refused a stay, on the basis that the termination by the insurers of the policy also put an end to the arbitration clause or agreement. The principle of autonomy is also applicable under Section 7 of the 1996 Act. An arbitration agreement is not confined to the primary obligations of the parties under the contract, but extends to the secondary obligations, which arise following its termination[61]. For example, a dispute as to the allocation of proportional liabilities under a contract is a question of the application of the contract as required by the arbitration clause according to the court in *Fletamentos Maritimos S.A. Effjohn International BV*[62], where a contract has been fully performed, the principle of autonomy of the arbitration clause would indicate that any dispute that might subsequently arise concerning the contract falls within the arbitration clause[63]. Allegations of frustration and consequent issues can be arbitrated and are therefore within the jurisdiction of arbitrators to determine under standard wordings. An arbitration clause in a contract may apply to non-contractual disputes between the parties, depending upon the scope of the clause and the connection of the dispute to the contract in Section 6.1[64]. The twin requirements of appropriate wording and sufficient connection must be satisfied[65].

56 *The Tradesman* [1961] 2 LR 183, *Overseas Union Inc. v AA Mutual International Ltd.* [1988] 2 LR 63. As Thomas LJ noted in *Seabridge Shipping AB v v AC Orssleff's Eftf's A/S* [1999] 2 Lloyd's Rep, the AA aimed to consolidate English arbitration law "in a logical order and expressed in language sufficiently clear and free from technicalities to be readily comprehensible to the layman."

57 *The Voltaz* [1997] 1 LR 35, *The Petz Schmkidt* [1995] 1 LR 202.

58 *Ashville Investments Ltd. v Elmer Contracts Ltd*. [1988] 2 AllER 577.

59 *Heyman v Darwins Ltd.* [1942] AC 356.

60 1915 AC 499.

61 *Paul Smith Ltd v H & International Holding Inc.* [1991] 2 LR 127.

62 [1996] 2 LR 304.

63 *Grestar Ltd v Carr* [1987] 2 FTLR 135, *Gillett v Thornton* (1875) LR 19 EQ 599 (arbitration clause between partners survives dissolution of partnership).

64 *Woolf v Collins* [1948] 1 KB 11.

65 *The Damianos* [1971] 2 AllER 1301, *Re Polemis And Furness Ltd.* [1921] 3 KB 560.

In *Paola D'alesion*[66] the clause referred to disputes arising under a bill of lading and the court held that the clause did not apply in the instant case to a tort action, which was independent of the contractual issues between the parties. By contrast, clauses that cover disputes relating to the contract would seem sufficiently wide to encompass tort claims that are closely related to the contract itself[67]. It seems that English courts held that a tort claim, which is closely related to the underlying contract, should be dealt with by the agreed arbitration procedure[68]. Consequently, courts have established the precedent on arbitration agreement matters.

4 Initiating arbitration and stay of proceedings

Arbitration application encompasses all applications relating to arbitration other than proceedings to enforce an award, including an action on the award. Every arbitration application must be supported by an affidavit setting out the evidence on which the applicant intends to rely and a copy of the affidavit must be served with the arbitration application.

An arbitration application may be made in the Royal Courts or Central London County Court Business List (LCCB) (SI 1996 No 3215 Article 5.1). Where the application is made in the central LCCB list, the judge in charge of the list may order the transfer of proceedings to the High Court. In the case of any other application the judge considers whether the application should be transferred to the commercial court or to any other in the list. The judge must consider the following matters in order to decide the transfer of proceedings: the financial substance of the dispute referred to arbitration, the nature of the dispute, the convenience of having the proceedings in the specific court and the importance of the proceedings for third parties.

Where judicial proceedings in the light of an alleged existence of an agreement to go to arbitration have been commenced, the application for a stay must be commenced in the court in which the legal proceedings are pending (S9–SI 1996 No 3215 Article 3). An arbitration application is to be served in accordance with the rules of the Supreme Court. The Court may determine any issue as to the validity of the arbitration agreement, in a stay application, or the court may stay its proceedings to resolve the question. A respondent who fails to acknowledge service is not entitled to contest the application without the leave of the Court. The fact that an application is not contested does not relieve the applicant of his duty to satisfy the court that the application should be granted. Section 9 is negative and merely stays jurisdictional proceedings and does not require the matter to be referred to arbitration by the court on refusing to stay its proceedings. So, Section 9.1 applies to both arbitration clause and submission agreements and confers upon a party

66 [1994] 2 LR 366.

67 *Fatem & Co. v Mareb Co.* [1997] 2 LR 738, *The Angelic Grace* [1995] 2 LR 87, *The Ermaipolis* [1990] 1 LR 160

68 *The Evje* [1974] 2 AllER 874. (The centrocon arbitration clause applied to general average claims by the ship owner against cargo interests.)

who is being sued in a court the right to apply to the court for a stay in respect of that matter.

If judicial proceedings are commenced in the UK on the basis that the contract is void, and there is an arbitration clause, the court is required to apply the separability doctrine and to stay its proceedings if the arbitration clause is valid and applicable to the specific dispute. The Act retains for the courts the essential minimum of assistance to and supervision of arbitrations. It could be said that the role of courts in order to commence arbitration is essential rather than only assisting. An application for a stay can be made even though the matter cannot be referred to arbitration until some other condition has been met. Has the court the power to waive the conditions set in section 9.3 under its general power in section 79 to extend time limits? It remains open to any party to assert that the parties are not in dispute and that there is no jurisdiction to grant a stay of judicial proceedings. For instance, an arbitration agreement with a consumer is unenforceable, under section 89, and it follows that where that provision applies, the court must refuse to stay its proceedings. Moreover, where an arbitrator is made a respondent to the proceedings, he or she is entitled to make representations to the court and the weight to be given to any such representations is a matter for the court. In other cases the arbitrator is entitled to make an *ex parte* request to the court to be made a respondent. A respondent who wishes to put evidence to the court in response to an affidavit filed in support to an arbitration application has to serve his affidavit within 21 days. The judges require strict compliance with the directions of rule 13 except with the leave of the court. On the one hand, the court can give directions not only as to the conduct of the arbitration application as it thinks best to secure expeditious and economical disposal thereof, but also as to the filing of evidence and to the attendance of deponents for cross-examination. On the other hand, if the applicant does not pursue his application with due dispatch, the court can dismiss the application. Any application is to be heard in chambers (Ord 73 r 15.2) but the court does have discretion to order that any application is to be heard in open court. The determination of a preliminary point of law (section 45) and an appeal of law (section 69) are to be heard in open court unless the court orders otherwise. Finally, the court can order any applicant to provide security for the costs of any arbitration application[69]. What is therefore left for arbitrators to decide?

The existence of an arbitration agreement does not prevent a party from commencing judicial proceedings[70]. The parties may not agree to oust the jurisdiction of the English courts. Domestic judicial proceedings cannot be restrained by injunction pending a reference to arbitration. Besides, judicial proceedings commenced in another jurisdiction can be restrained by injunction against the plaintiff in those proceedings[71]. The English court can grant an anti-suit

69 *Fitzerald v Williams* [1996] 1 AllER 171.
70 *McKellar and Westerman Ltd. v Eversfield* [1994] ADRLJ 140.
71 *The Golden Anne* [1984] 2 LR 489.

injunction against a person who has initiated proceedings in some other jurisdiction in breach of an agreement to arbitrate by virtue of section 37 of the Supreme Court Act 1981[72]. In *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No.1)*[73] the English Court of Appeal stated that the exclusion of "arbitration" from both the Conventions and the Regulation[74] meant that an anti-suit injunction to restrain a breach of an arbitration agreement was permissible. The House of Lords in *West Tankers Inc. v RAS Riunione Adriatica di Sicurta SpA*[75] referred this matter to the ECJ, whose decision is pending.

The courts, despite having the power to disregard an arbitration clause, have retained the discretion to refuse to intervene, by staying judicial proceedings and allowing the arbitration to proceed according to the parties' agreement. The discretion of the court to refuse to grant a stay was restricted by the AA 1975, by virtue of the NYC 1958 which was implemented into English law. Section 9 removes the discretion of the court to refuse to stay its own proceedings and enables the judicial action to go ahead in certain circumstances where the arbitration agreement itself is unenforceable. Hence, the court has the duty to stay its own proceedings irrespective of the seat of the arbitration in case an action is brought in the English courts concerning the argument that an arbitration clause exists. If interpleader is granted, the court must stay the proceedings if an arbitration clause governs the dispute between the parties irrespective of the seat. The court exercises its powers under section 43 in respect of arbitration with a foreign seat. The powers in Section 43 can be exercised only where the proceedings are being conducted in England.

While sections 9–11 require the court to stay its own proceedings in the face of an applicable arbitration clause, section 12 confers upon the court the power to extend the contractual time limits for the commencement of arbitration proceedings and the parties are not free to agree that contractual time bars are absolute. In fact, under Section 9(4) of the AA 1996, stay was granted on the ground that the parties had agreed that Radio Design's[76] claim should be submitted to arbitration in Sweden.

A dispute arises when one party makes a claim against the other, which is denied by the other. If a defendant has failed to respond to a claim, his silence is not to be construed as an admission of liability and there remains a dispute between the parties[77]. In the absence of a formal claim, the existence of a dispute

72 *Welex AG v v Rosa Maritime Ltd.* [2003] 2 Lloyd's Rep 509. *Noble Assurance Co. v Gerling-Konzen General Insurance Co.* [2007] AllER (D) 289 "the ends of justice would be equally well served by making a declaration as to the validity and scope of the award, which could then be relied on in an application to stay the Vermont proceedings on the grounds of *res judicata* and collateral estoppel".

73 [2004] EWCA Civ 1598.

74 Case C-159/02 *Turner v Grovit* [2004] 1 Lloyd's Rep 216.

75 [2007] UKHL 4.

76 *Capital Trust Investment Limited v Radio Design Ab And Others* [2002] EWCA Civ 135 www.courtservice.gov.uk

77 *Ellerine Brothers Ltd v Klinger* [1982] 2 AllER 387.

can be proved by the exchange of correspondence between the parties. Under the 1996 Act, a failure to agree is a difference but also a dispute (Section 6.1, 82.1). Whatever a dispute might be, it encompasses the concept of a difference. Courts have not drawn any distinction between arbitration clauses covering "all claims" and clauses dealing with disputes and differences[78].

Section 86 modifies section 9 in its application to domestic agreements and retains the discretion of the court to refuse to stay proceedings. In fact it has been accepted that the court has no discretion to refuse to stay its proceedings. The grant of a stay of judicial proceedings does not amount to a judicial reference of the dispute to arbitration[79]. Hence, the plaintiff in the judicial proceedings is precluded from continuing his action. Section 9.1 states that the court's response to judicial proceedings commenced in breach of contract are merely to stay those proceedings. A stay cannot be refused because there may be some delay in the matter actually being referred to arbitration. The court continues to have the power to issue a Mareva injunction freezing assets in support of the arbitration (Section 44.2e). Under section 11.1, where there has been an arrest and the admiralty proceedings are stayed so that the dispute can be referred to arbitration, the court granting the stay can: firstly, order that arrest of a vessel be maintained as security for the award; or secondly, order the lifting of the arrest on the basis that the stays of the proceedings shall be conditional on the provision of equivalent security. The arrest is treated in the same way as an arrest to secure a judgment (Section 11.2). The court will refuse to stay its own proceedings unless the respondent gives equivalent security following the lifting of an arrest. Moreover, this cannot come into terms with section 9 and the NYC, which does not permit a court to impose any conditions on the grant of a stay. If the High Court grants interpleader, and is of the view that the dispute falls within the terms of any agreement to arbitrate between the parties, it is to be referred to arbitration. Section 9.2 provides that a party to judicial proceedings who has taken any step in those proceedings may no longer apply for a stay of those proceedings so that the matter can be dealt with solely by arbitration. The obligation to refer the matter to arbitration does not apply where the court would not have stayed its own proceedings had the matter come before it – such as where the arbitration agreement is null and void, inoperative or incapable of being performed, or that there are extant judicial proceedings in which both parties have participated. In the event that the court does not stay its proceedings, it is not a bar to the court to hear the action. Thus, the obligation on the courts to stay their proceedings remains the primary method for the enforcement of arbitration clauses, and has to be observed by the English courts irrespective of whether the seat of the arbitration is in England or whether the arbitration agreement or the procedure is governed by English law (Section 2.2). English courts have the power to grant an injunction preventing a party to an arbitration agreement from participating

78 *Woolf v Calling Services* [1948] 1 KB 11, *Astro Vencedor* [1971] 2 AllER 1301, *The Ever Splender* [1988] 1 LR 245.

79 *The Star Texas* [1993] 2 LR 445.

in judicial proceedings in some other jurisdiction and to refuse to recognise or enforce any judgment obtained in breach of an arbitration agreement. The judicial seat is agreed by the parties, designated by the arbitrators under delegated powers or determined by all the circumstances of the case (section 3). If any one party to an arbitration agreement is not UK-based, the entire agreement is non-domestic.

As mentioned earlier, Section 9 lays down a common set of conditions for all stays, and draws a distinction between domestic and non-domestic agreements. The right to seek a stay arises where a party to an arbitration agreement has commenced legal proceedings against another party to the arbitration agreement. Hence, courts are the first to deal with the arbitration agreement. If judicial proceedings are commenced by a third party against a party to an arbitration agreement, and the third party seeks to join another party to the arbitration agreement as co-defendant in the judicial proceedings, then the other party has the right to seek a stay of the judicial proceedings insofar as the claim against him falls within the scope of the arbitration agreement. A party to the judicial proceedings who is not a party to the arbitration agreement cannot seek a stay[80]. Furthermore, a party to an arbitration agreement, who has not been made a defendant in the judicial proceedings, either because they are a co-plaintiff or because they have no role in the proceedings at all, has no right to apply for a stay[81]. The need for an agreement prima facie excludes non-consensual statutory arbitrations, as the NYC permits, although section 95 provides that its provisions are to apply to statutory arbitrations in this respect. Subject, of course to any statutory provision to the contrary. It could be argued that an ad hoc arbitration agreement made after the commencement of the judicial proceedings in which the stay is sought is an arbitration agreement under section 5[82].

A stay cannot be sought by a party who at the same time puts in issue the validity of the arbitration agreement itself, as this approach is a contradiction in terms. The position is different if the question is whether the agreement containing the arbitral clause has been terminated for breach. If there is a real doubt about the existence of the arbitration agreement, the court will refuse a stay and will determine whether there is a binding arbitration agreement[83]. The proceedings to be stayed must have been commenced in a court such as a county court or the High Court (section 105.1). A county court judge is under an obligation to stay the proceedings before it if there is a valid arbitration clause.

Can an industrial tribunal grant a stay of its proceedings where there is an obligation to arbitrate in an employment contract? A stay may be sought by the defendant in the judicial proceedings, or by the plaintiff in those proceedings in respect of any counterclaim which he/she alleges falls within the scope of the arbitration agreement. A stay may be granted if the matter in issue between the parties falls within the scope of the arbitration agreement, although the arbitration agreement is to be taken to include any preliminary alternative resolution

80 *San Kong v Lembaga* [1993] ADRLJ 177.
81 *Etri Fans Ltd, v NMB Ltd.* [1987] 2 AllER 763.
82 *The Tuhuti* [1984] 2 AllER 545.
83 *Willcok v Pickfords Ltd.* [1979] 1 LR 244.

procedures, which must be undertaken prior to arbitration, such as conciliation before arbitration. It remains possible for the court to stay its proceedings so that the full dispute resolution process can continue[84]. When an application is made for a stay, notice of the application must be given by the applicant to the party who has brought the proceedings and to any other party to the proceedings. The application must be made to the court in which the legal proceedings are pending and the court can either determine any issue as to the scope and validity of the agreement to arbitrate or it can stay its proceedings in order to resolve the question. An application for a stay of judicial proceedings, which applies to a claim and a counterclaim, may not be made by a person "before taking the appropriate protection steps (if any) to acknowledge the legal proceedings against him" (Section 9.3).

There is nothing to prevent the application for a stay of judicial proceedings from commencing arbitration proceedings, or insisting that they be continued, if they had previously been under way while the court is considering its position. In cases of preliminary issue as to jurisdiction and preliminary point of law (section 32) the arbitration continues, pending (Section 45) an application to the court. Moreover, the court can refuse to appoint an arbitrator where it is called upon to do so, in order to get the arbitration off the ground.

Arbitrators themselves can stay any existing proceedings pending the outcome of the application to the court. Will this interplay and alternating involvement of arbitrators and court cause problems to arbitration? The right to seek a stay of judicial proceedings will be lost to the applicant "after he has taken any step in those proceedings to answer the substantive claim". The matter is not one of discretion but of jurisdiction, so that once the applicant has taken a step in the judicial proceedings, the court has no jurisdiction to stay its proceedings. A distinction must be made between an applicant who contests the judicial proceedings on their merits by demonstrating an intention to defend them, and an applicant who has merely sought to safeguard his position pending the determination of his application for a stay. Any application to strike out the plaintiff's writ as disclosing no cause of action would be a step in the proceedings[85]. The applicant's state of mind is irrelevant. It is immaterial that the reason for the applicant having taken a step in the proceedings is delay by his legal advisers[86]. An act cannot be treated as a step in the proceedings if the applicant has stated that he intends to seek a stay. It could be said that the right to apply for a stay is lost if the defendant has expressly stated that he does not intend to refer the matter to arbitration. Besides, a court must grant a stay "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed"[87] (Section 9.4). The list

84 *Channel Tunnel v Balfour Ltd.* [1993] AC 334.

85 *Eagle Star v Yuval Co.* [1978] 1 LR 357.

86 *Turner v McConnel* [1985] 2 AllER 34.

87 Section 9(4) of the Act provides that the courts will stay any legal proceedings brought in breach of an arbitration agreement, unless the arbitration agreement is null and void. *Paul Stretford v Football Association Ltd & Anor [2007] EWCA Civ 238; CA (Civ Div).* There is a general proposition that:

in Section 9.4 is exhaustive and the English courts cannot refuse a stay merely because a party demonstrates that he would have superior legal rights in court than in arbitration[88].

Can a party refuse to take part in arbitration if there is a valid arbitration agreement and go instead to the courts? As long as a party can raise an arguable case in favor of validity, a stay is to be granted. The English courts have taken the view that any evidence of mutual intention to refer a matter to arbitration is to be enforced and treated as an arbitration agreement. Thus, a vague reference to arbitration in the parties' agreement will suffice. An arbitration agreement which is voidable is not null and void for the purposes of section 9, at least until it has been voided. A court can refuse to stay judicial proceedings in case the arbitration agreement is illegal. A failure to fulfill the requirement of an arbitration clause does not mean an offer not to arbitrate. An arbitration agreement can be inoperative if the dispute does not fall within the scope of the agreement or one of the parties has lost the right to refer the matter to arbitration[89]. The mere fact that a party in the proceedings lacks the financial capacity to meet any award against him is not a fact which renders the agreement incapable of performance[90].

Prior to the passing of the 1996 Act, it was possible for a party to succeed in an action for summary judgment under RSC Ord 14 despite the presence of an arbitration clause. Besides, in *Halki Shipping v Sopex Oils*[91] the court ruled that the jurisdiction of the court to grant summary judgment in the absence of a real dispute did not survive the 1996 Act. The Queens Bench Division granted the defendant's application for an order pursuant to section 9(4) of the AA 1996 staying the plaintiff's action for damages for breach of a charter-party. The court held that the parties had agreed to refer any dispute arising from or in connection with the contract to arbitration, and the term "dispute" covered any claim which the other party refused to admit or did not pay, whether or not it had a good defence in fact or in law. The 1996 Act does not include any reference to there being no dispute between the parties as a ground for refusing a stay of judicial proceedings[92]. An admission of liability can render an arbitration clause inoperative[93]. Where the arbitration clause is in *Scott v Avery* form, that is, where it provides that the making of an arbitration award is a condition precedent to the commencement of judicial proceedings, the court will stay the action if it is satisfied that the dispute falls within the clause and that the other requirements of section 86 have been met.

"where parties have voluntarily or … freely entered into an arbitration agreement they are to be treated as waiving their rights under Article 6 ECHR".

88 *Scor v Eras Ltd.* [1992] 1 LR 570.

89 *Halvan Ltd. v Compania De Seguros* [1995] 1 LR 303.

90 *Parzy v Haendler* [1981] 1 LR 545.

91 *Halki Shipping Corp. v v Sopex Oils Ltd*., [1997] 1 W.L.R. 1268; [1997] 3 All E.R. 833 (Q.B.D.); [1998] 2 LR 49. In that case Mr. Justice Clarke held that the existence of an arbitration clause in a charter party prevented the plaintiffs from applying for summary judgment under Order 14 and entitled the defendants to a stay of the action in terms of section 9(4) of the AA 1996.

92 *Hume v AA Mutual insurance Co.* [1996] 1 LR 19, *The Eregli* [1981] 2 LR 169.

93 *The Ever Splender* [1988] 1 LR 245.

Thus, a *Scott v Avery* clause ousts the general rule that judicial proceedings can be brought on a matter that has been made the subject of an arbitration agreement. A *Scott v Avery* clause is automatically overridden where a stay is refused and it is no longer an absolute bar to judicial proceedings. The parties cannot agree that the time limits laid down by them shall not be extended by the court. The courts have ruled that the action is to be stayed in such circumstances, so that the plaintiff must rely upon Section 12 for relief from the consequences of a time bar[94]. Section 12 does not apply to the statutory six-year limitation period[95]. A delay in submitting to preliminary alternative dispute resolution procedures is equivalent to a delay in submitting the dispute to arbitration proper.

The onus is placed on the party bringing the legal proceedings to challenge the arbitration agreement and persuade the court to allow the legal proceedings to continue. The tribunal will rule on the validity of the arbitration clause, subject to final determination by the court as a preliminary point (Section 32) or on a challenge to the award (Section 67). Hence, it seems that there is a need for a final appeal to court. If the court permits the arbitration proceedings, it would appear that a challenge to the validity of the agreement might be raised again under Section 30 before the tribunal, subject to considerations of *res judicata*[96]. So, the court's refusal of a stay will deprive a *Scott v Avery*[97] clause of any effect in relation to legal proceedings to enforce the court. An interpleader arises where two persons claim the same asset, which is held by a third person. The person in possession of the asset acknowledges that one of the claimants is entitled to the asset but is unable to determine if he or she can turn to the court and ask it to determine the issue. If the rival claimants are parties to an arbitration agreement covering the issue between them, the court is bound to direct that the issue be referred to arbitration. On granting the stay, the court may order the retention of an arrested vessel or the provision of equivalent security as means of ensuring the satisfaction of any award in respect of that dispute (Section 11).

The court has the power to extend time for beginning arbitral proceedings. Section 12 operates independently of the general power given to the court by Section 79.1 of the 1996 Act to extend other time limits relating to arbitral proceedings. Hence, there are two alternatives. The first is whether the court is satisfied that circumstances unforeseen at the time of agreeing to the time bar have arisen, and it would be just to grant an extension. The second test is whether the court is satisfied that one party has so conducted itself as to make it unjust to apply the time bar to the other. An applicant for an extension of time must

94 *Bruce Ltd. v Strong* [1951] 2 KB 447.

95 *The Jemrix* [1981] 2 LR 544.

96 *Lincoln National Life Insurance Co. v Sun Life Assurance Co. of Canada* [2004] EWCA Civ 1660; [2006] 1 AllER (Comm) 675 (CA (Civ Div)). *Svenska Petroleum Exploration AB v Lithuania* (No 1) [2005] EWHC 9; [2005] 1 AllER (Comm) 515 (QBD (Comm)). The international approach is only to allow a plea of *res judicata* where three identical elements exist in both arbitrations – same parties, same facts, and same causes of action.

97 [1856] 5 HLCas 81.

first have exhausted any possible application for an extension under institutional rules, or other available arbitral process, before applying to the court. Any appeal from a decision of the court can be made with leave. Leave would be granted if some question of difficulty on principle appeared to justify it. The decision of the court may be expected to be final. The court has the power to order that where an award, or part of an award, has been set aside or declared to be of no effect and fresh proceedings in respect of the dispute are commenced, the period of time between the commencement of the original arbitration and the date of the order setting aside or declaring the original award of no effect should be disregarded for limitation purposes. The date of commencement of the proceedings is relevant to the effectiveness of the agreement to exclude the court's jurisdiction under Section 45 and Section 69 (Section 14).

5 Jurisdiction

The court has the ability to exercise its power under the 1996 Act in order to support the arbitration in the limited case in which the seat has yet to be determined (section 2.4b). The 1996 Act applies only where the seat of the arbitration is in England, Wales or North Ireland, irrespective of whether English law is applicable law. The mandatory provisions of the 1996 Act will continue to apply regardless of whether English law is applicable, but the non-mandatory provisions of the 1996 Act will apply only insofar as they are not inconsistent with the applicable law and with other agreement between the parties[98]. The juridical seat is not automatically the same as the geographical site of any arbitral hearing. There are limits to the power of the parties to make arbitral or procedural agreements. Any agreement to leave out the applicability of the mandatory provisions will not be enforced or recognized by the English courts. The power of the court to stay court proceedings brought in breach of an arbitration clause is preserved by the new Act. Proceedings must be stayed unless the agreement to arbitrate is null, void, inoperative or incapable of being performed. Additionally, the power of the court to induct foreign legal proceedings brought in breach of an arbitration clause is preserved by the Act. The tribunal is competent to make a preliminary determination of its own jurisdiction[99] although this competence may be excluded

98 *Channel Tunnel Corp v Balfour Ltd.* [1993] 1 AllER 664, *Paul Smith Ltd v International Housing Inc*. [1991] 2 Lloyd's Rep 127.

99 *Belgravia Property Company Limited v S & R* (London) *Limited and Taylor Woodrow Management Ltd.* 2001 ht 01/043. The determination of the jurisdiction of an arbitral tribunal, pursuant to Section 32 of the AA 1996. Non-justiciability does not preclude english court from interpreting provisions of BIT in application challenging jurisdiction of arbitral tribunal *occidental Exploration & Production Company v The Republic of Ecuador, Case No A3/2005/1121*, Court of Appeal (Civil Division) (9 September 2005). The court concluded that there was no basis for suggesting that an English court, in the context of an English award, was prevented from determining the scope of the arbitrators' jurisdiction under section 67 or under section 66 of the Act. In reaching this conclusion, the court was influenced by the nature of the BIT, under which two States had deliberately agreed to confer rights intended to be enforceable by private persons. Consequently, the

by agreement, in which case the court must decide the jurisdictional issue. It could be argued that the possibility of delaying or avoiding arbitration by means of false jurisdictional challenges has been limited by the Act, but whether it is limited enough will be examined[100].

Where the seat is outside England, the court has no general jurisdiction to apply the 1996 Act. The seat of an arbitration was prima facie the place where the arbitration was to be held or in the absence of agreement on this point, the place of the chosen applicable law. Temporary presence in a place does not make that place the seat of the arbitration[101]. The seat is now defined as the place agreed to be the seat by the parties or by the arbitrators or an arbitral institution if the power is nominated by the parties, and that need not be the place which provides the applicable law if the parties have settled on this arrangement. The court can determine the seat taking into consideration the parties' agreement and all the relevant circumstances and the principle that a choice of applicable law is inseparable from the intended seat will continue to operate. An award emanating from arbitration (sections 53, 100.2b) with its seat outside England is to be enforced without regard to the substance of the award under the NYC. The definition of domestic agreement is based upon the seat of the arbitration (section 85). However, section 2.2.5 lists a number of exceptional cases in which particular provisions of the 1996 Act may be extended to arbitrations with no English seats. Any ruling by the arbitrators on their jurisdiction is subject to judicial review in any action on the agreement[102]. In England, the prevailing view in literature is that any decision denying jurisdiction should be rendered in the form of an award and can be reviewed under section 67 of the AA 1996. The reference to 'any award of the arbitral tribunal as to its substantive jurisdiction' in section 67(1)(a) strongly supports this view. However, it must be noted that under the English legal system, the power of the tribunal to determine definitively the scope of its own jurisdiction is subject to judicial control via sections 32 and 67 of the AA. These inroads into the tribunal's power reflect the English legal system's reluctance to accept complete exclusion of the court's inherent jurisdiction. Nevertheless, such usurpation of the tribunal's power is very restrictively defined under sections 32 and 73. First, if a party does not object to the tribunal's competence within a certain period of time, that party may lose the right to object. Secondly, the court will not consider the issue of competence unless the parties have agreed in writing for the

appeal was dismissed. The tribunal had jurisdiction to make an award on matters of taxation and had not acted in breach of principles of International Law (2 March 2006) *The Republic of Ecuador v Occidental Exploration & Production Co.*, case no: 04/656, High Court (Queen's Bench Division), England.

100 In *Metal Distributors (UK) Limited v ZCCM Investment Holdings plc* [(2005] EWHC 156 (QB)), Cresswell J considered important issues relating to jurisdiction and sections 30 and 67 of the AA 1996.

101 *Union of India v McDonnel Douglas* [1993] 2 Lloyd's Rep (LR) 48, *Sumitomo Heavy Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45, *The Star Texas* [1993] 2 Lloyd's Rep 445.

102 *Chimiport plc v D'alesio* [1994] 2 Lloyd's Rep 366. *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd [1999]* 1 AC 266.

court to resolve the question. According to *LG Caltex Gas Co. v China National Petroleum Corp*[103] it appears that it is possible for the parties to avoid the court's power of review over the tribunal's *Kompetenz-Kompetenz* award if they draft a new express agreement to that effect.

If there is no seat of arbitration, it is not certain that the English courts would recognize the arbitration. The most important connection would be that English law is the governing law. An arbitration, which had its seat in England, was recognized as being within the English legislation even though various parts of the arbitration were conducted abroad[104]. Section 2.4 allows the court to apply any of the provisions of Part I of the Act where there has been no choice or determination of seat, provided that it is appropriate for the court to exercise jurisdiction that will mean some connection with England, Wales or North Ireland. English courts may apply section 7 (separability of the arbitration agreement) and section 8 (death of a party) where the law applicable to the agreement is that of England, Wales or North Ireland, and the seat is abroad or has not been designated. It is not necessary for the entire proceedings to be conducted in a particular place for that place to be regarded as the seat. There is no need for a connection between the seat and the location of the proceedings, and the court can secure the attendance before the

103 *LG Caltex Gas Co. v China National Petroleum Corp.* [2001] EWCA Civ. 788.

104 *Sumitomo Heavy Industries v Oil Natural Gas* [1994] 1 LR 45 The Civil Judgments Act 1982 is applicable it is has been amended by the Civil Jurisdiction and Judgments Act 1991 (c. 12) The Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 implementing Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) (Amendment) Rules 2002. The Brussels Convention 1968, which regulates jurisdiction as between the courts of the EU Member States, and the Lugano Convention 1988, which establishes a parallel system as between the courts of the EU and EFTA countries (civil jurisdiction and judgments Act 1991) operate on the basis that a defendant can be sued in the place of his domicile. OJ 2001 L12/11. The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters repeals the Brussels Convention. Certain differences between national rules governing jurisdiction and recognition of judgments hamper the operation of the internal market. In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a community legal instrument, which is binding and directly applicable. The scope of this regulation must cover all the main civil and commercial matters apart from certain well-defined matters. The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty. In accordance with Article 1 this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. An agreement of the parties conferring jurisdiction shall be either in writing or evidenced in writing or any communication by electronic means, which provides a durable record of the agreement shall be equivalent to writing. However, the Brussels and Lugano Conventions are expressed as not being applicable to arbitration agreements, and therefore it remains necessary to seek leave from the High Court. The court first seized of the action has exclusive jurisdiction over the dispute (Article 21).

arbitrators of a witness who is in the UK provided that the proceedings are being conducted in England, even though the seat of the arbitration is elsewhere.

Moreover, under section 31 a party is entitled to register an objection to an assertion of jurisdiction by the arbitrators, thereby preserving his right to challenge the award on the ground of want of jurisdiction at a later date (section 32). If the arbitrators, or the parties, so wish, the court is entitled to consider the question of the arbitrator's jurisdiction as a preliminary point, although the arbitration may proceed while such a challenge is resolved. Parties can exclude judicial review of an award for error of law (Section 69) while an award may be challenged on the grounds that it was made without jurisdiction or that it was tainted by a serious procedural irregularity (sections 67–68, 70–71). Furthermore, section 72 codifies the right of a party not to participate in arbitration proceedings[105]. Participation in arbitration without objection to jurisdictional or procedural errors prevents subsequent challenges to the award on these grounds. The mandatory provisions of the 1996 Act apply to an arbitration agreement which has its seat in England, Wales and Northern Ireland and the fact that the agreement is not governed by English law is immaterial (section 4.4). The jurisdiction of the court regarding allegations of fraud was removed by the 1996 Act and so the court has no power to terminate an arbitration agreement or remove an arbitrator based on an issue of fraud in the proceedings. The right of the parties to arbitrate ought to prevail over a right of public defence. Arbitrators should be capable of dealing with issues of fraud. Under section 9 the court is required to stay its own proceedings where the agreement is non-domestic unless it is shown that the clause is inapplicable to the dispute. However, the court retains a general power to stay its own proceedings "if there are general grounds for not requiring the parties to abide by the arbitration agreement". The court could exercise the power to refuse a stay if the alleged fraudster so wishes (section 86).

As mentioned earlier, an arbitration agreement is a contractual clause evidencing agreement to refer future disputes to arbitration[106]. The parties may by agreement confer upon the arbitrators the power to determine their own jurisdiction, but their decision is open to judicial challenge at any stage. Even after the parties have agreed to confer upon arbitrators the power to decide their jurisdiction, a party can refer the matter to the courts in order to gain time, or to delay the whole process. English arbitration requires a dispute to exist between the parties before there can be a reference to arbitration. Must the dispute first come via a lawsuit before a court? The 1996 Act removes from the court its previous jurisdiction to give summary

105 *Law Debenture Trust Corp plc. v Elektrim Finance BV* [2005] EWHC 1412; [2005] 2 AllER 476 (Ch D). It relied on section 72(1) AA 1996 (the "Act") which provides that: "A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question: (a) whether there is a valid arbitration agreement … (c) what matters have been submitted to arbitration in accordance with the arbitration agreement … by proceedings in the court for … appropriate relief". That Law Debenture could not be forced to arbitrate if it wished to commence its own proceedings covering the same subject matter.

106 *The Stena Pacifica* [1990] 2 LR 234.

judgment in favor of a plaintiff who asserts that there is no dispute and that another obligation is owed to him by the defendant. Hence, the defendant is entitled to have the claim referred to arbitration in accordance with the arbitration agreement[107]. If the arbitrators find that there is no dispute between the parties, their view will depend upon the facts found by them for the absence of a dispute. Besides, it is possible for a party to apply to the court for an order that there is a dispute and that arbitrators possess the necessary jurisdiction over the matter in question.

In *Inco Europe Ltd. v First Choice Distribution*,[108] the Court of Appeal was given the first full opportunity to review its jurisdiction, in particular under section 9, but also made use of the opportunity to comment more generally on the appeal process. Lord Justice Hobhouse held that there was jurisdiction given to the Court of Appeal to hear appeals from decisions of a judge or court under section 9 of the 1996 Act, and that an aggrieved party had the right to apply to the judge or to the Court of Appeal for leave to appeal, and to apply to that judge or to the Court of Appeal to grant leave. It should be taken into account that the Court of Appeal summarily reviewed the different categories of appeal provided by the Act, which may be classified under three headings:

1 those sections where there is nothing stated on the appropriate, if any, means of appeal: section 9—stay, section 11—applications of the Limitation Acts, section 65—giving powers to limit recoverable costs, and section 72—saving the rights of persons who take no part in arbitration proceedings;
2 sections in which a right of appeal is expressly limited by the Act and restricted to situations when a lower court gives leave to appeal: including section 67—challenging the substantive jurisdiction of the arbitral tribunal and section 68—for cases of irregularity affecting the tribunal's proceedings, or the award; and
3 those in which rights of appeal exist to the Court of Appeal, in particular, Section 69 on points of law as mentioned above.

Moreover, there is nothing in section 9 which excludes the jurisdiction of the Court of Appeal and the same applies to sections 10, 11, 13, 28, 64, 65, 72 and 74. Therefore, all these provisions in their different forms are designed to reduce to an acceptable minimum the interference of courts in the conduct of arbitrations and the finality of awards. The minimum of interference is defined by law and courts and not arbitrators.

Parties can agree that the arbitration agreement and the agreement to which it relates are to fall together and will be effective to oust section 7 and so to oust the possible jurisdiction of the arbitrators to rule on their own jurisdiction. Courts are required to apply the principle of severability to a case coming before them

107 *Halki Shipping Co. v Sapex Oil Ltd.* [1998] 1 AllER 23.
108 *Wealands v CLC Contractors* (unreported February 1998). *Inco Europe Ltd. v First Choice Distribution* (unreported 30 September 1998 CA)

where the seat of the arbitration is in the UK or to a case in which the seat of the arbitration is elsewhere but the arbitration agreement is governed by English law (section 2.5). An arbitration clause is severable from the contract to which it relates, even if it is physically located in that contract, and does not automatically mean that questions of voidness, invalidity and the like can be arbitrated. It must be ascertained that the language of the arbitration clause extends to disputes as well as to jurisdiction. The arbitrator's ruling on jurisdiction is open to a challenge in the courts[109]. Judge Steyn[110] ruled that the court can rule on issues relating to the jurisdiction of arbitrators and it is possible to obtain a speedy declaratory judgment from a court as to the validity of an arbitration agreement before or during the arbitration proceedings. The right of a party to challenge an arbitrator's ruling about their jurisdiction to determine the validity of the main agreement by seeking declaratory or injunctive relief remains in place (section 72.1). Hence, we can have a double decision about a single matter, which means that one of the dispute systems is considered to be inferior and there is a need to refer to courts for legitimacy.

The 1996 Act provides a number of mechanisms whereby jurisdictional issues, such as the validity of the arbitral tribunal's constitution, may be raised in the course of the proceedings, including the possibility of an award on the point by the arbitrators or a preliminary ruling by the court as to the jurisdiction of the arbitrators. Moreover, the 1996 Act, consistent with the common law, does not permit the arbitrators to have the final word on their own jurisdiction, and sections 30–32 lay down a procedure for challenging the arbitrators' assertion or denial of jurisdiction. Jurisdiction of the ordinary courts over the control of the arbitrators and the review of any award are exercisable by the Court of Appeal instead of the High Court (Schedule 2 paragraph 2.1). All references in Part I of the 1996 Act are to be construed to the court as references to the Court of Appeal, and where an appeal moves from the court to the Court of Appeal—determination of a preliminary point of jurisdiction (Section 32.6), determination of a preliminary point of law (Section 45.6), and appeal on a point of law (Section 69.8)—the appeal goes from the Court of Appeal to the House of Lords (Schedule 2).

Section 30 of the AA 1996 provides that the tribunal may rule on its own substantive jurisdiction, as it in effect did in *Hussmann (Europe) Ltd.*[111], however, if its decision is challenged, the court must ultimately decide under Section 67 whether the tribunal has jurisdiction. The tribunal in its award dealt with the question of jurisdiction not as a separate issue but in relation to the application

109 *Chiminpart plc v GD Alesion* [1994] 2 LR 366.

110 *Harbour Assurance Co v Kansa Ltd* [1992] 1 LR 81.

111 *Hussmann (Europe) Ltd. v (1) Al Ameen Development & Trade Company (2) HH Judge Eugene Cottran (3) J. Anthony Murray (4) Dr A.K. Anvari* [2000] EWHC 210 (Comm) Company contended the tribunal did have jurisdiction as it had become a party to the distributorship agreement and thus to the arbitration agreement in clause 17; that HCN, in any event, had lost its right to object to the jurisdiction of the tribunal under section 73 of the Act, as they had failed to take the objection to jurisdiction forthwith before the tribunal when they knew or ought to have known of the matters relied on for their contention; they had nonetheless continued with the arbitration.

to amend. Section 31 of the AA 1996 makes it clear that any objection to the substantive jurisdiction of the tribunal arising during the course of arbitral proceedings must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised. Section 73 provides that if a party to arbitral proceedings continues to take part in the proceedings without making forthwith any objection that the tribunal lacks substantive jurisdiction, he cannot raise that objection later before the tribunal or the Court: "unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for the objection". The purpose of the provision is to ensure that a party does not keep a point "up his sleeve" and wait to see what happens while considerable expense is incurred. A party cannot be allowed to take part in proceedings and then challenge the award if he is dissatisfied with it on the basis of a point about which he knows or ought with reasonable diligence to have discovered[112].

It is clear from the Report of the Departmental Advisory Committee on the Arbitration Bill (DAC Report) that section 30 was intended to state the doctrine of "*Kompetenz-Kompetenz*". It was the intention that the basic rule was to be that the tribunal would make the rulings on jurisdiction in the first instance rather than recourse being had to the courts. section 32 provides an exception to this basic rule; under section 32(1) the court may determine questions as to the substantive jurisdiction of the tribunal on the application of a party to arbitral proceedings. In *ABB Lumnus Global Ltd v Keppel Fells Ltd*[113], Clarke J declined to consider an arbitration application for a declaration that an arbitration application was still on foot because the requirements of section 32(2) were not satisfied. He observed that the purpose of the Act was to restrict the role of the court at an early stage of the arbitration. It is clear from section 31(1) that a party is not precluded from raising an objection to the substantive jurisdiction of the tribunal by reason of the fact that he has appointed or participated in the appointment of an arbitrator. The judge, therefore, sets aside the service of the arbitration claim form on the primary ground that this court has no jurisdiction because of the terms of the Lugano Convention[114].

In *Lexmar Corporation and Steamship Mutual Underwriting Association v Nordisk*[115], Colman J held that proceedings to enforce an undertaking given by a third party securing an order for security for costs made in the arbitration were not within the exception. In the present case[116] the arbitration procedure to which

112 *Rustall v Gill and Duffus* [2000] 1 Lloyd's Rep 14.

113 [1999] 2 Lloyd's Rep 24.

114 *(1) Vale Do Rio Doce Navegacao S.A. (2) Seamar Shipping Corp v (1) Shanghai Bao Steel Ocean Shipping Co. Ltd.* (Trading As Baosteel Ocean Shipping Co.) (2) *Sea Partners A.S.* [2000] EWHC 205 (Comm).

115 [1997] 1 Lloyd's Rep 289 *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co. Ltd.* [2000] 2 AllER (Com) 70. *Harbour and General Works Ltd. v Environment Agency* [1999] BLR 409.

116 *J. T. Mackley & Company Limited V Gosport Marina Limited* [2002] EWHC 1315 (TCC).

the parties agreed involved time limits for the making of claims for arbitration. The Arbitration Act 1996, in section 12, makes provision for the court, and only the court, to extend time limits in certain circumstances for the commencement of arbitration proceedings. The effect of the Arbitration Act 1996 Section 1(c) and section 32 was that the court had no jurisdiction to determine the question whether the Notice to Refer was invalid without the agreement in writing of the other parties to the arbitration proceedings which it was contended had been commenced by the giving of the Notice to Refer or without the consent of the arbitrator appointed to decide the issues raised by the Notice to Refer. It may be arguable whether the jurisdiction of an arbitrator to decide on his substantive jurisdiction extends to any matter not specifically set out in paragraphs (a), (b) and (c) in Section 30(1), because of the qualification "that is to say" introducing those paragraphs. The general jurisdiction of the court to grant declaratory relief is excluded in matters relating to arbitration by the provisions of AA 1996 Section 1(c). The Court should observe the injunction given by that provision to be cautious in exercising its jurisdiction in relation to arbitration and it should not exercise that jurisdiction because of the policy of the AA 1996.

6 Determination of preliminary point of law

It was standard law prior to the AA 1996 that the arbitrators could not determine their own jurisdiction[117]. The doctrine of "Kompetenz-Kompetenz" has been recognized in English law[118]. Decisions of tribunals on jurisdictional issues are subject to subsequent appeals to the courts[119]. The 1996 Act states that the tribunal can rule on jurisdictional objections either in an award as to jurisdiction or in its award on the merits of the dispute. In either case, the award can be challenged in court. Besides, in exceptional cases, jurisdictional challenge could be made directly to the courts. The tribunal cannot continue with the proceedings if both parties consent to a suspension of proceedings, and this freedom creates delays. Hence,

117 *Internaut Shipping Gmbh v Fercometal Sarl* [2003] EWCA Civ 812 , V.V. Veeder, "The 1996 English Arbitration Act: A Ten Year Retrospective – Introduction", *Arbitration International*, 23 No 3 (2007), pp. 433–436, Bruce Harris, :Report on the Arbitration Act 1996", *Arbitration International*, 23 No 3 (2007), pp. 437–460, Peter J. Rees "The Conduct of International Arbitration in England: the Challenge Has Still to be Met", *Arbitration International*, 23 No 3 (2007), pp. 505–510.

118 *Christopher Brown Ltd v Genossenschaft* [1954] 1 QB 8.

119 Section 30. Competence of tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to: (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part. A Broches, *Commentary on the UNCITRAL model law on international commercial arbitration*, 1990, Kluwer. J. Hill, "The Law Relating to International Commercial Disputes, 1994," Lloyd's Press. A Asouzu, "A Treat to Arbitral Integrity," 1995 *J Inter'l. Arb.* 145. F Davidson, "The New Arbitration Act-A model Law?," 1997 JBL 101.

the possibility of judicial determination of preliminary points of law is established. To that extent, section 45.4 provides that, subject to contrary agreement, the arbitrators may continue their proceedings pending the outcome of an application to the court for a ruling on a preliminary point of law. Since the passing of the AA 1889, English law has recognized a procedure whereby arbitrators can voluntarily seek, or can be compelled by the parties to seek, the assistance of the courts in resolving apoint of law which has arisen during the course of the arbitration before an award has been made. The court may determine a question of substantive jurisdiction at the request of a party, but only with either the agreement of the other party or parties, or with permission of the tribunal and the court's satisfaction as to a number of conditions, which include the absence of delay. While Section 32 makes specific the general requirement set out in Section 40.5, Section 45.2 specifies the context of the determination of a preliminary point of law by the court.

Section 32[120] gives the court power to determine any question as to the substantive jurisdiction of the tribunal provided certain conditions are met, while section 45 gives the court power to determine any question of law arising in the course of the arbitration subject to similar conditions. Both sections restrict the right of appeal to cases where the CFI has given leave. But neither section 32 nor section 45 confer any express jurisdiction on the court to grant final injunctions in aid of decisions made under these sections. By contrast, Judge Richard Seymour, in *J.T. Mackley & Co. v Gosport Marina Ltd*[121] stated that the court possessed an inherent jurisdiction to grant declaratory relief, even where Section 32 had not been satisfied. Thus, judges who are not convinced of the merits of party autonomy may well be prepared to circumvent the strict wording of the Act to hold that the court should intervene. Public interest will have an overriding effect over the party autonomy rule. Thus, the party autonomy rule is subject to the mandatory rules of a legal system.

The facts that no express power to grant injunctions is given to the court when it is exercising its powers under section 32 or section 45 is determinative[122]. If the arbitrator seeks to exercise powers that he does not possess, then declaratory relief can be sought from the courts. In the case of doubts as to the existence of a power, a party can refer to the court under section 45 on the basis of a preliminary point of law. Moreover, an application can be made under section 68 for an order setting aside or remitting the award for want of fairness in the proceedings, contrary to the general principles in Section 33.

The procedure in Section 45 applies only to point of law, and the point of law must be one of English law because the courts have no jurisdiction under

120 *Vale Do Rio Navegacos S.A. v Shanghai Bao Steel Ocean Shipping Co. And Sea Partners Ltd* [2000] 2 AllER.(Comm.) 70, the court rejected the claimant's motion under section 32 which had been brought without the other party's agreement and before the arbitration had commenced. The court held that the court should only intervene in limited cases since the parties should resolve their dispute by the means they had agreed to beforehand.

121 [2002] EWHC 1315.

122 *Welex AG V Rosa Maritime Limited Case No: A3/02/2230.*

section 45 where the contract to which the dispute relates is governed by a foreign law. The restriction to points of law means that the arbitrator's decision to adopt a particular procedure or to exercise a procedural discretion in a specific way falls outside section 45, although his or her jurisdiction to do so may be a point of law[123]. The existence of a power of inspection was held to be a point of law[124]. An application to the court can be made by any party to the arbitration, although the court must be satisfied that the point of law substantially affects the rights of the parties. Moreover, an application can be made if the party has obtained the other parties' agreement or with the permission of the tribunal. There is a jurisdictional difference between an application made with the other parties' agreement and application made with the consent of the arbitrators. In the former case, jurisdiction is established automatically but in the latter case, the party has to demonstrate to the court's satisfaction that the application was made without delay, and determination of the questions will produce substantial savings in costs. The parties can agree that there is no need to apply to the court for determination of a preliminary point of law.

Agreements to preclude the exercise of the court's jurisdiction under section 45 are referred to as exclusion agreements. The courts have held that a small severable point does not justify the grant of leave to appeal against the award as a whole. Where the application is made with only the arbitrator's permission, the supporting affidavit has to give documentary evidence of the agreement or the permission and must identify the question of law to be determined. Additionally, the affidavit of the applicant must set out any evidence to be relied upon, demonstrating why the court should hear the application. Besides, if any other party wants to contest the application, his affidavit must set out any evidence to be relied upon, demonstrating why the court should not hear the application. An application is usually to be heard in open court. The court is not obliged to hear an application under section 45 but it has discretion in this regard. How is the court's discretion is to be exercised? If the question of law relates to a procedural matter, the court will refuse to hear the point unless a court ruling is the only way of breaking a procedural deadlock in the arbitration. An arbitrator who has refused his permission for an application under section 45 cannot be removed by the court under section 24 on the basis that he has failed to conduct the proceedings properly[125].

There is no appeal against the court's exercise of its discretion whether or not to entertain an application under section 45. A party can challenge the court's decision on its jurisdiction to hear the action. There can be an appeal only where the court gives its leave. The decision of the court on the question of law must be treated as a judgment of the court for the purposes of an appeal. No appeal goes to the Court of Appeal unless the court considers that the question is one of general

123 *Engineering Services Ltd. v Linder Plc.* [1996] ADRLN 2.
124 *The Vaos* [1983] AllER 211.
125 Brown v CBS Ltd [1987] 1 LR 279.

importance or is one which for some reason should be considered by the Court of Appeal.

The various powers open to the court regarding failure of appointment procedure are contained in section 18.3 but the Act does not indicate how the court's discretion is to be exercised.

7 Choice of law

Choice of law involves a two-stage process. In the first instance, the system of law applicable to the dispute must be determined. Secondly, when it has been determined, the relevant substantive rules of law of the applicable system of law must be used to resolve the dispute. Whether or not the arbitrators have applied the substantive rules of the chosen system of law to the relevant issue is a question of law, which can be reviewed by the English courts, but only where the arbitration has its seat in the UK (section 2). Even if the arbitration has its seat in England, so that the English courts have jurisdiction to review errors, that jurisdiction may be limited by the arbitrator's choice of law. The power to review errors of law under section 69 is confined to points of English law (section 82.1). For instance, if the arbitrators have decided that the procedure is governed by Spanish law, the mandatory procedural provisions of the 1996 Act, listed in Schedule 1, continue to apply to the arbitration despite the choice of law (section 4.4–5). There is a power of review in England in respect of those mandatory provisions, but it has to be said that the most important aspects of the arbitration are mandatory (section 33). Consequently, the voluntary part of arbitration is limited to some aspects and so arbitrators' authority stems from law rather than from the parties' will. English choice of law rules will determine the system of law to be applied to the various aspects of the dispute. Arbitrators have to decide on four issues:

1 the law governing the agreement to go to arbitration;
2 the law governing the contract or other matter from which the dispute has arisen;
3 the law governing the reference to arbitration; and
4 the law governing the procedure to the arbitration.

The applicable law has no direct connection with the question of whether the 1996 Act governs the arbitration proceedings. There is no necessary connection between the seat of the arbitration and the law governing the proceedings.

If the seat is not in England the 1996 Act does not, with the exceptions in section 2.2–5 of the 1990 Act, apply, and the arbitrators' decisions on the applicable law are not the concern of the English courts. It is for the arbitrators to determine the system of law that is applicable to the various matters coming before them. Parties may agree to the application of institutional rules to govern their arbitration. The applicable law may be determined by express or implied agreement or by ordinary conflict of laws rules in the absence of agreement. An agreement which provides

for England as the seat of the arbitration, but which does not contain an express choice of law provision, is to be regarded as governed by English law and so the 1996 Act will apply to it. An applicable law different to that of the arbitration agreement itself may govern the individual reference to arbitration, but it will be very rare for the applicable law of the individual reference to differ from the proper law of the arbitration agreement itself[126].

7.1 The law governing the agreement to arbitrate

Since 1 August 1991, English choice of law rules in contractual disputes are governed by the Rome Convention 1980, implemented by the Contracts (Applicable Law) Act 1990. The Rome Convention excludes a number of agreements, including, under Article 1.2d "arbitration agreements and agreements on the choice of court". Hence, the choice of law governing an arbitration agreement is to be determined by established common law principles relating to proper law (applicable law). The starting point is whether the parties have made an express choice of applicable law. The choice will be regarded as conclusive even if the applicable law has no connection with the contract[127]. The choice must not be meaningless and offend public policy. Hence, the choice must be "bona fide and legal" and must not give reason "for avoiding the choice on the ground of public policy". English law allows a choice of different applicable laws for different parts of the agreement[128]. If there is no express choice of law clause, the courts will examine the remaining provisions of the contract for evidence of an implicit choice. In the absence of any express or implied choice of law, the courts will seek to ascertain the intention of the parties. The courts are concerned with finding the system of law with which the contract has its closest connection. The factors to be taken into account include the domicile of the parties, the place at which the contract was made and the place at which the contract is to be performed[129]. The law governing the agreement to arbitrate will determine all matters of substance. Procedural matters will be governed by whatever is applicable to the procedure. In arbitration the law applicable to the procedure can be chosen by the parties or by the arbitrators and need not be the law of the forum. Issues concerning the scope, construction or validity of the arbitration agreement are to be determined in accordance with its applicable law[130]. Matters relating to evidence are a matter for the procedural law. Arbitrators' decisions on points of foreign law are not reviewable by the English courts, as section 69 applies only to points of English law. If the English courts are required to adjudicate over a matter governed by a system of law other than English law, the effect of the applicable law is a matter of fact to be proved as evidence before

126 *The Amazonia* [1990] 1 LR 236.
127 *Vita Food Inc v Union Shipping Ltd.* [1939] AC 277.
128 *Vesta v Buteher* [1989] 1 AllER 402.
129 *Atlantic Underwriting Agencies v Compagna di Milano* [1979] 2 LR 240.
130 *The Atlantic Emperor* [1989] 1 LR 548.

the English court[131]. If the arbitrators' evidential process was flawed and amounted to a serious irregularity (section 68), then the award can be challenged on that ground. If the procedure is correct, the arbitrator's conclusion on the application of a foreign law is inviolable[132]. The validity of an agreement to arbitrate must be tested by reference to the law that would have applied to it. If there is an express choice of law, it will be honored by the courts. In the absence of a choice, the courts will have to search for a choice implied by the terms of the clause itself. The agreement to arbitrate, while being a distinct agreement from the contract under which the dispute arises (section 7), nevertheless physically forms a part of the underlying agreement. A choice of law for the entire agreement is likely to be construed as equally applicable to the arbitration clause unless there is a contrary indication[133].

If the arbitration clause provides that the arbitration is to have its seat in a particular place, and there are no other indications as to its applicable law, the place of arbitration will determine the applicable law of the arbitration clause, unless the parties have agreed otherwise. The arbitrators may determine "where any part of the proceedings is to be held" (section 34.2a). Under section 100.4b English courts may refuse to enforce an award made in a NYC state if it is shown that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. Hence, if the parties have not nominated a law to govern the arbitration clause, the law of the seat of the arbitration determines the validity of the arbitration agreement. An award is made in the place of the seat of arbitration (section 100.2b). Section 104.2b is concerned only with the validity of the agreement to arbitrate, the recognition and enforcement of awards and, therefore, issues that might arise prior to the making of the awards will, be determined by the applicable law in the usual way. The law applicable to the agreement to arbitrate is relevant for the purposes of determining the validity of the agreement itself and the rules of construction to be applied to the agreement. If the arbitrators have chosen English law as the applicable law, their application of it is capable of challenge in the English courts under the rules relating to jurisdiction (sections 30–32, 67). The 1996 Act is silent on whether the arbitrators have autonomy in this regard. The choice of law of the arbitration agreement affects the jurisdiction of the arbitrators. Hence, if the arbitrators fail to apply the rules chosen by the parties, and assert jurisdiction over a matter not intended by the parties, but on an application of the rules of construction of the system of law which they have chosen to govern the arbitration agreement, they have erred on a question of jurisdiction, and the relevant provision of the 1996 Act will be applicable (sections 30–32, 67, 72–73). If the system of law chosen by the arbitrators requires a narrow construction of the clause, the arbitrators may have committed a serious irregularity contrary to section 68.2d by

131 *Callwood v Callwood* [1960] AC 659.
132 *International Trade v Kuwait Aviation Co.* [1975] QB 224.
133 *Sumitomo Ltd v Oil Commo* [1994] 1 LR 45.

failing to deal with all matters referred to them. The classification may be of great significance in that there may be in existence an exclusion agreement relating to errors of law, which prevents the operation of section 69 but not sections 67–68, which are mandatory.

The Rome Convention supplants the pre-existing choice of law rules governing all contractual obligations other than those relating to the exceptions referred to section 1.2–4. Exclusion applies only to the independent agreement to arbitrate, rather than to the underlying contract to which the arbitration clause relates. Different choice of law rules will apply to the arbitration clause and to the contract itself. It is unclear whether the Rome Convention extends to the agreement for the procedure of the arbitration. The Convention has to be applied by English courts to any dispute coming before them, irrespective of the parties' nationalities. Problems of interpretation may be referred by a national court to the ECJ for a preliminary hearing. National courts are entitled to rely upon the report on the Rome Convention prepared by Professors Giuliano and Lagarde (OJ 1986 C 282/1).

The governing law applies to the substantive issues arising under the contract, whether or not that law is English law. Arbitrations for the most part involve disputes arising under contracts. Questions of procedure are determined by English law, the *lex fori* (Article 10). The substantive validity of the main contract is prima facie the law that would have been its applicable law[134]. The applicable law of a contract subject to the Convention may be that of a non-contracting state (Article 2). An express choice will be departed from only where the choice is meaningless or offends public policy. Section 46(1)(a) of the AA 1996 requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. Under section 46.2 the choice of laws of a country is to be understood as referring to the substantive laws of the country and not its conflict of law rules. The effect of section 46.2 is to confirm the common law's refusal to recognize the *doctrine of renvoi*[135]. If the arbitrators disregard the parties' choice of law, then the error could be treated either as serious irregularity contrary to section 68.2 – excess of power otherwise than by exceeding substantive jurisdiction – or as error of law under section 69. Given that review of errors of law can be excluded by agreement under section 69, the matter should be capable of correction under the non-excludable powers of the court under section 68 to correct serious irregularity. If the parties had not chosen the law to govern their contract, the nominated seat of the arbitration was to be regarded as the best evidence of an implied choice of law[136]. An arbitration clause may permit the respondent to choose the forum for the arbitration, and in that case the choice of forum can have little relevance to the law applicable to the underlying contract itself[137]. A choice of seat of arbitration will amount to an implied choice of the law of that seat for the underlying contract, at least if there are

134 *The Parouth* [1982] 2LR 351, *Egon Oldendorf v Libera Corporation* [1995] 2 LR 64.
135 *Amin Rasheed v Kuwait Insurance Co.* [1983] 2 AllER 884.
136 *Compagnie martimes v Compagnie Tunisiene* [1971] AC 572, *The Castle Alena* [1989] 2 LR 383.
137 *The Star Texas* [1993] 2 LR 445.

no indications pointing towards any other applicable law[138]. If there is no express choice of substantive law, section 46.3 of the 1996 Act provides that "the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable". The arbitrator has to choose which conflicts of laws rules are to apply. The arbitrator must apply those rules to determine which law is the applicable law of the substantive rules of the applicable law to the dispute. Besides, English courts have jurisdiction under section 69 to hear appeals on decisions regarding matters of law and so the choice of law matter falls into the court's jurisdiction to intervene in arbitration. English courts cannot under section 69 hear any appeal on a point of foreign law. If the arbitrators choose to apply English choice of law rules, but fail to comply with the principle laid down in Article 4, they have erred in law and so there is an appeal against the arbitrators' decision on this point under section 69, although the right to seek leave to appeal can, of course, be excluded by agreement between the parties. Section 69(1) of the AA 1996 permits the incorporation by reference of an agreement containing a clause which excluded the right to appeal, without spelling out this exclusion clause in the body of the arbitration clause[139]. Section 46 does not deal in terms with a delegated choice of law. The arbitrators must comply with an express choice of law and they have the power to determine the relevant law by applying such conflicts rules as it regards as applicable if there is no such choice in agreement. It is possible to construe section 46.3 as encompassing a delegated choice of law, by reading it as covering every case in which there is no express choice falling within section 46.1, so that it would encompass not only the case in which no agreement at all was reached but also the case in which a choice was delegated. If a delegated choice of law is not a choice made with reasonable certainty, the principle of arbitrator autonomy under section 46.3 comes into conflict with Article 4 of the Rome Convention that the applicable law is the law with which the contract is most closely connected. Equity clauses or *amiable compositeur* provisions seek to relieve arbitrators from the duty to determine disputes in accordance with the strict principles of the applicable law only, but rather allow them to take a broader approach. The arbitrators themselves cannot decide to resolve the dispute in arbitration on equitable grounds unless the parties have authorized them to do so. An equity clause is effective under the 1996 Act where the agreement for the clause was entered into after 31 January 1997. There is a need for an express agreement between the parties regarding equitable arbitration and anything less is not sufficient to bring section 46.1 into play. The silence of the parties cannot trigger section 46.1b, as there is no agreement for equitable arbitration and section 46.3 states that if the parties have not agreed on the applicable law, the arbitrators must apply the law determined by appropriate conflicts rules. It could be argued that the parties have delegated to the arbitrators the power to decide the governing law, but it is difficult to see how such delegation

138 *Egon Oldendorft v Libera Corporation* N2 [1996] 1 LR 380.

139 Sukuman Limited v The Commonwealth Secretariat, case no: 2006 FOLIO 420, High Court (Queen's Bench)(27 February 2006).

permits the arbitrators to depart from a system of law as such. Where the parties have agreed that the arbitrators may adopt an equitable arbitration, then a decision by the arbitrators to use equitable arbitration rather than a recognized system of law would appear to be unchallengeable. The common law did not accept the validity of an equity clause, which in effect conferred absolute discretion on the arbitrators to disregard the terms of the contract and the law that would otherwise be applicable to the contract. This comes into terms with the scope of the 1996 Act that the courts will not rescue the parties from the consequences of their agreement.

7.2 The law governing the reference to arbitration

There is a distinction between the agreement to arbitrate and the actual reference to arbitration, the latter constituting a contract in its own right and so being able to have its own applicable law[140]. In practice courts have not stated that these two contracts have a different governing law. The plethora of different governing laws is deprecated.

7.3 The law governing the procedure of the arbitration

Is it a parties' choice or a half-mandatory arbitration? If the arbitration does have its seat in England, the mandatory provisions of the 1996 Act will apply to it in all circumstances whereas the non-mandatory provisions will apply to it unless the parties have agreed to the contrary. If the arbitration does not have its seat in England, but English law has been chosen, the English courts are not given any additional jurisdiction to intervene beyond that which is conferred upon them in respect of all foreign arbitrations. The non-mandatory provisions of the 1996 Act can be excluded by a foreign applicable law, and that law can be chosen either expressly or impliedly. An express choice of law will be honored by the courts in accordance with the common law rules on choice of law and in accordance with the Rome Convention. A choice of foreign procedural law is partly effective because such a choice cannot oust the mandatory provisions insofar as the rules of the applicable law are inconsistent with the non-mandatory provisions of the 1996 Act. If the parties have chosen a procedural law to govern their contract, the arbitrators are bound to honor that choice in accordance with section 1b—that the parties should be free to agree how their disputes are to be resolved. A party can challenge an award for serious misconduct in cases where the arbitrators failed to conduct the proceedings according to the procedure agreed by the parties (section 68.2c). English courts have limited power to assist a foreign arbitration whether or not its applicable law is English law[141]. If the arbitrators are given the express power to choose the law governing the

140 *The Amazonia* [1990] 1 LR 236, *The Bremer Vulkan* [1981] AC 909.
141 *Navieza Amazonica v Compania International* [1988] 1 LR 116.

procedure of the arbitration, they can do that and there is no conflict between the choice and their power under section 34.1 to decide procedural matters. As mentioned earlier, any choice of law will leave intact the mandatory provisions of the 1996 Act, and ousts only that which is non-mandatory and inconsistent with the rules in the law of the arbitrator's choice. Arbitration must have some connection with an accepted system of law in order to be recognized as valid in English law[142]. If England is not the seat of the arbitration, it remains possible for the parties to select English law as the curial law. Where the seat is not England but English curial law has been chosen, the court has no general jurisdiction over the arbitration, although it can exercise supportive powers under section 44 of the 1996 Act. The fact that English law is the curial law may render such intervention appropriate, as is required by section 2.3 of the 1996 Act. A delocalised award made under an international treaty is enforceable in England[143].

8 Arbitrators & the arbitral tribunal

Arbitrators derive their powers and duties from a combination of the parties' agreement, the contract between the parties and the arbitrators, and the law applicable to arbitrations as set out in the 1996 Act. The jurisdiction of the arbitrators stems solely from the arbitration agreement, which delimits the disputes to be referred to arbitration. The appointment of arbitrators will follow the parties' agreement but the law provides a variety of consensual and judicial powers of appointment in respect of arbitrators. Unless the parties have agreed otherwise, they are allowed to apply to the court to: exercise its powers to give directions as to the making of appointments (section 18(3)(a)); direct that the tribunal be constituted by such appointments (section 18(3)(b)); revoke any previous appointments (section 18(3)(c)); or make the needed appointments itself (section 18(3)(d))[144].

The procedure to be adopted by the arbitrators is a matter for them to decide, although the parties may dictate some points and in particular the parties may provide for submission to some form of institutional arbitration under the auspices of an international organization or a trade association, in which case the rules are set by the institution itself. All procedures are subject to the overriding requirement of English law that the arbitrators must act fairly and without bias, and the court is given powers to remove arbitrators who offend against the status of arbitrators as either fully contractual or fully statutory[145]. Moreover, the English AA 1996 allows parties to petition the courts to remove an arbitrator "if circumstances exist

142 *Bank Mellat v Helliniki Techniki* [1984] QB 291, *Coppee-Lavalin v Ken-ren Ltd* [1994] 2 AllER 449.

143 *Dallal v Bank Mellat* [1986] 1 AllER 239 *Harbour Assurance Ltd v Kansa* [1993] 1 LR 455.

144 *Through Transport Mutual Assurance Association (Eurasia) Ltd. v New India Assurance Co. Ltd.* [2005] AllER (D) 351.

145 *Norjarl Als v Hundai Ltd* [1991] 1 LR 524.

that give rise to justifiable doubts as to his impartiality". English courts have also held that arbitrators and judges must adhere to the same standard of impartiality. Additionally, the English courts apply two tests to ascertain impartiality. The first is known as the "actual bias" test. Actual bias is hard to prove and practically never invoked. The second is an "apparent bias" test. This test is based on facts and circumstances, which would indicate that there might be grounds for bias[146]. Bias or partiality may not only result from an arbitrator's relationship with one of the parties or a party's counsel, it can also be a function of an arbitrator's prior involvement in a similar case, or his previously published opinions. For instance, the arbitrator's direct contact with witnesses is, on an objective test, biased and so the court removed him from the case[147].

An appeal may be made to the High Court on any question of law arising from an award given in pursuance of an arbitration agreement. If the parties do not agree to appeal, leave must be sought from the commercial court. Moreover, appeals under section 69 are to go to a commercial judge and the commercial court transfers appeals and applications for leave to appeal to an official referee[148]. In *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*[149] *t*he parties agreed there would be an appeal from an arbitrator's award under section 69 of the AA 1996. Although there is a line of authority that usually the only admissible evidence in an appeal is the award itself, Jackson J held that the court should also receive any document referred to in the award which the court needs to see to determine a question of law arising out of the award (in this case, correspondence between the parties which the arbitrator did not reproduce in his award). He also held that the general principle of non-intervention in the Act did not apply to consensual appeals. Jackson J concluded that the arbitrator had come to the right conclusion and he denied he had jurisdiction to review factual questions that are dressed up as questions of law. Thus arbitrators do apply the law. The fees payable for the service of an official referee as arbitrator are to be taken in the High Court. An official referee acting as arbitrator actually has the same powers as a High Court judge.

Arbitrators can be given the exclusive power to determine the legal consequences of all of aspects of the dispute between the parties; whether or not such power has been given depends upon the proper construction of the arbitration agreement and upon whether the power of the courts to review a decision for error of law under section 69 has been excluded. The exception relates to the very jurisdiction of the arbitrators to hear the dispute. A question of jurisdiction can be any of the following: firstly, whether there is a valid arbitration agreement,

146 *R v Bow Street Magistrate, ex parte* Pinochet (No 2) [1999] 2 WLR 272. *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas. 759. R. v Gough [1993] AC 646. *AT&T v Saudi Cable* [2000] 1 Lloyd's Rep. 22; [2000] AllER (D) 657.

147 *Norbrook Laboratories Ltd. v (1) A Tank (2) Moulson Chemplant Ltd*. [2006] EWHC 1055 (Comm)

148 *Tate & Lyle Ltd. v Davy Mckee Ltd.* [1990] 1 AllER 157.

149 [2006] EWHC 727 (TCC).

secondly, whether the tribunal is properly constituted, and thirdly, what matters have been submitted to arbitration in accordance with the arbitration agreement. An arbitrator deals with those disputes that have accrued at the date of the reference to arbitration, and the arbitrator cannot reserve to himself/herself the power to adjudicate upon any future differences that might arise between the parties. The arbitrators are permitted to proceed to determine their own jurisdiction over a dispute by means of an award (section 30)[150]. The 1996 English AA provides that, should the parties' appointment procedure fail, the court should have regard to any agreed qualifications of arbitrators, but again there is no requirement on either the parties or the court to appoint legally qualified arbitrators and section 24 of the English AA further provides that an arbitrator, may be removed by the court at any time on the ground that he/she "does not possess the qualifications required by the arbitration agreement."

If arbitrators decide that they have jurisdiction and they proceed to an award, that award may be challenged under section 67[151]. If no objection is taken by either party to the arbitrators' assertion of jurisdiction to determine their own substantive, the parties are deemed to have waived their right to object by virtue of section 73.2. Hence, parties cannot subsequently seek to challenge the award for want of jurisdiction under section 67. As mentioned earlier, a party can contest jurisdiction by refusing to participate in the arbitration proceedings and he retains the right to challenge the award on jurisdictional grounds under section 67, to contest the enforcement of the award under section 66 or to seek injunctive or declaratory relief at any stage. Hence, an arbitrator's view is under review by a court at any moment during arbitration proceedings. Moreover, a party can participate in the arbitral process and raise an objection to the asserted jurisdiction of the arbitrators. The party's objection must be made before he has taken a step in the proceedings or as soon as he is aware of a jurisdictional issue. If the objection is not raised at the proper time, and the tribunal refuses to extend time under section 31.3, the objection is invalid and the party is deemed to have waived the jurisdictional issue under section 37. Where there has been a timely, the arbitrators can either make a preliminary award or proceed with the arbitration and deal with the issue by means of an award on the entire dispute. On the one hand, if the arbitrators make a preliminary award, there can be an appeal against the award on the basis of want of jurisdiction, and a failure to appeal against the award within the time limits laid down by section 67 will deprive the applicant of any right of challenge. On the other hand, if the arbitrators proceed without dealing with the objection regarding

150 Under section 30 of the AA 1996 arbitrators can resolve the jurisdictional question for themselves and the losing party can appeal against the arbitrators' ruling on jurisdiction under section 67 of the Act. Under section 67 of the Act a party can apply to the court to challenge any arbitration award as to its substantive jurisdiction, or for an order declaring an award made on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. Challenging an arbitration tribunal's jurisdiction *Oceanografia Sa De Cv V Dsnd Subsea As [2006]* EWHC 1360 (Comm).

151 *Oceanografia Sa De Cv V Dsnd Subsea As* [2006] EWHC 1360 (Comm).

their jurisdiction then a party may use section 67 to challenge the validity of the award on jurisdictional grounds. The parties can agree to allow a preliminary ruling on jurisdiction to be made by the court (section 32). The rationale of section 32 is clearly that if a matter has been left by the parties for determination by the arbitral tribunal, the court should not interfere: in that way it is an expression of the principle in section 1(c) of the Act.

The parties can agree that jurisdictional issues are beyond the arbitrator's competence. While a restricted arbitration clause can prevent the arbitrators ruling on the validity of the main agreement, it cannot affect the other matters constituting substantive jurisdiction referred to in section 30. Hence, the arbitrators have the power to determine their jurisdiction, but their ruling is open to challenge in the courts. Section 67 sets out the procedure whereby the validity of an award can be challenged on the ground that the arbitrators did not possess the necessary jurisdiction to make an award. The section replaces the inherent power to the court to set aside an award made without jurisdiction, by incorporating that power into the statutory regime. Section 67 covers both questions of fact and of law, which touch upon jurisdiction. In particular, section 67 is independent of any right which a party might have to challenge the proceedings by seeking injunctive or declaratory relief to the effect that the arbitrators had no jurisdiction, or to resist recognition or enforcement of an award on the basis of want of jurisdiction. Besides, section 72 saves the right of a non-participating party to seek injunctive or declaratory relief and section 66.3 states that leave to enforce an award shall not be given by the court, where the arbitrators lacked jurisdiction.

If the parties have excluded the arbitrators' obligation to give reasons, such an agreement operates as an agreement to exclude the right of the court to review an award on point of law. A party can lose the right to object if the party takes part in the arbitral process without making any objection that the arbitrators lack jurisdiction within the time allowed by the agreement. The principle does not apply where the party can show that he did not know and could not with reasonable diligence have discovered the grounds for the objection. On the one hand, section 73.1 brings waiver into play, unless the party can show that he did not know and could not with reasonable diligence have discovered the problem. Parties must exhaust all possible recourse to the arbitrator before applying to the court, as they are required to do by section 73(1) of the AA[152]. The burden of proof is on the applicant. On the other hand, section 73.2 prevents the party from reopening the question of the validity of the award unless he has sought to challenge it either under the agreed arbitral procedure or by means of an application under section 67. However, the court can, under section 67.3, make an order confirming the award, varying the award or declaring null the award in whole or in part. If the award is made without jurisdiction, the entire award must be set aside. If the award is varied, the variation imposed by the court takes effect as part of the award itself. Where the arbitration clause is in *Scott v Avery* form then the court makes a ruling in favor of

152 *Sinclair v Woods of Winchester* [2005] AllER(D) 194 (July).

the applicant by declaring the award to be ineffective in whole or in part. It may nullify the clause insofar as it relates to the issue to be resolved by the court. Under the 1996 Act the court's power is extended to challenges on the basis of jurisdiction and error of law, but it is no longer possible to strike out the clause itself. The leave of the court is required for any appeal from the decision of the court, and such leave may include an order for security for costs (sections 71.4, 70.8).

A person who fails to appear before the arbitrators, even to contest their jurisdiction, will not thereby prevent them from entering upon the reference and making an award against him. The arbitrator has statutory authority to proceed *ex parte* in the face of a refusal to appear. Where a person alleged to be a party to arbitral proceedings takes no part in the proceedings, he may seek injunctive or declaratory relief at any stage in the proceedings. Section 72 does not deal with the pre-existing right of a party not to seek to take positive steps against the proceedings on the award, but rather to contest its enforcement against him in subsequent judicial proceedings brought by the other party. On the one hand, a challenge to the proceedings could be made directly, by seeking injunctive or declaratory relief to the effect that the arbitrators had no jurisdiction. On the other hand, a challenge to the ultimate award could be made directly by injunctive or declaratory relief against the award, or indirectly, by contesting of proceedings in which the victorious party sought to have the award recognized or enforced. Leave to enforce an award is not to be given by a court where the party against whom it is sought to be enforced shows that the arbitrators lacked jurisdiction. The common law recognized the right of a party to appear before the arbitrators without conceding that he had accepted their jurisdiction. So, he was entitled to contest the validity of the award in enforcement proceedings brought against him. He could seek declaratory relief to the effect that the award was not binding on him. Section 31 confers a statutory right upon a person to appear under protest, which is a mandatory provision—but it is subject to the general principle in section 73 that a right to object can be lost by waiver. The result of law is to lay down a procedure under which an objection can validly be made by a party who appears in the proceedings. The court has no power to extend the time under section 79, which might lead to a reference to the court at an early stage, and runs contrary to the non-interventionist approach of the Act.

Furthermore, the court has no jurisdiction to make a preliminary ruling unless it is satisfied that the conditions set out in section 32.2b are met, namely that: firstly, the determination of the question is likely to produce substantial savings in costs, secondly, the application was made without delay and thirdly, there is good reason why the matter should be decided by the court. There is no appeal from the court's decision as to its jurisdiction in respect of these points unless the court itself gives leave to appeal. The ultimate ruling by the court is to be treated as a judgment (section 32.6). A party who objects to an assertion of jurisdiction by the arbitrators has the right to apply to the courts on the basis that, as a matter of contract, the arbitrators have no right to proceed with the hearing.

The effect of Schedule 2 is to allow a judge-arbitrator to exercise powers not otherwise available to an arbitrator in the event of an order of the courts, and to remove the narrow range of supervisory powers that the court would otherwise possess over ordinary arbitrators. Hence, two levels are established—arbitrators, and judges as arbitrators, conveying with them the status of judges—and the latter does not comply with the idea of voluntary arbitration. In other words, courts conquer arbitration once more via judges-arbitrators. Has the old fear of losing jurisdiction from the expansion of arbitration resurfaced, with courts planting themselves directly in the heart of arbitration in a more effective way? The court is empowered to consider and adjust the arbitrator's fees or expenses, order the entitlement of the arbitrator to fees following removal by the Court of Appeal (section 24), and grant relief to resigning arbitrator (section 25). An arbitrator may also make a peremptory order in respect to the conduct of the parties to the arbitration, and seek its enforcement by application to the court. A judge-arbitrator may himself enforce (section 42–44) any peremptory order as an alternative to application to the court. Where a judge-arbitrator opts to enforce the order himself, his actions are treated as having been carried out by the court. The court can extend the time granted to the arbitrator for the making of his award; in the case of a judge-arbitrator (section 50), that power can be exercised by the judge-arbitrator, and any appeal goes to the Court of Appeal with the leave of that court. Additionally, the parties can apply to the court for it to determine the amount of fees and expenses properly payable. A judge-arbitrator has the power to withhold delivery of the award pending payment. There is an appeal to the Court of Appeal from any decision of the judge arbitrator (section 56). Where the arbitrators do not determine the recoverable costs of the arbitration, a party can apply to the court for a determination. In the case of a judge-arbitrator, the application must go to the High Court. Any question as to what are reasonable fees and expenses may be dealt with by an application to the Court. A judge-arbitrator may do this for himself, subject to the powers of the Court of Appeal (section 64). The leave of the court is required for the enforcement of an award: a judge-arbitrator may grant such an order himself (section 75). An application may be made to the court for an order charging property to secure a solicitor's costs. A judge-arbitrator may exercise this power. A judge-arbitrator may himself make the appropriate order for service of documents, subject to appeal to the Court of Appeal, with its leave. The 1996 Act states that a judge-arbitrator can be removed for delay, inability to proceed or lack of impartiality. There are no statutory restrictions on the persons who can be appointed as arbitrators. The court has the power to remove an arbitrator who is not impartial, who is physically or mentally incapable of conducting the proceedings, or who has refused or failed to act properly in the conduct of the proceedings or to use all reasonable dispatch. Furthermore, the court can remove an arbitrator at any time on the ground that they do not possess the qualifications required by the agreement (section 24). The right of a party to challenge an award on the basis of section 24.1b remains, as long as it will not be lost by reason of waiver since the party has registered an objection forthwith or withdrawn from the proceedings. For instance, in *Three Shipping Ltd.*

v Harebell Shipping Limited[153] the court found that if an arbitration clause gives one party "better" rights in the form of an arbitration option, the advantaged party has the right to exercise that option by seeking a stay of court proceedings commenced by the other side. However, if the advantaged party takes a step in the court action or leads the other party to believe that it will not exercise its arbitration option, it may be deemed to have waived its right to arbitrate. Section 30.1b treats the proper constitution of the arbitral tribunal as a matter going to jurisdiction, and so the rules challenging an award for want of jurisdiction apply. Where it falls to the court to appoint an original or replacement arbitrator, the court must have due regard to the parties' agreement on qualifications (section 19). It is possible to treat a failure to object and subsequent acquiescence as an ad hoc agreement to vary the arbitrator's required qualifications, providing that there is writing in accordance with section 5.1 of the 1996 Act[154]. An application to remove a judge-arbitrator (section 24) and an application by a judge-arbitrator for relief from liability after resignation (section 25) would both have to be made to the Court of Appeal (section 93).

The impartiality of arbitrators is crucial to the entire arbitration process. There is no mechanism for ensuring that only impartial arbitrators are appointed in the first instance. The court has various default powers where there has been no agreement or for some other reason no appointment has been made (sections 17–18). A party can make an application to the court under section 24.1a to remove the arbitrator on the basis of justifiable doubts as to impartiality. For instance, the fact that an arbitrator was a barrister located in the same chambers as one of the advocates in the case was not sufficient ground to give rise to justifiable grounds as to the barrister's impartiality. Actual or apparent bias (for example, the doctrine of *nemo judex in sua causa*: that no one must be judge in his own cause) was required[155]. When a court exercises its default powers, it must have regard to any agreements by the parties as to any qualifications required of the arbitrators[156]. The general waiver provision appears not to apply to section 24.1a unless there has been actual irregularity in the conduct of proceedings or unless impartiality forms a part of the arbitrator's qualifications to be appointed, by virtue of the agreement between the parties. The court in *Rustal Trading Ltd v Gill & Duffus*[157] held that section 24 laid down an objective test, which reflected the position at common law[158] and the common law principles should be adopted in the context of arbitration. The court must make its

153 *Three Shipping Limited v Harebell Shipping Ltd.* [2004] EWHC 2001 (Comm).

154 *Pan Atlantic Group Inc. v Hasseh Ltd.* [1992] 2 LR 120.

155 *Thomas Dobbie Thomson Walkinshaw & Ors v Pedro Paulo Diniz Qbd* (Commercial Court), Thomas J., 19/5/99, *R v Gough* (1993) 2 WLR 883; *R v Bow Street Magistrates, ex parte Pinochet* (No 2) (1999) 2 WLR 272; *Pilkington plc. v PPG Industries Inc.* (1989) (Unreported, 1/11/89); *Nye Saunders & Partners v Bristow (1987) ILR 13/4/87, Cathiship S.A. v Allansons Ltd (1998) 3 AllER 714 and Grimaldi Compagnia di Navagazione SpA v Sekihyo Lines Ltd (1998) 3 AllER 943.*

156 *Cook International Inc v BV and Meadows* [1985] 2 LR 225.

157 [2000] 1 LR 14.

158 *R v Gough* [1993] AC 646.

judgment on the basis of the circumstances as it found them to exist, and was not concerned with whether the arbitrator did or did not in fact allow his mind to be affected by them. The circumstances must be such as to objectively justify genuine doubts as to the arbitrator's impartiality. A legal right is to be taken as having been waived where a party with knowledge of his right and of its infringement fails to take steps to enforce that right. There is the possibility that a party could challenge the award itself by reason of the arbitrator's want of impartiality if the arbitrator's impartiality was required by contract—the challenge might be made on the ground that the arbitrator lacked jurisdiction. Additionally, a challenge can be made on the basis that the arbitrator has failed to comply with the general duty under section 33 to conduct the arbitration impartially. It would have to be shown that the arbitrator failed to conduct the arbitration fairly, and not merely that the arbitrator had some form of personal interest in the outcome. Even an assertion of actual unfairness might be dismissed if no objection was raised at the relevant time. It is possible for the parties to agree on a procedure whereby allegations of lack of impartiality can be resolved at the appointment stage itself. Each arbitrator must, prior to any disagreement, act judicially and therefore impartially. An arbitrator whose partiality is reasonably in doubt may be removed (section 23) by the parties acting jointly or by an injunction or other person vested with the power, or by the court (section 24). A tribunal that found itself forced to resign because the agreement of the parties was seen as incompatible with its section 33 duty could apply for relief from liability and an order with respect to entitlement to fees and expenses. If the court was satisfied that the resignation was reasonable, relief might be granted. Any arbitrator is free to resign, and may then apply to the court for relief from any liability incurred prior to resignation.

English law has recognized the principle that judges are immune from suit at the instance of dissatisfied litigant or defendant and this principle was extended to all judges by the Court of Appeal in *Sirros v Moure*[159]. The crown itself is not vicariously liable for the conduct of a judge. The principle applicable to the judiciary has been established in the context of arbitrators[160]. Common law immunity applied only where the arbitrator was required to act in a judicial fashion. Liability in damages appeared to arise, as is the case with judges, only in the event of positive bad faith on the part of the arbitrator[161]. Section 29 has codified the common law principles conferring immunity upon arbitrators. The immunity covers both contractual and torts liability. The law of contract is the principal means by which the courts have exercised control over the conduct of professionals[162].

159 [1975] QB 118.

160 *Arenson v Casson* [1975] 3 AllER 901.

161 *Saif Ali v Sydney Mitchell Co.* [1980] AC 198.

162 *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 W.L.R. 118, *Smith v Eric S. Bush* [1990] 1 A.C. 831, *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, *Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp* [1979] 1 Ch. 384, *Sutherland Shire Council v Hayman* (1985) 60 A.L.R. 1, *Luxmoore – May v Messenger May Baverstock* [1990] 1 W.L.R. 109, *Roberts v J. Hampson & Co.* [1990] 1 W.L.R. 94, *Watts v Morrow* [1991] 4 AllER 937, *Swingcastle Ltd*

An arbitrator may be stripped of his entitlement to fees if they are removed for cause under section 24, and the arbitrator may be left facing an action for breach of contract in any of the limited situations in which the immunity does not apply. Where an arbitrator voluntarily resigns, not only may the court strip the arbitrator of any fees but the arbitrator will also lose the automatic exemption from liability (section 29). The arbitrator's immunity can be reinstated by the court to the extent thought appropriate in the light of the reasonableness of the arbitrator's resignation. An arbitrator removed by the court does not lose immunity from suit unless the arbitrator has acted in bad faith or has failed to act within the ambit of arbitratorial functions.

The general statements in section 33 are far from exhaustive of the duties of arbitrators. The parties can impose upon the arbitrators whatever time limits the parties think appropriate for the completion of the arbitration proceedings and the making of an award. If there is a failure to comply with section 33, which in the opinion of the court will cause substantial injustice unless the court acts, the court has the power to remit the award to the arbitrators, to set the award aside or to declare it to be of no effect where the arbitrators have acted without jurisdiction (section 68). The court has the discretion to hear the matter itself by refusing to stay its own proceedings. A party can apply to the court for an order removing the arbitrator on the basis that the arbitrator has failed to conduct the proceedings or make the award in time. The applicant must first have exhausted any right to apply to the arbitrator for it to act. A single procedure for applying to a judge in chambers for the removal of an arbitrator is set out in RSC. The court cannot refuse an application on the ground that it cites the wrong subsection of section 24. In the absence of any agreement between the parties regarding time, the 1996 Act does not impose upon the arbitrators any specific time within which the award must be made. It could be said that the 1996 Act's intention is to signpost a move away from arbitrations that resemble court proceedings. The court has the power to remove dilatory arbitrators. It is the duty of the arbitrators to give notice, and if they fail to do so, any party to the proceedings can apply to the court for an order that the umpire is to replace the arbitrators and has the power to proceed with the reference. The court has discretion to allow the arbitrator to retain some element of remuneration. In practice, the court might strip the arbitrator of all fees and expenses and require the arbitrator to repay such sums as had been received prior to the arbitrator's removal. The removal of an arbitrator does not take effect until an order has been made, and pending the hearing of the application by the court the arbitrators are entitled to continue the proceedings and make an award. If an application to the court is made, and this prompts action by the arbitrators resulting in the making of an award, the court appears to no longer have the jurisdiction to remove the arbitrators for delay.

v Alastair Gibson [1991] 2 W.L.R. 109, *Hipkins v Jack Cotton Partnership* [1989] 2 E.G.L.R. 157 and *Syrett v Carr & Neave* [1990] 2 E.G.L.R. 161. *Hayes v Dodd* [1990] 2 AllER 815.

It is unclear whether the parties are jointly and severally liable for the arbitrator's agreed fees and it could be agreed that joint and several liability under section 28.1 applies only to that proportion of agreed fees which the court regards as reasonable[163]. A party can apply to the court for the amount of the arbitrator's fees and expenses to be adjusted by the court (section 28). So, section 28 applies both where the arbitrators have made a determination that the losing party wishes to contest, or where they have failed to make a determination at all and the victorious party seeks a determination. Where the arbitrators refuse to release the award until they have been paid, the court has the power to consider and adjust the arbitrator's fees on condition that the applicant pays the requested sum in court in order to secure the release of the award. The court's specific power of adjustment under section 56.2 adds little to its general power of adjustment under section 28.2. Prepayment by a party in order to secure the release of the award does not preclude an application to the court (section 28). Should the court conclude that the amount paid is excessive, it can order the arbitrators to repay a part of the sum paid. The arbitrators have a lien over the award for their costs, entitling them to retain the award and release it on the payment of their costs. The losing party may have some incentive in taking up the award, where the party suspects that they have grounds to challenge the award on the basis of error of law, serious irregularity in the conduct of the proceedings, or want of jurisdiction. If neither party moves to take up the award, the lien is valueless and it will be necessary for the arbitrators to resort to legal action. The court does not have the power to adjust the arbitrators' fees where there is a written agreement fixing the amount of fees (section 56). Section 56.4 precludes any application to the court if there is some other agreed method of assessing the arbitrator's fees and expenses. The court can order a sum less than that claimed by the arbitrators for fees. Leave of the court is required for an appeal, although no leave is required for an appeal under the general provisions of section 28. Section 23 removes the right of a party to apply to the court for the revocation of his arbitrator's authority. In the absence of an agreement an arbitrator can be removed only by an application to the court (section 24), in which case good cause must be shown (section 23). In fact, the court is, involved frequently in arbitration, which does not comply with the view of arbitration being a uniquely independent and alternative dispute resolution mechanism.

Where the parties have not opted for a single arbitrator, they are likely to have agreed that they shall each appoint an arbitrator. In the absence of agreement, or an agreed procedure, and where there are more than two parties, the court under section 18 will make the appointment of the chairperson. The court has power pursuant to section 79 to extend the time limit in subsection 2 within which the defaulting party must act. It may set aside the sole appointment under subsection 3. No grounds are prescribed upon which the court should exercise its discretion under subsection 3 to set aside the appointment of a sole arbitrator

163 *Turner v Stevenage Council* [1997] ADRLJ 409.

pursuant to section 17. The court only has power to the extent that any agreement between the parties does not cover the events that have, or have not, occurred. Any application must be made upon notice in accord with rules of court applying to the originating process. The court has great flexibility and it may confirm appointments already made as constituting the tribunal, or revoke appointments already made, or give directions. As shown earlier, the court is required to have due regard to any agreement of the parties as to the qualifications required of the arbitrators. The court directs one of the parties either to initiate some process for making an appointment or to make an appointment that it had failed to make. Moreover, the court may use this power prior to making an appointment itself. The court must take into account any agreement of the parties as to the qualifications required of the arbitrators. Furthermore, the court's exercise of its powers under section 18 will be subject to appellate review in appropriate cases. Failure by the arbitrators to give notice of disagreement and so vest power in the umpire at the appropriate time, will permit any party to the arbitral proceedings to apply to the court for an appropriate order. Where only one of the parties seeks the termination of the arbitrator's appointment, they may do by applying to the court for the arbitrator's removal. The court exercising a power either under section 18 or section 24 will effectively revoke the arbitrator's authority, and such revocation takes effect notwithstanding the fundamental principle of irrevocability (section 23). The applicant must show substantial injustice to their application in order to justify removing the arbitrator. The consequences of resignation as between the parties would have to be the subject of an agreement between them or be determined by the court (section 25). If the tribunal is a judge-arbitrator, they may exercise the power of the court to order the consideration and adjustment of fees under subsection 2. A party losing on arbitration will not be able to re-open the issues by alleging negligence on the part of the arbitrator and bringing proceedings against the arbitrator. If arbitrators were not immune from such actions and they were exposed to an open-ended liability for the parties, considerable harm would be done to the finality of the arbitral process. The parties are not able, by agreement between themselves, to deprive the arbitrator of this protection. The arbitrators may apply to the court for relief from liability, together with an order with respect to their entitlement to fees and expenses under section 25.3. Moreover, parties can agree that the arbitrator should not be able to grant a remedy (such as injunctions) and the parties are, therefore, free to apply to the court for injunctive relief[164]. Consequently, if the parties to an arbitration clause want to exclude certain remedies totally, they will need to use very clear wording in their clause to achieve that end.

The power to award interest is contained in section 49 of the AA. Section 49 applies to statutory arbitrations by virtue of section 94, the arbitrator did not have power to award interest for the period before it became payable under the express provisions of the Regulations; and that, if he did have such power under the

164 *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm).

AA 1996, they erred in principle in awarding such interest, in circumstances where it was not made payable under the Regulations[165].

An arbitrator could use knowledge that one would reasonably expect the arbitrator to have acquired, given that the arbitrator was presumed to be experienced in the letting and valuation of properties of a similar nature[166]. Arbitrators should be at liberty to appoint experts to assist them in resolving the dispute between the parties. Failure to appoint an expert where a technical matter has arisen might of itself amount to a failure by the arbitrators to conduct the arbitration fairly in accordance with section 33. On the other hand, it could be argued that arbitration is chosen by parties because arbitrators are experts in the field, and there is no need for additional experts—in this respect not matching or and being a copy of litigation. In *Egmarta*[167] arbitrators had rejected Egmarta's application to submit expert evidence to assist the tribunal on the grounds that they had sufficient expertise to deal with the matters in dispute. There was nothing to suggest that they did not have the requisite expertise or that they would not have allowed *Egmarta's* expert evidence if they had felt unqualified to deal with the matter. There was nothing that could possibly be characterised as a substantial injustice by their refusal to allow this evidence to be put before them. Under section 37(1) of the AA 1996 the tribunal may, unless the parties have agreed otherwise, appoint an expert, and may allow an expert to attend proceedings. However, section 37(1)(b) provides: The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person. A tribunal should generally not hear evidence in the absence of the parties and so consultation with the experts should not take place after the close of the hearing or otherwise in the absence of the parties, as this deprives the parties of their right to comment. If the arbitrators fail to adopt judicial guidelines, they will have erred in law, and any award striking out the action can be challenged on a point of law under section 69[168], assuming that the power to challenge has not been excluded by agreement in writing, or on the ground of serious irregularity under section 68[169]. If the arbitrators have misapplied the guidelines in refusing to strike out the claim, the party can either await the final award challenging it on

165 *Durham County Council v Darlington Borough Council* [2003] EWHC 2598 (Admin).

166 *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 Jonathan Parker LJ in Warborough *Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 "the courts should accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions".

167 *Egmarta v Marco Trading Corporation* [2000] ADRLJ 261.

168 *North Range Shipping Ltd. v Seatrans Shipping Corporation* [2002] EWCA Civ 405 www.courtservice.gov.uk. Section 69 of the AA 1996 severely limits the right of appeal to the courts. Section 69(5) enables the court determining an application for leave to appeal to do so without a hearing. *In Mousaka Inc.v Golden Seagull Maritime. Inc.* [2002] 1 WLR 395 David Steel J at p. 404 said that his practice was: "To go further than merely refusing leave (with or without express reference to the statutory criteria) and to give some reasons why I had concluded that the arbitrators were correct (or at least not prima facie wrong) on the merits."

169 *Profilati Italia S.R.L. v Painewebber Incorp.* 2000 Folio 424. www.courtservice.gov.uk. A challenge to an arbitration award under section 68 of the AA 1996. *Petroships Pte Limited*

the ground of error of law or serious irregularity in the proceedings, or can apply to the court under section 24, seeking the removal of the arbitrators. Arbitrators can refer, or consent to a party referring, a preliminary point of law to the court under section 45. The court is unable to intervene concerning any ruling by the arbitrators as to whether or not the guidelines have been satisfied on the facts[170].

8.1 Removal of arbitrator by the court

An application to the court for the removal of an arbitrator is to be made in the usual form under the RSC procedure. Any decision by the court is subject to appeal only with the leave of the court. The 1996 Act does not confer any power upon the court, having removed an arbitrator, to do away with the arbitration agreement itself. The financial consequences for the removal of an arbitrator rest in the hands of the court, which may make such order as it thinks fit with respect to the arbitrator's entitlement to fees and to the possible repayment of fees previously received by him from the parties. English law has conferred upon the parties a good deal of autonomy in the number of arbitrators and as to the procedure for their appointment. Section 18 confers upon the court discretion to make an appointment in any situation in which there is no other appointment procedure. If one of the parties refuses to assist in making the necessary appointment, the court will have jurisdiction to make an appointment so the arbitration can go ahead. The power of the court to appoint an arbitrator where the agreed procedure has failed is discretionary and the court may refuse to exercise it in the applicant's favour in appropriate circumstances[171]. The court can, in the event of the failure of the appointment procedure, give directions for the making of the appointment. An appeal will be allowed to proceed by the judge where an important point of law relating to the hearing of the statutory provisions arises. The parties are free to agree on a number of arbitrators. The courts will enforce any agreement on arbitration and are able to implement the agreement by use of the machinery in the 1996 Act. The presumption in section 15.3 in favour of a single arbitrator ensures that any ambiguity in the arbitration clause will lead to the appointment of a single arbitrator[172]. The main effect of section 16.3 is to impose a time limit within which the parties must agree a candidate and make an appointment. As mentioned

of Singapore v Petec Trading and Investment Corporation of Vietnam and Others Respondents, 2001 Folio 339. First, an application pursuant to section 68 of the AA 1996 challenging the award on the basis of alleged serious irregularities affecting the proceedings which are alleged to have caused a substantial injustice to Petroships. Second, an application pursuant to section 69(2)(b) of the AA 1996 for leave to appeal on points of law. Third, an application pursuant to section 24 of the AA 1996 to remove all three members of the tribunal on the basis that the tribunal allegedly failed to properly conduct the arbitration and that a substantial injustice has been and will be caused to the claimants, justifying removal. *Rizwan Ali Bhai & Anor. v Black Roof Community Housing Association Limited Case* No: B2 1999 1197 CCRTF.

170 *James Lazenby v McNicolas Ltd* [1995] 2 LR 30.

171 *The Frotamorte* [1995] 2 LR 254, *The Sargasso* [1994] 1 LR 162.

172 *The Voltaz* [1997] 1 LR 35, *The Villa* [1998] 1 LR 195.

above, a party can apply to the court to exercise its general powers to extend time limits in the 1996 Act. Any party can make the application with notice to the other parties, by making them parties to the proceedings and serving on them the arbitration application and the supporting affidavit. The exhaustion of any agreed procedure regarding the appointment of arbitrators would appear to go to the court's jurisdiction to hear an application. An application may only be made to the court where the agreed procedure has failed (section 18.2). A party can apply to the court requesting the court to exercise its powers to break the deadlock. The court's jurisdiction is triggered by the expiry of the 28-day period. The court can either rule directly as to the making of any necessary appointment or make any necessary appointment itself. Where an appointment is made, it takes effect as if the parties had agreed to it. There is an appeal against the court's decision, but only with the leave of the court itself. The court may order the applicant to provide security for the costs of the application. The court cannot require security for the costs as a precondition of the exercise of its functions. The court in *Villa*[173] case held that the court's jurisdiction was limited to the appointment of a sole arbitrator. The Queen's Bench Division (Commercial Court) exercised its discretion under sections 15(3) and 18(3) of the AA 1996 to appoint a sole arbitrator where the contract did not specify any kind of tribunal and the parties had failed to agree on an appointment. The applicant had served a letter on the respondent proposing the appointment of one of three named arbitrators as sole arbitrator to resolve disputes arising under a charter party, but the respondent had failed to respond within the statutory period of 28 days. The court held that service of the letter was sufficient to commence arbitration proceedings within the jurisdiction, which had not been abandoned despite subsequent correspondence between the parties. The court also rejected the respondent's contention that the complexity of the dispute justified the appointment of a three-person tribunal, holding that under section 15(3) of the AA 1996, the court must, if it appoints at all, appoint a single arbitrator.

The ability of a party to apply to the court in the event of the failure of the appointment procedure is consistent with established international principles (Model Law Article 11.3). The court's default powers apply where a third party charged with the appointment of an arbitrator fails to fulfil its duty. An application to the court at any time before the agreed time has expired is premature because the court can exercise its powers only insofar as there is failure of an agreed procedure. Section 17 procedure shows where the arbitration agreement is silent regarding the number of the arbitrators, but the court concludes that the presumption in favor of a sole arbitrator is ousted as the parties intended the issue to go before two arbitrators. Section 17 procedure can be replaced with a contractual provision which must itself be exhausted before any application can be made to the court under section 18. In making any appointment, the court has to take into account any qualifications for arbitrators agreed by the parties (section 19). There is an appeal against the

173 *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA*, ("The Villa"), [1998] 1 Lloyd's Rep. 195 (Q.B.D., Comm.Ct.).

court's decision, but only with the leave of the court itself. Where an arbitrator has been appointed by one party, the court can maintain that appointment by treating the arbitrator as the sole arbitrator, maintain the appointment and appoint another arbitrator or remove the appointee and give directions for the appointment of a new tribunal. If a court has appointed its own arbitrators, the defaulting party may have some argument at the award stage that they have been treated unfairly, and the successful party may have some difficulty in persuading a foreign court to enforce the award in their favor. In every case involving a dilatory or non-performing arbitrator it is necessary to apply to the court for their removal under section 24, and any such application can be followed with an application for the appointment of a replacement where the replacement cannot be agreed between the parties. The right of a party to challenge arbitration proceedings on any ground is left unaffected by the reconstruction of the tribunal. It may be necessary to have recourse to the court if for any reason the procedure for the appointment of an umpire fails. The court has the power to revoke any appointment made and to make any necessary appointments itself. Moreover, the court may dismiss any remaining arbitrators and leave the matter to the umpire, or it may appoint a replacement arbitrator so that the proceedings before the arbitrators can begin again. The court has a default power to ensure that an umpire is appointed following a disagreement between the arbitrators which is not followed by a consensual appointment. In *Laker*[174] the judge addressed the question of whether a barrister appointed as arbitrator should be removed because a barrister from the same chambers had been instructed in the same matter by one of the parties. Rix J had to apply an objective test under section 24, namely whether circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality in the same way that a judge is disqualified if there is a real danger that the judge is biased[175]. It is often the case that one member of a barrister's chambers appears as counsel before an arbitrator who comes from the same chambers. The existence of common premises does not itself justify legitimate doubts as to whether there is dependence between the barristers sharing those chambers. There is not a list of factors that may or may not give rise to a real danger of bias. So, everything will depend on the facts, which may include the nature of the issue to be decided.

In *Kesley Housing Ltd v Ruddly Developments Ltd.*[176] the court was satisfied that the arbitrator had not displayed a level of incompetence that would have caused a reasonable person to lose confidence in the artbitrator. Breach by the arbitrators of a parties' agreement regarding the procedure is a ground upon which courts can refuse to enforce an award made in a foreign jurisdiction (section 103), and

174 *Laker Airways Inc v FLS Aerospace Ltd.* [2000] 1 WLR 113. *Locabail Ltd v Bayfield Properties Ltd.* [2000] 2 WLR 870. D Brown "Arbitrators, Impartiality and English Law" 2001 *Journal of International Arbitration* 123.

175 *R v Gough* [1999] 2 WLR 883. Graig, Park and Paulsson, "International Chamber of Commerce Arbitration," 2000 Oceana Publications. *KFTCIC v Icori Estero SpA International Arbitration* Vol 6, 8/91.

176 [1998] ADLRN 6.

constitutes a ground upon which the courts of a foreign state that is party to the NYC 1958 can refuse to recognize or enforce an English award. The supervisory powers of the court are limited to removing an arbitrator or setting aside an award, in both cases only where there has been substantial injustice to the applicant. Is there a need for a court's supervisory powers instead of an arbitral tribunals' supervision? Does a court's supervisory power bring efficiency and effectiveness? An application can be made to the court for the removal of an arbitrator who has failed to properly conduct the proceedings. The arbitrator's conduct of proceedings does not present a ground for a bias behaviour as long as there is no real danger of the arbitrator's having been biased against a party[177].

9 Arbitration proceedings

English law differs from the UNCITRAL Model Law in requiring that something more must be done than simply to request that the matter be referred to arbitration, and this remains the position under section 14 of the AA 1996. However, the Court in *Vosnoc*[178] granted the Plaintiff's alternative application for an extension of time to commence arbitration proceedings under section 12(3) of the AA 1996, finding that the circumstances were outside the reasonable contemplation of the parties and that an extension would be just. The limitation principles set out in the Limitation Act 1980 apply to arbitrations in the same way as they apply to ordinary court actions (section 13 the 1996 Act, section 34 the Limitation Act 1980). As mentioned above, not all arbitrations come within the 1996 Act, and in particular oral arbitration agreements are excluded, although the common law validity of oral arbitration agreements is preserved. Additionally, the Limitation Act 1980, section 34.6 is superseded by section 18.1b of the 1996 Act; and had provided that statutory arbitrations were governed by ordinary limitation principles. If the parties have been unable to agree a procedure, then either of the parties may apply to the court to exercise its powers (section 18.2). Statutory arbitrations are outside the 1996 Act, as they are non-consensual, although the 1996 Act has been extended to such arbitrations (section 94), and the limitation provisions in particular remain applicable.

In judicial proceedings the act, which must be performed by the plaintiff within the limitation period in order to commence the proceedings, is the issue of a writ. There is no fixed rule in arbitration proceedings as to how they are to be commenced[179]. The courts would not recognize any method which left the other party in any doubt that proceedings had been commenced. An implied request to

177 *Brian Andrews v John Bradshaw* [2000] ADRLJ 239, *Caparo Group Ltd v Fagor Arrasate Cooperative* [2000] ADRLJ 254, *Egmatra v Marco Trading Corp.* [2000] ADRLJ 261.

178 *Vosnoc Ltd. v Transglobal Projects Ltd.,* [1998] 1 W.L.R. 101 (Q.B.D.).

179 In *Welex A.G.* v *Rosa Maritime Ltd. (The Epsilon Rosa)* [2003] EWCA Civ. 938; [2003] 2 Lloyd's Rep. 509. Tuckey, L.J. concurred with the views of the Court of Appeal in *Donohue,* holding that if parties have agreed to resolve their disputes in a particular way they should be kept to their bargain unless there are strong reasons for not doing so.

appoint an arbitrator was sufficient to commence the arbitration process. The court in *Ocean Laser Shipping Ltd v Charles Willie & Co Ltd*[180] concluded that the test as to whether the documents relied on amounted to an implied request to appoint an arbitrator was whether the communications were in their context sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt that they intended to operate as a call for the appointment of an arbitrator. Where judicial proceedings have been brought in respect of a matter falling within a binding arbitration clause, an application for a stay of those proceedings does not amount to the commencement of arbitration proceedings. An implied request to appoint an arbitrator was sufficient to commence the arbitration process. The grant of a stay of judicial proceedings does not amount to a reference to arbitration. If there is no agreed arbitral procedure for resolving any problem of service, a party can apply to the court for assistance. On application, the court can specify how service is to be effected or it can dispense with the need for service. Any appeal from the court's decision required the leave of the court itself. It is not clear when service is deemed to have been effected following a successful application to court. A party who has waited until near the end of the limitation period before attempting to effect service may find himself time-barred if it becomes necessary to seek the court's assistance, because the court has no power to suspend statutory time limits pending its consideration of the matter (sections 76–77)[181]. The notice is sufficient to impose a requirement on the other party to appoint an arbitrator and the notice must clearly specify the disputes to be referred to arbitration. The court in the *Smaro*[182] case disapproved the decision in *Vosnoc*[183], which had held that express and precise language was required to commence arbitration. Section 75 allows the court to exercise its power to preserve property in order to recover costs in relation to arbitrators. Where service of notices and other documents related to arbitration is impracticable, the court has powers to assist.

The limitation defence has to be taken in the arbitration itself unless the parties have agreed that the matter is to be resolved by the courts. If the limitation defence is not taken in the arbitration it will not be possible for the losing party to ground an appeal to the court on it[184]. If waiver is not justified on the facts, the power of the court to extend time under section 12 may come to the party's rescue. A contractual time bar will specify the act that must be performed by the application within the specified time. The nature of the act will vary, depending upon the form of

180 [1999] 1 LR 225.

181 *Vosnoc Ltd v Transglobal Projects Ltd.* [1997] *The Times* 27 August, [1998] 2 AllER 990. *The Frotanorte* [1995] 2 LR 254, *The Sargaso* [1994] 1 LR 162.

182 *The Smaro* [1999] 1 LR 225.

183 *Vosnoc Ltd v Transglobal Projects Ltd.* [1998] 2 AllER 990. *The Sonja* [1993] 2 LR 435.

184 The courts have held that the presence of an arbitration clause in an agreement governed by the Hague Rules does not deprive the carrier of the right to rely upon the one-year limit in Article III, so that the ordinary six-year period under the Limitation Act for commencing arbitrations is overridden. If, despite the presence of a contractual limitation period barring a claim, a party does not raise any objection to the dispute proceedings to arbitration out of time, it would seem that the party does not waive the right to rely upon the barring clause.

the application. If the relevant act is not performed in time, the court has jurisdiction to extend time under section 12, but only if the relevant act can be regarded as a step in the arbitration proceedings. A mere obligation to submit a dispute within a given time does not fall within section 12. Where the arbitration clause requires a notice to be served by the applicant, the notice is effective if it makes clear the fact that a claim is being made and the subject matter of the claim[185]. If it is shown that the proceedings have never been validly commenced, and they result in an award, the respondent is entitled to have the award set aside on the basis of the arbitrator's want of jurisdiction[186]. Section 12 confers upon the court the power to grant relief in arbitration proceedings to the claimant who is affected by a time-bar provision. The 1996 Act removes the extension test of undue hardship, and replaces it with criteria based on unforeseeable circumstances and the conduct of the respondent. Moreover, section 12 is mandatory and cannot be ousted by contrary agreement[187]. The power to extend time applies only to contractual time limits and not to statutory time limits[188]. Section 12 is applicable to two types of clauses: a clause that bars the claim and a clause that extinguishes the claimant's right. A matter in issue between the parties on which the rights of the party making a claim depend is a claim within the meaning of section 12. An application may be made to the court only "after exhausting any available arbitral process for obtaining an extension of time". If arbitrators have been requested to extend time under their express power, but have refused to do so, then the court will be reluctant to override the arbitrator's decision on the matter[189].

A stay of legal proceedings and enforcement of the arbitral award apply, irrespective of the location of the seat. The arbitration may not have started at all but the court's assistance may be required. The non-existence of an arbitral institution that will manage commencement of arbitration prior to the establishment of an ad hoc arbitration is a real disadvantage. Where no seat has been designated or determined, the court, in making its assessment of appropriateness, must prejudge as best it can the outcome of the designation or determination process. The court may exercise powers—power to extend time for beginning arbitral proceedings (section 12), power to set aside appointment of sole arbitrator in default (section 17), failure of appointment procedure (section 18), power to remove arbitrator (section 24), power to determine preliminary point of jurisdiction (section 32), that it has within Part I and in support of an arbitration before the seat has been designated or determined, where it is appropriate to do so by virtue

185 *The Standard Ardour* [1988] 2 LR 159.

186 *The Santa Cruz* [1995] 1 LR 208 *Bunge S.A. v Deutsche Con.* [1980] 1 LR 352. In the event of an ambiguity as to the scope of a time bar clause, it will be construed in favor of the claimant. In the absence of express words to the contrary, a time-bar will be applied to counterclaims.

187 *Pittalis v Sherefettin* [1986] 2 AllER 227.

188 *The Stena Pacifica* [1990] 2 LR 234 *The Anteres* [1987] 1 LR 424 The one-year time limit (COGSA 1971) is statutory, so that it is not possible for the court to extend time. The power to extend time is restricted to agreements to refer future disputes to arbitration.

189 *Comdel Commodities Ltd v Siporex S.A.* [1990] 2 AllER 552.

of a connection with England. Not all international arbitrations are conducted in one place and not all awards are signed in one location. If there is a failure of the process of designation, determination by the court may become necessary, since there is no permanent mechanism supporting the establishment of ad hoc arbitral tribunals. The parties may need to know if Part I applies at all or they may need to make an application to the court in respect of it. If no seat has been designated, it is likely to be necessary for a determination to be made by the court. Additionally, internationally, for enforcement purposes, the seat is essential. Where parties wish a foreign law to apply, they should specify by agreement which non-mandatory provisions it is intended to replace, and to what extent. Matters in the foreign law, which conflict with the mandatory provisions of the Act, would not be effective at all (section 4). It is an abuse of process to raise matters before the English court, which had already been decided by a competent German court[190].

If the seat of the arbitration is outside the jurisdiction, the courts have no power to extend time in respect of the arbitration, even if English law is the law governing the agreement and the procedure. Even where the criteria for the making of an order extending time are satisfied, the court retains a residual discretion to refuse to make an order. The court may extend the time for such period and too such terms as it thinks fit. As shown earlier, the 1996 Act has removed the power of the court to order security for costs in respect of the arbitration. The court can order security for costs only in respect of proceedings before it in which an award is challenged (section 70.6). Section 34 provides an inclusive checklist of procedural and evidential matters, which the arbitrators are to determine subject to the right of the parties to reach their own decision on any matter. The court has no supplementary power in respect of these decisions and the role of the court is limited to assisting with the obtaining of evidence (section 43–44)[191], enforcing the arbitrator's orders and if agreed between the parties (section 42), determining any preliminary points of law (section 45). Moreover, the court cannot remit an award to the arbitrators merely because there has been some form of procedural irregularity. A dispute as to the scope of the arbitrator's procedural powers can be made the subject of a reference to the court (section 45). The various powers open to the court regarding failure of appointment procedure are contained in

190 *Karl Leibinger & Franz Leibinger v Stryker Trauma GmbH*, Case no: 2005 Folio 1019, High Court (Queen's Bench Division), England (31 March 2006).

191 In *Assimina Maritime Limited v Pakistan Shipping* (2005 AllER (D) 202 (January)), the English courts confirmed that section 44(2)(c) of the AA 1996 could not be used as a method of obtaining documents from a third party in a similar fashion to Rule 31.17 of the English Civil Procedure Rules (CPR). In reaching this decision, the judge noted that section 44(2)(c) only applies to property which "is the subject of the proceedings or as to which any question arises in the proceedings". Service by email deemed acceptable in arbitral proceedings (21 December 2005). *Bernuth Lines Limited v High Seas Shipping Limited*, Case No 2005 Folio 684, High Court of Justice (QBD). The judge held that, had the finding been that notice by email was ineffective, he would have permitted the claimant to amend its application notice so as to make an application under section 67 of the Act.

section 18.3 but the Act does not indicate how the court's discretion is to be exercised.

As discussed earlier, section 45 preserves the existing power of the court to intervene during the course of arbitration and before an award has been made, for the purpose of making a preliminary determination of a point of law. The court's power is subject to a number of restrictions and may be excluded altogether if the parties so agree. Furthermore, the court must be satisfied that the determination sought is likely to produce substantial savings in costs and the application has been made without delay and state the grounds on which it is said the question of law should be decided by the court. Thus, in English law parties can refer questions of law to the court showing a tendency to consider arbitration as an inferior system to deal with questions of law[192]. Not only is leave required on all issues but where the appeal is from the determination of the question of law, the court must additionally affirm that there is a question of general importance or some other special reason, justifying the consideration of the Court of Appeal. A court will not remove an arbitrator or overturn an award in respect of a refusal of leave to amend pleadings, a refusal to waive procedural requirements, the rejection of an application for adjournment, the selection of particular evidence as representative of the entire claim and refusal to allow service of points of reply out of time. The existence of a procedural power can be a point of law[193]. High Court proceedings follow a settled pattern that consists of the issue and service of the writ, exchange of pleadings, discovery, inspection of documents and property, the summons for direction and trial. Materials generated in an earlier international arbitration cannot be used in a subsequent one[194].

9.1 Powers of court in relation to arbitral proceedings

The procedure for commencing arbitration depends firstly on the parties' agreement and in the absence of any agreement when one party calls upon the other to initiate his obligations under the arbitration clause. Section 14 does not preclude the commencement of the arbitration proceedings in some other way, although an application to the court for the stay of judicial proceedings brought by the other party does not amount to the commencement of arbitration proceedings, as the grant of a stay does not of itself operate as a reference of the matter

192 Section 45 of the Arbitration Act 1996 provides that, unless otherwise agreed by the parties, the court may, on the application of a party to arbitral proceedings, settle on any question of law affecting the rights of any of the parties and arising in arbitration. Although it is not binding on the court, the court exercises its discretion where the parties had previously expressly agreed that either might refer questions of law to the court. *Taylor Woodrow Holdings Ltd. v Barnes & Elliott Ltd.* (Technology and Construction Court) (3 July 2006). Case no: HT-06-117, High Court (Queen's Bench Division) (TCC), England. The court had discretion as to whether it should hear an application under section 45 AA 1996, even where both parties had agreed they could refer such questions of law to court.

193 *Vaslo v Vaslo* [1983] 3 AllER 211, *Engineering Services Ltd. v Lindner plc.* [1996] ADRLN 2.

194 *Ali Shipping Corp. v Shipyard Trogir* [1998] 2 AllER 136.

to arbitration by the court. Secondly, a polite request or statement of intention will not suffice to commence the proceedings, unless there is agreement to that effect.

The power of extension[195] will lie with the court (section 79) unless the parties agree to give the tribunal power to extend time (section 34). The general powers exercisable by an arbitral tribunal run in parallel with the corresponding powers of the court. No provision in the AA 1996 gives the English courts the power to grant an anti-arbitration injunction. This court's decision is yet further support for the existing trend of the courts not to interfere in the arbitration process[196]. English courts have jurisdiction to grant an anti-suit injunction to prevent a party to an arbitration clause from commencing judicial proceedings in breach of the clause. It has to be taken into account that the injunction should as a rule be granted unless it can be shown that the applicant has submitted to the jurisdiction of a court or has otherwise delayed their application and the proceedings are at an advanced stage[197]. The court's powers are more extensive and extend to certain areas where it would not be appropriate or possible for the tribunal to act. Hence, the court should act where the tribunal has no power or is unable for the time being to act effectively. Besides, the arbitral tribunal alone has power to order security for costs instead of the court (section 35). Arbitrators may exercise their discretion very flexibly, and in a manner that may well diverge from that which the court would adopt, so long as what they do is in keeping with their section 33 duty (section 39). The parties should take steps to obtain the decision of the court on preliminary questions of jurisdiction or law. The tribunal has the power to make peremptory orders, and gives it sanctions, which can be applied if the peremptory orders are not complied with. The court supplements the sanctions available to the tribunal by applying those sanctions that are available to the court for breach of a court order. Additionally, the court would be able to fine a party, or send him to prison for contempt. Moreover, the court is entitled to act if courses available without reference to the court have been exhausted and the court may not exercise its discretion unless satisfied that the party affected is indeed in default. If the tribunal consists of or includes a judge-arbitrator, he may exercise the court's power under section 42 concurrently with the High Court. Therefore, it is an advantage for judges-arbitrators. An appeal from the court's decision may be made with leave. Furthermore, section 43 makes available to a party the court

195 *Gold Coast Ltd v Naval Gijon S.A. sub nom Hull 553 [2006] EWHC 1044 (Comm)* Gloster J discussed the correct approach to the extension of time under section 79. Relevant factors included: the length of the delay and whether the applicant had acted reasonably; whether the respondent or arbitrator contributed to the delay; whether the respondent suffered irremediable prejudice; whether the arbitration had continued during the period of delay and if so what impact that might have on e.g. costs, and the strength of the application.

196 *Elektrim S.A. V (1) Vivendi Universal S.A. (2) Vivendi Telecommunication International S.A. (3) Elektrim Telekomunikacja SP Zoo (4) Carcom Warszawa SP Zoo* [2007] EWHC 571 QBD (Aikens J).

197 *Goshawk Dedicated v ROP Inc.*[2006] EWHC 1730 (Comm) Anti-suit injunctions in support of arbitration clauses.

procedures that would be available to parties to proceedings in court to compel the attendance of witnesses who are located in the UK[198]. The court also has the power in aid of arbitration to order the issue of a request for the examination of a witness outside of its jurisdiction (section 44(2))[199]. How is an order of a court made against a defendant who is not present or domiciled within the jurisdiction? An application for service out of the jurisdiction may be made in the following situations[200]: Firstly, a party seeks some other remedy or requires the court to determine a question affecting an actual arbitration, an arbitration agreement or an award where the seat of the arbitration is not the UK. The court cannot grant leave unless it is made clear to appear to the court that the case is a proper one for service out of the jurisdiction. Where leave for service out of the jurisdiction is given, the arbitration application is valid for such period as the court may determine and must be served within six months. Secondly, for the service of an application in which the applicant seeks to challenge or to appeal to the court on a question of law arising out of an arbitration award, where it is shown that the award has been made in England. An award is made in the seat, unless the parties agree otherwise. Thirdly, where the application is for an order under section 44 that sets out the powers of the court to: grant interim injunctions, preserve evidence, etc. An order may be made against a witness and not a party to the proceedings. The English High Court recently specified the scope of injunctive relief available in support of arbitration under section 44 of England's AA 1996 in *Econet Wireless Ltd. v Vee Networks Ltd. & Others*[201]. The court specifies the extraterritorial reach of section 44 and so unless there is a valid connection with England, such as assets located in the jurisdiction, the proper court to which parties should apply for injunctive relief in aid of arbitration remains the court with jurisdiction at the seat of arbitration. Fourthly, any order made by the court under the 1996 Act and service is permissible with the leave of the court.

Can arbitration be concluded without the support of a court? The court's powers extend to certain areas where it would not be appropriate or possible for the tribunal

198 *Cetelem SA v Roust Holdings Limited* (2004) EWHC 3175 QB (Section 44 confers upon the court for the purposes of and in relation to arbitral proceedings the same powers in relation to certain matters as it has in court proceedings. Section 44(3) provides that the court may, if the case is one of urgency, make such orders as it considers necessary for the purpose of preserving evidence or assets.)

199 R. Briner "Domestic arbitration: Practice in continental Europe and its lessons for arbitration in England" 1997 *Arbitration International* 155.

200 The Rules of the Supreme Court (Amendment No 2) Order 1996 SI 1996 No 3219, RSC Ord 73 r 8.1.

201 [2006] AllER (D) 331 (Jun). *Econet Satellite Services Ltd v Vee Networks Ltd [2006] EWHC 1664 (Comm)* A party needs to show that there is a good arguable case for an arbitration to take place in England and Wales if the court is to make an order under section 44. *Econet Wireless Ltd v Vee Networks Ltd & Ors* [2006] EWHC 1568 (Comm) "Section 44 of the Arbitration Act 1996 gives the court jurisdiction to order interim injunctions but there is a discrepancy between courts exercising that jurisdiction when an English arbitration is in being (or about to be) and ' "the use of the court's exceptional powers under section 44 where the seat of the arbitration is elsewhere" '. *Glidepath BV and Others v John Thompson and Others* [2005] EWHC 818 (Comm).

to act. One exception is the power to order security for costs, which is conferred exclusively on the tribunal (section 38.3). The court has the powers set out in subsection 2 unless the parties specifically agree that the court shall not have certain or any of these powers. Additionally, the parties cannot by agreement confer different powers on the court, as they can in relation to the tribunal under section 38. So, the court may make orders in respect of the taking of the evidence of witnesses. Furthermore, the court has the power in this respect under Order 39 of the Supreme Court Rules. The court has the power to order the preservation of evidence, and can enforce measures involving the urgent search of a party's premises and the seizure of materials found there. In addition the court ex parte may exercise these measures. The court has the power to make orders in respect of property the subject of proceedings or as to any question which arises in the proceedings. These powers extend to property in the hands of third parties. The court can authorise entry by any person into premises such as vehicles, vessels, aircraft and hovercraft, in possession or control of a party to the arbitration. Moreover, the tribunal's powers (section 38.4) are restricted to directions in relation to property in the hands of the parties. As a result, the court can order the sale of perishable goods and grant an interim injunction or appoint a receiver. In cases of urgency the court can act to preserve evidence or assets, even where the arbitration has not been started. If the situation is not urgent, the court is entitled to act with the permission of the tribunal or the agreement of the parties.

The court may exercise its supportive powers (section 44), which consist of taking and preserving evidence and granting *mareva* injunctions to secure the sum in dispute. Thus, section 2.3 allows the English courts to support foreign arbitrations in the case of mareva injunctions against UK-based assets. Thus, English courts have the power to grant a mareva injunction freezing the assets of a party in the UK[202]. If no seat has been defined, but the arbitration has a relation with England, the court can exercise any of the powers contained in the 1996 Act (section 2.4). The court has the power to maintain an arrest of a ship ordered earlier in the name of security. Moreover, an award obtained in another seat is enforceable in England in the same way as any other award. If a party is outside the jurisdiction, the court can give leave to serve the application out of the jurisdiction. A respondent who wants to challenge a court's order must do so within 14 days of its service, but the right of the respondent to challenge within the relevant time must be set out in the order itself. As shown earlier, a third party who may be affected by an order has no *locus standi* to apply to the court to have the order set aside[203].

The court's power to take evidence in support of arbitration in the same manner as in legal proceedings applies only to the evidence of witnesses and not parties. The court cannot interfere with the arbitrators' discretion to require evidence and

202 *Credit Suisse v Guoghi* [1997] 3 AllER 724, *S&T Bautrading v Nordling* [1997] 3 AllER 718, Civil Jurisdiction and Judgments (Interim Relief) Order 1997 SI 1997 No 302.

203 *Westland Helicopters Ltd. v Arab Organisation* [1994] 2 LR 608.

the award cannot be set aside under section 68 for serious irregularity. Arbitrators do not have any power to compel witnesses to attend and give evidence. If evidence is required from a potential witness, this will have to be obtained by the use of court procedures under section 43.1. The same court procedures are open to a party to arbitration proceedings as are open to a litigant in judicial proceedings, to secure the attendance of any witness before the arbitrators so that evidence can be given. The relevant power of the court to secure attendance is the power to subpoena witnesses.

If the witness is in the UK, are the court's powers to secure the attendance of a witness available in respect of foreign arbitrations? The court's procedures to secure the attendance of witnesses under section 43 can be used irrespective of the seat of the arbitration[204]. The arbitrators cannot themselves take evidence from a witness who is unable to attend the hearing and the parties' agreement is meaningless, as the arbitrators cannot force a non-party to give evidence. It will be necessary to apply to the court for the existence of powers in this regard (section 44.2), which empowers the court to take evidence from witnesses. The court can take evidence on oath or affirmation if the arbitrators have no power to do so or are unable to do so, and the rules of the Supreme Court provide procedures for compelling witnesses to answer questions. Evidence can be obtained from witnesses outside the UK by means of an application to the court for its assistance (section 44.2a). The court may issue a request to the courts of the country where the witness is located, for them to assist in the matter. The power of the court to lend its assistance for evidence exists under section 2.3 even where the seat of the arbitration is abroad. So, a person involved in foreign arbitration proceedings can apply to the court for its assistance in taking evidence from a person within England. The court must not be of the view that the exercise of its powers of assistance is inappropriate in the circumstances. Discovery orders in arbitration are more selective than in judicial proceedings and discovery in arbitration is not automatic, because it is up to the arbitrators to order discovery. The court can, on application, make an order for specific discovery. Furthermore, the court does not, in its list of default parties in section 44, have any residual power to order discovery[205]. Additionally, the arbitrators cannot order discovery against third parties, as their jurisdiction is limited to the parties themselves, and equally the court cannot make such an order in support of arbitration.

The concept of peremptory order procedure is founded on the power of the High Court to make an order, which requires a person to do an act within a specified time by way of obedience to an order made by the court. An order must make

204 *Cetelem S.A. v Roust Holdings Limited* (2005) EWCA Civ 618 held that section 44(3) is restrictive, rather than permissive, so that it sets out the limits of the court's powers without the agreement of the parties or the permission of the tribunal. A contractual right could be an "asset" within the meaning of section 44(3) and, therefore, that a court could make an order protecting such a right by enforcing it if necessary.

205 *Taylor Co Ltd v Paul Brown* [1992] ADRLJ 117.

clear the precise time limits within which the act must be done[206]. The power of the arbitrators to make a peremptory order is subject to the arbitration or other agreement of the parties (section 41). Once a peremptory order has been made, but has not been complied with, it may be enforced by the courts. The order under section 42 is merely an order requiring the defaulter to comply, and to that extent cannot be inconsistent with the arbitration agreement itself. Section 42 does not specify the consequences of the defaulting party's failure to comply with the court's own order. The court can make an order if the following jurisdictional conditions are satisfied: (a) the parties have not excluded the jurisdiction of the court to make an order enforcing the arbitrator's peremptory order; (b) the applicant must have exhausted any available arbitral process and the relevant notice to the parties has been given. (c) the court is not to make an order unless it is satisfied that the party has failed to comply with it within the time prescribed, in the order or the time limits laid down by the arbitrators are unreasonable. Details and documentary evidence of the permission or agreement must be included in the application to the court. Even if the jurisdictional criteria are satisfied, the court still has discretion under section 42 whether or not to make an order. The common law has recognized the right of an arbitrator, like a court, to conduct the proceedings on an *ex parte* basis where one of the parties has failed to appear or to participate in the arbitration proceedings (section 41)[207].

A party seeking discovery against a third party can issue a subpoena under section 43 requiring the third party to produce documents which could have been compelled to have been produced in judicial proceedings, and so disobedience amounts to contempt of court. A subpoena must apply to specific documents, which are necessary for the fair disposal of the case[208]. If the obligation to grant inspection is not obeyed by a party, the court can make an order for inspection either by the other party or by the court[209]. Once discovery has been made, the documents become available for inspection by the other side. The powers of the court in section 43 are available in foreign arbitrations, provided that the proceedings are being conducted at the same time in England, Wales or Northern Ireland. The arbitrators have no power to order inspection of property belonging to one party, but in the exclusive possession of a third party, and an application to the court will be necessary if inspection is to be secured. The court has concurrent power with the arbitrators to make an order for inspection of property. Besides, the court has no jurisdiction to act if the arbitrators have the power to act but have refused to do so. Section 44.2c gives the court the right to authorize any person to enter premises to allow an inspection to take place. If a party refuses to allow inspection by entry to premises the arbitrators can make a peremptory order so demanding, which can then be enforced by the court. An inspection will be possible only on a court order where there is a reason to believe that property in possession of a party

206 Practice Direction [1986] 2 AllER 576.
207 *Maritime Nominees v Kaplan Russin* [1994] ADRLJ 52.
208 *Lorenzo Halcoussi* [1988] 1LR180.
209 SC Ord 23 229,11,12,13.

will be destroyed or disposed of in advance of the arbitration, and it is necessary for the property to be seized and secured so that the arbitration can be conducted properly. The court can issue an *ex parte* Anton Pillar order, authorizing seizure by a solicitor acting for the claimant. Moreover, the court has the same power to order inspection under section 44 as it has in relation to judicial proceedings.

Fundamental to the conduct of the arbitration is that the arbitrators are masters of their own procedure and the courts have no jurisdiction to intervene with procedural decisions. As long as the arbitrators have acted fairly and there is no substantial injustice to either party, the arbitrators' decision is unimpeachable, even though a court would not have conducted itself in the same way (section 34.2f). An interlocutory or procedural decision of the arbitrators can be challenged while the arbitration is in progress by way of application to the court for the removal of an arbitrator (section 24). The grounds for the application of section 24 are namely: that circumstances exist that give rise to justifiable doubts as to his impartiality and that he has refused or failed properly to conduct the proceedings or to use all reasonable dispatch in conducting the proceedings[210].

The admission of secret evidence is certain to be a serious irregularity, provided that it is relied upon by the arbitrators and their conduct causes substantial injustice to a party. If the only issue between the parties is one of valuation, and the arbitrator is to proceed by means of inspection, the court will be reluctant to intervene if one of the parties alleges that he has not had an opportunity to adduce evidence[211]. If the hearing is held without proper notice having been given to a party, the resulting award is liable to be set aside on the grounds of serious irregularity unless the hearing played no part in the decision-making process[212]. The denial of a fair hearing is the most fundamental form of serious irregularity and an award made without one of the parties being given a chance to present his case or to have his witnesses examined will be set aside[213]. The mere fact that a party has not presented evidence does not mean that there is serious irregularity[214]. If the arbitrators rely upon evidence, which has not been disclosed to the parties, the court will be entitled to find serious irregularity[215]. The arbitrators are required to reach their decision in a judicial way and as long as the arbitration has been conducted fairly, the court cannot overturn the arbitrators' findings of fact. The arbitrators' decision

210 *Kesley Housing Ltd v Ruddy* [1998] ADRLN 6. The tribunal itself will determine the relevance and weight of the evidence offered (Model Law Article 19, UNCITRAL Article 25).

211 *Glidepath BV v Thompson* (2005) EWHC 818 (Comm), the court held that the principles of confidentiality attaching to arbitral proceedings also governed the court's discretion to allow inspection of documents and evidence filed at court in relation to applications for a stay of proceedings in favor of arbitration, ancillary relief pursuant to section 44 of the AA 1996 or applications (such as those in the instant case) for freezing orders or non-party, pre-action disclosure in proceedings subsequently stayed in favor of arbitration. *Ali Shipping Corporation v Shipyard Trogir* (1999) 1 WLR 316.

212 *The Snata Cruz* [1995] 1 LR 208.

213 *Henry Boot Ltd. v DF Money* [1996] ADRLN 13, Schumacher v Laurel Island Ltd [1995] 1 LR 208.

214 *The Aros* [1978] 1 LR 456.

215 *The Peace Venture* [1996] 2 LR 75, *Socedal Iberica S.A. v Nidera* [1990] 2 LR 240.

to dispense with the strict rules of evidence cannot be challenged as an error of law, given that they have an absolute discretion in the matter, the only limitations being the provisions of section 33 that appropriate procedures are adopted and that the parties are given a fair hearing[216]. All of the arbitrators must hear all of the evidence and all of the arbitrators must seek to participate in the making of the award and so in any other case there is certainly a serious irregularity, which can be challenged under section 68.

The courts have proved, under earlier legislation, to be reluctant to interfere with the exercise of discretion by the arbitrators unless there has been substantial injustice to the applicant[217]. In *Ceval Alimentos S.A. v Agrimpex Trading Ltd*[218], the court remitted the award because the arbitrators refused to order discovery of documents, which would have made it clear whether or not the buyers had suffered any loss as a result of the sellers' breach of contract. If a party fails to answer questions put by the arbitrators, they can make a peremptory order, which they can seek the assistance of the court to enforce. In rehearing the jurisdictional issue[219], the court would approach the question of jurisdiction of the tribunal afresh by rehearing the relevant evidence, and this does not mean that the existence of the arbitrator's award was irrelevant in deciding whether an order for security for costs was appropriate, especially where no cogent reason was put forward for saying that the award was wrong. It is right to order security for costs if the party against whom the order was sought had sufficient assets to meet any order for costs and those assets were available for the satisfaction of any such order.

10 Interim measures & security in the 1996 Act

The drafters of the Act aimed to create a valid and legitimate dispute resolution mechanism that could operate effectively whilst being independent of the courts. The degree of independence of arbitral tribunals in relation to courts of law that the drafters of the Act have finally achieved is questionable it. Under the increased powers of the arbitral tribunal, it is the parties' right to grant the tribunal the power to order interim relief as set out in section 39 of the AA 1996. The very nature of summary judgment is to provide a party with the procedure necessary in order to avoid having to proceed to trial where there is virtually an uncontested case. An injunction can be granted at any time, even prior to the issue of a writ in urgent cases. The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action.

216 *Margulead Ltd. v Exide Technologies*, Case No. [2004] EWHC 1019 (Comm). (An arbitrator is empowered to adopt the applicable procedure for the arbitral proceedings insofar as the arbitrator regulates matters in a way that accords the claimant a reasonable opportunity to present its case. Additionally, the court held that the claimant's failure to object to the procedure during the hearing or any time previous to publication of the award was fatal to its application to set aside the award.)

217 *The Peter Kirk* [1990] 1 LR 154.

218 [1995] 2 LR 380.

219 *Azov Shipping v Baltic Shipping Company* (No 2) [2000] ADRLJ 227.

The manner in which an arbitrator will conduct the arbitral proceedings, including any powers granted expressly to him, will always be governed by the overriding mandatory provision of section 33. For instance, in *Guardcliffe Properties Ltd v City & St James Property Holdings*[220] the court held that the arbitrator was under a duty to inform the parties that he was considering making such a substantial discount and to give them an opportunity for comment, and so the arbitrator had failed to act in accordance with section 33, which imposed a duty upon him to act fairly and impartially, and, give each party a reasonable opportunity to present his case. Besides, section 42 provides that unless the parties have agreed to the contrary, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. Thus, section 44 is a fall back provision, in the event that the tribunal is not vested with these powers. It is worth mentioning that the court has the power to enjoin any person from removing assets from the jurisdiction in cases where there is a reasonable apprehension that such person will fail to honour the award and might seek to remove assets from the jurisdiction in order to prevent enforcement of the award. Section 44(2)(c), (d) and (e) provides that the court has the power, unless otherwise agreed by the parties, to make orders granting interim relief. In terms of section 44(3), the court is empowered, in the case of urgency, to "make such orders as it thinks necessary for the purpose of preserving evidence or assets". In this respect it is noted that the court has a supportive role since it is hereby empowered to order *Mareva* injunctions or Anton Pillar relief so as to help the arbitral process to operate effectively[221]. In terms of section 44(6), the court, after having made an order, can in effect hand over to the tribunal the task of deciding whether or not that order should cease to have effect. However, it is important to remember that the tribunal/institution can only so order if it has the power in relation to the subject matter. This obviously means that the tribunal should have the power to grant the relief itself in the first place, but did not do so under section 44(3) or (4). An injunction will be granted only in respect of the enforcement or protection of a legal or equitable right. Moreover, an injunction will be granted to prevent arbitration proceedings where the party can show that allowing the arbitration to continue will infringe a legal or equitable right belonging to him[222]. As mentioned above, unless there is a valid connection with England, such as assets located in the jurisdiction, the proper court to which parties should apply for injunctive relief in aid of arbitration remains the court with jurisdiction at the seat of arbitration[223].

220 [2003] EWHC 215 (Ch).

221 In *Through Transport Mutual Insurance Association (Eurasia) Ltd.* v *New India Assurance Go. Ltd. (The Hari Bhum),* [2004] EWCA Civ. 1598 in which it held that the English courts could still grant anti-suit injunctions when an arbitration agreement had been breached, despite the ECJ's rulings in *Turner* and *Gass.*; *Case C-159/02*, [2004] 2 Lloyd's Rep. 169. *Case C-116/02*, [2004] 1 Lloyd's Rep. 222.

222 *The Cladys No 2* [1994] 2 AllER 402, *The Cladys* [1990] 1 AllER 397.

223 *Econet Wireless Ltd. v Vee Networks Ltd. & Others* [2006] AllER (D) 331 (June).

The court has the same powers as it would have in judicial proceedings, insofar as the arbitral tribunal cannot itself do so, to make orders preserving the subject matter of the proceedings, to order the sale of any goods which form the subject matter of the proceedings and to grant an interim injunction or appoint a receiver. The court's powers are subject to contrary agreement by the parties[224]. The right of the court to order the maintenance of a vessel's arrest is preserved by the 1996 Act. The grant of interim relief whether *Mareva* injunction or injunction against breaches of the underlying contract pending the outcome of the arbitration, may only be ordered by the court. It recommends that the court shall act only if or to the extent that the tribunal has no power or is unable for the time being to act effectively. If the arbitrators have power, the court must be persuaded that the arbitrators cannot act. The court has power to revoke its own order or to confer the power to revoke the court's order on the arbitrators. So, the court's order will be made at a time at which the arbitrators have not been appointed. Additionally, the court can, on the application of a party, make an order preserving the subject matter of a claim in the case of urgency without the tribunal's permission or the consent of the other parties. Where an application is made to the court for the exercise of its powers under section 44, any decision of the court can be appealed to the Court of Appeal with the leave of the court. No application can be made to the Court of Appeal for leave to appeal. Besides, where the court's decision relates to the maintenance of the arrest of a ship under section 11 then there is no need for a leave by the court itself to appeal to the Court of Appeal. An appeal is not allowed to be made to the court against the decision by the arbitrators to exercise or not to exercise their interlocutory powers. If the arbitrator makes an order exercising interlocutory powers, and this is disobeyed by a party, any application by the arbitrators to the court for the enforcement of a peremptory order would inevitably reveal any defect in the order.

An application can be made to challenge a partial award that embodies an arbitrator's interlocutory order on the ground of serious procedural irregularity, error of law or want of jurisdiction. The court has no jurisdiction to interfere with an exercise of discretion by the arbitrators, concerning their exercise of interlocutory powers. Moreover, the court may act where there is a party's agreement or permission granted by the arbitrators and the applicant has to give notice of his application to the other parties. In the case of urgency, the application can be made *ex parte* by affidavit. The powers of the court to order security under section 44 are exercisable against persons outside the jurisdiction whether or not they are parties to the arbitration[225]. The court is empowered to give assistance in respect of an arbitration whose seat is outside England, Wales or Northern Ireland or whose seat has not been designated (section 2.3b). Besides, the court can refuse to exercise its powers where the fact that the seat is outside the jurisdiction "makes it inappropriate" for it to exercise its powers. For example, English courts can grant

224 *Coppee-Lavalin v Ken-Ren Ltd* [1994] 2 AllER 449.
225 *The Cienvik* [1996] 2 LR 395, *Tate & Lyle v CIA Usia* [1997] 1 LR 355.

Mareva injunctions over assets in England and RSC allows an application for leave for service abroad to be made against a defendant outside the UK for the purposes of an order under section 44[226]. The court is empowered to make an order regarding the inspection, photographing, preservation, custody or detention of property and, in addition, can authorize any person to enter premises in the possession or control of a party to the arbitration, even to order the sale of goods. The court can appoint a receiver for the purposes of arbitration proceedings in the same way as for High Court proceedings. The court is empowered to appoint a receiver in a case such as partnership dissolution and at the same time to stay all judicial proceedings other than those relating to the operation of the receivership. Injunctive relief can be specifically aimed at protecting the subject matter of the dispute such as preventing breaches of the underlying contract, but the majority of applications are for the general relief available under a *Mareva* injunction[227]. The court's order can be made pending the completion of judicial proceedings or arbitration to ensure that the respondent has sufficient assets to meet any award against him.

Two forms of security may be demanded of the applicant by the court in respect of an application under section 67. The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with. The court may order security for costs. On the other hand, the court does not have power to order security for costs in respect of applications to it in which the validity of an award is challenged. The Act confers upon the court the power to protect a party in jurisdiction proceedings, by requiring the applicant to provide security for costs of the application and to pay the sum owing under the award into court or otherwise to secure that sum. If the security is not provided, the court can dismiss the application. There is no indication as to the circumstances in which the court's powers in these matters will be exercised.

The court's power to make orders for security for costs in respect of arbitration has been removed entirely, although section 70(6) preserves the court's powers to order security for costs of certain applications to court. Applicants may resort to the court only if the arbitrator does not have the necessary authority, where a party has ignored an arbitral order, or for some reason the arbitrator is unable to exercise his powers. It is clear that arbitrators must comply with the overall and mandatory duty to act fairly, as set out in section 1(1) and section 33(1)(a). Any serious irregularity (including failure to comply with section 33(1)(a)) could form the basis of a challenge under section 68. On the one hand, the Act provides that the tribunal shall not order security for costs on the grounds that a party is ordinarily resident outside or that it is incorporated or has its central management and control exercised outside the UK. On the other hand, the Act does not confer upon arbitrators the power to secure the sum in dispute by an injunction, although it

226 *Coppe-Lavalin* [1994] 2 AllER 449.
227 *The Rena K* [1978] 1 LR 545.

is possible to seek a *Mareva* injunction from the High Court under section 44(2) of the Act. The new Act does not provide a party with much opportunity to challenge the arbitrator's ruling on security for costs.

Sections 38 and 39 allow parties the ability to grant the arbitrators power to order interim measures of relief. In fact, section 38 confers upon the arbitrator the power to preserve evidence, order security for costs and other general powers, and section 39 confers upon the arbitral tribunal the power to grant provisional orders. Moreover, section 39 must be read in conjunction with section 48, which contains the remedies an arbitrator can grant in an award. Section 39(1) makes available, upon party agreement, the arbitrator's power to grant, provisionally, any remedy that the arbitrator could grant in a final award under section 48[228]. Section 66(1) allows parties to seek the aid of courts for the enforcement of arbitral orders made under section 38 or 39. Alternatively, parties may seek to enforce a provisional order through the application of section 42 under which the court may make an order requiring a party to comply with a peremptory order of the tribunal. Nevertheless, this may only be sought by the tribunal or by a party with the tribunal's permission, unless the parties have agreed that the court's powers under section 42 will be available. Before granting court enforcement of the arbitral award, courts are required to determine that all possible arbitral forums and methods to obtain enforcement have been exhausted. The court can only step in to grant interim measures under certain preconditions, and section 44 of the Arbitration Act governs "court powers exercisable in support of arbitral proceedings." Section 44(5) is the central provision governing a court's power to grant interim measures in aid of arbitration[229]. A party wishing to seek interim measures from a judge for reasons of speed or immediate enforceability must persuade the judge that it is entitled to the interim measures. The party will also have to prove, based on section 44(5), that the tribunal has no jurisdiction to make the interim measures or that it is unable for the time being to act successfully.

Moreover, in English Arbitration law, *Mareva* injunctions and Anton Pillar orders are key weapons in the arsenal of a claimant and are granted *ex parte* and only in cases where the party seeking the injunction demonstrates urgency. The "urgency test" is used to determine if an application for interim measures of protection is needed immediately, such as the freezing of bank accounts to prevent asset dispersion, or if the remedy is non-urgent, where the speed of the order

228 *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 A.C. 221 (HL). The English AA 1996, section 48, provides that unless otherwise agreed by the parties, the tribunal may "order the payment of a sum of money, in any currency". Lords Hoffmann, Scott and Rodger agreed with Lord Steyn in allowing the appeal, but indicated that they thought that the arbitrators had at least made an error of law in the selection of the exchange rates (but the contractors had no remedy under section 69).

229 Section 44(5) provides: "in any case the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."

is not as essential. Measures are therefore granted by courts and not arbitrators even if the parties agree to allow arbitrators that power. Parties may apply directly to courts, without tribunal approval, and may seek these measures even if the arbitral tribunal is not yet constituted. Section 44's exceptions do not apply; to limit court intervention as far as possible serves the needs of arbitration because court applications can critically delay and hamper private dispute resolution. However, in most cases, court involvement is inevitable, particularly during the enforcement stage. The English Act takes this into account when it provides for a special enforcement mechanism for arbitrator-granted interim relief. Nevertheless, the courts decide whether the arbitral tribunal has jurisdiction to order interim measures[230]. In *Cetelem S.A. v Roust Holdings Ltd.*[231] the Court held that the courts only have the power under the AA 1996 to grant interim relief in cases of urgency, where such relief is necessary for the purpose of preserving evidence or assets. It seems that the case represents a further erosion of the one-stop adjudication principle on which the AA was based, and will provide cause for concern for parties keen to keep court intervention in arbitration to a minimum. Moreover, in *Hiscox Underwriting Ltd. v Dixon* "*Hiscox*[232]", Cooke J had found that section 44(3) does not restrict the power of the court to grant interim relief under the Act, since it is illustrative, not exhaustive, of the type of relief available to the courts. Besides, in *Cetelem,* the Court favored a highly expansive interpretation of section 44(3) that would permit the grant of a mandatory interim injunction for purposes of protecting a claimant's contractual rights, where threatened.

11 The effect of arbitration on third parties

The identities of the parties to an arbitration agreement will be determined at the outset, but in some cases the court may find an ad hoc agreement between the original parties and a third party for the third party to join the arbitration proceedings[233]. For instance, the court allowed a dispute to proceed to arbitration despite the fact that technically the parties in dispute were not in privity of

230 Adam Johnson, *Interim Measures of Protection under the Arbitration Act 1996*, 1 INT. A.L.R. 9–18, 14 (1997). An *ex parte* Mareva injunction is an order directed to the defendant that prevents him from dealing with his assets pending judgment or, in the arbitration context, pending award. Such an injunction is often coupled with an order requiring the defendant to disclose information and documents concerning his assets. Mareva injunctions are often urgent, and conducted in an *ex parte* setting, without notice to the defendant. The Anton Pillar order is an order issued by a court to preserve evidence. First developed in cases in the IP context, in which potential defendants who were given notice of proceedings would often seek to prevent the successful prosecution of claims against them by destroying any offending materials in their possession, an Anton Pillar order is a type of search and seizure order that requires the applicant or his representatives to be given access to the defendants premises to search for and retain in safe-keeping documents or other materials relevant to the action which might otherwise be destroyed.

231 *Cetelem S.A. v Roust Holdings Ltd.* [2005] E.WC.A. Civ. 618.

232 Hiscox Underwriting Ltd. v Dixon [2004] E.W.H.C. 479.

233 *Hoeech Export v Honsa* [1990] 1 LR 374.

contract[234]. In judicial proceedings the rules of the Supreme Court make it possible for the defendant to join a third party to the proceedings and in arbitration proceedings concurrent hearings can be achieved only if the parties so agree[235]. Each claim has to be determined in separate arbitration proceedings in order to preserve confidentiality of evidence, but most of the evidence will not be confidential and it is likely that a single arbitration will be more efficient in terms of cost and time than two or more private arbitrations[236]. The parties can agree to confer upon the arbitrators the power to consolidate proceedings or to hold concurrent proceedings. The Court of Appeal decided that it had no power to require the parties to co-operate in arbitration proceedings[237]. A stay may be refused only where the arbitration agreement is null and void, inoperative or incapable of being performed. The right to apply for a stay is confined to the contracting parties and a third party has no *locus standi* to ask the court to stay legal proceedings. The main provisions of the AA 1996 would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee. The right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement[238].

12 The award, review and enforcement

The arbitrators have the jurisdiction to make an additional award where their original award is incomplete. Final, partial, provisional and agreed awards are all awards in their own right and are binding on the parties and enforceable. The power to issue procedural orders and directions in the course of the proceedings are not awards and are not challengeable as awards but only on the basis of serious irregularity in an application to have an award set aside or remitted. A final award is an award by the arbitrators, which determines all of the issues in dispute between the parties[239]. A preliminary adjudication, which is binding only pending arbitration, is not final is not an award in its own right. The High Court in *Sea Trade Maritime v Hellenic Mutual War Risks Association (Beminda) Ltd*[240] held that it was open to arbitrators to reserve an issue for future decision and, in this case, this did not amount to an omission on the part of the tribunal. The court found that the tribunal had addressed the issue of costs and determined that that issue would be subject to a future award. Thus, section 57 was inapplicable. The court noted that secion 57 was, in fact, a remedial provision designed to enable a tribunal to correct

234 *Beaufort Development v Gilbert Ash Ltd* [1998] 2 AllER 778.
235 *Oxford Shipping Co v Nippon Yusen* [1984] 3 AllER 835.
236 *The Eastern Saga* [1984] 3 AllER 835, *The Vimeira* [1984] 2 LR 66.
237 *Abu Dhabi* [1982] 2 LR 425.
238 *Nisshin Shipping Co Ltd. v Cleaves & Company Ltd. and Others* [2003] EWHC 2602 (Comm).
239 *Ronly Holdings Ltd. v JSC Zestafoni, Case No. 2004/137.* The court held that, other than in respect of an interim award, an award must be complete as to all of the issues before the tribunal. In addition, an arbitral tribunal has no power to reserve the decision of an issue before it to others.
240 [2006] EWHC 578, The English High Court has recently clarified an arbitral tribunal's right to reserve costs to a subsequent award.

an obvious mistake, or deal with something left out. With regard to secton 47, the court observed that this provision gave the power to decide the issues in more than one award. Nothing in that section indicated that arbitrators could not reserve the issue of costs until a later time. This judgment clarifies that an arbitral tribunal can decide various issues in separate awards under English law. The orthodox view has prevailed, confirming that a tribunal has the capacity to reserve decision on certain issues for a later award.

The 1996 Act maintains the rules on recognition and enforcement of foreign awards, but restricts the right of the court to set aside or remit an award. An application can be made to the court for the setting aside or remission of an award on the ground that the proceedings were tainted by serious irregularity, such as failing to comply with the general duty of fairness (section 33); failing to comply with the agreed procedure; and any irregularity in the conduct of the proceedings. The courts will intervene if there is obvious bias or if the circumstances give rise to a strong likelihood of want of impartiality[241].

Any appeal from a court's decision may be made with leave and if the tribunal is a judge-arbitrator, he may exercise the power conferred by section 50 himself, in which case any appeal from his decision will go to the Court of Appeal with the leave of that court (Schedule 2 paragraph 2). The agreed award will be capable of enforcement as a judgment or order of the court in the same manner as any other award (section 51). Subject to the powers of the court under section 79 and section 80(5), it is clear under the scheme of the Act that any challenge to an award on the question of jurisdiction must be made within 28 days of the publication of the award; the consequence of a failure to do so is that the party objecting to the jurisdiction loses that right[242]. The courts should accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions[243]. Additionally, the court can rule that the arbitrators did not, in the light of the parties' agreement, have the jurisdiction to make the award, or that the award was reached in a manner that was procedurally unjust. It could be argued that the arbitrators' decision not to make a partial award is an interim award that can be challenged before a court[244].

If the arbitrators decide not to make a partial or provisional award, their decision will be based on facts and points of law. Even though arbitrators' view

241 *Tuner v Stevenage Borough Council* [1997] ADRLJ 409. *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238; [2006] 1 Lloyd's Rep. 375 (QBD (Comm). Although there was an appearance of bias on the part of the third arbitrator, and that this amounted to a serious irregularity, the preliminary award being challenged should not be set because the irregularity had been waived with respect to that award. However, although the challenging party did not get the section 68 remedy that it applied for (the setting aside of the award), they did get a section 24 remedy that they had apparently not applied for, namely a decision from Morison J. that the arbitrator in question should resign.

242 *Peoples' Insurance Company of China, Hebei Branch v Vysanthi Shipping Co. Ltd.* [2003] EWHC 1655 (Comm).

243 *Warborough Investments Ltd. v S. Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ.751.

244 *The Trade Fortitude* [1992] 1 LR 169.

of the substantive law that led them not to make a partial or provisional award might have been erroneous, it would be difficult for the appellant to challenge it under section 69. Can a failure to make a partial award fulfil the jurisdictional precondition for judicial review that the error substantially affects the rights of the parties? A partial or provisional award has independent legal effect, it is possible to apply or appeal to the court for the award to be set aside or remitted for want of jurisdiction, error of law, or serious irregularity. Any application or appeal to the court against the award must be made within the time limits set out in section 70[245]. Any agreed award is treated as an ordinary award and the arbitrators have the power to make an agreed award unless the parties' agreement prevents them from doing so (section 51). Draft awards are not recognized by the 1996 Act and their purpose is to allow the parties to see the arbitrators' conclusions and reasons for them in advance of the publication of the final award. In the absence of the publication of a draft award, any errors in the award can justify an application for it to be set aside under sections 67–69, subject to the right of the arbitrators to correct any spelling mistakes or to clarify any ambiguity under section 57[246]. Furthermore, the majority of awards are made in writing, but the arbitrators can make an oral award if the parties agree that writing is not required (section 52). The award must be signed by the arbitrators and this signature prima facie determines the date on which the award is made. The award is to be signed by all of the arbitrators and only dissenting arbitrators have the right to not sign the award, which means a difficulty may arise in determining the date on which the award is made. Failing to give the opportunity to all arbitrators to sign the award means that it can be set aside or remitted under section 68. Moreover, should the parties' agreement require that all arbitrators have to sign the award, a dissenting arbitrator may not refuse to do so because such a refusal puts him in breach of duty[247].

In reaching their award, a party can apply to the court for their removal (section 24). If an award is remitted to the arbitrators following an application or appeal to the court against it, the arbitrators have to make a fresh award within three months of the date of the court's order. In the absence of any contractual agreement, an application can be made to the court for the extension of time under section 50. The fact that there is a mistake in the award cannot by itself rationalize the extension of the time limit[248]. Besides, the right to apply to the court may be ousted by the parties' agreement. The court can extend the time as long as it thinks fit and time can be extended whether or not it has expired[249].

245 *The Singapore Fortune* [1987] 1 LR 270.

246 *Gold Coast Ltd v Naval Gijon S.A. sub nom Hull 553 [2006] EWHC 1044 (Comm)* S57 of the AA 1996 allows a party to apply to the arbitrator to correct an award (or make an additional award) if there has been an error.

247 *Cargill International S.A. v Sociedad Iberica S.A.* [1998] 1 LR 489.

248 *Gold Coast Limited v Naval Gijon S.A.* [2006] EWHC 1044 (Comm) The court recognised that the policy of the 1996 Act is to make it more difficult to challenge arbitrators' decisions (see *The Vimeira* [1985] 3 AllER 641).

249 *Oakland Metal Co v Benaim & Co. Ltd.* [1953] 1 QB 261.

The court is able to extend time retroactively and so permit the enforcement of an award that is made after expiration of the period providing that the court is satisfied that an injustice would otherwise be done (section 50.3). The leave of the court is required for an appeal from the court's decision on the extension of time.

In the *Lesotho*[250] case, the parties in an arbitration agreement had agreed that the arbitrators' award should be final. There was, therefore, no right of access for either party to the court, on a point of law under section 69 of the 1996 Act. Section 49(6) of the 1996 Act made provision for the power of the tribunal to award interest in these circumstances as a matter of substantive right. The arbitrators, therefore, exceeded their powers when they had recourse to what would have been their discretionary powers in section 49(3) to resolve a matter to which they should have applied the substantive law of the contract. An arbitration award may be set aside or declared to be of no effect under the 1996 Act on application to the court, and so where the award is set aside or declared null and void, it may be necessary for new proceedings – either judicial or arbitral – to be commenced. Where the court sets aside or nullifies an award in full or in part, it may declare that the period between the commencement of the arbitration and the date of the court's order is to be disregarded. Hence, the claimant is restored to his original position and is free to commence new proceedings. Consequently, it could be said that the reference to the courts, taking into consideration the needed formality, means inefficiency of arbitration.

The seat of the arbitration is to be determined by the parties or by the arbitrators in the event of default, and the seat of the arbitration is to be stated in the award (section 52.5). If there has been a delay in notifying the award to the losing party, and this has caused prejudice to the losing party, the court has the power to extend time limits for applications and appeals under section 79.

There are old cases in which an award was set aside by courts for failure by the arbitrators to deal with all the issues referred to them. The modern approach is for an incomplete award to be remitted by the court under section 68.2d[251]. In *Ledwood Construction v Kier Construction*[252] an award was remitted due to the arbitrator's failure to consider all of the issues put to him. An arbitrator cannot make an award which requires the exercise of some future power by him. An arbitrator cannot reach an award conditional upon a ruling of the courts.

Prior to the 1996 Act, English law did not require arbitrators to give reasoned awards. The award is to contain reasons unless it is an agreed award or the parties have agreed to dispense with reasons. If the reasons are given, but are inadequate to allow the court to determine whether an error of law is contained in the award for the purpose of hearing an appeal on a point of law, the court has jurisdiction to order a new reasoning, provided that there is no agreement to exclude judicial review.

250 *Lesotho Highlands Development Authority v Impregilo Spa* [2003] *EWCA* Civ 1159.
251 *Thomas v Countyside* [1994] 4 AllER 853.
252 [1998] ADRLJ 79.

A court can order reasons to be given for the purpose not just of an appeal on a point of law, but also for the purpose of determining whether the arbitrators have exceeded their jurisdiction or the proceedings were conducted under serious irregularity. In the absence of a contrary agreement, a party can apply to the court for an order requiring reasons to be given (section 68). If the parties have excluded judicial review for error of law then the court cannot order reasons in respect of an error of law. Additionally, if the parties agreed that the award should be unreasoned, that agreement is enough to oust the jurisdiction of the court to hear an appeal on a point of law (section 69). An application to the court under section 68 for an order remitting the award to the arbitrators for the provision of reasons can take place only for procedural irregularity, which does not correlate with a failure to provide reasons. It could be argued that the court's power to order reasons for the purpose of an application under sections 67–68 is ousted where there is an agreement for an unreasoned award. In the absence of an agreement between the parties dispensing with the need to give reasons, it is clear that reasons must be given. If the parties agree that the arbitrators are not to give reasons for their award, then the arbitrator's ruling as to the allocation of costs cannot be challenged, because the parties' agreement excludes judicial review on the ground of error of law. The Court of Appeal in *CGU International Insurance Plc & Ors v Astra Zeneca Insurance Co Ltd*[253] held that in order to retain the compatibility between sections 68 and 69 of the Act and Article 6 of the European Convention on Human Rights (ECHR) (the right to a fair trial), the Court of Appeal has a very limited residual discretion to hear an appeal on the ground that the judge's decision not to allow that appeal had been unfair. Section 67(4) is human rights compliant, provided that it is open to the Court of Appeal to review "the fairness of the process of the determination of the question whether leave to appeal should be given"[254].

Interestingly, section 70.4 extends the court's ability to order reasons beyond appeal on point of law under section 69 to applications under sections 67 and 68. An appeal on a point of law can be brought only in respect of a question that the arbitrators had been asked to determine. Regarding additional costs of arbitration that will arise where there has been a successful application for reasons, the court has discretion to make a supplementary order relating to the costs of the arbitration. Where there is a parties' agreement allowing appeal, then provided that there is a point of English law involved, the court has no discretion to refuse to hear the appeal[255]. The application for leave to appeal must identify the question of law to be determined and must state the ground on which it is alleged that leave to appeal should be granted. There are a number of jurisdictional preconditions that

253 [2006] EWCA Civ 1340.

254 *Kazakhstan v Instil Group Inc. [2007] EWCA Civ 471.* An agreement to arbitrate is not contrary to Article 6 of the ECHR unless it was entered into as a result of duress, undue influence or mistake, or included onerous or unusual terms that should have been brought to the attention of the other party, but were not. *Paul Stretford v Football Association Ltd* [2007] EWCA Civ 238.

255 *The Trade Nomad* [1998] 1 LR 57.

apply to an application for leave to appeal that do not apply to a consensual appeal (section 69.3)[256].

On the one hand, if the point of law forms just one part of an under matter, leave to appeal might be refused. On the other hand, if the point of law is the basis of the arbitrator's reasoning, leave can be granted, even though other points of law have arisen between the parties. The court can grant leave where a number of points of law have arisen, the cumulative effect of which is to determine the parties' right. A party cannot raise before the court a question of law that had not been argued by the arbitrators, except when the point of law has been put to the arbitrator but not dealt with by him in his award[257]. The court can give leave to appeal if first the award is obviously wrong and second the question of law is of general public importance and the correctness of the award is at least open to serious doubt. No one ought to be compelled into an arbitration to which he is not a party. Such a person is entitled to have his objection to the arbitration heard in court, without the circumscription of the AA. On the face of it, that inevitably means that the trial of the issue of jurisdiction will be a trial *de novo*. The court in *Nema*[258] drew a distinction between points of law with general importance and points of law which were one off. Moreover, the House of Lords in *Antaios*[259] has restated the guidelines for leave to appeal. The criteria in section 69.3c to grant leave to appeal are jurisdictional and the court may not simply grant leave to appeal against an award. The only matters that have to be adjudicated are whether or not the question is of general importance and whether the court in its discretion should grant leave. The applicant must establish to the degree of serious doubt to which the award is incorrect. An error should be demonstrated easily and quickly.

256 For leave to be granted by a court, the following jurisdictional conditions have to be met by the applicant: (a) There must be a question of law and must arise out of an award made in the proceedings. The court cannot challenge interlocutory decisions and directions of the arbitrators because they do not constitute an award in their own right. (b) An appeal can be brought within 28 days of the making of the award only if the party has first exhausted any available arbitral means of appeal or review. (c) The application for leave to appeal must identify the question of law to be determined and state the basis on which it is alleged that leave to appeal should be granted. Has the court jurisdiction to consider at the hearing grounds that are not specified in the application? (d) The determination of the question must affect the rights of the parties, the question is one that the arbitrators were asked to determine and the award was wrong considering that the question of law was of general public importance.

257 *Vitol S.A. v Norelf Ltd* [1995] 3 AllER 971.

258 [1981] 2 AllER 1030. In *Seabridge Shipping v Orsleff's Efif's* ([1999] 2 Lloyd's Rep 685) the charter party was expressly governed by English law and contained a London arbitration clause. At arbitration, it was held that the Hague Rules had been incorporated and that the charter's fax, sent one day prior to the expiry of the one-year time limit, did not meet the requirements of section 14 of the AA 1966 in order to commence the arbitration. The judge disagreed with the arbitrator's decision concerning section 14 of the AA 1996, holding that copying a fax to the ship owners was a valid notice to commence the arbitration such that the charterers' claim was not time-barred.

259 [1984] 3 AllER 229.

In any other case the applicant will not have satisfied the court that the award is obviously wrong[260].

If the court finds that the arbitrators have erred in law, then the court can set aside the award insofar as it is related to costs, the award may be remitted to them for fresh consideration or the court can resolve the matter itself by varying the award[261]. Any objection to the arbitrators' directions regarding expenditure cannot be referred to the court, during the conduct of the proceedings, other than by an application to the court for the removal of the arbitrators on the basis that the arbitrators are preventing by their directions a fair hearing of the issues. Moreover, another remedy is a challenge to the award on the basis of serious irregularity. If the parties have laid down costs rules and the arbitrators do not adhere to them, then an application may be made to the court, as the arbitrators have not conducted the proceedings according to the parties' agreement, taking into account that the arbitrator's award caused substantial injustice[262]. If the arbitrators fail to provide the basis for their determination of costs, the award can be remitted to them on the basis that they have failed to adhere to the formal requirements of the award. The court is free to provide some other means of determining the costs, which can include remitting the award to the arbitrators[263]. Hence, if the arbitrators assert their lien on the award and refuse to release it, any party can apply to the court for an order requiring the arbitrators to deliver their awards and the court can at the same time determine fees and expenses. If the arbitrators assert a lien on the award, the court has no power to determine the reasonableness of any sum owing to them by virtue of contract. Whether or not the arbitrators have withheld their award on application can be reviewed by the court (section 64.2) for it to determine the level of remuneration which is to be regarded as recoverable in the award. A party can make an application to the court at any stage in the proceedings for a reasonable charging basis to be determined.

260 *Carden Ltd v Unlee* [1996] ADRLJ 71. *Egmatra v Marco Trading Corp.* [1998] C.L.C. 1552. *Continental Bank N.A. v Aeakos Compania Naviera S.A. (1994)* 1 WLR 588. *Nea Agrex S.A. v Baltic Shipping Co Ltd (1976)* 1 QB 933. An Appeal Under section 69 of the AA must be based on errors of law and not findings of fact. *Demco Investments & Commercial S.A. & Others v SE Banken Forsakring Holding Aktiebolag*, Case No 2004/834, High Court of Justice (QBD) (30 June 2005) the court held that there was no room for any appeal under section 69 of the Act against the findings of fact in the award itself, since these had to be accepted before making any application for permission to appeal. The court considered the tribunal's interpretation of these agreements and concluded that the tribunal had not been "obviously wrong".

261 *Metro-Gammel Ltd. v Fki Engineering plc.* [1996] ADRLN 19, *Cadmus Investment Ltd. v Amec Building Ltd.* [1997] 7 CL 27, *The Maria* [1993] 2 LR 168.

262 Substantial Injustice only occurs if a tribunal fails to address an important or fundamental issue *Fidelity Management S.A. & others v Myriad International Holdings B.V. & others*, Case No 2005 Folio No 154, High Court of Justice (Queen's Bench Division) (9 June 2005). The court further held that only a failure to deal with an important or fundamental issue would be capable of causing "substantial injustice" and it drew a distinction between, on the one hand, a failure to deal with an issue and, on the other hand, a failure to provide sufficient reasoning for the decision. The Court held that only the former could fall within section 68(2)(d) of the Act and consequently dismissed the appeal.

263 *Bevan Ashford v Goeff Yeande Ltd.* [1998] *The Times* 23 April.

As mentioned above, a party can apply to the court (section 28) for an adjustment of the sum demanded by the tribunal. If a party considers that the tribunal claims fees that are too high, the party can apply to the court to secure the release of the award and simultaneously seek an adjustment to the fees and expenses claimed. The court may order the award to be released against the applicant paying into court the final amount claimed or some lesser amount, to deal with the possibility of an excessive claim by the arbitral tribunal, making it impossible for a party to obtain the award. Moreover, the court can direct how the amount of the expenses is to be determined by the third party. No application to the court can be made where there is a possibility of appeal or review of the arbitrators' fees by some other arbitral process. For example, by applying to a relevant appellate arbitral tribunal, leave of the court is required for any appeal. Immediate payment of the tribunal's expenses in order to obtain delivery of the award does not preclude a later application to the court (section 28) for an adjustment to the arbitrator's fees in accordance with what is reasonable. The court can order the repayment of any excessive amount paid, but only if such an order is reasonable in the circumstances. Hence, parties have a choice between an application directly to the court (section 56) or the payment of the full amount to the arbitrators and subsequent challenge under section 28. A challenge to the arbitrator's fees can be made by any party and not only by a participant[264]. The court can order costs to be determined by such means as it can specify, and the basic means is by reference to judges with experience or to taxing to masters. Where the tribunal consists of or includes a judge-arbitrator, the powers of the court can only be exercised by the High Court (section 63).

In the case of a judge-arbitrator, the application to release the award is made to the judge-arbitrator rather than the court. Applications by a party for a correction or for an additional award must be made within 28 days of the date of the award, but the time can be extended by agreement between the parties or by the court under section 79 (section 57). Where the tribunal is a judge-arbitrator, the time limits set out in section 57.4,6 for the application or exercise of these powers do not apply. The final and binding quality of an award does not affect challenges to the award, made either without recourse to the court or pursuant to sections 67–69 (section 58). As shown earlier, the tribunal is required to give reasons unless the parties agree otherwise. Thus, the new Act adopts a more formal and written type of award. Should the tribunal fail to comply with the requirements or the reasoning is not appropriate, that may be grounds to challenge the award in a courtroom.

If an award does not include an award of costs, the award can be remitted to arbitrators (section 68) on the grounds of serious irregularity. The costs of any application to the court under the 1996 Act are a matter for the court and not for the arbitrators. Hence, where a party appeals against an arbitration award on the

264 *Rolimpex v Hadji E Dossa* [1971] 1 LR 380.

basis that there is an error in law, the court will deal with the costs of the appeal[265]. The court can order security for costs for the application to it, as in the case of any other judicial proceedings. Additionally, the court can order that the costs of the rehearing or remission are to form part of the costs of the arbitration. Furthermore, the court can, on the ground of serious irregularity[266], declare an award to be of no effect in whole or in part, thereby encompassing the possibility of alleged voidness where arbitrators exceed their powers. There is no power under section 43 of the AA 1996 for a party to apply to the court for an order of disclosure, whether it is third party disclosure or even disclosure from a party. Section 43(4) protected the third party from applications, which would not have been granted had the application been made under CPR 31.17 in court proceedings[267]. Arbitrations being private proceedings cannot affect the rights of third parties. Thus, an arbitrator cannot award the costs of arbitration against a person who is not party to the arbitration proceedings[268].

Errors in allocating costs are errors of law[269] and are challengeable by appeal on the grounds of error of law under section 69[270]. An allocation of costs that

265 *The Avala* [1994] 1 LR 363.

266 Court refuses to set aside award due to delay, inaction and other grounds, *Sinclair v (1) Woods of Winchester Ltd and (2) Harrison*, Case No HT-05-123, High Court (Queen's Bench Division) (14 July 2005). Turning to the second question, the removal of the arbitrator, the court held that the arbitrator had not done anything wrong, either before or during the proceedings or in granting the award, and that there was therefore no procedural irregularity. In addition, the court held that in any event, no substantial injustice had been demonstrated by the claimants resulting from any of the criticisms of the award and, consequently, the actions under both section 68 and section 24 of the Act had to fail.

267 *BNP Paribas & Ors. v Deloitte & Touche LLP*, 2003 *EWHC* 2874 [COMM].

268 *The Vimeira No 2* [1986] 2 LR 117, RSC Ord 4 r 9.2. Correspondence challenging jurisdiction does not make entity an actual or real party to arbitral proceedings, *Law Debenture Trust Corporation plc v (1) Elektrim Finance B.V. (2) Elektrim S.A. (3) Concord Trust*, Case No HC05C00554, High Court of Justice (Chancery Division) (1 July 2005). The Court held that the correspondence that the claimant had entered into, asserting the tribunal's lack of jurisdiction, did not amount to participation in the arbitration proceedings and that consequently, it was suitable for the court to determine the extent of the tribunal's jurisdiction granting an injunction against the second defendant to refrain it from pursuing the arbitration.

269 Error of law does not always amount to an excess of jurisdiction, *Lesotho Highlands Development Authority v Impregilo SpA & others, Case No [2005] UKHL 43,* House of Lords (30 June 2005). The court stated that the tribunal had the power to grant pre-award interest pursuant to section 49(3) of the Act and that the law of Lesotho could not be recognized as an agreement to the contrary for the purpose of section 49(2) of the Act. Their Lordships established that, if the tribunal chose a currency that should not have been chosen, or applied interest that should not have been awarded, the erroneous exercise of an available power by the tribunal, in determining the currency or granting interest, was an error of law. Nevertheless, the court held that a mere error of law did not by itself amount to an excess of jurisdiction pursuant to section 68(2)(b) of the Act and so allowed the appeal.

270 Substantial hurdles to overcome in application to appeal award pursuant to section 69 of the English AA 1996, *Surefire Systems Limited v Guardian ECL Limited*, Case No HT-05-183, High Court (Queen's Bench Division) (10 August 2005). Jackson J stated in *obiter* that where parties entered into an arbitration agreement, their rights to challenge an arbitrator's award were firmly

is not justified as a matter of law constitutes an error of law and does not give rise to remission or setting aside of an award or any other ground. Moreover, an appeal can be made if the conditions for the grant of leave to appeal are satisfied (section 69). When an arbitrator has refused to hear submissions on costs, that action can be classified as failure to give the parties a proper hearing and constitutes serious irregularity which can be challenged under section 68. The definition of irregularity is found in paragraph 2 of section 68, which illustrates a list of occasions referred to as irregularities. Inevitably there is a need for judicial interpretation of the term "irregularity" and therefore reference to the test of misconduct as it has been established by previous case law will probably be made.

A party can apply to the court on the ground that there is a serious irregularity in the award, that the arbitrators have not dealt with the issues put to them or that the award is uncertain or ambiguous. Thus, the court will intervene if substantial injustice would otherwise result to one of the parties. The court has jurisdiction to remit the award for serious irregularity where the arbitrators have admitted a mistake in the award. The parties are free to agree on the powers of the arbitrators to make an additional award. A party can apply to the court for remission of the award to the arbitrators so that a supplementary award can be made on the basis that the award is defective. Once a supplementary award is made, it forms part of the original award. If the arbitrators have refused to correct their award or to make a supplementary one, the objecting party can apply to the court for the award to be set aside or remitted on the basis of serious irregularity. The court has jurisdiction to deal with the matter after the arbitrators have been given the opportunity to correct the problem themselves. If the award is incomplete in any aspect, the courts should intervene to correct it, since there is no other mechanism to cover the mistakes of the tribunal. There is a problem with the time limit of 28 days and the courts have to exercise their discretion to extend the statutory time limits under section 79 in order to avoid injustice results caused by refusal of arbitrators to exercise powers.

A final award is binding on the parties to the arbitration, in the same way as court judgment is on the parties to the litigation. Any failure by the losing party to implement the award must be countered by proceedings to enforce the award. Additionally, an award declaratory does not confer any right of enforcement on the claimant and the party must bring separate judicial proceedings on the original cause of action, relying on the award as evidence of his claim. An award is

limited by the Act. He also noted that any application would have to overcome the 'substantial hurdles' set up by section 69 and that in making an application for leave to appeal, the parties had to make certain they did not burden the court with inadmissible evidence or with many pages of complex arguments about factual issues which the arbitrator had decided. English courts have repeatedly refused leave to appeal where the applicable law is not English law. For that reason, parties will effectively exclude section 69 by providing for a law other than English law to apply to their contract. Even where leave to appeal has been granted, the English courts have been reluctant to overturn arbitrators' awards on questions of law. *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep 305 and *Sanghi Polyesters Ltd (India) v International Investor (KFC, Kuwait)* [2000] 1 Lloyd's Rep 480.

enforceable and must be recognized in any other proceedings between the parties as long as it has not been set aside[271]. At the end, an award does not have any automatic result, but merely creates an obligation enforceable by action. In particular, claims up to £3,000 are automatically referred to arbitration and are normally dealt with by the district judge, whose award stands as a judgment (section 92).

The parties have the power to correct an award without recourse to the courts. The award must be made within the prescribed time otherwise it would be a nullity because the arbitrators would lack the appropriate jurisdiction. An award will be regarded as having been made in the place of the seat of arbitration, thereby avoiding disputes over where an award is made. Thus, the view expressed in *Hiscox v Outhwonte*[272] where it is held that the place of signature determined the place where the award was made is nullified. The parties have the power to agree on the remedies, which the tribunal can grant, and they may give the tribunal powers which are not available to the courts. Although the remedies must not be contrary to public policy, the tribunal can award compound interest and its power is wider than that of the court[273]. In fact, the compound interest is granted on a compensatory and not a punitive basis[274]. This therefore means that only courts can grant punitive measures.

The Act has incorporated the principles upon which the English court would grant leave to appeal as they have been endorsed by courts under the 1979 Act[275]. The term "dispute" has been defined by the courts[276]. It is stated that a court which makes an order for summary judgment, even though the dispute falls within the scope of an arbitration agreement, subverts the principle of party autonomy[277].

271 *Arnold v Nat West Bank plc.* [1993] 1 EG 94 *India Oil Corp. v Coastal Bermouda* [1990] 2 Lloyd's Rep 407.

272 [1992] 1 AC 562. Challenging an award for violation of public policy requires unconscionable or reprehensible conduct and an arbitrator's mistake does not necessarily constitute a substantial irregularity, *Mohammed Abdulmohsin Al-Kharafi & Sons for General Trading, General Contracting and Industrial Structures WLL v Big Dig Construction (Proprietary) Ltd.* (in liquidation, formerly known as Protech Projects Construction (PTY) Limited), Case No 2004 Folio 828 and 2005 Folio 438, High Court (Queen's Bench Division) (14 October 2005). The court stated that the issue of who should pay the costs of the arbitration was a question of law and that consequently, any challenge could only be brought under section 69 of the Act. The court further stated that section 69 of the Act was not available to the claimant because the agreement to ICC arbitration precluded its application. In addition, the court held that even if failure to consider the CFAs was a question of fact, the arbitrator, in failing to consider the CFAs to establish the "costs incurred" under Article 31.1 of the ICC Rules, would have, at most, been mistaken and would not have committed a serious irregularity under section 68(2)(d) of the Act. Finally, the court concluded that there was no substantial injustice since the claimant should have anticipated that, if it lost, it would have to meet an award of costs.

273 *Westdeutsche Landerbank v Islington LBC* [1996] 2 WLR 802.

274 *National Bank of Greece v Pinios Shipping Co.* [1989] 3 WLR 1330.

275 *Delta Civil Engineering Co. Ltd. v London Docklands* [1996] 81 BLR 19. The arbitration clause of the contract was wide enough to give the arbitrator jurisdiction to make an award of costs. There was no reason not to grant leave to enforce the award and the appeal would be allowed.

276 *The John Helmsing* [1990] 2 Lloyd's Rep 290, *Hayfer v Nelson* [1990] 2 Lloyd's Rep 265.

277 *Sa Coppee Lavatin v Ken Ren Chemicals & Fertilizers Ltd* [1994] 2 WLR 631.

As mentioned above, there are provisions enabling the court to require an applicant seeking to challenge an award to provide security for costs[278]. This power is not to be exercised on the grounds that the applicant or appellant is an individual or corporation based outside the UK. In *Gbangbola v Smith & Sherriff Ltd*[279] the court held that the parties have established that there was serious irregularity in dealing with the costs of the arbitration so as to attract section 68 of the 1996 Act. Nothing in the 1996 Act prevents a party to an arbitration agreement from making an application for summary judgment as well. Although the right to appeal on a point of law may be excluded by the parties' agreement, the court's setting aside jurisdiction under section 67 cannot. If the tribunal fails to respect the parties' choice of law and decides the case as *amiable compositeur* or by reference to *lex mercatoria* then the court can set aside the award on the basis that the tribunal exceeded its powers. Thus, the court is the safeguard of the public interest and the means of avoidance of injustice instead of leaving tribunals to handle these matters. The court is given powers to provide means of ensuring service where difficulties arise which cannot be dealt with by the arbitrator (section 77). So, the available arbitral process for resolving the matter has first to be exhausted. This power did not exist previously. The new Act does not revive any jurisdiction of the court to set aside or remit an award on the grounds of errors of law (section 81.2). It is clearly recognised that arbitration is not fully equipped to be an independent and alternative method of dispute resolution. Section 78 provides that notices may be served by any effective means. The court has the power, where service is not reasonably practicable, to direct how service is to take effect or to waive it completely. Any notice required in respect of legal proceedings must comply with the relevant rules of the court. The court has the power under section 79 to extend any time limit agreed in relation to the arbitration proceedings or any other time limit specified in the Act, apart from time limits for the commencement of arbitration proceedings which are dealt with by section 12. The effect[280] of section 12 is that, pursuant to the principle of party autonomy, to introduce a very material restriction of the situations in which the court can grant an extension of time for commencement of arbitration is introduced.

The concept of serious irregularity encompasses the concept of misconduct, remission and defective awards and admitted mistakes. There is serious irregularity only if what had occurred is too far removed from what could rationally be expected from the arbitral process to be justified[281]. Section 68.2 sets out a series

278 *Lexmar Corp v Nordisk* [1977] 1 Lloyd's Rep 289. Proceeding to enforce a letter of undertaking given by a third party pursuant to an order for security for costs made in an arbitration under the 1950 Act. English courts had exclusive jurisdiction over Lexmar's claim. *Continental Bank v Aeakos Compania Naviers* [1994] 1 Lloyd's Rep 505, 2 AllER 540.

279 [1998] 3 AllER 730.

280 *Grimaldi Compagnia v Sekihyo Line* [1998] 3 AllER 943, *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 AllER 23, *Vosnoc v Trans Global* [1998] 1 Lloyd's Rep 711, *Cathiship S.A. v Allanasons Ltd* [1998] 3 AllER 714. The court in the *Lysland* confirmed the power of the High Court to order the arbitrator to state a special case. [1973] 1 QB 296.

281 *ABB AG v Hochtief Airport GMBH and Athens International Airport SA* [2006] EWHC (Comm).

of grounds upon which an application can be made to the court for an award to be set aside or remitted on the ground that the proceedings or the award itself have been tainted by a serious irregularity. If the award is remitted, it is likely that the same arbitrators will be retained. If, by contrast, the award is set aside or nullified but the dispute remains in arbitration, the court has the power to remove the arbitrators under section 24 of the Act, and they are to be replaced in accordance with the procedure for appointment of the original arbitrators, under section 27 of the Act. The serious irregularity has taken place either in the proceedings or in the award itself. An interim award as well as a full award can be set aside under section 68.2[282]. The purpose of introducing a substantial injustice request was to emphasize that the English courts no longer have a general supervisory jurisdiction over arbitrations and should be called upon to intervene only if there is clear and substantial injustice. Any default on the part of one party or legal advisers can no longer amount to a ground for remission. The list of grounds set out in section 68, upon which an award can be set aside is exhaustive. Moreover, section 68.2 allows application to the court under the general duty of the tribunal (section 33), which means compliance with the rules of natural justice. If the arbitrators have made their award, further evidence is not admissible, but if the award has been made and it is possible for the late evidence to be heard, failure to allow its admission can in certain circumstances amount to serious irregularity. The issue in any section 68 application is not whether the arbitrator has reached an accurate conclusion[283]. Arbitrators are permitted to reach awards based on their own experience but have to do so on the evidence presented to them and must not bring in new and different evidence. An arbitrator is not bound by the way a party had pleaded its case as long as the arbitrator gives each party a reasonable opportunity of presenting its case[284]. Furthermore, failure to adhere to the ethos of arbitration required by the parties and excess of arbitrator's procedural powers are grounds for challenging an award. Failure to deal with all the issues that were put to the tribunal amounts to a ground of misconduct that allows the court to remit the award to the arbitrators for its completion. The right to appeal can be excluded by agreement.

An award carrying one of the defects set out in section 68 does not mean that it is a nullity, but rather permits an application to be made to the court for the award to be set aside[285] or remitted under section 68. It is not appropriate for the

282 *Ismail v Polish Ocean Lines Ltd.* [1997] 2 LR 134, *The Avala* [1994] 2 LR 363, *Ceval Alimentos S.A. v Agrimpex Trading Ltd* [1995] 2 LR 380.

283 *JD Wetherspoon plc v Jay Mar Estates* [2007] EWHC 856 (TCC).

284 *Trustees of Edmond Stern Settlement v Simon Levy* [2007] EWHC 1187.

285 *Gbangbola v Smith & Sherriff* [1998] 3 All E.R. 730. In Ronly, Gross J. took the view that the arbitrator had exceeded his powers by deducting from the amount awarded an as yet unproven sum claimed by the respondent for credits under other contracts between the parties falling outside his jurisdiction, and expressing the hope that the issues relating to the credits could be resolved in some other forum. The judge held that by making a decision on deductibility of the credits, the arbitrator was ruling on matters not put before him. In Gbangbola the applicant Gbangbola applied to the court under section 68 challenging the order for costs and award of the arbitrator.

parties who wish to object to an award to await enforcement proceedings as a remedy is available following an application to the court under section 68. The court can declare an award wholly or in part ineffective. Where the arbitrators lack jurisdiction to act in a certain way, their award is a nullity and liable to be set aside, which means that the court can provide the appropriate remedy. Applications under sections 24 and 68 of the 1996 Act can be combined and so the court has discretion between the choice of remedies. If the parties' arbitration agreement is still valid after the award has been set aside by the court, then the court can make an order under section 13.2 requiring the period between the commencement of the arbitration proceedings and the court's order to be disregarded for the purpose of determining whether the new proceedings have been commenced. An award can be remitted partly and in time the new award has to relate only to the matter remitted, without reciting the unaffected part of the award. Furthermore, the court has modified the three-month period both when an order is made and also under its general power to extend time limits under section 79. An application challenging an award is an arbitration application and is governed by the principles set out in RSC. The court can order an applicant to provide security for the costs of the application and can direct that the appeal be dismissed if the order is not complied with. Besides, the parties cannot agree in advance that there is to be no right to apply to the court in the event of any irregularity.

English legislation[286] permits a challenge to an award which is allegedly made without jurisdiction, because the arbitration agreement was non-existent or did not cover the dispute in question, or because the arbitrators were not validly appointed. It is clear that both questions of fact and questions of law, which affect jurisdiction, are within the right of appeal under section 67. Substantial injustice is required before an award can be remitted or set aside (section 68.1–procedural irregularity, section 69.3–error of law, must substantially affect the rights of the parties[287]).

As mentioned above, if one party wishes to contest jurisdiction, he has the right either to refuse to participate in the arbitration proceedings, by virtue of

Lloyd J Q.C. set aside the award because the party was denied the right to make representations as to the award of costs.

286 Common law in the nineteenth century recognized that the parties could agree to empower the arbitrators to state a case on a point of law for the opinion of the court. An arbitrator was empowered to state an award or any part of an award in the form of a special case for the consideration of the High Court (section 5 common law procedure Act 1854, section 21 AA 1950). If the arbitration refused to state a special case, he could be ordered to do so by the High Court.

287 In *BMBF (No.12) Ltd v Harland and Wolff Shipbuilding and Heavy Industry* [2001] 2 Lloyd's Rep. 227, the Court of Appeal overturned a first instance decision and upheld the arbitrators' award on the basis that "it is not for the courts to substitute its own view for that of experienced arbitrators on questions such as this." The English courts have recognised that section 69 is a "long stop provision" and the courts should exercise this provision sparingly so as to "respect the decision of the tribunal of the parties' choice." (*per* Tuckey J in *Egmatra AG v Macro Trading Corporation* [1999] 1 Lloyd's Rep 862 at 865).

section 72–in which case he retains the right to challenge the award on jurisdictional grounds under section 67, to contest the enforcement of the award under section 66 or to seek injunctive or declaratory relief at any stage—or to participate in the arbitration proceedings. An objection must be made before he has taken a step in the substantive proceedings or as soon as he is aware of a jurisdictional issue (section 31). If the objection is not made at the proper time, and the tribunal refuses to extend time under its power to do so in section 31.3, the objection is invalid and the party is deemed to have waived the jurisdictional issue under section 73. Section 67 cannot be invoked. On the one hand, section 67.1 sets out the right of a party to challenge an award on the basis of want of substantive jurisdiction, including the validity of the arbitration agreement, the constitution of the tribunal or the scope of the arbitration agreement. On the other hand, section 70.6,7 confers upon the court the power to protect the respondent in jurisdiction proceedings by requiring the applicant to provide security for the costs of the application and to pay the sum owing under the award into court or otherwise to secure that sum.

An award can be defective both in a jurisdictional and in a procedural or legal sense. Prior to the 1996 Act, where an application was made to the court to set aside an award for procedural irregularity, and the court took the view that the problem related to jurisdiction, the court retained an inherent power to set aside for want of jurisdiction[288]. The fact that it may not be easy to categorise a problem, in the event of doubt it is sensible for the application to be made under sections 67, 68 and 69. A party to arbitral proceedings can apply to the court in order to: (a) challenge the award of the tribunal as to its jurisdiction; or (b) obtain an order declaring the award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have jurisdiction. In *Lesotho Highlands Development Authority (Respondents) v Impregilo SpA and Others (Appellants)*[289] held that an error of law does not in itself mean that the arbitrators were acting in excess of their powers under section 68§ (2)(b) giving a clear indication that courts should not undertake a review of the merits of a tribunal's award. Lord Steyn quoted Lord Wilberforce, who stated that, under the new Act, arbitration should be "regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law." The judgment makes it clear that the courts should not review an arbitration award simply on the basis of an error of law on the part of the tribunal, as this does not in itself amount to the tribunal acting in excess of its powers. The courts have been given a clear indication that they should not undertake a review of the merits of the tribunal's decisions, save where the Act expressly provides for that in section 69. The courts will not allow applicants to

288 *Altco Ltd. v Sutherland* [1971] 2 LR 292.

289 [2005] UKHL 43, [2006] 1 A.C. 221 (HL) the courts will not interfere with the arbitral process simply because one party feels that the arbitrators have arrived at what he considers to be a wrong conclusion and will need to demonstrate that he suffered "substantial injustice" which had real effect. The House of Lords held that an arbitral award should not be reviewed by the courts simply because the arbitrator had made an error of law.

challenge an arbitrator's conclusion on a question of law by way of an application under section 68.

It has to be taken into account that substantive jurisdiction is defined by section 30 as the validity of the agreement, the constitution of the tribunal or the scope of the agreement. An application or appeal may not be brought if the applicant or appellant has not first exhausted any agreed procedure for the resolution of jurisdiction disputes. The obligation to exhaust internal procedures does not apply to a party who has challenged the award for want of jurisdiction and who has exercised his right not to appear in the proceedings. The applicant must have exhausted any right to have the award corrected by the arbitrators themselves on the grounds of clerical error or ambiguity. However, the applicant must comply with the time limits laid down in section 70.3[290]. As shown earlier, the arbitral tribunal can continue the proceedings and make a further award while an application to the court under section 67 is pending in relation to an award as to jurisdiction. The arbitrators have the power to continue the arbitration while the appeal against the award as to jurisdiction is resolved. Section 67.3 sets out the order-making powers of the court in application (section 87), and S 71.2 adds that if that award is varied under section 67.3b the variation imposed by the court takes effect as part of the award itself. Whilst an application for leave under section 69[291] of the AA ought to be a paper-only application, (section 69(5)) an application under section 68 for setting aside due to a serious irregularity will usually be heard orally[292]. An arbitrator's award on costs was altered by the court due to a variety of errors by the arbitrator in his original award, which the judge decided were matters of law[293].

290 Time for making of an application can be extended by the court (section 79). A problem with the time limits might arise where the arbitrators withhold the award as security for payment of their fees and expenses, for by the time the award is released the 28-day period may have expired. If the arbitrators have issued a preliminary award the protesting party must challenge the award on jurisdiction within the permitted 28 days and cannot wait for the ultimate award before making the challenge.

291 *Newfield Construction Ltd. v John Lawton Tomlinson Kathleen Christine Tomlinson* [2004] EWHC 3051 (TCC).

292 *Bulfracht (Cyprus) Ltd. v Boneset Shipping Co. Ltd.* [2002] EWHC 2292 (Comm).

293 *Fence Gate Ltd v NEL Construction Ltd* (2001) 82 Con LR 41. His Honour Judge Lloyd QC in *Weldon Plant v The Commission for New Towns* (2000) BLR 496 held that the mere fact that there was an error in the award which was unfair to a party did not mean that there must have been a failure to comply with section 33 of the Act and, therefore, a serious irregularity for the purposes of section 68(2)(a). The limited applicability of section 68 was emphasised by the DAC Report, quoted by Tuckey J in *Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyd's 862 at page 865: "[Section] 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the Arbitration that justice calls at for it to be corrected." Similar points, also emphasising the additional requirement of substantial injustice, were made by Cresswell J in *Petroships Pte Ltd v Petex Trading and Investment Corp.* [2001] 2 Lloyd's 348. The court's powers to interfere with an arbitrator's discretionary decision as to how he should exercise his discretion under section 30(1) should not be engaged unless it is clear that in exercising his discretion he has failed to have regard to the relevant facts and to his duty under section 33.

An appeal against an award is to be made in a form specified to the rules of the Supreme Court and must be accompanied by an affidavit setting out the evidence upon which the applicant intends to rely[294]. The applicant must comply with the statutory requirements set out in section 69. The court can order that any money payable in accordance with the award shall be brought into court or otherwise secured pending the determination of the appeal. The court may direct that the appeal be dismissed if the condition is not complied with. An application for leave to appeal is to be determined without a hearing unless it appears to the court that a hearing is required. If there has been a successful application for leave to appeal, the court will, on granting leave, arrange a date for the hearing of the appeal. The grant of leave can be conditional upon the provision of security for costs or other conditions that the court thinks fit to impose[295]. If the court cannot resolve the question of law because there is insufficient information in the award, their remission of the award is the appropriate remedy[296]. If an award is set aside in whole or in part, the court can order that any provision that an award is a condition precedent to the bringing of legal proceedings is to be ineffective regarding the part of the award that has been set aside. Section 71.4 ensures that a *Scott v Avery* arbitration clause does not preclude the commencement of judicial proceedings on a matter falling within that part of the award that has been set aside.

Leave from the High Court is required to appeal all decisions concerning challenges of arbitral awards, whether on grounds of jurisdiction (section 67), serious irregularity (section 68)[297] or a point of law (section 69)[298]. A first instance judge's decision to refuse an appeal against its ruling on a point of law under section 69 would be considered final under section 69(8), and so not subject to further appeal. The Court of Appeal has residual jurisdiction to guard against unfairness in the process by which the High Court reaches a decision on appealability. The Court of Appeal held that section 69(8) prohibits it from deciding whether it can hear an appeal from a High Court decision relating to permission to appeal. In order to ensure procedural fairness, the Court of Appeal has limited residual jurisdiction to review an exercise of discretion by the High Court. The court of appeal is not looking for an error of law, but for a substantial defect in the fairness of the process.

Is the arbitrators' jurisdiction reinstated on the setting aside of the award? The parties are under the obligation to arbitrate. When leave is given for an appeal to the Court of Appeal, the Court of Appeal must determine first whether the judge had properly exercised his jurisdiction in giving leave to appeal and secondly the court must undertake reconsideration of the guidelines by which any decision as

294 *Foleys Ltd. v City and East London Family* [1997] ADRLJ 401.

295 *Secretary of State v Euston Centre Ltd.* [1995] 1 AllER 269.

296 *The Fanis* [1994] 1 LR 633.

297 An "error of law" on the part of the arbitrators will not give rise to "substantial irregularity," sufficient to uphold an appeal under section 68. *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221 (HL).

298 In *AstraZeneca Insurance v CGU International Insurance* [2006] AllER (D) 176 (October).

to whether leave to appeal on a point of law is to be taken. If the judge refuses leave to appeal to the Court of Appeal, the Court of Appeal has no jurisdiction to hear an appeal against such a refusal. Where a court has heard an appeal on a question of law contained in the award, the court's decision on the question of law is to be treated as a judgment of the court for the purposes of a further appeal. Where there has been a successful application for leave to the Court of Appeal, that court does not have the jurisdiction to allow the appeal on any other ground than the question of law in respect of which leave to appeal was granted[299]. Finally, the 1996 Act confines the jurisdiction of English courts over arbitration awards to questions of English law. Where a contract is governed by the law of any other state, the English courts have no jurisdiction to hear an appeal on a question of law under section 69. It is supposed that where the applicable law is English law and a point of directly effective EU law arises for consideration, the EU law constitutes English law for this purpose and, therefore, an appeal is possible.

AMEC[300] raised three objections before the arbitrator in accordance with section 31 of the AA 1996. The arbitrator ruled that he had jurisdiction in relation to the dispute relating to the contents of HA's letter to AMEC dated 6th December 2002, and AMEC was aggrieved by the arbitrator's decision concerning jurisdiction. Accordingly, on 27th April 2004, AMEC issued the present proceedings in the Technology and Construction Court, in order to challenge the arbitrator's interim award, pursuant to section 67 of the AA 1996. AMEC asked this court to set aside the interim award and to make a declaration as to the arbitrator's lack of jurisdiction or alternatively as to the limited extent of the arbitrator's jurisdiction. Any challenge under section 67 of the AA 1996 to an arbitrator's decision on his own jurisdiction proceeds by way of rehearing rather than review[301].

12.1 Exclusion of judicial control

Some of the courts' powers of control can be excluded by agreement in writing while others are mandatory (section 4 and Schedule 1) and cannot be excluded by

299 *Vitol S.A. v Norelf Ltd.* [1996] 3 AllER 193.

300 *Amec Civil Engineering Limited v The Secretary Of State For Transport* [2004] EWHC 2339 (TCC). The parties have very sensibly agreed that the written and oral evidence adduced before the arbitrator should stand as evidence in the present proceedings in this court. The court decides that the arbitrator has jurisdiction relating to the dispute relating to all of the contents of HA's letter to AMEC, dated 6th December 2002. The court specifies that the hearing in this court is a complete rehearing, rather than a review and so the court express its view for the case, which is superior, rather than the arbitrator's view. This court should make an order under section 67(3)(a) of the AA confirming the interim award. This court makes an order under section 67(3)(a) of the AA 1996 confirming the interim award of the arbitrator dated 30 March 2004.

301 See *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering* SDN BHD [2002] EWHC 1993 (Comm); [2004] 1 Lloyd's Law Reports 190 at paragraphs 19–23; and *Peterson Farms Inc. v C&M Farming Ltd*, [2003] EWHC 121 (Comm); [2004] 1 Lloyd's Law Reports 603 at paragraphs 17–18.

any means, including choice of some other curial law. The right to apply to the court for a preliminary determination of a point of law can be ousted by agreement, which is valid whether it is included in an arbitration clause, or made at any other time. The court may hear an application if it is satisfied that the question substantially affects the rights of the parties and that the determination of the question is likely to produce substantial savings. Regarding preliminary points of law the parties can agree that there is to be no application to the court under section 45.1. If the substantive contract, or the part of the contract under which the question of law has arisen is to be governed by a law other than English law, then the arbitrators are not to apply strict rules of law to the underlying contract. Hence, judicial review of points of English law in an arbitration award can be excluded. There is an increasing ease with which the parties can contract out of judicial review. It is possible to agree to exclude the jurisdiction of the court to hear an appeal in respect of error of law in an award in the case of a domestic agreement.

12.2 Enforcement of awards

An award is final and binding on the parties subject to judicial review on jurisdictional or procedural grounds or on the basis of an error of law. An award is incapable of direct enforcement by the successful party and the court's assistance is necessary. An award can be enforced by bringing an action on it under section 66 applying to all awards whether made in England or in some other jurisdiction. Section 66 provides that enforcement of awards shall be refused where the court is satisfied that the arbitral tribunal lacked jurisdiction to make the award. Section 66.1 allows an award to be enforced in the same way as a judgment. This is so, irrespective of the location of the seat of the arbitration (section 2.2b). Section 66.2 re-enacts that part of section 26.1 of the 1950 Act, which additionally empowered the court to give a judgment in the terms of the award, thereby allowing the judgment rather than the award to be enforced. Additionally, section 66.3 prevents the enforcement of an award, which was made outside the jurisdiction of the arbitrators, providing that the party taking the jurisdiction point has not lost the right to do so. Where the tribunal is acting without jurisdiction, and a party nevertheless participates in the proceedings without objection, the combined effect of sections 30 and 73 is to regard that party as having waived the jurisdictional point. The right of a party to rely upon want of jurisdiction at enforcement stage will be dependent upon him not having participated in the arbitration proceedings (which is his right under section 27) or upon him having participated after having registered an objection. If he has objected, and the matter has been resolved by a preliminary ruling by the court under the procedure set out in section 32 rather than in the ultimate award, the jurisdiction point cannot be reopened at the stage where the award is to be enforced. Section 66.4 creates a saving for awards, which are to be recognized and enforced under other regimes, most importantly foreign awards governed by the Geneva Convention and the NYC. The enforcement of such awards is governed by sections 99–104 of the Act. An action may also be brought upon such awards.

However, it is likely that a party may argue that it was never party to the arbitral proceedings, that it was wrongly joined, that the arbitrator decided matters that were not within the scope of the submission or that the decision did not apply the law chosen by the parties. Recognition or enforcement by a court "may" be refused where a party to the arbitration agreement was under some incapacity, where the arbitration agreement was invalid, or where a party did not have proper notice of the proceedings or was otherwise unable to present its case. A NYC award which exceeds the scope of agreed matters to be submitted to arbitration or which was rendered by an arbitral tribunal not appointed in accordance with the parties' agreement or the law applicable in the place of arbitration may also be refused enforcement. If the award has not yet become binding on the parties or has been set aside in the country in which, or under the law of which, it was made, enforcement can be resisted. A Convention award may also be refused recognition or enforcement if it has decided a matter which cannot be settled by arbitration or if enforcement would be contrary to public policy. Public policy as the basis for refusing enforcement is preserved by section 81[302]. For instance, in *Soinco v Novokuznetsk*[303] the court refused to enforce the award of a dispute, which was referred to arbitration under the International Arbitration Rules of the Zurich Chamber of Commerce and in accordance with the provisions of the contract. The judge held that under English law and in relation to section 5(3) of the 1975 Act, enforcement of this award would be contrary to English public policy. Consequently, the enforcement of an award depends upon its compliance with the public policy of the state.

An award is regarded as having been made in the seat of the arbitration. Under earlier law, an award was made where it was signed[304]. English courts can enforce an award expressed in a foreign currency[305]. An action brought on an arbitration award operates as an action to enforce a contract and the court has the usual range of remedies available to it as in any action for breach of contract. The court can grant a declaration that the award is binding. An injunction may be granted to prevent anticipated breaches of an award. A *Mareva* injunction extending beyond the party's assets within the jurisdiction can be granted, freezing assets as security for the enforcement of the award[306]. Section 66 is split into two parts, enforcing an award as if it were a judgment and entering a judgment in the terms of the award. In many cases an order under section 66.1 will be sufficient for the party seeking enforcement. Section 66 is not mandatory, it simply provides a procedure for the enforcement of an award in the form of an order or judgment commenced

302 *Aiglon Ltd v Gan Shan Ltd.* [1993] 1 LR 164. *Macob Civil Engineering Ltd. v Morrison Construction Ltd.* 1999 ADRLJ 235. *Silver Standard Resources Inc. v Joint Stock Company* 1999 ADRLJ 243.

303 [1998] 2 Lloyd's Rep 337.

304 *Hiscoxh authwait* (No1)[1991] 3 AllER 641.

305 *Zhejiang Import and Export Co. v Siemens* [1993] ADRLJ 183, *Stargas Spa v Petredec Ltd* [1994] 1 LR 412.

306 *Rossel v Oriental Shipping Ltd.* [1990] 3 AllER 545.

by summons rather than by writ. An action on the award will fail if the award is by its nature unenforceable (it is defective or was made without jurisdiction). An oral arbitration agreement cannot be enforced by summary procedure and it will be necessary to bring an action on the award. The award has to be in a form (not ambiguous or uncertain) that renders it enforceable. If the defect cannot be corrected under the slip rule, the party can apply to the court for the award to be remitted for correction. Section 103 sets out an exhaustive list of grounds on which the enforcement of a foreign award can be refused. An award made in excess of the arbitrator's jurisdiction could not be enforced under the summary procedure. Leave to enforce an award is not to be given where the tribunal lacked substantive jurisdiction. Besides, partial enforcement is possible where a severable part of the award is not tainted by want of jurisdiction. If jurisdiction has been determined by the court on a preliminary reference (section 32), the right to contest enforcement will have been lost. The enforcement of an award is subject to the discretion of the court to stay the execution of a judgment[307]. Enforcement of an award under the summary procedure is governed by RSC. An application for leave can be made *ex parte*, but the party is obliged to disclose to the court any objections to enforcement of which he is aware[308]. A prior award may be used by one of the parties to raise a defence of issue estoppel in a new arbitration between the same parties[309], which could be seen as a type of precedent.

12.3 Enforcement of foreign awards

The Civil Jurisdiction and Judgments Act 1982, which was implemented in England by the Brussels Convention 1968 and the Lugano Convention 1988, provided for the recognition and enforcement in England of judgments given by the courts of EU and EFTA Member States. As mentioned above, the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, the Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 implementing Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) (Amendment) Rules 2002 are applicable in England. The NYC as implemented in England allows arbitration awards to be enforced by the High Court[310]. The principle of territorial sovereignty means that a judgment delivered in one country cannot, in the absence of international agreement, have a direct operation of its own force in another[311]. A foreign court will be deemed to have

307 *Far Eastern Shipping Co. v AKP Sovcomflot* [1995] 1 LR 320.
308 *Curacao Trading v Harkison* [1992] 2 LR 186.
309 *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041.
310 *Arab Business v Banque Franco Tunisienne* [1997] 1 LR 531.
311 *Adams v Cape Industries* [1990] Ch 433.

jurisdiction if the defendant and plaintiff consented to the jurisdiction of the forum in which the judgment was obtained[312].

The English courts have jurisdiction to entertain an action on a foreign arbitration award in the same way as on an English award. If section 66 procedure cannot be used, the award is not in a form enforceable by the English courts, and reliance on enforcement by action may be necessary[313]. An English award can be enforced if the submission to arbitration was valid and the validity of submission in a foreign award is tested by the law applicable to the submission to arbitration. English courts will enforce an award that is within the jurisdiction of the arbitrators. A foreign award containing errors of law – even of English law – is enforceable by an action on the award in England[314]. If the awards error goes to jurisdiction, the English court will not enforce the award. The arbitrator's jurisdiction is to be determined by the law applicable to the parties' agreement[315]. A foreign award must be final in order to be enforced by action in England. Is an award that is the subject of judicial review by the curial courts final for enforcement purposes? An English court will not refuse to enforce an award if an alleged fraud has been already dismissed[316]. Moreover, English courts will not enforce a judgment or award, which is contrary to domestic public policy[317]. If illegality was not undisputed, the court would prima facie enforce the award unless the relevant facts were not put before the arbitrators. Hence, once the issue of illegality had been raised and dealt with by the arbitrators, and there was nothing to suggest that the question of illegality had not been properly dealt with by the arbitrators, then the award should be confirmed[318]. In *Soleimany v Soleimany*[319] the Court of Appeal refused to enforce a foreign award on the ground that it was contrary to English public policy because the agreement was illegal, and that it was contrary to English public policy for an English award to be enforced if it was based on an English contract which was illegal when made. Besides, if an agreement were to be performed by influencing government officials abroad and not in England, enforcement would not necessarily be contrary

312 *Holdings Inc v Patel* [1990] 1 QB 335. C. Clarkson, *Jaffey on the conflict of laws*, 1997, Butterworths.

313 *Dalmia Cement Ltd v National Bank of Pakistan* [1974] 3 AllER 189.

314 *Bank Mellant v GAA Co.* [1988] 2 LR 44.

315 *Dallal v Bank Mellat* [1986] 1 AllER 239.

316 *Interdesco S.A. v Nullifire* [1991] *The Financial Times* 8 May.

317 *Ed & F. Man Ltd v Haryanto* [1991] 1 LR 429, *US v Inkley* [1988] 3 WLR 304, *Soinco S.A. v Novokuznetsk* No 1 1997 *The Times* 29 December, *Westacre Investment Inc. v SDPR Holdings Ltd.* [1998] 2 LR 111, Case 393/92. *Municipality of Almelo v Eneriebedriif NV* [1994] ECR I 477. In England, in the well-known *Westacre Investments v Jugoimport* ([1999] 3 AllER 864 (Q.B.); [1999] 3 W.L.R. 811 (C.A.)) case, both the High Court and the Court of Appeal categorically refused to review an arbitral award in a matter where a very serious policy consideration was at issue, namely international corruption. The Court of Appeal in *OTV v Hilmarton* ([1999] 2 Q.B. 222) held that an award cannot be set aside simply because an English court "would have reached a different result."

318 *Soinco v Novokuznersic* 1998 unreported.

319 [1998] 3 WLR 811.

to English public policy[320]. Public policy arguments should not be accepted by a court simply because they could be invoked in the forum if the same facts had been presented in a domestic context, unless the internal law of the forum is the *lex causae*. So, locally accepted prejudices are not always appropriate in an international context. English courts may refuse to enforce an award on the public policy ground that it infringes the EU law. One of the grounds for refusing to enforce a foreign award is public policy. Section 103.3 provides that a court may refuse to enforce an award if it would be contrary to public policy to do so. Thus, an English court may refuse to enforce an arbitration award despite the fact that the submission to arbitration was valid under its applicable law and that the arbitrators did not exceed their jurisdiction. A public policy provision can be found in almost every international convention or treaty relating to foreign awards or judgments and it is one of the defences for refusing to enforce a foreign award or judgement. The concept of public policy is not defined because the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various countries. The role of public policy is to serve as the guardian of the fundamental moral convictions or policies of the forum and the public policy reflects the fundamental economic, legal, moral, religious, political and social standards of every country. What is considered to pertain to public policy in national cases does not necessary pertain to public policy in international cases[321]. Thus, there is a need for a common concept of public policy grounds for refusing to enforce arbitral awards. Public policy should be narrowly construed. The notion of national public policy can be wider than that of international public policy, since any principle which is mandatory in the sense of private international law should be mandatory in a domestic context. The courts will refuse to enforce an award if there has been effective enforcement in some other jurisdiction[322]. For instance the mere enforcement of an award in a private dispute would not contravene public policy[323]. Public policy does not prevent the enforcement of an award reached under a law determined under a procedure agreed between the parties.

The summary enforcement procedure contained in section 66 is applicable to foreign awards as well as to English awards. An award enforceable under common law will be enforceable under section 66 unless the submission was void, the award was made without jurisdiction or there is public policy reason for refusing enforcement. English courts cannot order the payment of money in some other jurisdiction. A court deliberating whether to set aside leave to enforce a foreign award had to examine the alleged injustice of the arbitral procedure, to consider whether the enforcer had called upon the courts of the country concerned to exercise

320 *Lemenda Trading Ltd. v Africa Middle East Petroleum Ltd.* [1998] 1 LR 361.

321 A. Zhilsov, "Mandatory and public policy rules in international commercial arbitration," 1995 *Netherlands International Law Review* 97.

322 *Deutsche Schachtbau v Shell International Petroleum Ltd.* [1990] 1 AC 295.

323 *Dalmia Ltd. v National Bank of Pakistan Ltd. [1978] 2 LR 223. Deutsche Schachtbau v Ras Al Khaimah Oil Co.* [1990] 1 AC295.

their supervisory jurisdiction and whether, it had failed to take advantage of any remedy available under the jurisdiction and if such failure had been reasonable[324]. Finally, the English courts take a broad view of arbitrability and, for the most part, appear to be reluctant to refuse to enforce a foreign award on the grounds of public policy (which is deliberately not defined in the 1996 Act).[325]

12.4 Enforcement of NYC award

The provisions of the AA 1996, sections 101–103 concern NYC awards, namely, awards made pursuant to an arbitration agreement in the territory of a state which is a party to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The award must be made in a contracting state other than the UK, while enforcement under the 1996 Act is possible in respect of a convention award, which is defined by section 100.1. An award is to be treated as made in the seat of the arbitration, wherever it was signed or delivered to the parties[326]. The award must be made in a contracting state and a state not included in the list may be a contracting state, but this would have to be proved before enforcement could be ordered by the English court. The AA 1996 implements the NYC in England and section 103 sets out grounds for a court refusing to enforce an award. Parties must have the opportunity to present their case but in *Kanoria & Ors v Guinness Anor*[327] the party against whom the arbitration was made had never been given an opportunity to present his case and this breached the rules of natural justice and therefore regardless of the fact that the discretion to refuse to enforce an award is strictly limited, the court refused to enforce the award.

A NYC award is recognised by the court acknowledging its binding effect as between the parties to it. Two methods of enforcement of a NYC award are open to a party. The first is an application directly to enforce the award in the same way as a judgment. If leave is given, a party can issue execution upon the award as if it were a judgment. Court procedures will then be available to enforce the award. In the case of a court's order to do or refrain from doing something, the court's powers include that of committing the respondent to prison for contempt. The second method is an application to enter a judgment in terms of the award–then the party can rely on the judgment of a judicial resolution[328] of the issues that prevents any further action being brought in a foreign court.

The NYC principles can be applied by a contracting state to awards made in non-contracting states (Article I.3). A NYC award is to be recognized as binding upon the parties between whom it was made. Even if the defendant has no assets in the UK and there is no jurisdictional connection between the award and the UK,

324 *Minmetals Germany GmbH v Ferco Steel Ltd. The Times*, March 1, 1999, *Dane Air Transport S.A. v Air Canada The Times*, March 31, 1999. *Re Q's Estate, The Independent*, March 19, 1999.
325 *Yukos Oil Company v Dardana Ltd* [2002] 2 Lloyd's Rep 326.
326 *Hiscox v Outhwaite*, No 1 [1991] 3 AllER 641.
327 [2006] EWCA Civ 222.
328 H. Seriki, *Enforcement Of Foreign Arbitral Awards And Public Policy*, 2000 ADRLJ 192.

the award is enforceable in England. As shown earlier, section 103 defines the defences against the enforcement of a NYC award. The award can be enforced as respects those parties of the award that were within the arbitrators' jurisdiction as long as separation is possible[329]. The English courts can review awards arising from arbitrations whose seat is in England, Wales or Northern Ireland and so these awards cannot be NYC awards[330]. The courts of a contracting state can refuse to enforce a NYC award if it has not yet become binding on the parties. A NYC award is unenforceable as long as an application has been made to the curial court for review of it and has not been published the court's decision upon the application[331]. An arbitration award made in one constituent part of the UK can be enforced in another part of the UK according to the Civil Jurisdictions Act 1982.

Once the court in *Svenska* recognized the interim award pursuant to sections 101–103 of the AA 1996 the government's claim that it was not party to the arbitration agreement and so was entitled to state immunity failed. Recognition was relied upon as a gateway to issue estoppel, not as a reason why, independently of any issue estoppel based on the common law, the government's claim that it was not party to the arbitration agreement was bound to fail[332]. Section 101(2) of the AA 1996 provides that awards may be enforced by leave of the court. Thus an application is necessary for the purposes of enforcement. Under the AA 1996 a person who takes no part in arbitral proceedings may contend, when it is sought to enforce an arbitration award against him, that the tribunal had no jurisdiction over him. The interim award was not an English arbitration award but a Danish arbitration of which recognition was sought pursuant to section 101–103 of the AA 1996. The only burden on the person seeking recognition of the award is to produce the documents required by section 102. He does not have to show at that stage that the award was binding upon the person against whom recognition is sought. Such questions are for that person to claim at the second stage under section 103[333]. When seeking to persuade the court to recognize the interim award, pursuant to section 103(2) of the AA 1996 the calimant can rely upon a "recognizable legal principle" which affects the government's prima facie right to a refusal of recognition of the interim award. Since the introduction of the AA 1996 it has been recognized that a person who has taken part in arbitration proceedings for the purpose of contesting the jurisdiction of the arbitral tribunal,

329 *China Agribusiness v Balli Trading* [1997] 5 CL 32.

330 *Arab Business v Banque Franco-Tunisienne* [1996] 1 LR 485, [1997] 1 LR 531, *Far Eastern Shipping v AKP Sovcomflot* [1995] 1 LR 520.

331 *Soinco SAGI v Novokuznetsk No 1* (1997) *The Times* 29 December.

332 *Svenska Petroleum Exploration Ab v Government of The Republic of Lithuania Ab Geonafta* [2005] EWHC 9 (Comm). Mere waiver of immunity not to be treated as a consensual submission to jurisdiction of English courts. Therefore, the interim award gave rise to an issue estoppel and the first defendant was barred from arguing before the English court that it was not a party to the arbitration agreement. *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta, Case No 2004* Folio *272,* High Court (Queen's Bench Division) (4 November 2005).

333 *Dardana Limited v Yukos Oil Company* [2002] 1 AllER (Comm) 819.

and who loses that argument and then fails to avail himself of a right to challenge the award may not object later to the tribunal's jurisdiction on any ground that was the subject of that ruling. This principle is recognized in section 73(2) of the AA 1996, having been recommended by the Departmental Advisory Committee on Arbitration Law.

13 Conclusions

The Act seeks to significantly narrow and delimit the role of the court, ensuring that the court's role is one of support for the arbitral process, rather than interference. Arbitrators have been given more powers. It seems that the new Act contains some very positive provisions, which empower arbitrators and delimit the role of courts by cutting back their powers. There is a shift of powers away from the courts to arbitration. The judges alone had power to order security for costs in arbitration, unless the parties agreed to endow their tribunal with such a power. Under the new Act this power has been removed from the courts and given to arbitrators[334]. The powers that remain with the court are spelled out and delimited (sections 42–45). These powers are regarded, at least theoretically, as supportive of the arbitral process. In practise the assistance/intervention of the court seems to be influential for the whole arbitration proceeding. For the first time the tribunal may or discharge a court's order (section 44.6). Therefore the tribunal can act as effectively as the court. Arbitrators are empowered to continue proceedings notwithstanding that a person has made an application to the court (sections 24.3, 32.4, and 45.4). So, court applications should not be a simple method of disrupting the arbitral process. Appeals on points of law may be excluded at any time and further restrictions have been enacted to limit such appeals (section 69.3). The court has lost the power to set aside a condition as stated in sections 25.1,4 of the 1950 Act, which are repealed.

On the other hand, the arbitral tribunal, unlike the courts, has no power to consolidate arbitrations, which could lead to a situation where two arbitrations based on the same facts result in different awards. Two basic features of English arbitration law, which have not been addressed by the Act, are those of confidentiality and privacy, which are two of the main advantages which arbitration has over court proceedings[335]. Moreover, the confidentiality of arbitration has been recognised as part of English law for many years[336]. To prohibit any disclosure of the award would frustrate a fundamental purpose of the arbitration by preventing

334 *Coppe Lavalin v Ken-Ren Chemicals* [1995] 1 AC 38. The decision of the House of Lords has been reversed by the new Act.

335 *Esso/BHP v Plowman* [1995] 128 AllER 391. Arbitration proceedings and materials produced are treated as confidential to the parties and the arbitrator, subject to certain exceptions. *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314. Sharon Gerbi, *Confidentiality in arbitration under UK law*, International Dispute Resolution Newsletter. June 2006, Issue 14. www.twobirds.com.

336 *Ali Shipping Corp v Shipyard Trogir* [1998] 2 AllER 136 (CA)). The permission of the court to a third party should not be granted unless all the parties to the arbitration consented or there was an overriding reason in the interests of justice. The award could be disclosed (setting aside the general duty of confidentiality) in situations where the disclosure was convincingly necessary to

enforcement of the award[337]. Furthermore, respondents applied to a court, under section 68 of the AA 1996, that there was a serious irregularity in the award and the court[338] in respect of section 68 recited "sensitive matters of greatest confidentiality" and that such confidentiality would be lost if the judgment were published and so publication of the judgment was forbidden. Hence, the fact that the parties had come to the courts to challenge the award on the basis of a serious irregularity or lack of jurisdiction did not mean that confidentiality in the arbitral proceedings or in the award had been waived.

An advantage of the arbitral procedure remains its confidential nature. Of course, appeals to the court continue to exist under the new Act (section 69), unless the parties specifically remove any right of appeal. Furthermore, an exception to the principles occurs when an award will become public in enforcement proceedings or if challenged, and several non-parties may have legitimate interests in being informed about the arbitration.

However, certain provisions relating to the powers of the courts apply if the seat of arbitration is elsewhere. The courts have the power to grant interim relief in support of arbitrations having a foreign seat, which means that the court gets new powers to assist foreign arbitrations. The court still has jurisdiction to decide about the illegality of the contract. The level of judicial intervention in arbitration matters is, to a large extent, dependent upon the attitude of the judge towards arbitration and, of course, the finality of arbitration agreements is thereby undermined, since certain judges might not have confidence in the arbitral process and thus be more inclined to intervene. As mentioned above, it is for the parties to decide how their arbitration should be conducted, unless the public interest dictates otherwise, and subject to the mandatory provisions of the Act. Thus, the state intervenes and diminishes the parties' will. The legislator, through these provisions, keeps the sovereign power of the state in hands of the courts. The arbitral tribunal is not regarded as a means of safeguarding the principles of public order and policy.

It seems that, in practise, arbitration has been changed to more closely resemble litigation by increasing written decisions. The new Act demands the award to have a specific format. Arbitration would lose the speed and efficiency that makes it such a useful alternative to the judicial system, and these safeguards enhance the accuracy only slightly. Arbitration should result in final resolution of disputes in a substantially shorter time. Moreover, the arbitral process has lost much of its credibility due to participants moulding it into a litigation format. The mandatory provisions of the Act are a setback of the principles of the supremacy of the arbitration agreement and the notion of party autonomy. Many provisions of the new Act are stated specifically as following the courts' proceedings instead of a

establish or protect a party's legal rights against a third party. *Hassneh Insurance Co. of Israel and others v Mew* [1993] 2 Lloyd's Rep 243. *Insurance Co. v Lloyd's Syndicate* (1994) CLC 1303.

337 *Associated Electric and Gas Insurance Services Ltd ("Aegis") v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041.

338 *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company* [2004] EWCA Civ 314). *Arab National Bank v El-Abdali* [2004] EWHC 2381 (COMM).

concise informal procedure. Thus, flexibility of arbitration has been lost through the transposition of principles and procedures used in litigation to arbitration. Arbitration can now be seen as a minor image of litigation with detailed pleadings, full discovery, oral hearings and trials. So, its credibility as a real alternative to litigation is being questioned. An answer to the complexity of commercial and maritime arbitrations is effective arbitration management. It seems that the court, under the 1996 Act, plays a key role in arbitration taking into account the previous case law and the drafting of the Act, which is done in accordance with the principles established by court's decisions. The arbitral tribunal is first of all unable to enforce its own award. Finally, the analysis has revealed an extensive intervention of courts in the various steps of the arbitration proceedings, indicating the impact of courts upon arbitration in English law and showing that arbitration and courts are not co-equal dispute mechanisms, and arbitration has not gained its independence as a dispute mechanism.

5 The role of courts in commercial–maritime arbitration in Greek law

1 Introduction

The significance of arbitration as an effective means of resolving disputes has increased, especially in the field of commercial transactions. Articles 264, 867–903 and 906 of the Code of Civil Procedure (CCP)[1] govern arbitration in Greek law. Law 2735/1999[2] creates a special legislative regime for international arbitration by incorporating the UNCITRAL Model Law into the domestic legal order.

The rules of arbitration contained in the CCP applicable to Greek courts are mainly procedural and so they are not established as rules of a new equally independent and alternative dispute system to courts[3]. Arbitration is considered to be a parallel but dependent to courts dispute system, which is workable within the system and the procedures applicable to courts. To that extent any problem caused during arbitration is referred to courts instead of a second-degree arbitral tribunal. Any matter referring to civil law disputes between contracting parties can be taken to arbitration if there is an agreement about it either within their agreement itself or within an independent agreement[4]. In the areas objectively covered by the provisions of the NYC, its rules always apply within the limits of its subjective scope (setting aside the relative provisions of the CCP) because ratified international conventions prevail over all contrary provisions (Article 28 of the Greek Constitution). On the other hand, the second paragraph of Article 867 states that labor relations based on either an individual or a collective agreement cannot be the object of arbitration, even if there is an arbitration clause in the contract. The Greek Supreme Court has considered the issue of compulsory arbitration in the context of a provision included in law 1876/1990 concerning labor disputes[5]. The Court's reasoning focused predominantly on

1 Amended by Article 17–18 of Law 2331/1995.

2 *Government Gazette* A167 of 18 August 1999.

3 G. Zekos, "An overview of maritime arbitration in Greek law," 1999 *JMLC* 81, www.jmlc.org G. Zekos, "The Role of Courts in Commercial and Maritime Arbitration Under Greek and US Law," 2000 *Managerial Law*, issue 3.

4 K. Kalavros, *Code of Civil Law Procedure*, 1986 Sakkoulas Art 867, at 225. A Mantakou*, Basic Principles of Law and International Commercial Arbitration*, 2006 DEC 1123.

5 G. Zekos, *Characteristics of Labor Arbitration in Greek Law*, 1999 *ADRLJ* 185, England.

Article 22(2) of the Greek Constitution which expressly contemplates the arbitral resolution of labour disputes[6]. Disputes arising from labor relations are regulated by Articles 663–676 of the same Code and decided according to a special procedure defined therein[7]. Greek legislation has made this distinction because the public interest has prevailed over the right of the parties to choose their judge[8]. It is submitted that this strict interpretation of the wording of the Article should not be followed, and some matters should be left open to be decided by arbitration. Greek legislation has decided that the normal civil procedure is too slow and complicated to be followed in labor disputes, which must be solved quickly. Arbitration is not allowed in divorce and other matrimonial cases of a personal nature, covered under Book IV of the Civil Code (Family Status) are labor and bankruptcy cases. Anti-trust matters are not arbitrable but claims founded on unfair competition are.

According to Article 20 of the Greek Constitution every person has the right to legal protection by courts and courts exercise the judicial function. Regardless of the constitution reference and the Greek CCP which states that the resolution of civil disputes is exercised by courts which are the state institutions, there are cases where reference to other persons for the resolution of civil disputes resolution of disputes regarding arbitration is allowed but there is always a need for the existence of a dispute and the parties' reference of the dispute to be resolved by arbitration. The difference between arbitration and courts focused on the type of institution dealing with the difference. Courts are fundamental institutions dealing with the resolution of civil disputes according to the Greek Constitution and the CCP.

Parties can decide for voluntary arbitration according to Articles of the CCP or according to rules of a permanent institution of arbitration (902 CCP). There is a need for a specific agreement and reference to parties' agreement for an institutional arbitration and in any other case there is reference to ad hoc arbitration according to the CCP[9]. If parties take part in an institutional arbitration this means that parties have agreed on institutional arbitration, regardless of the fact that there is no specific agreement regarding following institutional arbitration. It is worth mentioning that parties in an institutional arbitration have to follow the rules of the institution and do not have the freedom to decide about the arbitral procedure. Orders enjoining a party from resorting to the courts are contrary to Articles 8(1) and 20(1) of the Greek Constitution, which guarantees a right of access to Courts[10].

6 Arios Pagos 25/2004, [Nomos Database: 348167].

7 Ibid. at 173–74. See Court of Appeal of Athens 2684/83 1983 Epitheorisis Ergatikou Dikaiou (EED) 521. L. Sinaniotis, Special Procedures, Athens 197, at 161. Labor differences according to Article 663 CCP cannot be arbitrated, Court of Appeals of Piraeus 77/2006 (Nomos Database 392291).

8 L. Dasios, *Labor Procedure Law*, Vol. A/1 Athens 1980 at 41.

9 Supreme Court 375/75 1975 NV 765.

10 2004 Court of Appeal (Maritime Cases Section) [2004] Piraiki Nomologia 92. www.kluwerarbitration.com. "The existence and effect of the alleged arbitration agreement, contained

There is a view that only voluntary arbitration is legalized by the Constitution. The Court of Appeal of Athens[11] recently decided that compulsory arbitration is contrary to the Constitution because it eliminates the right of the parties to have their dispute determined by the appropriate judge, that is to say a judge of a civil court or the arbitrator when the initiative for the change has been left in the hands of the parties. On the other hand, the Constitution itself states, without any distinction, that arbitration as a means of settling particular labor disputes and thus compulsory arbitration, could be legal. Furthermore, according to Article 8 of the Greek Constitution, parties cannot decide about the specific court that will decide their dispute because the CCP establishes the court's jurisdiction or refers any dispute to arbitration, which can be seen as a way of legalizing two equal bases for the resolution of a dispute. People can refer specific disputes mentioned in the CCP to arbitration and the CCP by itself does not establish the arbitrator's jurisdiction. Hence, the exclusion of courts' jurisdiction and the establishment of arbitral resolution of specific disputes is allowed by the Greek Constitution if there is a party's agreement. The Greek Constitution makes positive reference to the rights of persons to waive or oust the jurisdiction of national courts. In other words, the parties' agreement establishes the arbitrators' authority and excludes courts' jurisdiction for the resolution of the specific dispute. Thus, the decision of a person that his/her case be tried by an arbitration tribunal rather than by an ordinary civil court is not against the constitution. However, there are other occasions, according to the CCP, on which any person can decide not to use the normal civil law procedures and, therefore, the use of this right cannot be said to be against the Constitution in those circumstances. For example, a person has the right not to appeal against a decision of a civil CFI. It is worth mentioning that the right of a party to use any means of appeal is legal only if it is referred to an ad hoc dispute and not to all future ones. The parties can exclude the jurisdiction of a court by specifying a dispute to arbitration according to rules specified by law. An arbitral tribunal, by having jurisdiction for the resolution of a specific matter, is vested with a constitutional guarantee established for the state institutions which are not courts. In reality, can any arbitration agreement exclude courts' jurisdiction? It could be said that the principle of excluding a courts jurisdiction by an arbitration agreement is minimized not only by the court's review of arbitral awards but also by its intervention in the various stages of arbitration, as will be analyzed.

in C's regulations, was a matter to be pleaded before the Greek court in which C had been sued. That court had jurisdiction to decide this matter and, if C's arguments were successful, would have dismissed the action for want of jurisdiction. Recognition of the anti-suit injunction had been granted pursuant to the Brussels Convention. According to Article 1(4) of the Brussels Convention, as interpreted by the European Court of Justice in the *Van Uden* case (C-391/95, [1998] ECR I-7091), proceedings to obtain interim measures to protect or facilitate the arbitration process – as opposed to the underlying substantive law rights in dispute in the arbitration process – are excluded from the scope of the Brussels Convention".

11 Court of Appeal of Athens 1556/94 48 Armenopoulos 464.

The arbitral tribunal, regardless the CCP, has got equal functional characteristics than a court, is not considered to be a state institution as courts according to Article 87 of the Greek Constitution and so it is not a state institution having the duty to provide judicial protection under Article 20§1 Greek Constitution. Arbitration does not mean that the person loses the right to legal protection but instead of courts an arbitral tribunal will decide according to the arbitration procedure and it is possible to refer the case to courts again according to Articles 897, 900 and 901 CCP. Hence, according to Articles 897, 900, 901 CCP courts have jurisdiction to deal with a civil difference regardless of its reference to arbitration. In the case of nullification of an award, will the case go back to arbitration or to a court?

The jurisdiction of an arbitral tribunal to solve civil disputes is broader than that of court jurisdiction to solve civil matters, taking into account the specific jurisdiction of the court specified by the CCP[12]. Can courts review an award for arbitrators' authority to deal with the matter (897§4 CCP) if the courts do not have jurisdiction to deal with the subject matter of the dispute? It seems that the judicial review of awards is considered as part of the substance of an arbitration procedure. In the case of a nullification of an award; this does not mean that the dispute is solved; and so the dispute can be referred either to a court or an arbitral tribunal.

It is worth mentioning that according to Article 8§1 of the Greek Constitution, the legitimate judge is not only the state judge (87 Greek Constitution) but also the arbitrator of Article 867 CCP. The arbitrator is not a judge but he/she plays the role of a judge in arbitration in accordance with the constitutional guarantee and legitimacy of law. Is there a conflict between Articles that repeal the equality of judges and arbitrators? Arbitrators exercise a public function according to Article 438 CCP because they act as a substitution to the judges and courts. It is argued that arbitration is not a contractual creation by the parties' agreement, but arbitration is an instrument for dispute resolution equal to that of courts. The equality of the mechanisms is questionable. According to Article 5 of the Greek Constitution, arbitration agreements for voluntary arbitration are legal and no one can be deprived of their legal judge against their will, as expressed by their arbitration agreement concluded with their free will. Thus, arbitration is not an unconstitutional thesmos and dispute mechanism. The author agrees with Mustill and Boyd that the authority of arbitration gets its value from law as specified by the CCP and is not precluded by the Greek Constitution.

Arbitration is a private tribunal for the settlement of disputes. For that reason the public may not be admitted in the hearings if its admission is objected to by either party or the arbitrator. Additionally, arbitration is a *sui generis* thesmos of law. Any arbitration agreement is based on the first paragraph of Article 8 of the Greek Constitution which states that any person cannot be denied against his will, the right to have his case decided by an appropriate state court as stated by the law and so parties cannot change courts' jurisdiction for the dispute of differences.

12 Supreme Court 825/77 26 NV 273.

Hence, any contracting party should be allowed to decide whether they want their case to be tried by an ordinary civil court under the civil law procedure or by an arbitration tribunal. Moreover, the Constitution allows the reference of disputes to arbitration according to the conditions specified by the relevant law. The freedom of parties to choose a dispute to be resolved by arbitration does not mean that the reference of any kind of difference to arbitration is allowed. On the other hand, it can be said that this right is circumvented when a party is allowed to file a suit in the civil courts against a decision of an arbitration tribunal,[13] although arbitration and litigation are regarded as two equal and parallel procedures. In fact, civil courts cannot investigate the substance of the arbitrator's decision unless the decision is against public order or morality[14]. Those elements of the decision which are against the public order or morality, must come out of the content and the facts referred to in the decision, rather than from its legal reasoning[15]–namely the principles of law upon which the arbitrator has based his decision. The Greek legal order has a very favourable stance towards arbitration, both domestic and international[16].

This chapter will show the impact of courts on the functionality of arbitration in Greek law, in order to analyse the co-equal nature of arbitration and courts as dispute mechanisms.

2 Arbitrability

As has been said above, any civil law dispute can be the subject of arbitration. Indeed the content of the term "civil law difference" is broader than that set out in Article 1 of the CCP[17]. Therefore, disputes decided by administrative courts can be the subject of arbitration if there is an arbitration clause in the contract[18]. Cases which have to be decided by a specific procedure, not labor, can also be decided by arbitration. Scholars take the view that only disputes which can be decided by a civil court should be matters of arbitration. In contrast, the courts have indicated that any kind of civil law dispute which fulfills the demand of the Articles of the Code regulating arbitration, may be subject to arbitration[19]. Thus, arbitration tribunals have a dynamic role to play in the Greek legal system. However, a problem arises when a civil court lacks jurisdiction to try the case. In the first place, the answer to this problem is that the civil court examines the legality of an arbitration tribunal's decision, taking into account that the same civil court examines only the formal

13 Court of Appeal of Athens 6976/81 1981 Hellenic Dikaiosini (HD) 746.

14 Supreme Court 1661/80 29 Nomiko Vima (NV) 1074, Court of Appeal of Athens 73/84 25 HD 376.

15 Court of Appeal of Athens 350/79 10 Diki 278.

16 K. Kerameus, S. Kousoulis, "Civil Justice Reform: Access, Costs and Delay. A Greek Perspective," in A. Zukerman ed, *Civil Justice in Crisis, Comparative perspectives of Civil procedure*, Oxford 1999, p 382.

17 Supreme Court 441/82 31 NV 46, Supreme Court 622/72 40 Epitheorisis Ergatikis Nomothesias (EEN) 37. G. Oikonomopoulos, G. Mitsopoulos, Consultation, 23 NV 1133.

18 Simbulio Epikratias 1197/2005 2006 Dikaio etairion and epixeiriseon (DEC) 111. Taxation disputes are arbitrable.

19 Supreme Court 875/76 25 NV 336, Supreme Court 825/77 26 NV 673.

legality of the decision and not the substance of it. Furthermore, where a decision of an arbitration tribunal is annulled, a civil court in effect determines the case rather than an arbitration tribunal. Yet it has been argued that the case should be tried by an arbitration tribunal again where the contracting parties so wish.

Civil law disputes have to satisfy a further condition in order to be submissible to arbitration–that the parties must be able to act freely upon the object of the dispute, because some matters are compulsorily regulated by statutes regardless of the parties' will[20]. Hence, things which are defined by public order rules as objects of compulsory law cannot be subject to arbitration. The second paragraph of Article 867 of the CCP is a compulsory law rule. Therefore, disputes coming out of any kind of individual labor agreement or contract, or collective agreement between professional and industrial enterprises or between them and their employees regarding labor relations, between organizations of social benefit and the people who have been insured by them, cannot be the subject of arbitration[21]. In other words, firstly we have the kind of disputes which law allows to be arbitrated and secondly the parties' arbitration agreement also defines the arbitrability of a dispute.

The Greek Constitution defines in 26§3 that the judicial function will be implemented by courts and specifies the procedure and conditions for the appointment of judges (Article 87) and the organization of courts (Article 93). Hence, the judicial function prima facie is attributed to the state responsible for the court function. It is considered that allowing institutions other than courts to deal with dispute resolution affects and causes problems to the public policy of a state[22]. That is why states are reluctant to allow the development of a fully independent and ADR system such as arbitration and consequently some matters are considered not to be arbitrable. Moreover, states authorize the capacity of courts to recognize and enforce awards, not mentioning the extensive review of awards by courts. Hence, it could be argued that arbitrability is an exception to the court's monopoly to deal with dispute resolution. Furthermore, reflecting the understanding of arbitration as an inferior dispute resolution mechanism, the courts' support and at the same time the courts' inspection, is needed for the completion of a dispute by arbitration. Regarding international commercial arbitration, arbitrability is mainly refused only for reasons of public policy.

3 The arbitration agreement

According to Article 867 CCP, parties are free to subject the settlement of contractual disputes to arbitration, provided that the parties have the right to freely

20 The "arbitrability" of a dispute presupposes, under Article 867 CCP, that it is related to private law rights that the parties are free to dispose at will.

21 D. Bastas, *Settlement of Individual Labor Disputes*, 1995 Sakkoulas at 122.

22 N. Pappas, *Arbitrability*, 2002 DEC 684.

dispose the subject matter of the dispute[23]. A valid arbitration agreement indicates that there is a civil law difference, the parties have the freedom to deal with the object/subject of the dispute and the capacity to conclude an agreement, and have met the requirement of writing[24]. The parties' arbitration agreement is valid only against the contracting parties[25]. As a matter of principle, under Greek Law, an arbitration clause is held binding solely for the signatory parties[26]. The parties' arbitration agreement is not valid against third parties except in the case where the third party agrees to be obliged. Civil law differences can be solved by arbitration even if they are not solved by the courts. The Supreme Court in 1381/1981[27] acknowledged with regard to a construction partnership where arbitration was the agreed way of resolving disputes among three partners, that when one partner had appointed an arbitrator, the second partner validly appointed another arbitrator both for himself and the third partner but court decisions have been more careful about the particularities of multiparty arbitration, by applying the criteria of the

23 Court of Appeals of Athens 168/2004 2004 DEC 569. Supreme Court 255/96 37 ED 1559. Court of Appeal of Piraeus 929/2003 2004 DEC 566. Court of Appeal of Piraeus 702/2003 2004 DEC 936.

24 Court of Appeal of Athens 6029/2003 2004 HD 845. A. Mantakou, *The conclusion of arbitration agreements in international transactions* (1st edn. Sakkoulas Athens 1998) 191. A. Foustoucos, *The validity of arbitration agreements and its control in Arbitration: Studies, Articles, Contributions* (1st edn. Sakkoulas Athens 2000) 26–33.

25 Supreme Court 980/86 18 Diki 995.

26 A number of exceptions are acknowledged, but predominantly in maritime contracts: (a) An arbitration clause incorporated in a bill of lading, concluded between the captain and the shipper, is considered binding for the ship-owner too, even if he/she is not a contracting party. The same applies for bills of lading issued by a maritime broker authorised by the captain to do so, as an agent of the ship-owner. (b) An arbitration clause incorporated in a bill of lading is binding for the legitimate end holder thereof even if he/she is not a signatory party. (c) When the claims deriving from the primary contract have been assigned to a third party, then the debtor is entitled to raise the arbitration clause in case the assignee of the debt, sues him before the civil courts. The assignee of the debt is entitled to file his lawsuit before the arbitral tribunal, even if he/she was not a contracting party. (d) In case of debt assumption by a third party, the latter is held bound by the arbitration clause. (e) In case of a guarantee contract, the guarantor is entitled to raise the arbitration clause incorporated to the core contract, if sued before the civil courts. On the other hand, he/she may not be directly sued before an arbitral tribunal, unless he/she is a signatory party to the main contract. An arbitration clause incorporated in a contract signed by a company, is also binding for its major shareholders, in case the conditions for lifting of the corporate veil are met.

27 1981 Diki 187. Multiparty arbitration is possible under Greek law, but the conditions for its validity and the appropriate means of its implementation have not been defined clearly. Accordingly the *Arios Pagos* by decision 1381/1980, Dike Vol. 12 (1981) 187 stated with regard to a construction partnership, where arbitration was the agreed way of resolving disputes among three partners that when one partner had appointed an arbitrator, the second partner rightly appointed another arbitrator both for himself and the third partner. Successive court decisions have been more careful about the particularities of multiparty arbitration, by applying the criteria of the parties' conflicting interests. CFI of Piraeus 727/1987, *Diaitisia* Vol. 1 (1992) p 72. Stelios Koussoulis, *Main Issues on Arbitration* Vol. II (Athens 1996) pp. 173–174. Anghélos C. Foustoucos, "Multi-party Arbitration", *Dike* Vol. 12 (1981) p. 189.

parties' conflicting interests[28]. There are many court decisions regarding the type of differences that can be solved by arbitration[29]. Greek law does not provide for strict requirements other than that the agreement expresses the will of the parties to have their dispute settled by arbitration. Mandatory arbitration is illegal without the parties' agreement[30].

The conclusion of the arbitration agreement by being a contract is regulated by the civil code regarding contracts, and courts formulate the established and prevailed precedent about the conclusion of a contract[31]. The ability of parties to conclude an arbitration agreement is regulated by the Greek civil code and specifically the rules about contracts, but the existence of an arbitration agreement regarding its type, content and the arbitrability of the difference are regulated by the CCP (Articles 65, 98, 867–69, 871–72). So, the ability of the parties to conclude an arbitration agreement is decided by the parties' nationality law. The agreement must be written and, therefore, the writing is *ad solemnitatem* for the conclusion of the agreement[32]. The need for an *ad solemnitatem* written agreement is required for the minimum content of the arbitration[33], which means the parties' agreement on the submission of a specific difference to arbitration. In other words, there is a need for a meeting of the parties' minds on at least the reference of the specific difference to arbitration. The formal requirement of "in writing" also applies to the authorisation given to a representative who signs the arbitration agreement on behalf of another person or a legal entity. Lack of specific authorisation in writing can be "cured" in domestic arbitrations by the simple appearance and involvement of the parties in the arbitration. In international arbitrations, the legal results arising from a lack of specific authorisation in writing are determined by either the law governing the powers and/or the capacity of the natural person or legal entity giving the authorisation, or by the law applicable to the arbitration clause[34]. The Greek Supreme Court finally held that company directors act as "substitute organs" for the Board of Directors (according to Article 22 of law 2190/1920) and can justifiably sign arbitration agreements without any such particular authorisation[35]. It was considered that there was no written agreement when the parties had merely exchanged fax or telex[36].

28 CFI of Piraeus 727/1987, 1992 Diaitisia 72. S. Kousoulis, *Main issues on arbitration*, Vol. II, Athens 1996, p 173.
29 Supreme Court 468/79 27 NV 1471. Court of Appeal of Athens 8445/2005 2006 DEC 1299.
30 Court of Appeal of Athens 4168/82 13 Diki 689.
31 Supreme Court 1143/74 23 NV 642. Arios Pagos 1428/2005 2006 DEC 77.
32 Supreme Court 1481/ 77 26 NV 1194, Supreme Court 1143/74 23 NV 642, Court of Appeal of Athens 6029/2003, 2004 ED 845.
33 Supreme Court 550/1996 39 ED 549. Supreme Court 1268/1985 34 NV 862. Court of Appeal of Athens 168/2004 2004 DEC 569.
34 S. Kousoulis, *Fundamental problems of arbitration – Theory* (1st edn Sakkoulas Athens 1996) 78–79.
35 Arios Pagos 586/1983, 1992 Diaitisia 298, Arios Pagos 563/1989, 1992 Diaitisia 269.
36 Court of Appeal of Athens 4508/81 1981 HD 644, Supreme Court 1002/73 22 NV 612.

Now it is considered that the exchange of fax or telex means the existence of a written arbitration agreement[37]. The absence of a written arbitration agreement means that there is no valid arbitration agreement. Greek law accepts the power of arbitrators to fill gaps in a long-term contract where the parties have failed to do so.

The autonomy of the arbitration agreement from the main contract is a legal concept, not a factual determination. Thus, it does not mean that acceptance of the arbitration agreement must be separate from that of the main contract. Neither does it mean that the arbitration agreement cannot follow the main contract where the latter is assigned to a third party. The arbitration agreement is regarded as an independent contract in itself[38]. Regardless to the void of the main agreement the difference can be referred to arbitration[39]. However, such an agreement can be contained in the same document in which the main contract is incorporated. For example, an arbitration clause can be contained in a bill of lading contract[40] or a charterparty[41]. An arbitration clause is valid as long as it is written according to Articles 65§2, 869 CCP and 2§2 NYC[42]. The court interprets the contract and the arbitration clause according to Articles 173 and 200 of the Civil Code and the failure of the court to do so means the refutation of the decision according to 559§1 CCP[43]. Reference to an arbitration clause, which is contained in another written agreement of the parties, should be specific[44]. On the other hand, this strict reference to the written nature of the agreement is bypassed when the parties voluntarily take part in the arbitration procedure[45]. It is repaired only the non-existence of a written agreement and not the void of the agreement for other reason[46]. Taking part in arbitration does not mean the inability to conclude an arbitration agreement or the non-existence of any arbitration agreement. Thus, an oral arbitration agreement becomes effective where there is clear agreement by taking part in the arbitral process. The writing could be *ad probationem* if parties consent to arbitration, regardless of the writing of the agreement, but law establishes the writing as *ad solemnitatem* for the conclusion of an arbitration agreement and so a security policy containing an arbitration clause signed by both

37 Court of Appeal of Athens 4508/81 22 HD 644.

38 G. Oikonomopoulos, *Independence of the Arbitration Agreement*, 5 Diki 691. Supreme Court 1425/1999 2001 DEC 405. Supreme Court 877/2000 2001 DEC 408. Court of Appeal of Piraeus 702/2003 2004 DEC 936. Court of Appeal of Athens 2479/2006 2006 DEC 1294.

39 Supreme Court 825/77 26 NV 673.

40 G. Zekos, *The Contractual Role of Bills of Lading under Greek, United States and English Law* 2001, Barmarick Publications, England.

41 Court of Appeal of Piraeus 475/2005 2006 DEC 78.Court of Appeal of Piraeus 999/2003 2005 DEC 52. Supreme Court 1932/2006 (Nomos Database 414025) Arbitration clause incorporated in a charter-party.

42 Court of Appeal of Piraeus 999/2003 2005 DEC 52. Court of Appeal of Athens 168/2004 2004 DEC 569.

43 Court of Appeal of Athens 8320/2004 2005 ED 520.

44 Supreme Court 553/79 27 NV 1595, Supreme Court 238/78 35 EEN 446.

45 Supreme Court 1143/74 23 NV 642, Supreme Court 1481/77 26 NV 1194.

46 Supreme Court 844/84 34 Armenopoulos 979.

parties (Article 160 CC) qualified as a written agreement for the commencement of a valid arbitration[47]. Hence, the signature of both parties was a fundamental element in the existence of a valid arbitration agreement[48]. For instance, in a security policy there was a need for the signature of both the parties in order for the arbitration agreement to be valid[49]. If the arbitration agreement is signed by a proxy without full power it is void. An instrument empowering an agent to conclude an arbitration agreement on behalf of a principal must also be in writing, in both domestic and international transactions[50]. There is no need for signature if the arbitration agreement is concluded before a court and the arbitration agreement is included in the court's record signed by the judge (870§2 CCP). If the arbitration agreement is concluded before a judge, the parties must who sign it. Therefore, courts can be present even in the conclusion of an arbitration agreement. In other words, the court contributes to the conclusion of the arbitration agreement. However, other defects of the original arbitration agreement, such as the ability to contract or the suitability of a dispute to be solved by arbitration, cannot be restored by the submission by the parties to the procedure of an arbitration tribunal. An arbitration clause is not affected by invalidity of the contract in which it is incorporated. It is argued that the arbitration agreement means the exclusion of state jurisdiction expressed by courts to deal with the dispute, but it will be examined whether the courts involvement in the arbitration process means that the state keeps jurisdiction over arbitration. Taking part in the arbitration procedure does not repair the illegal content of an arbitration agreement and defects of the

47 Court of Appeal of Athens 3259/1999, 2000 NV 1421. Court of Appeal of Athens 168/2004 2004 DEC 569. Supreme Court 550/96 39 ED 549. Written arbitration agreement Articles 158, 159, 160 Civil Code & 867–869 CCP, Court of Appeal of Athens 2471/2006 (Nomos Database 415759).

48 Supreme Court 1148/1977 26 NV 1194. The Supreme Court has held that the signatures of all parties must be placed upon each original copy of the agreement; an exchange of letters, telegrams and the like does not meet the requirement of the written form (Decision no. 1143 of 1974, published in *Nomikon Vima*, Vol. 22, p 642; the decision is based on Article 160 of the Civil Code. Article 160 of the Civil Code provides: "If a written form is prescribed by the law or by the parties for a legal act, the document must bear the handwritten signature of the person who issued it. In the case of a contract the signatures of the parties must be put on the same document. If there are more than one original of the contract, the signature of a party on the original which is destined to the other party will suffice".

49 Supreme Court 1002/1973 22 NV 612. Greek Supreme Court [Arios Pagos] Plenum, 20 March 1997, Decision no 8 of 1997 Hellenike Dikaiossyne (1997, no 38) pp 764–767 "The Plenum of the Greek Supreme Court upheld the decisions of the lower instances, finding that the arbitration clause contained in the insurance contract constituted an agreement in writing binding the parties. The Court of Appeal accepted the following: 'From the unambiguous formulation of the contents of the present document, which is being interpreted in good faith, after taking into account the trade usages, after seeking the true intentions of the parties, without rigid application of the terms (Articles 173–200 CC). Thus, the insurance contract of the vessel belonging to ANC (which also contained the accession and succession contracts), which also stipulated the reception of the freight and demurrage of the vessel and the relevant legal and judicial representation of ANC, was drawn up in writing, since ANC's offer and WoE's acceptance bear the original signatures of their legitimate representatives."

50 Supreme Court 88/1977 25 NV 1126.

parties' will for the conclusion of the arbitration agreement. The parties must take part in the arbitral process—a party's demand for postponement of the procedure or allegation of non-existence of an arbitration agreement is not enough for the party to be considered as taking part in the arbitration procedure. The substantive law for contracts and their interpretation governs the arbitration agreement[51]. In order to be valid an arbitration agreement referring to future disputes has to be written and refer to the specific relationship from which the dispute will arise (868 CCP).

As mentioned earlier, the resolution of civil disputes by arbitration is attributed to arbitral tribunal (867 CCP), if there is a parties' agreement in accordance with the fundamental procedure of parties' freedom to contract (361 CC). Who examines the applicability of Article 361 CC in the parties' agreement? The result of the voluntary reference of dispute resolution to arbitration by parties is the exclusion of state jurisdiction (264 CCP) for the resolution of the specific differences. The characteristics of voluntary arbitration are the existence of a civil difference, arbitrability of the difference, parties' agreement for the exclusion of courts and jurisdiction. According to Articles 867, 871§ 1 CCP parties can agree on arbitration and appoint a court as an arbitrator. So, a court can be appointed as an arbitrator regardless of the fact that the court as a state institution has no jurisdiction for the specific dispute. By playing the role of an arbitrator does a court contribute to arbitration becoming more like litigation rather than arbitration, because it is obvious that judges will be influenced by their legal background and inheritance and familiarity with litigation? The problem is focused on deciding whether the agreement is for a court acting as arbitrator based on an agreement for prolongation of competence or an arbitration agreement–because in both cases there is a party's agreement for the resolution of a dispute by a court which originally has no jurisdiction to deal with the case. A specific party's agreement for dispute resolution by voluntary arbitration is the necessary element for voluntary arbitration, transforming a court into an arbitral tribunal (467, 871§1 CCP). The selected court does not act as a forum of state power but as a person (arbitrator). In any other case we have prolongation of competence of a court. The interpretation of the parties' agreement reveals whether a court has appointment to act as an arbitral tribunal or as a state court according to the Greek Constitution. In case of a doubt about the appointment of a court as an arbitral tribunal, then the court acts as a state court.

The civil law on contracts defines the reasons for the cessation of a contract such as an arbitration agreement but additional reasons for cessation are identified in Article 885 CCP. The reasons for the cessation of an arbitration agreement are defined by Article 885 CCP but they are not conclusive, which means that other reasons might be accepted to cease an arbitration agreement,[52] which will

51 Supreme Court 1481/77 26 NV 1194.

52 Court of Appeal of Athens 3521/80 14 Diki 285. Court of Appeal of Piraeus 702/2003, 2004 DEC 936. Court of Appeal of Piraeus 923/2003, 2004 DEC 566.

obviously be determined by the court's precedent in its interpretation of contracts according to the Greek Civil Code. The arbitration agreement ceases if the arbitrators die and they are not replaced[53]. The agreement for the ceasation of an arbitration agreement has to follow the same written format as the original arbitration agreement because it is a new agreement[54]. The arbitration agreement cannot be ceased by a single party's[55] decision. Moreover, the arbitration agreement ceases to exist if the time for the issue of an award is passed without its issue[56]. The agreement for the extension of the time for the issue of the award is an amendment of the original arbitration agreement, but the arbitration agreement is still in force despite the insolvency of the parties[57]. If both parties do not ask for reference of a dispute to arbitration means the cessation of the arbitration agreement regarding, of course, the specific dispute referred to arbitration by the parties because if there is reference to arbitration of a big scale of differences, then the arbitration is still in force for the differences that we do not have *res judicata*. It could be argued that the issue of an award for the dispute means cessation of the arbitration agreement.

The parties prior to the commencement of the arbitral process can ask the court to decide for the existence of a valid arbitration agreement[58]. If a party raises the objection of submission of a case to arbitration during the first hearing (Article 263 CCP), the court will refer the case to the private jurisdictional authorities[59] (Article 264 CCP). The courts' decision for the reference of the dispute to arbitration can be appealed or an appeal for the quashing of a judgment by a writ of error according to 513(1), (553 (1) CCP can be made, and the final judgment produces *res judicata* for the validity of the arbitration agreement[60]. Where there is not a different agreement contained in the contract, the arbitrators can decide about their jurisdiction and the arbitrability of the dispute[61]. Thus, arbitrators and judges can examine the validity of the arbitration agreement. The validity of the arbitration agreement is decided according to the law agreed by the parties or the rules of the private international law of the place where the agreement is concluded, the law applied to its content or the law of the parties' nationality. Hence, the court is involved in arbitration

53 Supreme Court 1249/77 26 NV 1039.

54 Court of Appeal of Athens 3540/84 27 HD 106.

55 Supreme Court 1183/85, 53 EGL (Epitheorisis of Greek Lawyers) 418.

56 Supreme Court 352/85 26 HD 866.

57 Court of Appeal of Athens 7124/84 16 Diki 208.

58 Supreme Court 91/93 1996 Dikaio of Enterprises and Companies (DEC) 781. Arios Pagos 1561/1998 1999 DEC 793.

59 Court of Appeal of Athens 1904/2006 2006 DEC 1298. Arios Pagos [Supreme Court], Decision no 149 of 1986 Hellenic Dikaiosini, Vol. 27 (1986) pp 494-496. The Supreme Court stated that the appellant's allegation that the arbitration agreement was concluded by the agent without a written authorization was not valid and had been rightly rejected by the Court of Appeal, since the appellant did not contest the validity of the arbitration agreement before the Judge of First Instance. As a result, the Supreme Court did not examine the appellant's objection based on Article V(1)(*a*) of the Convention.

60 Supreme Court 738/2001 2002 EGL 715.

61 Court of Appeal of Athens 3057/93 1996 DEC 782.

even before commencement of arbitration and there is a need for reference of the case by the court to arbitration. Moreover, the state court, before it refers a case to the private jurisdictional forum, must examine whether there is an existing and valid agreement on arbitration[62].

The court examines the validity of the arbitration agreement when it decides about the appointment of arbitrators and umpire or their replacement. It is argued that since the court has examined the validity of the arbitration agreement and arbitrability then the arbitrators lack jurisdiction to examine them but the extension of the power of the arbitral tribunal is not examined by the court. Furthermore, arbitrators can examine the validity and the scope of application of the arbitration' agreement unless the agreement prevents them from doing so. Arbitrators must take into account the rules of the applicable substantive law decided in accordance with the private international law. The parties' agreement may entitle the arbitrator to issue an award *ex aequo et bono*, subject to public policy principles. In fact, the court exercises a certain degree of control both at the beginning and the end of the arbitration procedure. Accordingly, a party may launch a claim relating to the agreement before a court, which will then have to refrain from further examining the case if there is an arbitration clause. In doing so, the court will ascertain whether the arbitration clause is valid and whether the dispute is covered thereby. Therefore, the legality of the arbitration agreement is examined by civil courts in the following instances[63]: First, when there is an application for nullity of the arbitration agreement; secondly, where the parties have not appointed an arbitrator by agreement and the court has to appoint one; and thirdly, when the civil court reviews the legality of the arbitrators' decision.

Article 887 CCP is a substantive law rule included in the CCP and so the substantive law of contracts regulates an arbitration agreement[64]. On the other hand, it could be said that the arbitration agreement is a procedure agreement because the effect is a reference to civil procedure by excluding the courts' jurisdiction. The exclusion of courts' jurisdiction is not against the constitution because the arbitration agreement for voluntary arbitration is allowed and the parties have the freedom to agree for the resolution of any civil disputes by arbitration[65]. If parties take part in arbitration, the invalidity of the arbitration agreement has to be pleaded from commencement of arbitration, and so the parties silence might repair the invalidity.

As mentioned above, the validity of the arbitration agreement is independent to that of the main agreement, regulating the parties' relations apropos the arbitration agreement[66]. For instance, the arbitration clause can be included in a bill of

62 K. Kerameus, "The examination of an arbitration agreement by state courts while arbitration pending," 1989–90 RHDI 42.

63 Court of Appeal of Thessaloniki 534/77 1978 Armenopoulos 498, Supreme Court 219/73 21 NV 1140, Supreme Court 816/83 32 NV 638.

64 Supreme Court 1183/85 1986 EGL 418.

65 Supreme Court 1684/86 35 NV 1055.

66 Supreme Court 816/83 32 NV 819.

lading contract[67]. The arbitration clause can be void for the same reason that the main agreement is void[68]. Usually an arbitration agreement is autonomous and independent, unless the parties treat it as an appendix to, or as a part of, another contract. Accordingly, the arbitration agreement can be considered as autonomous and separate, provided the parties have not explicitly agreed that it will be invalid if the main contract is invalid[69]. Hence, the voiding of the main agreement does not nullify the arbitration agreement, except when the parties declare that there is a single agreement and their validity is interdependent[70]. The interpretation of the arbitration agreement has to be made according to the rule of good faith and morals (869 CCP, 173, 200 CC)[71]. The arbitration clause is independent from the main contract and the validity of the main contract is mainly decided by arbitrators[72]. Besides, the validity of the arbitration clause is examined by the court[73]. The arbitration clause should be clear and specific about dispute resolution by arbitration of the specific difference. Moreover, the validity of an arbitration agreement is dependent on the substantive law applicable to contracts (179 CC). The arbitration agreement brings forward the liabilities of the parties in the arbitral procedure and any party can object to its validity until commencement of the arbitration procedure. The arbitration agreement can be voided for fraud, threat and error until the award is made enforceable. Finally, an arbitration agreement is valid if there is a civil difference, the right of parties to use the object of the difference, the content of the arbitration agreement is legal and the agreement must have a specific form. It is worth mentioning that the court's precedent has established the prevailing view about the interpretation of the Articles of CCP regarding arbitration rather than the interpretation endorsed by arbitral tribunals.

4 Jurisdiction and applicable law

Taking into account the fact that the Rome Convention does not apply to arbitration agreements, an agreement is governed by the substantive law provisions relating to contracts. As Greek private international law[74] contains no special rule on the arbitration agreement, the provision applied is Article 25 CC–Article 11 CC regarding the type of the agreement, refers to contractual obligations in general. Therefore, the arbitration agreement is governed, first of all, by the law to which was subjected, expressly or silently, by the parties (*lex voluntatis*)[75]. Indications

67 Supreme Court 568/68 17 NV 175.
68 Supreme Court 329/77 25 NV 1340.
69 S. Kousoulis, *Jurisdictional Problems in International Arbitration*, Athens 2000, p 29.
70 Supreme Court 627/69 18 NV 431.
71 Supreme Court 176/76 24 NV 706.
72 Court of Appeal of Piraeus 702/2003 2004 DEC 936.
73 Court of Appeal of Piraeus 923/2003 2004 DEC 566.
74 Court of Appeal of Piraeus 1071/1999 2001 DEC 409.
75 Court of Appeal of Piraeus 702/2003 2004 DEC 936. K. Karameus and S. Kousoulis, *Applicable Law and the Arbitration Agreement*, 2006 DEC 25. "The parties' will expressed by the arbitration

that conceal the will to choose the law applicable to the arbitration agreement are, the express choice of law which will regulate the main substantive contract that contains the arbitration clause, the invocation by both parties of a certain law in their written agreements, or the submission of the case to the authority of an institutional arbitration tribunal of a certain country. In the absence of a choice the judge is called upon to decide the law which will govern the arbitration agreement, by taking into consideration its jurisdictional function and considering all the factors that could point to its connection to a certain law, and by evaluating subjective or objective circumstances that could determine the law appropriate for application in the given case. Whether a dispute may be submitted to the jurisdictional authority of the arbitrators is judged according to the *lex fori*[76]. For instance, a foreign arbitration award is recognized if its object is arbitrable under Greek law[77].

The capacity of the parties to arbitrate is determined by the conflict of law rules of the forum where the issue arises before the courts. If parties do not specify the applicable law in their arbitration agreement, then the Greek private international law defines the applicable law (890 CCP). So, arbitrators apply the Greek substantive law if there is not a different agreement but the arbitration agreement cannot exclude the application of public policy rules (890 CCP). The applicable law defines the terms and the type of the arbitration agreement. The Supreme Court in 830/1972[78] held that an arbitration taking place in Greece, the proceedings of which were carried out according to the English Arbitration Act 1950, was valid, provided the two essential requirements under Greek law–adherence the to principles of equality and equal opportunity–were respected. The court upholds an arbitration clause for arbitration by a foreign arbitral tribunal using a foreign law[79].

The conclusion of an arbitration agreement means that the courts have no jurisdiction to deal with the differences referred to arbitration. Who examines the jurisdiction of an arbitral tribunal? The jurisdiction of an arbitral tribunal is examined either by a court or by an arbitral tribunal[80]. Arbitrators examine their jurisdiction and the relation to the dispute matters unless there is a different view expressed by the parties' agreement (887§2 CCP). Thus, according to Article 887§2 CCP arbitrators can decide on their own arbitration and examine incidental questions subject to contrary party agreement, but the arbitrator's decision is not binding for the state court while the court examines the same question during

agreement is the basis for the designation of the applicable law. A broad clause includes torts' claims arising from the parties' contract".

76 CFI of Rodopi 84/2005 2006 DEC 80. The clause is examined during the assessment of the jurisdiction of the court (lege fori).

77 S. Kousoulis, "Accrual problems of international arbitration," 1996 *RHDI* 49.

78 1973 NV 202. Supreme Court 899/1985 1985 NV 399.

79 Court of Appeal of Athens 2712/78 27 NV 421.

80 The court refers the case to arbitration Court of Appeal of Athens 1944/2006 (Nomos Database 415779) Court of Appeal of Athens 1213/2006 (Nomos Database 401538).

the adjudication of an application for setting aside the arbitral award. The court examines the jurisdiction of an arbitral tribunal when the arbitrability of a dispute is raised before a court procedure (264 CCP), when the arbitration agreement is concluded before a court, when the court appoints an umpire or replaces an arbitrator or excludes an arbitrator, when the court defines the dates of arbitration, collects evidence for the arbitration procedure and in the stage of judicial review of an award. It could be said that the court has no jurisdiction to deal with the validity of the arbitration agreement and arbitrability if the interpretation of the agreement and arbitrability are left to arbitrators by the parties' agreement. It is argued that the power of arbitrators to rule on their jurisdiction is related to the character of arbitration as equal and parallel to courts dispute resolution method[81].

Reference of a dispute to arbitration by a court after a party's objection before the court according to Article 284 CCP means that the court has no jurisdiction to examine the specific dispute, and the absence of jurisdiction for the specific dispute stops if the arbitration agreement ceases to exist. The court simultaneously examines the validity of the arbitration agreement and arbitrability in order to refer the dispute to arbitration. If the arbitral tribunal is in session, then the court should not examine the jurisdiction, validity of the arbitration agreement on arbitrability because there will be two alternative dispute systems dealing with the same case despite the fact that only the arbitration agreement and the award have procedural results upon a court case considering the same dispute while the commencement of an arbitral procedure has no effect upon a procedure before a court. The court's decision for reference to arbitration is final and a party can appeal against this decision,[82] which means that the court will ultimately decide about arbitrability.

As mentioned earlier, the jurisdiction[83] of the civil courts is abolished when the parties have agreed to resolve any dispute arising out of their contract by arbitration. Moreover, it is supposed that the civil courts intervene only to help in the progress of an arbitration procedure. Besides, even if a civil law dispute has been taken to arbitration, civil courts have jurisdiction to review it when there is an objection by a party to the jurisdiction of the arbitration tribunal[84]. According to 867 CCP all kinds of civil disputes can be arbitrated whether or not the same dispute can be tried before a court. Is the arbitral jurisdiction wider than that of the courts' jurisdiction? Are arbitration and courts parallel jurisdictions that replace each other according to the parties' agreement? It could be said that the jurisdiction of an arbitral tribunal to solve civil disputes is broader that of the court's jurisdiction to solve civil matters, which means that disputes not solved before a court can be arbitrated[85].

81 K. Kerameus, *Legal Issues*, 1980 Thessaloniki.
82 Supreme Court 816/83 32 NV 638.
83 Article 3 of CCP, Court of Appeal of Piraeus 77/1985 1985 *Epitheorisis of Maritime Law* 446.
84 A. Foustoukos, *Thesmos of Permanent Arbitrators in Greek Law*, 1977 NV 1300.
85 Supreme Court 825/77 26 NV 273.

The arbitrator's decision about their jurisdiction creates *res judicata* and the possibility of the courts to decide about the arbitrators' authority in many occasions (264, 887§2, 897§1, 2, 901§1 CCP) does not mean that in every occasion the court will re-examine their authority. The authority of arbitrators to deal with the merits of the case and the arbitral proceedings is based on the law, the arbitration agreement and the parties' demands, and will mean that one source of authority does not preclude the other.

5 Initiating arbitration and stay of proceedings

Commencement of arbitration brings all the legal results arising from a lawsuit before a court[86]. According to Article 884 CCP the court can define a time for commencement of arbitration or the issue of the award. The court examines the conditions for the initiation of the arbitral process or the issue of the award without the need for specific evidence. Moreover, after a party's application, the court decides on the extension of the time for the initiation of arbitration or the issue of the award taking into account the change of the conditions as in the case of litigation and in accordance with Article 758 CCP, which means that there is no cessation of the arbitration agreement for non-issue of an award in due time. Third parties cannot take part in arbitration if there is no arbitration agreement between the parties of the arbitration and the third party. On the other hand, a third party can submit a lawsuit to void an award if he/she has a legal interest according to 899 CCP.

There is no specific procedure for the lawsuit before an arbitral tribunal and so there is no need for delivery of the lawsuit to the party as happens for a lawsuit before courts in accordance with the rules specified in CCP. A lawsuit before an arbitral tribunal means firstly commencement of the arbitration proceedings and secondly that the arbitration claim is stopped from being outlawed according to Article 261 CC.

As mentioned earlier, if the difference for which an arbitration agreement is concluded is before a court, then the objection must be submitted in the first discussion and in any other case the difference will be solved by the court[87]. The parties must raise the objection about the existence of an arbitration agreement because the court does not examine it by itself[88]. The court examines the existence of the arbitration agreement concerning the difference before the court only if the agreement is concluded before it. If there is no objection about the existence of the arbitration agreement, this does not mean that the party abandons their right for arbitration. Moreover, the court examines the validity of an arbitration agreement raised before it, except if the arbitration agreement mentions that the arbitral tribunal will examine its validity[89]. The legality of the agreement will be decided according to the law applying to its content and type.

86 Supreme Court 111/71 19 NV 604.
87 Supreme Court 2040/84 33 NV 1160. Supreme Court 1328/2001 2003 EGL 7.
88 Supreme Court 272/83 50 EGL 795.
89 Supreme Court 980/86 54 EGL 947.

A party must propose the reference of a dispute to arbitration in the first session of the CFI, otherwise the court will continue the court proceedings and the case cannot be referred to arbitration at a later stage (263 CCP). So, if there is an objection about the existence of an arbitration agreement, then the court has to stay court proceedings and refer the case to arbitration. Of course, the court's decision on the matter can be appealed before the court of appeal and also go to the supreme court afterwards, which shows the depth of the court's involvement in arbitration from its commencement[90]. Therefore, if the difference is arbitrable, then the court refers the case to arbitration but the effects of the lawsuit before the court are kept and so if the arbitration agreement ceases to exist then the case goes back to the court with summons (264 CCP). Consequently, the court examines the existence and validity of an arbitration agreement, as well as the arbitrability of the difference. It is argued that the court initially decides on the validity of the arbitration agreement prior to the transfer of the case to arbitration (264 CCP) and finally the court re-examines the validity of the arbitration agreement if there is a lawsuit for voiding the award (897§1 CCP). Moreover, the court examines the validity of the arbitration agreement when there is an objection (plea) for reference of the dispute to arbitration and the courts' decision creates *res judicata* for the validity of the arbitration agreement unless the parties mention that the arbitrators investigate the validity of the arbitration agreement[91]. In addition, the arbitral tribunal examines the validity of the arbitration agreement when it investigates its jurisdiction to deal with the dispute under 887§2 CCP.

As mentioned earlier, if there is a court process for a dispute, then the parties must plea before the court reference to arbitration during the first court session after the conclusion of the arbitration agreement according to Article 263 CCP, and the court refers the case to arbitration (264,870§2 CCP). It has to be taken into account that Article 870§2 CCP applies if the arbitration agreement is concluded while the difference is before the court and during the court proceedings[92]. It is argued that it is not possible to have the conclusion of an arbitration agreement before the judge who is involved with discovery and evidence[93]. This author considers that the conclusion of an arbitration agreement can be made before the judge dealing with evidence because the judge is part of the whole court process according to Article 870§2 CCP.

6 Arbitrators

The contracting parties can name their own arbitrators who must not be seen as their representatives. In practice there are occasions where the arbitrators appointed have been parties' representatives, which is against the principle that the arbitrators must be neutral and act objectively in carrying out their duties. In these cases a

90 Supreme Court 905/82 31 NV 982, Supreme Court 816/83 32 NV 638.
91 Court of Appeal of Athens 6752/76 31 Armenopoulos 292.
92 Supreme Court 2040/80 52 EGL 791.
93 B. Bathrakokilis, CCP, 1996, Athens p. 727.

third arbitrator is usually appointed to decide the case[94]. A legal entity cannot appoint its legal representative or one of its directors as arbitrator in a dispute in which it is involved[95]. The arbitration agreement is not necessary to refer to the appointment of specific arbitrators or the circumstances of their appointment, but parties have to appoint an equal number of arbitrators. According to Article 873 CCP the parties of arbitration appoint their arbitrators and the refusal to appoint an arbitrator by a party means his/her proposal for the rescission of the arbitration agreement[96]. In the absence of an agreement about the appointment of an umpire in arbitration, the arbitrators are obliged to appoint one and the umpire has to take part in the arbitral procedure[97]. The umpire can be appointed even after commencement of arbitration[98]. Moreover, the appointment of an umpire occurs only when the parties have not agreed to the arbitration agreement. An arbitration agreement is valid even if there is no reference to the appointment of an umpire[99]. It has to be taken into consideration that arbitrators exercise their duties under the constitutional guarantee[100]. Dispute resolution by voluntary arbitration is constitutional and allowed according to the Greek law and the arbitrator acts as a judge in the arbitration.

Detailed rules regarding the nomination of arbitrators are laid down in the CCP and in the case of disagreement among the parties concerned, the arbitrators are appointed by the court (Articles 878–879 CCP). Article 871 CCP defines the appointment of arbitrators and it is mentioned that a court can act as an arbitrator. Furthermore, in 871§2 CCP the people that cannot be appointed as arbitrators are specified. Therefore, it is possible to have a court acting as arbitrator, which obviously it will apply and follow all the litigation traditions in arbitration. Article 871A CCP specifies the appointment of judges as arbitrators, which shows the depth of involvement of courts and judges in arbitration[101]–they influence the whole arbitration procedure because it is apparent that judges will bring and apply their judicial tradition in arbitration procedure. The authority of a judge acting as an arbitrator is established by the parties' agreement[102]. An appointed judge acting as an arbitrator must not be referred with his/her position in a court otherwise the agreement is void[103]. Arbitrators decide on the arbitration proceeding except if there is a different specific reference in the parties' arbitration agreement.

The extent of the powers of the arbitrator depends on the parties' will expressed in their agreement, together with certain principles of public policy. Hence, the will

94 K. Beis, *Objectivity in Arbitration*, 10 Diki 758.
95 Court of Appeal of Athens 1966/1972, 1972 NV 1453.
96 Court of Appeal of Athens 3540/84 27 HD 106.
97 Court of Appeal of Athens 5610/86 29 HD 1199.
98 Supreme Court 185/75 23 NV 922.
99 Supreme Court 185 /75 23 NV 922.
100 Supreme Court 1059/82 31 NV 1355.
101 Supreme Court 242/90 31 HD 1004.
102 Supreme Court 445/2002 2003 DEC 435.
103 Court of Appeal of Thessaloniki 2015/90 1990 Armenopoulos 357.

of the contracting parties determines the arbitrator's authority regarding not only the object of the difference but also the jurisdiction and proceedings followed by them[104]. Arbitrators' authority, in contrast with judges' authority, does not stem from the state but from the parties' agreement, which means that their award does not have *erga omnus* against third parties, in contrast with a judgment. According to 883 § 2 CCP an application for disqualification of arbitrators will be adjudicated by the court having jurisdiction according to Article 878§ 1 CCP. Parties can withdraw their agreement about arbitrators and there is no need for any kind of agreement to be used[105]. Any party can demand the replacement of an arbitrator or umpire by the court[106].

Moreover, in accordance with the procedure specified by Article 741 CCP, the court of the place where arbitration takes place has jurisdiction to decide the exclusion of an arbitrator. The arbitrator has to abstain from his or her duties as soon as the challenge procedure begins. If a court decides the exclusion of an arbitrator then the arbitral tribunal stops the whole procedure untill a new arbitrator is appointed. Arbitrators cannot impose punitive damages or decide on compulsory measures regarding evidence, but this can be done if a court acts as the arbitrator (888 CCP). Hence, there is a superiority of courts acting as arbitrators over ordinary arbitrators. Moreover, an arbitrator cannot ordering, alteration or recall an injunction but ordering, alteration or recall of an injunction can be made only by a court (889 CCP). Additionally, jurisdiction for dealing with the parties' agreement for the appointment of arbitrators or umpire is decided by the court of the place where the arbitration takes place. The court's decision to accept the appointment of arbitrators or umpires is repealed if there is new evidence, but the repeal is invalid if the arbitral procedure has already started[107]. The court replaces arbitrators or umpires need for the correction of an award[108].

Article 879 CCP clarifies that the court has a list from which it appoints arbitrators. The arbitrator can refuse the appointment for reasons defined in Article 880 CCP and the court can permit an arbitrator to refuse acting as an arbitrator and its decision is taken under the specific court procedure of Article 741 CCP. Furthermore, in case of a disagreement the court can appoint and revoke the arbitrators (Art 878, 883 CCP).

In fact, the court will investigate arbitrators' power; when an objection for the existence of an arbitration agreement arises in court (264 CCP); second, when the arbitration agreement is concluded before a court or a judge responsible for the case (870§2 CCP); when the court appoints or replaces an arbitrator or umpire (878 CCP); when the court allows the resignation of an arbitrator or umpire (880 §2 CCP); when the court decides about excluding an arbitrator or umpire from an arbitration panel (883 § 3 CCP); when the court decides about the timescale

104 Court of Thessaloniki 1223/88 42 Armenopoulos 1234.
105 Court of Appeal of Athens 10943/81 15 Diki 53.
106 Supreme Court 78/76 24 NV 606.
107 Supreme Court 153/89 22 Diki 403.
108 Supreme Court 535/90 1991 EGL 268.

within which the arbitration must take place (884 CCP); when the court contracts discovery or any kind of evidence on behalf of an arbitral tribunal (888§ 3 CCP); when the court decides about the void of an award (897 CCP) or the non existence of an award (901 CCP); when the court decides about the *res judicata* of an award and; when the court decides about the reprieve against the enforcement of an award. The court decides about the arbitrators' power when examining the confirmation and enforcement of a foreign award according to 903 & 906 CCP. In which stage is the court not involved in arbitration? Arbitrators are unable to carry on arbitration without courts' involvement, thereby minimizing the effectiveness of arbitration as an alternative dispute mechanism which is supposed to be the second pole in a legal system.

Arbitrators have a duty (881 CCP) to conduct their proceedings in a fair way, but fraud and gross negligence affect arbitrators' liability and any lawsuit has to comply with Articles 118 CCP and 216 CCP for compensation before courts. The Greek Criminal Code provides for criminal liability of judges or arbitrators who accept bribes in order to conduct a case in a way favorable to one party (Article 237 Penal Code). Arbitrators exceed their authority if they decide about an object not referred to arbitration by the parties' agreement[109] or arbitrators act against the law and the authority as specified by the parties' arbitration agreement[110]. Additionally, arbitrators do not exceed authority if they interpret a law wrongly or apply a wrong Article, or there is absence of reasoning of the award or wrong evaluation of evidence and so the arbitrators' view on the matter of the dispute[111] is finally incorrect. The impartiality of arbitrators is safeguarded by the provisions for challenge and liability of arbitrators. Furthermore, Articles 882–882A CCP specify the fees of judges that are appointed as arbitrators. To that extent, parties can submit a lawsuit against awards for the fees of arbitrators before a court. The court follows a specific procedure for the resolution of disputes about these fees[112].

In other words, Article 878 CCP defines that the court has jurisdiction to appoint arbitrators or umpires if there is no parties' agreement, and so the courts examine the application of the parties for the appointment of arbitrators or umpires. The court's decision about the appointment of arbitrators or umpires cannot be appealed but it can be revoked by a court (586, 758 CCP), and it produces *res judicata* for the court deciding the void of an award (897 CCP)[113]. Hence, some means of appeal applicable against court decisions are applicable against the court's decision on the appointment of arbitrators or umpires, which shows the entanglement of arbitration with court proceedings.

Arbitrators or umpires can ask for a court's permission not to act as arbitrators or umpires if there are reasons that do not allow them to fulfill their duties.

109 Supreme Court (Arios Pagos) 1449/95 1997 HD 1544.
110 Court of Appeal of Athens 8815/2002 2003 ED 821.
111 Court of Appeal of Athens 201/95 1997 HD 883.
112 Supreme Court 1260/86 54 EGL 457.
113 Supreme Court 153/89 31 HD 537.

Additionally, according to 883§2 CCP an arbitrator can ask to be relieved either if he does not possess the qualifications or on the same grounds upon which a judge can be challenged as specified in Article 52§1 CCP. The court's decision on the matter cannot be appealed, revoked or reformed (880 CCP). The arbitral tribunal decides about the arbitrators' fees but the award can be appealed before a court, which decides according to the proceedings of Article 678 CCP (882 CCP)[114]. If parties have appointed arbitrators, then they can revoke the appointment and the arbitrators can ask for their exception by a court, which decides while taking into account Articles 58, 60 CCP. Moreover, arbitrators are not involved with the arbitration until the court decides about their exception. Arbitrators exceed their authority if they do not decide about the object of the dispute according to the arbitration agreement, but there is no exceeding of authority if arbitrators wrongly interpret the dispute or decide the object in a different way from the arbitration agreement or they leave part of the difference unsolved[115]. The arbitrator acts as a judge, and any nullification of arbitration by the state is against the Constitution because the arbitrator during the arbitral process acts as the legal judge for the dispute.

The arbitrator's power can be challenged either because there is no arbitrator's authority to deal with a dispute or there is a difference regarding the depth of the arbitrator's power. If arbitrators do not decide on all the differences referred to arbitration or they neglect to decide on one of them, then they exceed their power, and this leads to the void of the award[116].

In fulfilling his duty the arbitrator has to conduct the arbitration proceedings taking into consideration the information before him and basing his evaluation on his personal knowledge about the case–because in this occasion the award can be voided[117]. It is worth mentioning that the personal knowledge of the arbitrator about events that have not been presented during the proceedings rather than personal legal knowledge and understanding of facts will cause the void of an award. An arbitrator cannot use a voided award as precedent to decide a case, because it is a reason of voiding the award as in a court decision based on Article 544 CCP for rehearing. Thus, the complications of court proceedings and litigation are applicable to arbitrations, which are becoming a replica of the courts' system.

After an application by a party the court can order an arbitral tribunal to issue its award within a specific time (884 CCP). Arbitrators have exceeded their authority if they have not issued the award within a specific time mentioned by the parties' agreement or the time imposed by a court decision or they have issued an award about an object not included in the parties' agreement. Arbitrators have to treat both parties equally and all parties have to take part in the hearings and present their evidence either orally or by submitting documents[118].

114 Supreme Court 1060/89 31 HD 1447.
115 Supreme Court 1661/80 29 NV 1074.
116 Supreme Court 1661/80 29 NV 1074.
117 Court of Appeal of Athens 6839/86 27 HD 1489.
118 Supreme Court 1795/83 16 Diki 357, Supreme Court 1509/82 15 Diki 322.

If there is more than one arbitrators and there is no dissenting agreement, then they decide together with the umpire and the award is voidable if Article 891 CCP is not followed regarding the arbitrators' decision[119]. It could be argued that an arbitral tribunal with many arbitrators works as a court in taking a decision and so works as an equal substitute of a court. All arbitrators have to vote in order to avoid any rejection of the award at a later stage. If there is no majority in the votes then the view of the umpire makes the majority[120]. The award cannot be voided because arbitrators have chosen the seat of arbitration and any action of arbitrators in accordance with 886§1 CCP does not mean the void of an award[121]. The replacement of arbitrators does not mean the cessation of the arbitration agreement and so the award cannot be regarded as issued after the cessation of an arbitration agreement[122].

Arbitrators decide about their jurisdiction and examine all the incidental matters regarding the dispute, such as validity of the arbitration agreement, arbitrability and applicable law (887 CCP). Moreover, arbitrators can decide on: the validity of the main contract, the validity of the arbitration agreement, the interpretation of the arbitration agreement (especially with regard to the extent of their jurisdiction) and the validity of their appointment. On the other hand, state courts are also competent to examine the validity of an arbitration agreement[123]. When the arbitrator's decision about the conclusion of an arbitration agreement and its validity is examined, it does not produce *res judicata* and so the court re-examines the validity of the arbitration agreement when there is a lawsuit for the void of the award[124]. A lawsuit before the court during arbitral proceedings against the validity of the arbitration agreement is not against any of the Articles of the CCP. Therefore, the court decides on the conclusion of an arbitration agreement and its validity based on the substantive law, which means that the court gives legitimacy to arbitration and so arbitration is treated as an inferior dispute system and arbitrators are considered to be less legally educated regardless that a judge or a whole court can be appointed as arbitrators. Consequently, arbitration as an entire dispute system is considered to be inferior to courts rather than the people acting as arbitrators.

There is a need for an award covering all the differences referred to arbitration according to the arbitration agreement in order to have the arbitration agreement ceased so that the non-decided difference can be referred to arbitration[125]. Arbitrators cannot impose punitive damages or injunction for discovery and evidence except when, as the arbitrator has been appointed, a court shows a difference in the status of arbitrators, based not on their appointment but in their status before the appointment. This highlights the prevailing power of courts even

119 Supreme Court 1661/80 29 NV 1074.
120 Supreme Court 211/88 56 EGL 127.
121 Supreme Court (Arios Pagos) 831/94 1997 HD 1071.
122 Supreme Court (Arios Pagos) 1616/95 1997 HD 1069.
123 Court of Appeal of Piraeus 77/1985 1986 NV 24.
124 Supreme Court 403/89 57 EGL 99.
125 Court of Appeal of Athens 1137/75 23 NV 519.

in the role of arbitrators (888 CCP). Arbitrators have to apply to a court the place where arbitration occurs, to take care of examination of witnesses or discovery[126]. Article 889§1 CCP specifies that arbitrators cannot order an injunction except in the case of 888§1 CCP where the arbitrator is a court, and if a court has ordered an injunction then the lawsuit for the commencement of arbitration has to be made within the time ordered by the court.

An award can be voided if people not complying with Article 871 CCP and the parties' agreement[127] have been appointed as arbitrators. Arbitrators have to comply with the obligations applying to judges in their contract of duty as judges in litigation (independence and impartiality). In fact, the court safeguards the efficiency of the contracting of arbitration by controlling arbitration during the whole process.

7 The arbitration procedure

The civil code procedures before the courts are introduced as the framework for a fair and legal process based on the sovereign power of a state. The court itself examines the application of the procedural preconditions defined by the CCP. In fact, the court examines the jurisdiction of the court, the arbitrating parties, the object of the dispute and the legality of any means of appeal. Moreover, the court examines the procedural conditions for a fair hearing, and the absence of the specified procedural conditions means the rejection of the lawsuit (73 CCP). Furthermore, the court can examine the jurisdiction of an arbitral tribunal to rule on its jurisdiction or the arbitrability of the specific dispute or the validity of an arbitration agreement, or reference of the dispute to arbitration. Additionally, the court investigates the authority of arbitrators attributed by the parties' agreement to deal with the specific difference. The procedure in a court case is regulated by the CCP but in order to start a court procedure there is a need for the necessary prerequisites such as the lawsuit and the dispute. On the other hand, in the arbitration procedure there needs to be an arbitration agreement, arbitrability and jurisdiction.

The same procedural principle for the collection of evidence used by civil courts is also applicable to arbitration. However, the arbitrator has the freedom to follow a procedure other than the civil law procedure if there is no specific mention about it in the arbitration agreement. In a civil case the scope of the case is defined by the lawsuit and its content cannot change during the trial. On the other hand, in arbitration the scope can be changed by the parties or the arbitrator. Furthermore, the formality of obtaining evidence can be bypassed by the arbitrator at any stage, but both parties must be treated equally. Otherwise, the arbitrator's decision can be annulled by a civil court.

126 Court of Appeal of Athens 8178/81 30 NV 823.
127 Supreme Court 242/90 31 HD 1004.

The arbitral tribunal can examine all the prejudicial matters (887§2 CCP) as a court can (284 CCP) even if the court has no jurisdiction to deal with a prejudicial matter. On the one hand, a court acting as an arbitral tribunal can order compulsory measures to force a witness to appear. On the other hand, ordinary arbitrators cannot do so. However, they may ask the Justice of the Peace (JP) to order such compulsory measures or collect evidence for them. If there is a court decision recognizing the non-existence of the award, the case goes back to the courts for a decision. The court can order the suspension of enforcement of an award against which there is a lawsuit for its void by court or recognition of not existing by a court.

The parties can lay down specific procedural rules in their agreement. The arbitral procedure takes part in accordance with the guidance of arbitrators (886 CCP). There are certain compulsory provisions from which arbitrators cannot deviate, whether the arbitration is ad hoc or institutional, domestic or international. The parties' authority to deal with the arbitral procedure stops at the moment the procedure commences. It is argued that the arbitral procedure follows the rules of evidence applied by courts but not the exact same rules throughout the process so arbitrators cannot ignore rules of public policy and morals[128]. Nevertheless, arbitrators must ensure that the principles of equality of the parties and the right to an adequate hearing are not thereby infringed[129]. According to the Supreme Court[130] the award is null if the arbitrator did not summon the parties to a hearing. On the other hand, arbitrators can decide on the basis of written submissions and written evidence alone[131]. Article 336.4 CCP allows judges to use private knowledge common to everyone as well as rules of common experience in this respect, but any view formed by a personal involvement in the case they cannot use. Furthermore, the rules of evidence might change during the process according to the arbitrators, in contrast with the courts where the order of the rules is defined by the CCP[132]. The subject of the arbitration can change during the process in contrast to courts where the subject is defined by the lawsuit of the parties. Additionally, arbitrators can request courts to contribute to the arbitration proceedings and discovery.

Evidence collected by the court about a case which is referred afterwards to arbitration can be presented to the arbitral tribunal, except if there is a different clause in the arbitration agreement. Hence, the procedure continues to the arbitral tribunal from the point arrived at in the court except if there is a different clause in the arbitration agreement. The results regarding the substantive law applicable to the dispute from a lawsuit before a court continues after the case is referred to arbitration but not the results regarding the procedure before the court. Moreover,

128 Supreme Court 1795/83 16 Diki 367.
129 Supreme Court 13/95 36 ED 1524. Supreme Court 1779/99 41 ED 988.
130 112/1982 unreported.
131 Court of Appeal of Athens 6951/1980 1981 NV 117.
132 Court of Athens 13988/84 34 NV 95.

the case cannot be referred to a court before an award is published by the arbitral tribunal. If during the arbitral procedure the arbitration agreement ceases, then the courts have jurisdiction to deal with the case and decide about their jurisdiction. The case is then referred again to the court by a writ of summons and not a new lawsuit and the case starts from the point stopped before its reference to arbitration[133]. If a court's decision about reference of a case to arbitration is voided then there is no *res judicata*. Otherwise there will be refusal to deal with a difference, which is against the Greek Constitution[134].

8 Review of award by courts

The arbitration award is not a court decision (a judgment) although that it has the same effects, because it is not the result of a state action but a private party's action and its legality depends on the parties' agreement (897 CCP). According to Article 897 CCP an award can be nullified by a court's decision if the parties' agreement is, firstly, null; secondly, the parties' agreement is no longer in force; and thirdly, the arbitrators have exceeded their authority to decide the issue[135]. Besides, the recognition of the non-existence of an award can be achieved by a lawsuit or an objection for the reasons mentioned in Article 901 CCP. According to Article 897§1 the award is void if the arbitration agreement is void and there is no need for a previous court's decision about the voiding of the arbitration agreement. It could be said that if the arbitrators omitted to decide on any of the issues submitted to them and if the arbitration is still operative and valid, a new arbitral tribunal may be appointed to decide on these issues[136].

All arbitrators, along with the umpire, decide and sign the award except when there is a different parties' agreement (891 CCP)[137]. An award issued by the arbitrator who was excluded is voidable[138]. With the parties' agreement the award has at least to make reference to the parties' arbitration agreement and contains the legal reasoning and analysis of the award[139]. Article 892§2 CCP defines that the award must make reference to the arbitration agreement, the grounds of the enacting part of the award and it has to be signed by the arbitrators and the umpire. The award is final from the moment is signed and not the moment it is submitted to the court for recognition[140]. The arbitrators can correct their own award (894 CCP). The award creates *res judicata* similar to a court decision for the parties of the arbitration considering the same dispute and legal reason. Moreover, the subjective limits of the award coincide with that of a court decision. Additionally,

133 Supreme Court 12/80 47 EGL 360.
134 Supreme Court 1249 /77 26 NV 1039.
135 Court of Appeal of Piraeus 611/2006 2006 EDC 1200.
136 K. Kerameus, "CCP: Article by Article commentary," Vol. II *Sakkoulas* 2000 p 1678.
137 Supreme Court 211/88 56 EGL 127. Court of Appeal of Athens 1772/2003 2004 ED 506.
138 Supreme Court 1009/2002 2003 ED 1294. Supreme Court 445/2002 2003 ED 435.
139 Supreme Court 1490/82 24 HD 781.
140 Court of Appeal of Athens 73/84 25 HD 376.

the award has effects upon third parties not taking part in the arbitration proceedings and concerning the discussed dispute.

Conflict in the content of an award its and legal reasoning make the *res judicata* of an award impossible and its enforcement means that the award is void. Furthermore, the cessation of an arbitration agreement by a written arbitration agreement of the parties before the issue of the award means that the award will be voided[141]. Moreover, any procedure chosen by arbitrators in arbitration is not a reason for voiding an award[142].

The enforcement of an award and the differences arising from the enforcement are not referred to arbitration because the enforcement of an award is not a difference that parties can freely refer to arbitration[143]. A party can, pursuant to the provisions of the law on enforcement, submit an application to the competent court to ask for the granting of the leave of enforcement. It could be argued that appeal and cessation are available against a judgment of a judge who confirms their refusal to grant exequatur[144]. The court cannot review an award regarding the law and interpretation of the law by the arbitrator and their view expressed in the content of the award[145]. A court for matters of public policy and morals can review the enacting part of an award. Moreover, the conflict between the reasoning and the substance of the award does not mean that the award is void[146].

Can courts review an award for arbitrators' authority to deal with the matter (897§4 CCP) if the courts do not have jurisdiction to deal with the subject matter of the dispute? It seems that the judicial review of awards is considered as part of the substance of an arbitration procedure. The nullification of an award does not mean that the dispute is solved it can still be referred either to a court or an arbitral tribunal.

According to Article 892 CCP the award must be written and signed with handwritten signature by the arbitrators but the parties can agree in a different way for example they can decide that the award will be signed only by the umpire. If the award is not written then it is void. A written and signed award is considered to be final and it has to be submitted before a court for its confirmation in order to be regarded as a judgment. An unsigned award can be annulled but arbitrators can correct any mistakes[147]. The non-delivery of a copy of the award to the parties is not considered to be a reason for the award to be considered as being void[148]. Article 892 CCP also defines the necessary elements to be

141 Supreme Court (Arios Pagos) 187/94 1995 HD 1077.
142 Court of Appeal of Thessaloniki 1950/93 1995 Armenopoulos 813.
143 Court of Appeal of Athens 6121/80 29 NV 113.
144 A. Foustoukos, *Larbitrage Interne et international-en droit prive Hellenique*, Paris 1976 nos 223–224.
145 Supreme Court 1661/80 29 Nomiko Vima (NV) 1074.
146 Court of Appeal of Athens 201/95 1997 HD 883, Supreme Court 537/2007 (Nomos Database 421217) Public Policy defined according to Article 3 Civil Code and 897§ 6 CCP.
147 Supreme Court 221/2004 2005 NV 251.
148 Court of Appeal of Athens 73/84 25 Diki 376.

included in the content of an award. The parties can agree that there will be reference to the arbitration agreement in the content of the award and the legal reasoning of the decision without any further analysis and explanation. The place and the time of the issue of an award are obligatory for the content of an award because the place of the issue of the award defines the jurisdiction of the court, which will confirm the award. If there is no reference to the place of issue of the award, then this is a reason for the award to be voided by a court's decision. The award must be reasoned by the arbitrators and so the award will be void if the arbitrators' reasoning of the award based on the facts of the case does not lead to the application of the substantive law regulating the dispute[149]. The absence of full reasoning cannot be a reason for the annulment of an award[150]. It is argued that the absence of reasoning in an award is not against Article 93 of the Greek Constitution and against public policy because an arbitral tribunal is not considered to play the role of a court with public power[151]. The arbitrator can correct their award in accordance with Articles 315, 316 CCP which are also applicable to court decisions. If the arbitrators correct their award against the reasons referred to in Articles 315, 316 CCP then the arbitrators have exceeded their power and the award will be reviewed and voided by a court (897 §4 CCP).

Article 895 CCP that an award is not appealable by any legal means, but the parties can agree for the award to be reviewed by other arbitrators. The parties' agreement about the review of the award by other arbitrators means the acceptance of an appellate arbitral tribunal that can review the award[152]. Should an appellate arbitral tribunal deal with the review of awards by law? An award as a court decision produces *res judicata* and a confirmed award can be enforced and produce the same legal results as a court decision. It could be argued that an award becomes a court decision and so there are also two types of decisions enforceable in the same legal system. An award also creates *res judicata* for procedural matters (896, 322 CCP). Can parties nullify the *res judicata* of an award by their arbitration agreement? Parties can cease the force of an arbitration agreement until the issue of an award (896 CCP).

The view of arbitrators for any procedural matter of arbitration creates *res judicata*. On the other hand, the court can examine the matters of arbitrability, the existence of an arbitration agreement and the power of arbitrators conferred by the parties' agreement.

The arbitrators' decision, which has to be submitted to a civil court in order to be transformed into an executable document, also has to be authorized by a civil court (Article 893 CCP). Why can an award not be enforced directly creating a need for a court's confirmation for its final enforcement? The legal distinction of an award as domestic or foreign immediately determines the depth of the control

149 Supreme Court 1306/82 24 HD 410.
150 Court of Appeal of Athens 1772/2003 2004 ED 506.
151 Supreme Court 500/83 51 EGL 61.
152 Supreme Court 468/79 46 EGL 397.

exercised by the courts before the award becomes enforceable[153]. It seems that civil courts have the final word, which makes the whole process slower than if formalities such as authorization had been transferred to the arbitration tribunals themselves.

The three-month time limit for filing an appeal against an award begins with the delivery of the award to the parties[154]. An action may be brought before the Three-Member District Court by an aggrieved party on the grounds that: the arbitration agreement is invalid, the terms or the scope of the authority of the arbitrators have been exceeded, the rights of equal treatment and adequate hearing have been infringed, public policy principles were violated and there are reasons justifying the re-opening of the case. This remedy may be pursued as far as the Supreme Court but it has no reprieve (stay of execution) effect. On the other hand, the arbitration tribunal has jurisdiction if there is no clause in the agreement to the contrary[155]. As mentioned above, the award must be signed by the arbitrators and deposited with the One Member District Court and notified to the parties. If the award is not signed by the majority of the arbitrators then it is voidable[156]. In fact, arbitration is concluded by the issue and the simple delivery of the award to the parties[157]. The award becomes enforceable after filing with the court.

If there is no agreement for a review by an appellate arbitral tribunal of Article 895§2 CCP or the time has passed without reference to appeal, then the award produces *res judicata* similar to a court decision according to Articles 322, 324, 330, 332, 334 CCP. Article 896 CCP gives equal force relating to legal results to that of a court decision to an award regarding *res judicata.* It could be argued that a signed award produces *res judicata* but in order to be enforced it has to be confirmed by a court. The reason for the production of *res judicata* is to avoid having the same dispute referred to any other type of dispute resolution[158].

The factors for which the decision is reviewable and may be annulled are stated in the details of the Code itself[159]. According to Article 897 CCP[160] an

153 See Arios Pagos 899/1985 1985 NV 1399.

154 Court of Appeal of Athens 7444/1998, 2000 NV 480. Arios Pagos 1473/2000 2001ED 686.

155 Court of Appeal of Athens 2997/76 24 NV 552.

156 Arios Pagos 686/1999, 2000 ED 373. Court of Appeal of Athens 1577/2001 2001 Armenopoulos 1099. An agreement that courts cannot examine the legality of the parties' agreement regarding the arbitration clause is null.

157 Arios Pagos 5/2000, 2000 ED 375.

158 Court of Appeal of Athens 2135/87 35 NV 406.

159 Supreme Court 1661/80 31 NV 1074.

160 According to the provisions of the CCP, an arbitral award may be set aside, in whole or in part, by a court decision, on the following grounds: if the arbitration agreement is null and void; if the award was rendered after the arbitration agreement ceased to have effect; if the arbitrators who made it were appointed in violation of the stipulations of the arbitration agreement, or in violation of legal provisions, or if their appointment has been revoked by the parties, or if they have rendered an award despite the fact that a challenge against them was accepted by the court; If the arbitrators exceeded the powers granted by the arbitration agreement or the powers allowed by law (i.e., in relation to procedural matters such as interim

award can be voided for a number of reasons: if the arbitration agreement is void; if the award is issued after the cessation of the arbitration agreement; for reasons referred to the improper appointment of arbitrators or their exclusion; the arbitrators have not properly used the power attributed by the parties' agreement; no proper contract of the arbitration proceedings and so no fair hearing of both parties[161], no proper vote of the arbitrators and problems with the signing of the award and its content; the award is against the public policy and morals; the award does not make sense or there are conflicting parts of the content; if the reasons applicable for rehearing of a court decision under Article 544 CCP apply to an award. However, only a court of appeal can void the award after a parties' lawsuit for reasons mentioned specifically in Article 897 CCP[162]. In an action to set an award aside pursuant to Article 897 of the CCP, the claimant is precluded from putting forward grounds that have been rejected by a final judgment on an application for a declaration that the arbitration agreement is invalid[163].

Error of law is not a reason for voiding an award[164]. Greek courts cannot declare a foreign award void but the only thing that they can do is to confirm it[165]. The Supreme Court stated that lack of reasons in a foreign award, for which enforcement is sought in Greece, is not contrary to Greek public policy[166]. An award made under a foreign law that allows a party to appoint their arbitrator as sole arbitrator if the other party fails to appoint an arbitrator, is considered valid and can be enforced in

measures of protection or ordering a witness to appear, for which they are not empowered); if the arbitrators violated the principle of equality and the right of the parties to be heard (Article 886), if they did not make their award in accordance with Article 891, or if they violated the provisions of law concerning the form of awards (Article 892); if the award is contrary to public policy provisions or to good morals; If the award is not intelligible or if it contains contradictory provisions; If there is a ground of *requête civile*. The classical grounds of *requête civile* according to Article 544 CCP are false evidence confirmed by an irrevocable decision of a criminal court, discovery of new, decisive evidence, a forged arbitral award, etc.

161 Court of Appeal of Athens 953/2004 2005 ED 1131. Court of Appeal Judgment No 147/2002 (Unreported) – Court of Appeal. www.kluwerarbitration.com. "On this basis (ie, Articles 897(5) and 886(2) of the CCP) the Court of Appeal set the award aside, dismissing, on the facts, an argument that the parties seeking to set the award aside had tacitly accepted to comply with it after it had been made. It is also of note that neither the applicant parties nor the court of its own motion raised the issue of impartiality (CCP, Article 897(6); Act No 2735/1999, Articles 34(2)(a)(iv) and 12). Given that under the arbitration agreement the chairman of the tribunal had to be a certain judge and given that C, D and E had not objected to the appointment of arbitrator X to sit in both cases, it would hardly be arguable that the chairman and arbitrator X were biased because they participated in both cases".

162 Court of Appeal of Athens 1772/2003 2004 ED 506.

163 Supreme Court of Greece 1425/1999, 7 Business and Company Law 405 (2001).

164 Court of Appeal of Athens 8224/2003 2004 HD 510.

165 Supreme Court 83/87 29 HD 667.

166 Arios Pagos [Supreme Court], Decision no. 149 of 1986 Hellenike Dikaiossyne, Vol. 27 (1986) pp. 494–496.

Greece. Thus, this award is not deemed to be contrary to the international public policy of Greece[167].

Articles 897–901 of the CCP regulate the limited powers of the court of appeal to review an award. A national court, in trying a setting aside lawsuit, may apply only the provisions of the *lex fori* that while they specify the reasons for challenging an award, at the same time indicate the attitude of each state's legal order towards arbitration. The arbitrator must decide according to rules of substantive law (Article 890§1 CCP). The parties can give the arbitrators the power to decide as *amiables compositeurs* but Article 890§2 CCP defines that public policy rules cannot be excluded. Misinterpretation or violation of non-mandatory rules of law is not among the grounds for setting aside an award. Furthermore, the court can vacate an award strictly for the reasons referred to in the Code[168]. Most of them relate to the formal conditions with which the arbitrator must comply in order to arrive at their decision and concerning the fair and equal treatment of both parties[169]. For instance, an award can be nullified if it is against the public policy (281 CC, 897 CCP) or the arbitrator had no power to deal with the matter[170], in other words the arbitrator exceeded his power. If the arbitrator has not taken a document into account this does not mean *due process* and if the arbitrator has not taken into consideration a clause of the main contract, it does not mean that the arbitrator has exceeded its authority[171]. Hence, misinterpretation or violation of the rules of substantive law by the arbitral tribunal is not among the grounds for setting aside, except where enforcement of the award is contrary to international public policy. The content of an award and its reasoning has to be against public policy or good morals[172] in order to be annulled[173]. An award is against public policy[174] if its content and not merely its reasoning is against a mandatory law (*jus cogens*) and Articles 3, 33 Civil Code[175]. Public policy as a ground for the refusal of the

167 Supreme Court 329/1977 1977 NV 341.

168 Court of Appeal of Athens 3057/93 1996 DEC 782. Court of Appeal of Athens 8495/2000 2001 DEC 412.

169 Supreme Court 1779/1999 2001 DEC 407.

170 Arios Pagos 1441/2000 2001 ED 395. N. Nikas "The Annulment of an Arbitration Award" 2001 ED 352. Court of Appeal of Athens 8827/97 2001 ED 459.

171 Court of Appeal of Athens 8224/2003 2004 ED 510.

172 Arios Pagos 133/2006 2006 DEC 1291.

173 Supreme Court 13/95 44 NV 404. Supreme Court 6/90 31 ED 522. Supreme Court 1273/2003 2004 Xronika of Private Law 246.

174 Public policy is one of the grounds most frequently pleaded by losing parties wishing either to set aside an arbitral award rendered in Greece or to reject the request for the recognition and enforcement of a foreign award before the Greek courts. Awards rendered in Greece can be set aside if they contradict "national provisions of public policy" (Article 897 (6) Greek CCP). These are the *jus cogens* provisions of Greek law, ie, all mandatory Greek law provisions whose application cannot be suspended by the contrary will of the parties.

175 Court of Appeal of Athens 953/2004 2005 ED 1131. Article 33 of the Civil Code states that foreign law is not applied if it contravenes morality or, generally, public policy: Konstantinos D. Kerameus, Phaedon J. Kozyris, eds., *Introduction to Greek Law*, 2nd revised edn. (Kluwer-Sakkoulas 1993) p. 309.

recognition and enforcement of foreign arbitral awards has a diverse, far more restrictive meaning. In this perspective, public policy is the "truly international public policy" as it is defined by the Greek rules of private international law triggered when the prospective recognition and enforcement of the foreign arbitral award "contradicts the fundamental principles of the moral, economic, legal and institutional order of the Greek state[176]." On the other hand, it could be argued that there is a need for a standard internationally accepted definition of the public policy matter applied for the annulment of arbitration awards. Greek courts are unwilling to acknowledge that foreign arbitral awards violate international public policy. A non-exhaustive list of procedural and substantive law matters that have been found contrary to the international public policy in Greece includes: a party-appointed arbitrator raising the arguments on behalf of the party appointing them and/or submitting evidence for this purpose even if this is provided by the procedural rules governing the arbitration; violation of fundamental principles of a fair hearing; anti-suit injunctions protecting or facilitating the arbitration process; excess insurance claims; punitive damages to the extent that they are disproportionately excessive and therefore fulfil a "penalising" function. In the majority of cases Greek courts have rejected allegations that foreign arbitral awards contradict public policy[177].

The absence of the reasons mentioned in 867, 869 CCP for the conclusion of an arbitration agreement cause the void of an award. If the parties have failed to object during the arbitration, the void of the arbitration agreement means the repair of the reason for voiding an award. If the main contract is void then this does not mean that the arbitration agreement is void as well. The appointment of arbitrators against the arbitration agreement is a reason for voiding an award and the illegal appointment of arbitrators must exist at the time of the appointment of arbitrators and not at the time of issue of the award. If the arbitrator exceeds his power (jurisdiction), this is anticipated by looking at the parties' arbitration agreement[178]. The arbitrator exceeds his power when he deals with a subject not referred to arbitration by the parties' arbitration agreement or they exceed the time for the issue of the award[179] or the arbitrator has not followed the proceedings defined by the parties agreement[180] or the arbitrator has not applied the defined substantive law; but not for the arbitrator's interpretation of the law. The wrong evaluation or estimation of the subject, power or applicable law is no reason for voiding an award[181]. The evaluation of facts by the arbitrator is not reviewed by

176 Arios Pagos 219/1973, Nomiko Vima 1140 (1973); Arios Pagos 272/1983, Nomiko Vima 1565 (1983). Arios Pagos 1559/1979, Nomiko Vima 1094 (1980).

177 Arios Pagos 17/1999, [NOMOS Database: 279760].

178 Arios Pagos 217/2004 2006 DEC 77. Court of Appeal of Athens 2084/2006 2006 DEC 1296. Supreme Court 536/2007 (Nomos Database 423570) Excess of arbitrators' authority. Court of Appeals of Athens 9420/2006 (Nomos Database 413976), Court of Appeals of Athens 2084/2006 (Nomos Database 415765) Excess of authority.

179 Supreme Court 345/85 26 HD 863.

180 Supreme Court 1385/90 1991 EGL 579.

181 Supreme Court 663/74 23 NV 27.

the court[182]. When the subject for whom an award has been issued is not arbitrable then the award is non-existent rather than void. The award will be voided if there is no equal treatment of both parties regarding discovery and evidence and there is no hearing of the parties[183]. In order to be voided the lawsuit against an award by a court has to be submitted within three months of its delivery to the parties but it can take place directly after the issue of the award[184]. In fact the parties can renounce their right for a lawsuit against an award after the issue of the award (900 CCP).

An award can be declared as non-existent for the following reasons: firstly; there is no arbitration agreement[185]; secondly, the award refers to an object or subject not referable to arbitration; and thirdly, the parties named on an award are not real people (901 CCP). For instance, an award is void because it considers a non-existent company[186]. In addition, if arbitrators have exceeded their authority then their award is voidable[187]. The lawsuit for declaring an award as non-existent is submitted before the court of appeal of the place where the award has been issued. On the other hand, the award can be enforced regardless of a lawsuit for a court's decision regarding its non-existence. A foreign award can be declared as non-existent by the court that has issued it or the court of the applicable law[188].

The arbitration agreement ceases after the issue of an award. So if the award is voided for any reason then where will the difference be solved? The difference will be solved by courts having jurisdiction for the specific difference according to Article 264 CCP and parties can no longer object to the jurisdiction of the court on the point that there is no arbitration agreement. It could be said that the difference will go back to arbitration if the award is voided for illegal appointment of arbitrators, not legal representation of the parties or absence of hearing of the parties[189], but not for invalid arbitration agreement. It is characteristic that Article 897§8 specifies the possibility that the court can re-examine the award for the same reasons applicable to a court decision, which means that the award has gained the status of a court decision and it is treated equally. Is it an award or replica of a judgment? Why does legislation impose all the reasons of review of a court decision upon an award when arbitration is supposed to be a more informal dispute mechanism, not formal litigation? Moreover, in order for an award to be enforced it must be confirmed by the court, which means that it becomes a judgment only by the court's confirmation[190]. In other words all the Articles of

182 Supreme Court 289/2005 2005 EGL 519.
183 Court of Appeal of Athens 4554/82 13 Diki 703, Court of Appeal of Piraeus 611/2006 (Nomos Database 415791) Annulment of awards.
184 Supreme Court 438/78 27 NV 199, Supreme Court 1009/88 30 HD 1348.
185 Supreme Court 217/2004 2005 ED 100, 2006 DEC 77.
186 Court of Appeal of Athens 1772/2003 2004 HD 506.
187 Supreme Court 217/2004 2005 ED 100.
188 Supreme Court 899/85 39 NV 1399.
189 Supreme Court 1540/79 28 NV 1092.
190 Supreme Court 424/83 31 NV 1593.

the CCP for re-examination of a court decision are applicable to an award and so the court can scrutinize an award. The court of appeal of the place of issue of an award has jurisdiction to deal with the re-examination of an award. Hence, it could be said that the legislator has determined the involvement of the court on so many occasions in order to control an award rather than to consider it an award and the court decision as independently equal judgments of two equally independent dispute resolution systems.

It is questionable whether an award can be enforced despite an application for re-examination and its review by courts. Different views are expressed and some scholars consider that the award is under suspension until there is a court decision about the re-examination of the award[191]. This author thinks that the award can be enforced and if the court decides that it is void then the party who has enforced the voided award has to compensate the other party for all the loss occurred because of the enforcement of a void award. The development of an appellate arbitral tribunal which will review awards will bring efficiency and so the reviewed award can be enforced without a court's confirmation.

Greek courts cannot opt for the voiding or non-existence of foreign awards, but they can refuse to confirm and enforce foreign awards according to the conditions specified by 903 CCP[192]. The lapse in giving reasons for the award, the lack of impartiality and independence of the arbitrators, and other irregularities pertaining to the constitution of the tribunal can support other grounds for the refusal of the recognition and enforcement of an arbitral award, but not the ground of public policy. In general, the Greek courts cannot re-examine a foreign award[193]. International awards on arbitration costs submitted for recognition and enforcement before the Greek courts may potentially face the public policy objection, in particular when they are inexplicably high, considering the actual value of the dispute. In the context of litigation taking place abroad, the Athens Court of Appeal has decided that an excessively high costs award rendered by an English Court (Legal Costs: £87,000 – Value of the dispute including interest: £82,000) was not in proportion to the value of the dispute and so contradicted Greek public policy (Article 33 of Greek Civil Code). Enforcement was therefore refused[194].

9 Types of provisional remedies available in Greek law

Greek law provides for a broad range of provisional remedies (Asfalistika Metra; Articles 682–738 CCP) guaranteed payment and mortgage note, arrest, judicial receivership, provisional award of claims, provisional settlement of the situation,

191 Supreme Court 298/79 27 NV 1292.

192 Supreme Court (Arios Pagos) 83/87 31 HD 327, Supreme Court 899/85 1985 NV 1399, Court of Appeal of Piraeus 628/2004 2004 Piraiki Nomologia 358.

193 Supreme Court 899/85 18 Diki 501. E Basilakakis, *Enforcement of Foreign Awards Concerning Punitive Damages*, 2006 DEC 459.

194 Court of Appeal of Athens 6115/2005, [NOMOS DATABASE: 394865].

affixing of seal, unsealing, drawing up of inventory and public deposit). Courts may adopt any measure necessary for the provisional relief of any claim relating to substantive rights or property matters, contractual liability and tort cases. The CCP lays down the conditions for granting certain provisional remedies. Provisional measures may be granted on the condition that the plaintiff launches the principal action within a certain period, which cannot be less than 30 days after the granting of the provisional remedy. Provisional remedies may be ordered on application *ex parte*. To that extent, the court may, upon application, issue an order pending the adoption procedure for provisional measures, should this be deemed necessary (Article 691 CCP). In case of provisional award of claims, the mandatory time limit for the initiation of the principal proceeding is 30 days after the publication of the decision (Article 729.5 CCP). The applicant for the provisional measures must initiate the arbitration procedure within the time limit set by the court (Article 889.2 CCP). Moreover, provisional remedies may be modified or revoked by the court before which the principal procedure is pending (Article 697 CCP). Besides, arbitration tribunals do not have this power (Article 889.1 CCP). Safety measures can be taken by courts and an arbitral tribunal cannot take or revoke safety measures. Hence, the arbitrator has neither power to grant provisional relief nor power to amend or revoke existing measures of provisional relief under Greek law. Preliminary injunctions can be imposed only by civil courts and not by arbitration tribunals[195]. An arbitrator cannot change or withdraw these measures. Only civil courts can impose preliminary injunctions and penal charges.

Parties to an arbitration agreement may seek provisional relief from the One-Member District Court pursuant to Articles 682 et seq. CCP. Additionally, courts may adopt provisional measures in case of urgent need or in order to avoid imminent danger. Both requirements have to be assessed in conjunction with the right or situation which is to be secured or preserved through the adoption of provisional remedies. To the extent that courts have jurisdiction, they may order provisional measures notwithstanding the fact that foreign arbitration proceedings are conducted in this respect. The court may examine issues arising from the pending foreign arbitration proceedings in order to ensure that the CCP requirements relating to provisional relief are complied with. The proceedings regarding provisional relief in Greece is governed exclusively by Greek law. The court with subject matter competence and territorial competence will have jurisdiction (Articles 683, 733, 736, 15, 163, 697–8 CCP). Territorial competence will normally depend on the defendant's domicile (Article 22 CCP), defined as a person's principal and permanent establishment (Article 51 CCP) consisting of *corpus and animus* (Articles 25, 29, 30, 31, 21, 28, 34–40 CCP). The rules of procedure for obtaining provisional relief are common for all kinds of measures and are laid down in Articles 683–703 CCP. Moreover, the court may require the applicant to provide security. Court decisions rejecting applications for provisional relief are not subject to judicial review. Greek law will be

195 K. Karamitsanis, *Legal Nature of Voluntary Arbitration*, 6 Diki 385.

applied in the enforcement of protective measures. The provisions of the CCP (Article 700 CCP) concerning the execution of final affirmative judgments, arbitral awards and notarial documents are applicable for the purpose of enforcing provisional decisions adopting protective measures. Additionally, Greek law governs enforcement of foreign protective measures. Hence, a decision of a foreign arbitral tribunal or a foreign public court adopting provisional measures is likely to be enforced in Greece.

On the one hand, foreign arbitral awards adopting provisional remedies will be recognized in Greece if the arbitration agreement was valid under the applicable law, the subject matter was arbitrable under Greek law, the award is not subject to review, the defeated party must not have been deprived of the right to a defense, the award is not inconsistent with a judgment of a Greek court on the same issue among the same parties having *res judicata* effect and the award is not contrary to morality and generally to Greek public policy (Article 903 CCP). Concerning execution of foreign arbitral awards in Greece, Article 905 CCP provides for an exequatur proceeding before the One-Member District Court of the defendant's domicile or residence or, in the absence thereof, of Athens. Furthermore, in order to render foreign arbitral awards enforceable, it is necessary to establish that the foreign arbitral award is judicially enforceable under the law of the country of origin and the foreign arbitral award is not contrary to good morals[196] or Greek public policy. The fact that the foreign arbitral award adopts provisional remedies is unlikely to constitute an infringement of good morals or Greek public policy. On the other hand, decisions of foreign public courts adopting provisional measures are enforced in Greece pursuant to the exequatur proceeding of Article 905 CCP, provided that such decisions are recognized in Greece. A foreign award cannot be enforced in Greece if its content is against Greek public policy[197]. The following conditions for the recognition of such foreign decisions will apply: the foreign court must have had international jurisdiction according to Greek law, the defendant party must have been given the opportunity to defend not less favorable than that available to nationals of the country of origin, it must not be inconsistent with a Greek court decision on the same subject binding the same parties and the decision should not be contrary to good morals and Greek public policy (Article 323 CCP). Recognition and enforcement requirements are in line with the Brussels Convention on Jurisdiction and Enforcement of Judgments to which Greece is a party[198]. In fact, Article 24 of the Convention provides that a court decision adopting provisional measures is a judgment within the meaning of Article 25 and susceptible to recognition and enforcement in the other contracting states[199]. The validity of a clause in an arbitration agreement waiving the right for provisional remedies is governed by the law, which is applicable to the arbitration agreement

196 Arios Pagos 133/2006 2006 DEC 1291.

197 Court of Appeal of Piraeus 110/2004 2005 Diki 831.

198 H. Collins, *Provisional measures, the conflict of laws and the Brussels Convention*, 1981 Yearbook of European Law 244. 259–62.

199 *Denilauler v Couchet Freres* [1980] ECR 1553.

in accordance with the parties' will. Advance exclusion of the possibility of the application of provisional measures in an arbitration agreement will be deemed legal and enforceable. A notification and hearing are granted to the defendant unless urgent circumstances cause the court to decide otherwise. If the court considers it necessary, it may issue a provisional order as soon as it receives an application for provisional measures. To that extent, the defendant has a cause of action for damages under certain conditions (Article 703 CCP). For instance, if the principal claim has been rejected by a court or by an arbitral tribunal, the party that applied for the provisional measures must compensate the defendant for damages accrued because of the enforcement of the provisional remedies, provided that the applicant knew or because of grave error was not aware of the unfounded character of their claim. The courts that assume jurisdiction with respect to a provisional measure do not also assume general jurisdiction over the subject matter of the dispute, which continues to fall within the jurisdiction of the competent court or arbitral tribunal[200].

10 International commercial arbitration under law 2735/1999

The newly introduced law 2735/1999[201] regulates international commercial arbitration and incorporates the UNCITRAL Model Law in Greek legislation. Article 1 defines what constitutes an international arbitration. International arbitrations' distinguishing elements are: firstly, the residency of the contracting parties in different countries; secondly, the place of the arbitration in a foreign state or the place of the implementation of the underlying agreement in another country; and thirdly, the parties' agreement that their contract is related to different countries. The prerequisites needed for a dispute to be referred to arbitration according to the Articles of the Civil Code of Procedure are still in force (Article 1.4). Arbitration in Greece proceeding under a foreign arbitration law was considered a foreign arbitration, and could not be challenged in the Greek courts. Awards made under that Act may be set aside under the circumstances exhaustively provided for in Article 34 of the new Act[202], and produce *res judicata*

200 S. Tzifras, *Provisional Measures*, 1980 Athens, A. Brinias, *Law of Execution*, 1978 Athens. Court of Appeal of Athens 7725/2000 2001 DEC 907.

201 *Government Gazette* vol. A no 167 of 18 August 1999.

202 Article 34(2) LICA (Law International Commercial Arbitration). A party to the arbitration agreement was under some incapacity, or that the said agreement is null and void under the law to which the parties have subjected to it, or, failing any indication thereon, under Greek law; or the party making the application for setting aside was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or 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; or 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 LICA. The LICA also recognizes the authority of the court to decide *ex officio* when: The subject-matter of

effect as domestic awards of the CCP (Article 35(2) of the Act and Article 896 of the Code). The courts, including the Supreme Court (*Arios Pagos*), took the view that the nationality of the award was determined by the procedural law applied to the arbitral proceedings. It could be argued that the power of the tribunal to order interim protection in Article 17 of the Act is an improvement on Article 889 of the CCP. Article 1(4), final sentence, purports to render arbitrable labour disputes involving merchants. Thus, disputes arising out of labor relations are still not regulated by the new law but only the commercial disputes arising out of the relations between the manufacturers and their customers can be referred to arbitration (Article 663.4 CCR). An agreement is written if it is incorporated in an exchange of letters, telex, fax, telegrams or other means of telecommunication, which provide a record of the agreement. It could be argued that in accordance with Article 7.7 of the new law the writing is *ad probationem* rather than *ad solemnitatem* for the conclusion of the agreement. Article 5 specifies that the national courts should intervene only regarding matters regulated by this law. The Court of First Instance of the seat of arbitration has jurisdiction to deal with problems considering the appointment of arbitrators or the court of the place of residency of the applicant, or finally the CFI of Athens. The court must consider the parties' agreement regarding the qualifications of the arbitrators that will be appointed by it. Moreover, a party can apply to the arbitral tribunal and request that they revoke an arbitrator, but if the arbitral tribunal refuses to act, then the party can apply to the court demanding the removal of an appointed arbitrator. During the proceedings for the revocation of an arbitrator, the tribunal can continue its proceedings and issue its award. Moreover, if an appointed arbitrator refuses to act or cannot carry on their duties, then a party can apply to the court for that abitrator's replacement. As mentioned above, the new law states that the exchange of fax or telex where an arbitration clause is incorporated, is regarded as a written agreement needed for the existence of a valid arbitration agreement[203]. The arbitral tribunal can proceed and decide about its own jurisdiction (Kompetenz-Kompetenz) and its ruling can be appealed. The substance of its ruling about jurisdiction can be challenged before the court, but only as part of the final award. The parties' agreement to arbitrate a matter does not prohibit a party from applying to the court for the granting of an interim injunction regarding the arbitrable claim. The novelty of this law is that the arbitral tribunal can order a preliminary injunction but at the same time, upon a party's application, the court can rule not only for an injunction but also for recall or change of the injunctive relief. It seems that the tribunal's injunction is not enforceable and its implementation depends on the parties' voluntary compliance. The tribunal can request the court's assistance in the discovery and evidence process of arbitration (Article 27). Additionally the

the dispute is not capable of settlement by arbitration under Greek law; or the award is in conflict with the international public policy, as defined in Article 33 of the Civil Code.

203 In accordance with law 2331/1995 and Article 869 CCP a signed letter was considered as a written agreement.

tribunal can correct clerical mistakes of its own award. A party can challenge and request the annulment of the final award before the court of appeal for the following reasons: (1) the party's inability to contract or the arbitration agreement is void in accordance with the applicable law; (2) the award deals with a claim outside the party's agreement to arbitrate or contains matters not referred to arbitration. It is possible that part of the award can be annulled but the part of it dealing with matters referred to arbitration by the parties' agreement can be enforceable; (3) a party has not been invited either to take part in the arbitration proceedings or in the appointment of the arbitrators; (4) the panel has not been appointed in accordance with the parties' agreement or in case of an absence of an agreement, according to the provisions of this law. Moreover, the court of appeal by its own initiative examines firstly the arbitrability of the matter in accordance with the Greek law and secondly the award's compliance with the international public order (Article 33 Civil Code of Greece). The final award is enforceable and the court cannot examine the merits and the substance of the dispute. A party can apply to the court for an injunction against the immediate enforcement of the award until the court of appeal issues its decision considering the tribunal's award annulment. Arbitrators have exceeded their authority as long as they deal with matters not arbitrable in accordance with the parties' agreement. Failure of the arbitrators to deal with one of the claims submitted to arbitration is not a reason for annulment of the award according to the new law[204]. Besides, this is a reason for the review of the award by the court in accordance with English law (the 1996 Act). Hence, in this case if the award needed to be enforced in England then there will be a problem of validity. The court can require an applicant seeking the challenge an award to provide security for costs. Finally, the new law empowers arbitrators to deal with major parts of an arbitration by themselves, but there is still room for the court to intervene and decide about fundamental matters of an arbitration and not only to support an arbitration.

11 Conclusions

In Greece most of the legal theory concerning arbitration has been focused on examining the interrelation between court proceedings and arbitration proceedings and to what extent the principles and means of appeal and court proceedings are applicable to arbitration or should be applied to arbitration. The litigation background has been applied to cover any gaps in arbitration procedure under the CCP. Scholars and judges want to make sure that arbitration does not diverge from litigation, thereby ensuring that courts have the last word. Besides, N. Pappas[205] considers that arbitration has been developed and established as an equal and effective dispute resolution mechanism in addition to the courts.

204 Arios Pagos (Supreme Court) 1661/80 29 NV 1074, Arios Pagos 13/95 44 NV 404, Court of Appeal of Athens 1072/91 1993 HD 1531.

205 N. Pappas, *Arbitrability*, 2002 DEC 684.

The above analysis has shown that arbitration under Greek law is a court-oriented process. Courts are involved throughout the arbitral process. The arbitral tribunal cannot begin or end the whole process without the courts' involvement. Besides, there is an effort to minimize the courts' involvement. Hence, the state seems to favor a semi-independent arbitration mechanism, especially in international commercial arbitration. The freedom of the parties should prevail over the public interest as long as public order is not disturbed by the settlement of a dispute by arbitration and arbitration is considered as a constitutional thesmos. The basis upon which arbitration has been developed in Greek law is the court of law, but the powers of the arbitral tribunal cannot be overlooked. It seems that arbitration is merely a parallel system and probably an inferior one; a procedure regulated by the CCP supplementing litigation. Arbitration has not been developed into an independent and dispute mechanism co-equal to the courts; dealing with a dispute by itself from start to end and being the second pole in a legal system.

6 The role of courts in commercial–maritime arbitration in Belgian law

1 Introduction

Arbitration was considered to be in derogation of one's fundamental right to access the public judicial system. Arbitration is the settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision. It has to be taken into account that arbitration is not purely a contractual matter between the parties: national laws and international conventions also recognise a judicial function to arbitration. Arbitration clauses are common in complex contracts involving large sums of money and it is often easier to enforce awards abroad than court rulings, but arbitration does presuppose the good faith of the parties and it is not uncommon for parties to protract the procedure by challenging an arbitration matter before the courts.

States were only willing to confer upon arbitral awards the same authority as that of court judgments in limited circumstances. The court system usually fails to offer procedures that are well-suited to the resolution of commercial disputes. Due to its neutral location, its position among the bigger economic powers in Europe and its multilingual and multicultural facilities, Belgium is regarded to be an ideal location for parties to settle their international disputes.

The Belgian legal framework governing arbitration is based on both national law and international treaties. There are also a number of arbitration institutions that operate within this legal framework, which have their own regulations. Belgium's arbitration statute is found in Articles 1676 to 1723 of the Belgian Judicial Code (BJC), enacted by the law of July 4, 1972. By adopting this law, Belgium agreed to implement the model law annexed to the Strasbourg Convention of 1966. Austria and Belgium were the only countries to sign the Strasbourg Convention and only Belgium ratified and enacted it. The Convention was intended to bring uniformity in the laws of arbitration so as to ensure a better adjudication of international commercial disputes in Europe. Additionally, other European countries enacted the UN Commission on International Trade Law's Model Law on International Commercial Arbitration (UNCITRAL Model Law). By the law of 27 March 1995, a paragraph 4 was added to Article 1717 of the Judicial Code, which provided that an application for the setting aside of an arbitral award rendered in Belgium was excluded, if none of the parties to the dispute decided in the arbitral award was

either a physical person having Belgian nationality or residing in Belgium, or a legal person formed in Belgium or having a branch or some seat of operation there. Inspired by foreign arbitration legislation and the UNCITRAL Model Law, in 1998, Belgium amended its arbitration law, modernizing its procedures and adapting them to the requirements of contemporary national and international arbitration[1]. The 1998 amendments were intended to establish Belgium as a centre of transnational arbitration and make up lost ground from having taken a rather isolated position. Belgium has made important modifications to the Judicial Code, offering at least the same advantages, if not more, as in the neighbouring countries with respect to arbitrations conducted in Belgium. The capacity of public sector institutions to conclude arbitration agreements, the possibility of correcting and interpreting an arbitral award, the possibility for a third party to intervene in an arbitration procedure, the possibility in arbitration procedures involving foreign parties to waive the application for setting aside of the arbitral award rendered in Belgium are modifications made by the law of 19 May 1998[2]. Moreover, the modifications introduced by the new legislation refer to the choice of the seat by the parties (1693 BJC), protective and provisional measures granted by the arbitral tribunal, maximum flexibility of the arbitral procedure (1696 BJC), intervention of a third party affected by the arbitration (1696 bis), possibility of the arbitral tribunal to sit as amiable compositeur except when a public law entity is a party to the arbitration agreement (1700 BJC), Article 1709 bis authorizes arbitrators to impose a penalty on a non-complying party. Furthermore, impartiality or independence are reasons for challenging arbitrators (1690 BJC), interim awards are allowed by Article 1699 BJC, Article 1702 bis introduces rectification and interpretation of awards and Article 1703 BJC expressly provides the appeal against an award. A distinction can be made between voluntary and compulsory arbitration. In Belgium compulsory arbitration is unknown, and voluntary arbitration without a parties' agreement is an exception. The reform of the Belgian law on arbitration does not bring about an entirely new law but has amended a certain number of provisions of the law.

Belgium[3] participates in bilateral and multilateral treaties that call for the use of arbitration, including the 1958 UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the NYC). As a result of its participation in the NYC, Belgium pledged itself to a simplified enforcement procedure for foreign arbitral awards and gained assurance that Belgian awards would be recognized and enforced in the 134 signatory countries.

1 The Belgian arbitration law was amended only twice. The first amendment was by the law of March, 27, 1985, *Official Gazette* of April 13, 1985, at 516. The second amendment was by the law of May 18, 1998, *Official Gazette* of August 7, 1998, at 25353.

2 P. Hollander, *The 1998 Belgian Arbitration Reform Act*, 1998 August LCIA Newsletter 5.

3 Belgium is a party to the Geneva Convention on the Enforcement of Arbitral Awards of 1927, the European Convention on International Commercial Arbitration of 1961, the Agreement Relating to the Application of the Convention of 1962, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

The efficiency and attractiveness of arbitration as currently implemented will depend on the balance that any given legal system creates for arbitration: if the contractual character is given too much primacy, the parties might be left without the proper means of guaranteeing *due process* of law; if the judicial character is emphasised too much, the arbitral proceeding might lose the speed and finality which are essential for efficient arbitration. An arbitral award may not be reviewed on the merits by national courts, but the validity of an arbitral award may be controlled by a judicial court.

In this chapter the analysis of the Belgian law will show the impact of courts upon arbitration revealing the co-equality or dependence of each system. Reference to national laws of European countries such as Austria, Italy, Germany, the Netherlands, France and Switzerland will be made in order to determine common elements and convergence regarding the role of courts in arbitration and, therefore, showing at the same time the depth of tradition established in European national laws to have courts intervening in the arbitration process, indicating the dependence of arbitration upon courts' authority.

2 Arbitrability

There are various rules of national law that restrict the ability of the parties to submit to arbitration disputes between them. One of the main effects of submitting a dispute to arbitration is that the parties exclude the jurisdiction of courts of law on the same dispute; the other important effect of arbitration is that the winning party can present the award for enforcement to any court in a country where the losing party has assets. The areas where arbitrability is excluded vary from country to country: as a general rule, arbitration is usually permitted in all matters that the parties can freely dispose of. Disputes which have as their object a question concerning, or directly affecting, public order cannot be arbitrated.

Because States tend to view arbitration quite favourably, the number of public policy limits to the arbitrability of disputes has significantly decreased in recent years. Disputes arising out of obligations that are contrary to public policy are excluded from the field of arbitrability. Only disputes arising out of a contract which is itself contrary to public policy are non-arbitrable. The very contract out of which a dispute arises has to directly breach a rule of public policy. According to Article 1676 Code judiciaire belge any dispute, which has arisen or may arise out of a specific legal relationship and in respect of which it is permissible to compromise, may be the subject of an arbitration agreement. Hence, any civil law dispute can be the subject of arbitration. In other words the wording of the Article allows us to consider that any type of dispute except that precluded by the Article is arbitrable. Paragraph 3 of Article 1676 introduces all the exceptions provided for it in the laws of Belgium, thereby making less impact upon the subject of arbitrability. Taking into account that courts in the US have accepted the arbitrability in many other subjects previously not arbitrable, the new Belgian law does not adopt an expansive approach about the substance of arbitrability. The legislator decided to introduce

all exceptions established by previous law into the new Act regardless–a policy clearly in favor of arbitration. Any dispute which falls within the competence of the Labour Tribunal as determined in Articles 578 to 583 (tribunal du travail) is *ipso jure* null (Article 1678 §2) except the exceptions provided by law where a labor dispute can be arbitrable[4]. However, arbitration agreements involving questions of labor law can be validly concluded after a dispute has arisen. In other words, a clause that was null originally will have full effect if it is subsequently confirmed by the parties[5]. M. Storme[6] says that Belgian courts favour a narrow construction of legislative provisions that entails the non-arbitrability of particular matters and so the *prima facie* rule is that a dispute is arbitrable.

Besides, the French law on arbitration still gives meaningful recognition to the subject-matter-in-arbitrability defence – bankruptcy disputes are not arbitrable because they implicate the rights of non-arbitrating third-parties – and establish mandatory rules of arbitral procedure, such as that awards must be rendered with reasons[7]. Some aspects of the statutory law on arbitration cannot be modified by contract, which shows that the French rule on contract freedom differs in some significant respects from its counterpart in US law. In the 1996 Arbitration Act in England, while the statute incorporates the principle of freedom of contract, it also acknowledges the need for mandatory provisions of law on arbitration. French law prohibits arbitration of disputes arising out of certain matters or involving certain persons as parties. However, the rule in Article 2059 Code Civil[8] is not

4 Arbitration clause regarding disputes with the beneficiary concerning a supplementary collective health and disability insurance policy provided for employees in their contract of employment. Labour tribunal Ypres (1 Chamber) 4 May 1985 *Bull Ass* 1986, 391. Specific statutes exclude or limit the arbitrability of particular kind of contracts, such as insurance contracts and employment contracts. Arbitration clauses for matters belonging to the jurisdiction of the labour courts are null if concluded before the dispute arises (Article 1678–2 of the Code), except for employment contracts of high level or management employees (Article 69 of the Act on Employment contracts of 3 July 1978).

5 Civil Court of Brussels 13 March 1992, *Actualites du droit* 1992, 1377.

6 M. Storme, B. Deweulenaere, *International Commercial Arbitration in Belgium*, 1989 Kluwer p 16.

7 Recently, the scope of arbitration within French law has been progressively extended (2000–02) to public companies when dealing with industrial or commercial matters under precise conditions. N.C.P.C. Article 1471. The regulation of arbitration in the name of the public interest still takes place in France. *Busquet v Peyre*, Cass. 2e civ, Nov 7, 2002. The French Court of Cassation held that a contract provision permitting the arbitrators to extend the statutory time limit for rendering the award was not enforceable. To modify the statutory time limit rules, either the arbitrators or the parties had to file an action before a court of law. The French Court of Cassation appears to have established a code of conduct for itself consisting of granting true effectiveness to arbitration clauses.

8 J. Delvolve, J. Rouche, G. Pointon, *French Arbitration Law and Practice*, 2003 Kluwer Law International, p. 38. According to Austrian Act 2006, any pecuniary claim is arbitrable; non-pecuniary claims are arbitrable if the parties are entitled to conclude a settlement on the matter in dispute – in both cases it is required that the claims, in the absence of an arbitration agreement, would fall within the jurisdiction of the courts of law (Article 582). State courts must examine the lack of objective arbitrability or violation of rules of substantive public policy ex officio in annulment proceedings (Article 611). The amendments to the German arbitration law of 1998 explicitly expanded the range of matters that may be subject to arbitration to all claims of a proprietary nature (section 1030(1) CCP).

concerned with arbitrability but simply with the question of whether the relevant person has the legal capacity to dispose of its property or rights. It has to be decided firstly whether the subject matter of a dispute is arbitrable and only then is it necessary to enquire whether the person has legal capacity to enter into an arbitration agreement relating thereto. This author thinks that the legal capacity of person to conclude arbitration agreements should not be considered as a matter of arbitrability. While all "claims of economic interest" are arbitrable, irrespective of the fact that substantive law governing the contractual relationship might provide for a more restrictive definition of the objective arbitrability, in Swiss law arbitration is allowed in the case of a "concordat" but arbitration cannot be allowed regarding the issues for which the commercial court has exclusive jurisdiction, such as matters related to the control and ratification of the concordat[9]. Insurance matters and disputes that belong to the competence of the labour courts can be referred to arbitration, but only after the dispute has arisen.

Disputes concerning termination by the grantor of an exclusive distributorship producing its effects entirely or partially within Belgian territory cannot be settled by arbitration which is agreed upon prior to the end of the contract and which has as its purpose and effect the application of a foreign law[10]. The Court of Appeal of Brussels[11] specified that it is not the law of the forum that is to be applied but rather the law chosen by the parties that determines the validity of an arbitration

(Baumbach/Lauterbach/Albers/Hartmann, Zivilprozessordnung, 64th edn. (2006), section 1030, at para. 2). Claims of a non-proprietary nature are arbitrable if the parties can freely dispose of the legal goods that are at dispute.

9 The Concordat now constitutes Switzerland's uniform domestic arbitration law. It continues to apply in its entirety to national (domestic) arbitration between two (or more) Swiss parties. Article 177(1) now governs objective arbitrability notwithstanding any mandatory provisions of Swiss domestic or foreign law to the contrary; the only barrier is Swiss ordre public. Matters of arbitrability are to be determined and adjudicated irrespective of the validity of the contractual obligation according to the *lex causae.* ATF 118 II 353 in re *Fincantieri-Cantieri Navali Italiani SpA v Oto Melara* of 23 June 1992, where the SFSC, matters involving EU or US competition or antitrust laws are arbitrable in Switzerland, including matters regarding the alleged nullity of a contract or of a contractual provision, the alleged illegality of a restraint of trade and the right to invoke an individual or block exemption under Article 85 (3) EC Treaty. Moreover, the revocation of an oil-drilling concession, or the expropriation of a power plant or oil and gas facility: all claims of such a nature do involve economic or financial interests and so are (pursuant to Article 177 (1) PIL) objectively arbitrable for any arbitral tribunal having its seat in Switzerland, in spite of the fact that those claims might well be considered non-arbitrable under the *lex causae* in question.

10 Cour de Cassation 28 June 1979, Audi-NSU Auto Union AG v SA Adelin Petit Cie*, Yearbook Commercial Arbitration V* 1980 pp 257–259. *Matermaco S.A. (Belgium) v PPM Cranes Inc. (US)*, Legris Industries S.A. (France) Tribunal de Commerce [CFI], Brussels, 20 September 1990 The arbitration clause in … the contract of 1 October 1988 may not be recognised. Hence, this court has jurisdiction over the first defendant; according to Article 4 of the Law of 27 July 1961, Belgian law applies to the present dispute.

11 3d chamber 4 October 1985, JT 1986, 93 *Yearbook Commercial Arbitration XIV* 1989 pp. 618–620. *Plastimoda S.P.A. v Mobica n. v Belgian Supreme Court* (Cour de Cassation), 13 December 2001, http://www.cass.be, in the case that a written distributorship agreement contains an arbitration clause and is renewed according to Article 3 *bis* of the law of July 27, 1961 relating to the unilateral breach of an exclusive, open-ended distributorship agreement the judge cannot decide that the

agreement contained in an exclusive distributorship contract producing its effects in Belgium. The application of the law of 17 July 1961 is limited to disputes arising from the unilateral breach of an exclusive distributorship agreement for an undetermined duration, according to the Commercial Court of Brussels of 29 October 1991[12] and it does not come into play in a dispute concerning the terms under which the grantor may exercise its right not to renew an exclusive distributorship contract for a determined period. Thus, disputes regarding the termination of exclusive distribution agreements of an indefinite duration (falling under the scope of the mandatory Belgian law of 27 July 1961) will be considered as arbitrable if the mandatory law of 1961 will be applied by the arbitrators. Moreover, In *Van Hopplynus*[13], the Supreme Court held that when the arbitration agreement is governed by a foreign law that does not permit specific kinds of disputes to be arbitrated, the court has to decide that the dispute is not arbitrable. In other words, this decision brings forward the phenomenon of double face of arbitrability of a matter (domestic arbitrability versus foreign arbitrability) and so matters of exclusive distributorship are arbitrable if parties apply Belgian law and not arbitrable if they apply a foreign law. It is worth mentioning that, concerning the same case, the Commercial Court refused to apply Belgian law and the Court of Appeal affirmed–which for this author is the right aproach towards implementing parties' agreement, taking into account that the exclusive distributorships are not a matter of international public policy, which means the the Supreme Court's approach does not promote Belgium as a key location for arbitration.

Prior to the law of 19 May 1998, public sector entities could in principle not submit their disputes to arbitration[14]. In accordance with Article 1676 para. 2 B.J.C., legal persons public law may hereafter conclude an arbitration agreement if the agreement concerns the settlement of a dispute relating to the conclusion or the execution of a contract. Moreover, by law or royal decree deliberated in the Council of Ministers, further matters may be determined, in which legal persons of public law shall be able to conclude arbitration agreements showing that arbitration is not merely a matter of parties' arbitration agreement but arbitrability is also created by law and courts. The reform opens the likelihood of arbitration in Belgium to new users, such as the legal persons of public law. As a consequence, If a party signs a contract with a public sector institution it can request to submit any dispute relating to the conclusion or the execution of this contract to arbitration, so as not to submit the disputes to the state courts. The public sector entity needs to give its approval to an arbitration agreement either in the contract or at the time the dispute arises.

arbitration clause is not applicable to the renewal of the agreement for the reason that it will not be reproduced in a written and signed agreement by the parties.

12 Keutgen, Chron. Jurisp., *L Arbitrage* 1987 a 1992 no 14.

13 *Van Hopplynus Instruments v Coherent Inc*., Nov 16, 2006, C.02.0445.F.

14 H. Verbist, "La clause d'arbitrage perdant ses effets suite à la succession de l'état dans les droits d'un des contractants," Tijdschrift voor Procesrecht en Bewijsrecht – *Revue de Droit Judiciaire et de la Preuve*, 1998, Nr. 2, p 68.

It has to be taken into account that Article 2(3) of the NYC does not expressly indicate the law applicable to the arbitrability of a dispute[15]. Further, when the arbitration clause is pursuant to the agreement of the parties, subject to foreign law, the court ruling on the tribunal's jurisdiction may exclude arbitrability of a dispute when allowing such would constitute a "breach of its law and legal order"[16] showing that arbitrability is not an internationally defined term but its content is affected and formulated by national law and courts' interpretation according to the context of domestic public policy and so contributes to the lack of enforcement of awards internationally, leading into less effective arbitration. Since courts can ignore the parties' arbitration agreement, it could be argued that arbitration from a contractual and coercive dispute mechanism is transformed into a dispute mechanism whose credibility is based upon courts' licence to deal with the dispute that parties have agreed to submit to arbitration, and consequently arbitration is still far away from being a dispute mechanism co-equal to courts.

The terms for the anticipated dissolution of a company can be submitted to arbitration[17]. In bankruptcy nothing forbids the administrator from entering into an arbitration agreement if this would further the liquidation of the estate but he is not allowed to conclude such an agreement in disputes for which the bankruptcy court has an exclusive jurisdiction – the commercial district court of the district in which the debtor has its principal establishment – or in cases in which by law the opinion of the "Ministère public" has to be asked[18]. Moreover, it could be argued that a referral of disputes concerning individual claims would be entirely acceptable. Arbitration agreements concluded before the insolvency are binding on the administrator[19]. Furthermore, the Belgian Supreme Court (BSC) has decided that arbitration agreements can be opposed to the administrator, provided they specifically concern the appointment of the arbitrators and the

15 The Supreme Court (*Corte di Cassazione*) stated that a national court conducts a substantive judgment when it examines the validity of an arbitration agreement (in this case providing for a foreign arbitration) in order to verify if a dispute is subject to arbitration or, it has to be referred to a State court. Article 2.3 of the NYC does not expressly provide for a jurisdictional issue to be discussed before the national court seized of an action related to the validity of the arbitration agreement. The Supreme Court regarded such a validity to be strictly connected to the parties' autonomy to refer a dispute to arbitration as a private process. Hence, the national judge is not seized of any jurisdictional matter in this case, and the Court quashed the decision by which the judge considered his exam of the dispute as entailing a question of jurisdiction. *Heraeus Kluzer Gmbh v Soc. Dellatorre, Case no: 35,* Italian Supreme Court (Corte di Cassazione), Italy. (5 January 2007)

16 Case No. C020216N. On October 15, 2004, the Belgian Supreme Court ruled on a case concerning the arbitrability of claims arising under Belgium's Law of July 2, 1961, regarding the unilateral termination of Exclusive Distributorship Contracts.

17 Commercial Court of Ghent, 9 May 1988, Tijd. Gentse Rechtsp. 1988, 78.

18 T'Kint, F., "Convention d'arbitrage et faillite," in *L'arbitrage dans la vie des sociétés*, Bruylant 1999, 227.

19 Storme and Demeulenaere, *International and commercial arbitration in Belgium*, Deventer Boston 1989, p 39, no. 87.

matter to be decided, they are not subject to reversal and the question in issue is not one for which the commercial court that has decided on the bankruptcy has exclusive jurisdiction[20]. Additionally, if an arbitration agreement was entered by the debtor and the implementation was started before the formal declaration of bankruptcy, the creditor could adopt the arbitration agreement and according to Huys and Keutgen [21] the administrator is bound by the agreement and has to follow up on the agreement. The administrator could ignore the arbitration proceedings if these would run counter to the interest of the estate. Besides, the debtor could conclude an arbitration agreement concerning assets the bankruptcy code leaves him in possession of and the debtor can start a new business, thereby concluding an arbitration agreement concerning the assets acquired in the course of the new business activity[22]. On the other hand, in the USA, bankruptcy proceedings override agreement to arbitrate and so arbitration is inconsistent with the kind of centralized decision-making that is critical for Chapter 11 bankruptcy proceedings[23].

Matters of EU competition law and antitrust policy are arbitrable under Belgian law, but public policy concerns arise if the arbitrators enforce a clause that is prohibited under Articles 81 and 82, and so manifestly breach European competition law. One of the objectives of Regulation No. 1/2003 was to harmonize competition rules in Europe by requiring courts and national competition authorities to apply EU competition law in all cross-border cases. Questions concerning the interpretation of the prohibition laid down in Article 81(3) EU law should be open to examination by national courts when asked to determine the validity of an arbitral award[24]. Thus, arbitrators must raise competition law *proprio motu* in order to avoid having their award set aside at a later stage if it is enforced in the EU. Arbitrators will not be allowed to grant exemptions based on Article 81(3) of the EC Treaty, since this right is an exclusive competence of the Commission. Arbitrators are authorised neither to allow behavior contrary to Article 81 nor to link pecuniary sanctions to such injunctions. A finding of an infringement of national competition rules does not

20 Cour de Cassation, May 8, 1998.

21 Huys M. and Keutgen G., "L'arbitrage belge en droit belge international," Brussels 1981, 56, nr.47.

22 F.T'Kint, "Convention d'arbitrage et faillite," in *L'arbitrage dans la vie des sociétés*, Bruylant-Brussels 1999, p 222.

23 Joseph C. Phillips, Mowbray, L.L.C. and White Mountain Mining Company, *L.L.C. v Congelton, L.L.C.* and United States Trustee, Case No 04-1586 of the United States Court of Appeal for the Fourth Circuit. Bankruptcy Proceedings Override Agreement to Arbitrate – On 1 April 2005 the Court recognized the strong federal policy favoring international arbitration, but held that the congressional intent to permit a Bankruptcy Court to enjoin arbitration was sufficiently clear to override that general policy.

24 *Eco Swiss Case*, http://europa.eu.int/jurisp/cqi-bin/form.pl?lang=en (legal texts-case law), [1999] ECR I-3055. *G. Zekos*, "*Eco Swiss v Benetton*: Court's Intervention in arbitration," *2000 Journal of International Arbitration 91, No 2. EcoSwiss China Time Ltd. v Benetton International NV*, Case 126/97, 1999, ECR I-3055. The Paris Court of Appeal, in *SA Thales Air Defence v GIE Euromissile*, decided Nov. 18, 2004 (Docket No. 2002/19606), confirmed that Article 81 of the EC Treaty is part of French public policy.

eliminate an action for breach of the EU rules. According to the ECJ[25] a restrictive practice which had been found to infringe national competition rules may also constitute an infringement of Article 81 of the European Commission (EC) if there is a satisfactory degree of prospect that the agreement or concerted practice at issue may have an effect, direct or indirect, actual or potential in the relevant Member State or in other Member States. Moreover, in *Mostaza Claro v Movil*[26] the ECJ held that national courts should examine whether the arbitration agreement is void on their own motion even if the consumer has neglected to raise this issue before the arbitral tribunal. It is worth mentioning here that the House of Lords in England[27] in a competition law case commented that EC decisions are only binding if they involve the same parties and the same agreement. Lord Hoffmann in the ruling held that the EC decisions will always have evidential value and UK courts will always find these highly influential. In July 2006, the House of Lords overturned the Court of Appeal's decision in *Inntrepreneur Pub Company v Crehan*[28] in relation to the applicability of EU competition law to UK cases. The case is of interest, as it is the first time that a decision to award damages for a breach of Article 81 of the European Treaty has been overturned. The judgment will make it more difficult for UK claimants to rely on EC findings when they are bringing actions against parties not addressed in the relevant decision, making the applicability of the *Eco-Swiss* case more problematic Moreover, the Swiss Federal Supreme Court (SFSC) explicitly stated that arbitral tribunals sitting in Switzerland must affirm their jurisdiction to scrutinize a contract in respect of its compatibility with the competition laws[29].

25 Judgment of the ECJ in Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others. ECJ* judgment of 13 July 2006 in the Vincenzo Manfredi case ("Manfredi Judgment").

26 (ECJ, Oct. 26, 2006, case C-168/05).

27 *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38. The House of Lords looked at existing case law on conflicts between decisions of national courts and the EC, including *Delimitis v Henninger Brau* [1991] ECR I–935 and *Masterfoods Ltd v HB Ice Cream* [2000] ECR I–11369. In *Delimitis* it was held that a network of beer tie arrangements would infringe Article 81 if: the agreements in their economic and legal context had the cumulative effect of denying access to new national and foreign competitors; and the agreements contributed to the cumulative effect of the totality of similar contracts on the market. In *Masterfoods* the ECJ held that domestic courts when determining domestic disputes must follow EC decisions on the validity of agreements.

28 In 2004, the Court of Appeal looked at the decision which the EC had made on beer tie agreements in the case of *Whitbread* [1999] OJL 88/26 and followed the decision in *Whitbread* that the beer tie agreements denied access to new domestic and foreign competitors. The Court of Appeal held that the beer tie was uncompetitive and breached Article 81 of the EC Treaty as well as infringing the Chapter I prohibition of the Competition Act 1998. In its judgment, the Court overrode the English common law principle that a party to an illegal agreement cannot sue the other party for damages. It awarded Crehan damages of £131,336 (plus interest) for his resulting loss.

29 This competence of an arbitral tribunal was specifically confirmed in a recent landmark decision of the SFSC rendered in re *G. S.A. v V SpA* on 28 April 1992 published in *ATF 118 II 193*. The underlying case had to do with a Cooperation and Investment Contract between a Belgian group and various Italian companies. The rationale of the contract was to exploit mutual synergies by dividing up the marketing territories, and by certain pricing agreements. The contract was subject to Belgian law and contained an arbitration clause. The *ad hoc* arbitral tribunal sitting in Geneva

Additionally, The Swiss Federal Tribunal[30] refused to review competition law matters decided by an arbitral tribunal. In contrast with the well known *Eco-Swiss* ruling in which the ECJ stated that the provisions of European competition law have to be regarded as a matter of public policy within the meaning of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards, and so should be reviewed whenever an award is challenged before a court of a Member State, the Swiss Federal Tribunal left it entirely to the arbitral tribunal to apply competition law. Therefore, an arbitral tribunal sitting in Switzerland has the last word on competition law matters arising in the course of the arbitration. Furthermore, under the EC Merger Regulations[31] an arbitration tribunal can now decide whether exemption under Article 81 (3) is appropriate in particular circumstances. This is well illustrated by the recent decision of Cour d'appel de Paris in the case of *Thales* v *Euromissiles*[32] concerning the application of EU competition law which is accepted to have a public policy character. The Cour d'appel de Paris stated that the French court could not review the merits of the award and the decision of the tribunal. Therefore, the reviewing judge may not examine the complex issue of conformity of a particular contract with EU competition law. On the other hand, The Brussels District Court in *SNF v CYTEC Industrie*[33] has recently set aside an ICC award on the ground that the arbitrators failed to correctly apply European competition law rules. Recalling the ECJ's decision in *Eco-Swiss*, which requires national courts to annul awards that are contrary to European competition rules, the court found that the ICC award was tainted because damages had been awarded, thereby giving effect to an agreement the tribunal found to be void. This case teaches that even when arbitrators pay due respect to the impact of European competition rules on the contract they are reviewing, their awards remain at risk if a state court looks differently at the consequences of the nullification of the contract. It is also noteworthy that, before the Brussels court ruled in this case, the French courts had already upheld the same award in exequatur proceedings, both at first instance and before the Paris court of appeals. Thus, a discrepancy concerning the approach of EU competition law and its applicability, observed in the courts' decisions, making it impossible for arbitrators to follow a line which will safeguard the enforcement of their awards. Moreover, courts, in their effort to keep their judicial sovereignty distinct, produce contradictory judgments regarding the

rendered an interim decision *inter alia* refusing to suspend the arbitration until a decision by the EU Commission was obtained. The resultant final award was attacked by both parties who filed challenges to the SFSC on the basis of Article 190 (2) PIL. The Supreme Court quashed the Award, remitting the same back to the arbitral tribunal, on the argument that the Tribunal failed to use its jurisdiction to examine the relevant contract in respect of its conformity with Articles 85/86 (81/82) Treaty of Rome. The Federal Supreme Court considered the issue as a jurisdictional issue according to Article 190 (2) b PIL, where the Supreme Court exercises a broad scope of review.

30 *Tensacciai SpA v Terra Armata SrI Docket* No 4P.278/2005, March 8, 2006, *ASA Bulletin* 3/2006, p. 521 with commentary by Landolt.

31 Merger Directive: EC Regulation 139/2004 of 20 January 2004 ('ECMR').

32 18 November 2004, (2005) 8(2) *Int't AIJi* 55; (2005) *Juris Classeur* 35.

33 March 8, 2007, R.G. 2005/ 7721/A.

enforcement of EU law and consequently make the recognition and enforcement of arbitral awards problematic, further invalidating arbitration as an alternative dispute mechanism.

There is an expansion of the content and subject of arbitrability by the new Act, but it does not provide much new substance to the content of the term by including, for example, that all civil law matters are arbitrable as long as there is a party's agreement.

3 Arbitration agreement

Regarding the capacity of a person to conclude an arbitration agreement, the Belgian law specifies that with the exception of legal persons of public law, whosoever has the competence or is empowered to compromise, may conclude an arbitration agreement (Article 1676 §2). The ability of any party to conclude an arbitration agreement depends on the conditions set down by the civil law and so the conditions, which must be met for the conclusion of any ordinary contract, have to be satisfied. The arbitration agreement is subject to the same requirements as those for entering into the agreement that is the subject matter of the arbitration. In other words, the conditions which applied to the conclusion of a contract of which the execution is submitted to arbitration also apply to the conclusion of the arbitration agreement.

The ability of parties to conclude an arbitration agreement is without prejudice to the exceptions provided for in the Belgian law and specifically the rules about contracts, but the existence of an arbitration agreement regarding its type, content and the arbitrability of the difference are regulated by the Belgian Judicial Code. Belgian law gives parties the right to agree to arbitrate existing or future disputes in specified circumstances. Article 1676 of the BJC provides that a person who has the capacity or is empowered to compromise may conclude an arbitration agreement for any dispute that has arisen or may arise out of a specific legal relationship for which it is permissible to compromise. Thus, only if the parties agree to arbitrate will arbitration be an acceptable forum for dispute settlement. Therefore, it is of utmost importance that the intent of the parties be clear. Moreover, Part VI of the BJC grants the parties other rights in connection with the arbitration process. It defers to the will of the parties in selecting the arbitration panel[34], the law applicable to the merits of the case, the procedural rules that will apply to the arbitration, and the place of arbitration[35].

The conclusion and existence of an arbitration agreement means that the courts have no jurisdiction to deal with the differences referred to arbitration and so according to Article 1679 the judge will state that he has no jurisdiction, unless, the agreement is not valid or has terminated, which means that the judge and not the arbitral tribunal in the first instance examines the validity of an

34 Articles 1681–1682 BJC.
35 Article 1693, 1 BJC.

arbitration agreement. An objection regarding nullity of the arbitration agreement must be brought before any other objection or defense is raised. Therefore, even prior to the establishment of the arbitral tribunal, the court assists arbitration and currently the court's intervention seems to be necessary in order for parties to commence arbitration. An application to a court for preservation or interim measures is not incompatible with an arbitration agreement and does not imply a renunciation of the agreement (Article 1679 § 2). An arbitration clause deprives the courts of jurisdiction even with respect to an action arising out of a guarantee following from a main action that had been submitted[36]. Moreover, a party who exercises a right in an insurance policy has to accept the effects of the clause formulated in its favour of others and submit to the arbitration clause contained in the policy[37]. Additionally, it is not necessary to draw specific attention to the arbitration clause itself, provided that the wording of the reference incorporates the standard conditions into the contract[38] beyond doubt.

To that extent, in the Netherlands[39], the court declared the absence of jurisdiction to deal with a case for which an arbitration agreement had also been concluded. Hence, it could be argued that if arbitration is a co-equal and independent to courts dispute system then the court should no longer be involved in any way in the arbitration process. It seems that the first insight of an arbitration agreement is made by courts rather than the arbitral tribunal directly. A judge's view on jurisdiction means that the court has no jurisdiction to examine the specific dispute and the absence of jurisdiction for the specific dispute stops if the arbitration agreement ceases to exist. The *Italian Supreme Court*[40] held that since the bill of lading was issued after the charterparty, the ouster of the jurisdiction clause replaced the arbitration clause contained in the charterparty. To that extent, in German law, the court also deals with the jurisdiction of an arbitral tribunal prior to its establishment[41] and the court concurrently examines the validity of the arbitration

36 Liege Commercial Court 27 June 1985 Dr Europ. Du transp. 1985 p 572.

37 Brussels 22 June 1989 Pas. 1990 II 54.

38 Court of Appeal of Liege, 3 March 1982, Jurisprudence de Liege, 1982, p 301.

39 Netherlands Code of Civil Procedure – Book Article 1022 – Arbitration Agreement and Substantive Claim Before Court; Arbitration Agreement and Interim Measures by Court 1. A court seized of a dispute in respect of which an arbitration agreement has been concluded shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid.

40 The Supreme Court affirmed the Court of Appeal's dismissal of the case, finding that the arbitration clause contained in the charter party applied to disputes arising out of the affreightment, while the ouster of jurisdiction clause incorporated in the bill of lading was clearly concerned with disputes arising out of the carriage of the goods by sea. Consequently, the Court held that there was no incompatibility and that no competing party intentions could be discerned. The Court also held that since the bill of lading was issued after the charter party, the ouster of jurisdiction clause replaced the arbitration clause, hence confirming the lack of jurisdiction of the Italian Courts. *S.G.L. Carbon SpA v Agenzia Marittima A.L.R.* and *Agenzia Marittima Clivio S.R.L.*, Case No 731, Italian Supreme Court.

41 Under 1032(2) a German court may only decide the arbitrators' jurisdiction if requested to do so before "the arbitral tribunal is constituted." The German Federal Court of Justice confirmed, in a

agreement and arbitrability in order to refer the dispute to arbitration. In French law, and in a case involving two parties (a French and a British corporation) related by a joint venture agreement that included an arbitration agreement, the Appeal Court of Paris ruled that the arbitrators should decide on their own jurisdiction and on the arbitrability of the matter presented to them, even though their decision might be subject to judicial control in a subsequent setting aside procedure[42].

The arbitral tribunal may rule with regard to its own jurisdiction and for this reason, may check the validity of the arbitration agreement but a declaration that the contract is invalid shall not entail *ipso jure* the nullity of the arbitration agreement contained in it. Arbitrators are not allowed to adapt the contract to fundamentally changed circumstances and so they can interpret it but not change it. Arbitration in Belgium cannot be extended to include the power of a third party to complete or modify the terms of a contract. Additionally, arbitration clauses are treated as separable parts of the contract and so an arbitration agreement is a distinct legal obligation and the principle of separability is recognized by Belgian law. Moreover, the arbitral tribunal's decision that it has jurisdiction may not be contested before courts, apart from the occasion that at the same time as the award is contested on the main issue and by the same procedure.

The objection to the arbitrators' jurisdiction cannot prevent the arbitrators from ruling on the main contract's validity. A ruling that the arbitral tribunal has no jurisdiction may be challenged before the courts immediately after it made. The

decision dated January 13, 2005 (Docket No. III ZR 265/03), that parties can no longer agree in their arbitration agreement to give the arbitral tribunal the power to decide on its own jurisdiction in a manner binding on the courts (Kompetenz-Kompetenz) and so the final decision on the jurisdiction of an arbitral tribunal now lies squarely with the courts. Klaus P. Berger, "The New German Arbitration Law in International Perspective," 26 *Forum Internationale* 8–9 (2000). Because of the equating of arbitration ruling with a judgment having legal force (1055 ZPO) the ruling can be reviewed or suspended by a national court (1059 ZPO). The German law expressly states a preference for the arbitrators to decide their jurisdiction in an interim award but that award would, of course, be subject to immediate set-aside proceedings. When a court is properly seized of the jurisdictional issue, it is to make a full determination, not merely a prima facie one, as required in French law. Peter Schlosser, "La nouvelle législation allemande sur l'arbitrage," 1998 *Rev Arb.* 291, 298.

42 Appeal Court of Paris, May 19, 1993, *Labinal v Mors, Revue de l'arbitrage*, 1993, p 957. In Austrian law, the arbitral tribunal is competent to decide on its jurisdiction (principle of *Kompetenz-Kompetenz*). It may do so in an interim award on jurisdiction or in the final award. Awards on jurisdiction are subject to challenge. Under 1983 arbitration law the arbitral tribunal must dismiss the claim if it finds that it lacks jurisdiction. Under the new Arbitration Act the arbitral tribunal will be entitled to render a (declaratory) award relating to its jurisdiction (section 592 para 1 CPC). This will now permit an independent challenge of the decision on jurisdiction in front of state courts. On March 1, 2007, new Article 186(1bis) of the Swiss Private International Law Act (PILA) entered into force. Under the new provision, unless "notable grounds" require a stay of the proceedings, arbitral tribunals seated in Switzerland are explicitly authorized to decide on their own jurisdiction, even if a lawsuit in the same matter between the same parties is already pending before a national court or another arbitral tribunal.

Court *N.V.B. v Nederlands Arbitrage Instituut and others*[43] held that the arbitrators have the power to decide the issue of the validity of the arbitration agreement. A party wishing an early court ruling on the arbitrators' jurisdiction could initiate parallel court proceedings on the dispute submitted to arbitration and wait for the other party to raise the court's lack of jurisdiction on the grounds of the existence of a valid arbitration agreement. The defendant is required to raise the court's lack of jurisdiction in *limine litis* before the defence on the merits of the case. Courts do not decline jurisdiction and refer the parties to arbitration *ex officio*. If a party objects to the court's jurisdiction on the basis of a valid arbitration agreement, the court is obliged, under Article 1679 of the Code to decline jurisdiction and refer the parties to arbitration while verifying whether the arbitration agreement is valid or has ceased to exist. The defendant who raises the objection of the court's lack of jurisdiction for the first time before the appellate court waives his/her right to move for a dismissal on the basis of the existence of a valid arbitration agreement. A party can request a declaratory court judgment on the validity and/or applicability of the arbitration agreement. M. Storme[44] argues that Belgian law does not allow the parties to apply for a declaratory court judgment on the validity and/or applicability of the arbitration agreement. Besides, B. Demeulenaere[45] thinks that the parties can apply for a declaratory judgement at any time before the rendering of the final award, provided that the conditions for jurisdiction *ratione loci* of the court are fulfilled. If a party invokes an arbitration clause, it contests the power of the Belgian courts to hear a dispute, rather than their jurisdiction. A court decision enforcing (or not enforcing) an arbitration agreement is, therefore, subject to immediate appeal[46].

The court can at the demand of one of the parties come to a decision whether a ruling that the arbitral tribunal has no jurisdiction is well founded (Article 1697). In a decision dated Nov. 22, 2005, a commercial court in Belgium refused, on jurisdictional grounds, to entertain a request by a Belgian company for an injunction prohibiting the Netherlands Arbitration Institute (NAI) and three arbitrators it had appointed from continuing an already-commenced arbitration to which the Belgian company was a party. The arbitration proceedings had been initiated by a Dutch company, which alleged that the Belgian company breached a contract for the supply of computer software. The Belgian party sought relief from a Belgian commercial court, attempting to block the arbitration on the grounds that it never agreed to arbitrate and that the NAI breached the principle of equality of parties when it appointed three Dutch arbitrators. The court ruled that it lacked jurisdiction to issue the requested injunction. The court's decision demonstrates a

43 *N.VB. v Nederlands Arbitrage Instituut and others, Tribunal de Commerce (5th Room), Mechelen* 22 November 2005.

44 M. Storme & B. Demeulenaere, *International Commercial Arbitration in Belgium*, 56 (Kluwer Law & Taxation Pub., 1989.

45 M. Storme & B. Demeulenaere, "International Commercial Arbitration in Belgium," 57 (Kluwer Law & Taxation Pub., 1989.

46 *R.B. v J.H. 7* April 2003 – Court of Appeal (Antwerp) R.D.C. 2004/6 – June 2004, p 572.

plain unwillingness on the part of the court to get in the way of the arbitration proceedings. Moreover, the court held that the jurisdictional issue should be decided in the first place by the arbitral tribunal. Once a dispute is referred to a Belgian court, the court must first determine whether the agreement is valid and still in effect before it can refer the parties to arbitration. Furthermore, the decision by the Belgian commercial court shows that Belgian courts are used to making sure that the arbitration process is safeguarded from undue judicial interference. Belgian courts will not strike down an arbitration agreement providing for arbitration abroad if the subject matter of the dispute cannot be submitted under Belgian law[47].

To that extent the negative kompetenz-kompetenz principle was codified in French law with the 1981 enactment of Article 1458 of the French New Code of Civil Procedure: Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null. The French approach turns on two principal considerations. First, if an arbitration tribunal has already been seized of the matter, the French court will refuse jurisdiction and leave questions respecting the arbitration agreement's existence, validity and scope to the arbitrators. Second, if an arbitration tribunal has not been seized, the court will undertake a limited scrutiny of those questions and will retain jurisdiction only if the arbitration agreement is manifestly null. Thus, if the court finds prima facie existence, validity and scope, it will refer the parties to arbitration. After an award is rendered – that is, at Stage 3 – French courts will review the arbitrators' jurisdiction *de novo*[48]. The French doctrine allows greater court scrutiny if a party goes to court before the case has been presented to arbitrators, on the theory that such a party is more likely to be acting in good faith with legitimate concerns about the arbitrators' jurisdiction. French law preserves the exclusive jurisdiction of the courts of appeal for review of arbitral awards. Thus, there is a convergence regarding the view of courts about their jurisdiction when there is a parties' arbitration agreement.

Moreover, according to Article 1679 § 2 BJC, application to courts for preservation or interim measures in arbitration shall not mean a rejection of the arbitration agreement but means that courts can take provisional or interim

47 CA Brussels, 4 October 1985,1986 JT 93. TC Brussels, 5 October 1994, 1995 *Rev Arb* 311.

48 Fouchard, Gaillard, Goldman, "On International Commercial Arbitration" 661–88 (Emmanuel Gaillard & John Savage eds., 1999). Although Article 1458 concerns domestic arbitration in France, the principle has been extended by court decision to international arbitration. Concerning international awards in French law, recognition and enforcement will be rejected "if there is no valid arbitration agreement or the arbitrator ruled on the basis of a void or expired agreement …" N.C.P.C. Article 1052 (Fr.), reprinted in Jean-Louis Devolve*, Arbitration in France: the French law of national and international arbitration* 86 (1982). See also *Arab Republic of Egypt v Southern Pacific Properties, Ltd. & Southern Pacific Properties (Middle East), Ltd.,* 23 *Int'l Legal Mat'l* 1048, 1061 (1984) (setting aside an award because the court found *de novo* that Egypt was not a party to the arbitration agreement).

measures in arbitration rather than the arbitral tribunal itself. Belgian courts can award provisional measures, including a provisional payment through summary proceedings called référé-provision if the claimant's rights are not disputable. Hence, Article 1679 para. 2 BJC stipulates that an application to the judicial authority for provisional or conservatory measures shall not be incompatible with an arbitration agreement and shall not imply a waiver of the arbitration agreement. The waiver of a right cannot be presumed, but may only be deduced from facts that are not susceptible of another interpretation[49]. Parties have to state explicitly that they waive all setting aside proceedings either in their arbitration agreement or later in the terms of reference (Article 1717§4 BJC). To that extent in Netherlands law, courts can also order interim measures showing a convergence of the two laws regarding the role of courts in interim measures[50]. Furthermore, in Austria, Italy, Greece and some Scandinavian countries, the authority to rule on interim relief falls into the reserved prerogatives of State courts. Such reserved prerogatives of State courts cannot normally be derogated by agreement of the parties.

According to Article 1677[51] BJC an arbitration agreement shall be constituted by any means of writing or by other documents binding on the parties and showing their intention to have recourse to arbitration. The word "document" is understood in its broadest sense and so this requirement is satisfied even by unsigned papers which the courts recognize as binding upon the parties, as long as the papers demonstrate the parties' will to resort to arbitration[52]. So, there is written agreement

49 Belgian Supreme Court 14 June 1995 pas. 1995 I 630 (No 298). Supreme Court 13 January 1994, pas 1994 I 33 (No 17).

50 Netherlands Code of Civil Procedure – Book Article 1022 2. An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of Article 289. In the latter case the President shall decide the case in accordance with the provisions of Article 1051.

51 An arbitration agreement is supposed to be included in a written and signed agreement, or in other binding documents. A building sub-contractor who starts work after receiving a project agreement without returning the agreement, or without any other objections, will be bound by the language of the agreement, such that the entire text of the unsigned agreement that contains the arbitration clause will govern the entire project. Commercial Tribunal Hasselt (Rechtbank van Koophandel te Hasselt), 14 June 2000, Rechtskundige Weekblad, 2000–2001, p 1283. (Belgium Code Judiciaire, Article 1677 (May 19, 1998) ("An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration."), *available at* http://www.jus.uio.no/lm/belgium.code.judicature.1998/1677). According to section 1031(1) German CCP, the arbitration agreement must be either made in writing or in some other form of communication evidencing an agreement between the parties (notably fax or email). An arbitration agreement can also be concluded if a party does not object to the substance of a document transmitted to it by the other party (or if the parties do not object to a transmission by a third party to both of them) provided that it is common usage for such a document to become binding if no objection is raised in good time. Contractual reference to another document containing an arbitration clause is equally possible. Finally, acceptance of a bill of lading containing an express reference to an arbitration clause in a charter party implies the conclusion of an arbitration agreement.

52 Brussels, 4 November 1991 JT 1992, 60.

when the parties had merely exchanged fax or telex or any documents binding on the parties and accepted as evidence by Belgian law. In other words, when the parties have made use of an document unsigned, it is a written agreement as long as it demonstrates their will to resort to arbitration. Belgian case law broadly interprets the writing requirement and so the written instrument merely has an *ad probationem* (some evidentiary) function allowing the arbitration agreement to be in other forms (including in electronic form), on the condition that the parties agree to this, not one that is *ad validitatem* (a condition of validity of the contract)[53]. Thus, an oral arbitration agreement can be valid under Belgian law but the problem is of evidence in case a party denies the existence of the oral arbitration agreement. Moreover, an arbitration agreement can be evidenced by the minutes of the arbitral tribunal's first hearing, in which the tribunal acknowledges its competence, if signed by the parties[54]. On the other hand, an arbitration agreement which was proposed in writing and accepted orally would not meet the written form requirements of Article II, 2 NYC. Most national courts treat Article II(2)'s writing requirement as a mandatory minimum and maximum requirement[55]. If there is no written acceptance of the offer, the consequence is that although the parties may have entered into a valid agreement to arbitrate, that is not an agreement fully in keeping with the scope of the NYC, this is well established[56]. Furthermore, a recently reported decision of the Bavarian[57] Highest Regional Court held that noncompliance with the form requirements of an arbitration agreement under Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) could be cured by a party's participation in the arbitration. The Federal Supreme Court (Bundesgerichtshof) has recently confirmed that the most favoured treatment mandated by Article VII of the NYC requires national courts deciding on the enforcement of foreign arbitral awards to consider the law governing the arbitration agreement if this law contains more permissive form requirements than Article II of the NYC[58].

53 In other words, writing is not required for the validity of the arbitration agreement; it only has evidential value. M. Huys & G. Keutgen, *L'arbitrage en droit belge et international*, 110 (Bruylant, 1981); D. Pire, "La convention d'arbitrage," in X *L'arbitrage* 32 (Story-Scientia, 1989); Court of Cassation, Oct. 27, 1996, Pasinomie 1996, I, 952–957; Court of Appeal Brussels, Nov 4, 1983, *Journal des Tribunaux* 1992, 60–62; Court of Appeal Antwerp, Nov 9, 1983, Limburgs Rechtsleven 1984, 62–67; CFI Liege, Feb. 23, 1996, Revue de Jurisprudence de Liege, de Mons et de Bruxelles 1996, 1319–1321; CFI Namur, Oct. 2, 1996*, Journal des Tribunaux* 1997, 276; CFI Liege, Dec. 11, 1985, Revue Regionale de Droit 1986, 58–60.

54 L. Dermine, "Observations sous tribunal civil de liege," 10 November 1976, 1978 *Journal des tribunaux* p 138.

55 Max Bonnel, "How not to arbitrate," 72 *Arbitration* 391 (2006).

56 *Rintin Corp v Domaz* 374 F3d 1165.

57 Docket No. 4 Sch 05/04.

58 *Federal Supreme Court*, Decision dated 21 September 2005, SchiedsVZ 2005, pp. 306–308. The German Federal Court of Justice recently considered the most-favored-nation clause of Article VII of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). The Federal Court of Justice held that when examining the validity of an arbitration agreement, judges should consider the form requirements of the NYC, the national law dealing with the

To that extent in France, Article 1443 of the New Code of Civil Procedure (NCPC) states that an arbitration clause is null if it is not stipulated in writing in the principal agreement or in some document to which that agreement refers[59]. The French legislative solution does not provide for specific rules along statutory lines regarding maritime arbitration[60]. An arbitration agreement is valid as to its form if made in writing, by telegram, telex, fax or any other means of communication, provided that it can be evidenced by a "text" (Article 178(1) of the 1987 Swiss Act). Signature of such a text by either party is not a requirement. Moreover, in Austrian law according to Article 583 of CCP 4th chapter[61], section 1031 CCP of German Law[62] and Article 807 of Italian CCP[63] the arbitration

recognition and enforcement of arbitral awards, and the domestic law governing the arbitration agreement-determined pursuant to the conflict of laws rules of the state in which enforcement is sought (Docket No. III ZB 18/05).

59 Arbitration agreements are not subject to any formal requirement or any minimum content. They are enforceable provided that they evidence the intention of the parties to resort to arbitration. Chambre Arbitrale Maritime de Paris, sentence no. 531, March 29, 1984, DMF 1985, 115; Cour d'Appel de St. Denisdela Réunion, November 29, 1985, DMF 1986, 471. The Hamburg Rules at Article 22(1) and the Multimodal Convention 1980 at Article 27(1), both referring to an agreement "evidenced in writing." Moreover, if there is no agreement on arbitrators or voting of arbitrators for a majority then parties can apply to the Court mentioned in Article 582 for a declaration that the arbitration agreement is rescinded or of no effect in the particular case (Article 591 of Austrian CCP).

60 Delebecque, "L'arbitrage maritime contemporain: point de vue français," 2004 DIR. MAR. 436.

61 The new arbitration provisions are embedded in the Austrian Code of Civil Procedure (ss 577–618). specifically, arbitration agreements can be made either: (i) by means of a written document signed by the parties (ii) through the exchange of letters, faxes, emails and other means of telecommunication which provide a record of the agreement. (Section 583(1)). Austrian Supreme Court confirmed (obiter) its view that the validity or invalidity of the arbitration agreement invoked by the defendant must be assessed – unless otherwise agreed between the parties – according to the laws of the state where the arbitral award would be rendered, which according to the parties' arbitration agreement was Switzerland. *OGH 19.2.2004, 6 Ob 151/03d*.

62 The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, faxes, telegrams or other means of telecommunication which provide a record of the agreement. Right of Final Determination of Validity of Arbitration Agreement Reserved for State Courts). The State Courts' competence to finally determine the validity of an Arbitration Agreement was found to be mandatory and in the opinion of the Court, could not be derogated by Party agreement. The Court held however that the inclusion of the *Kompetenz-Kompetenz* clause in the Arbitration Agreement did not affect its validity, which according to the Court was in conformity with the formal requirements set out in sec. 1031 para. 5 of the ZPO. *Case No III ZR 265/03 of the Bundesgerichtshof (German Federal Court)*. In German legislation Code of Civil Procedure, §1031 Nr. 4 ZPO (approving of an arbitration agreement contained within a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication that provide a record of the agreement).

63 The Supreme Court affirmed the Court of Appeal's dismissal of the case, finding that the arbitration clause contained in the charter party applied to disputes arising out of the affreightment, while the ouster of jurisdiction clause incorporated in the bill of lading was clearly concerned with disputes arising out of the carriage of the goods by sea. Consequently, the Court held that there was no incompatibility and that no competing party intentions could be discerned. The Court also held that since the bill of lading was issued after the charter party, the ouster of jurisdiction clause replaced the arbitration clause, hence confirming the lack of jurisdiction of the Italian Courts. *S.G.L. Carbon*

agreement has to be in writing or be contained in telegrams, telexes or in electronic documents or data exchanged by the parties. An arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party in German law[64]. As mentioned above, an arbitration agreement must be made in writing to be binding but an exchange of letters or the acceptance of standard terms and conditions, provided they evidence the consent of the parties, is sufficient proof of an arbitration agreement. In other words, there is a need for an instrument in writing signed or not by the parties, or other documents binding on them to show their intention to arbitrate. Thus, the written instrument merely has an ad probationem (some evidentiary) function, not one that is ad validitatem (a condition of validity of the contract). In other words, writing is not required for the validity of the arbitration agreement; it only has evidential value.[65] It could be argued that there is a need for meeting of the parties minds on at least the reference of the specific difference to arbitration. Therefore, the absence of a written arbitration agreement or other binding document means that there is no valid arbitration agreement. Vera van Houtte[66] argues that arbitration agreements have to stem from a document (signed or not by both parties), they are not subject to any prescribed requirement or any minimum content providing evidence of the parties' intention to resort to arbitration. Otherwise, arbitration agreements are not enforceable. A court cannot decide that the arbitration clause is not applicable to the renewal of a distributorship agreement, for the reason that it has not been reproduced in a new written and signed agreement[67]. Moreover, a project agreement that contains an arbitration clause will govern the entire project when the contractor started the work without any objections[68]. It has to be taken into account that courts, rather than an arbitral tribunal, deal with the investigation of the validity of the arbitration agreement in their examination of jurisdiction by examining the written nature of the arbitration agreement. An agreement that attempts to submit all possible disputes between the parties to arbitration is not binding (1646 BJC).

SpA v Agenzia Marittima A.L.R. S.R.L. and Agenzia Marittima Clivio S.R.L., Case No 731, Italian Supreme Court.

64 The latest reform of arbitration in Germany permits for the introduction of a special rule on maritime arbitration, stating that in order to validate the arbitration agreement contained in the bill of lading, an express reference to the arbitration clause must be contained in a charter party. Code of Civil Procedure, §1031 Nr. 4 ZPO. Section 1031 German Commercial Code & Code of Civil Procedure In English 467 (Charles E. Stewart trans., 2001).

65 Court of Appeal Antwerp, Nov 9, 1983, Limburgs Rechtsleven 1984, 62–67, Court of Cassation, Oct. 27, 1996, Pasinomie 1995, I, 952–957; Court of Appeal Brussels, Nov 4, 1983, *Journal des Tribunaux* 1992, 60–62; CFI Namur, Oct. 2, 1996, *Journal des Tribunaux* 1997. 276.

66 Vera van Houtte, "Dispute resolution," www.gettingthedealthrough.com.

67 Belgian Supreme Court (Cour de Cassation), 13 December 2001.

68 Commercial Tribunal Hasselt (Rechtbank van Koophandel te Hasselt), 14 June 2000. B.VB.A. A. v/ B.VB.A.M. – 14 June 2000 – Commercial Tribunal Hasselt (Rechtbank van Koophandel te Hasselt).

4 Arbitrators

The power of arbitrators is granted by the parties' agreement and Article 1700, 1, of the BJC states that the arbitrators shall decide the dispute in accordance with the rules of law, unless the parties have agreed otherwise. In other words, the parties may agree to grant the arbitrators the power to render an award based on the principles of equity, which means that the award need not strictly conform with national law. An arbitrator who is given this power is referred to as *amiable compositeur*. Before the 1998 amendments of the BJC, the parties could authorize arbitrators to decide ex aequo et bono only after a dispute had arisen[69]. The amendment of Article 1700 allowed the parties to agree to amiable composition in the initial pre-dispute arbitration agreement. The new Belgian arbitration law[70] hereafter permits parties prior to the introduction of the arbitration proceedings to empower the arbitral tribunal to decide in equity. Legal persons of public law are, however, prevented from conferring to an arbitral tribunal the powers to decide a dispute in equity. It has to be taken into account that arbitrators acting as *amiable compositeurs* are not exonerated from respecting rules of *ordre public* and, in the case of an international arbitration, from respecting the rules of international public order.

Arbitrators have a duty to issue enforceable awards. Therefore, they must be aware that their interpretation of applicable law, EU law or any other national law will be subject to review by a competent national court in a member country of the EU. The Arbitral Tribunal determined that, based on the definition in EC Regulation No. 4064/89, the agreement could not be considered a concentrative joint venture; based on this categorization, EC Regulation no. 4064/89 did not apply and the Arbitral Tribunal determined it should apply Article 85 of the EC Treaty[71]. Additionally, the Tribunal determined that it was bound by the community competition law and was required to take into account the interpretation and application of the law by community institutions, particularly the EC Commission and the Court of Justice[72]. National courts have the task of safeguarding EU principles that have become part of the national legislation. To that extent, on a co-equal to courts basis, arbitral tribunals should also safeguard EU principles as well.

69 Court of Appeal Brussels, Oct. 14, 1980, *Yearbook VII*, 1982, 316–318.

70 Herman Verbist, *Legal Insight* No. 1, 1999 p. 17**,** Herman Verbist, "Reform Of The Belgian Arbitration Law," *Revue de Droit des Affaires Internationales/ International Business Law Journal*, Paris, 1998, No. 7, pp. 842–857.

71 *Portuguese Co. v French Parent and French Subsidiary* – Final Award of 1994 in Case No. 8423. In Austrian law, some provisions, all of them relating to the intervention of the courts at a time when the arbitral tribunal has to be installed and when arbitrators are challenged, apply if the seat of the arbitration has not yet been established provided that at least one of the parties has its domicile or ordinary residence in Austria. Under such circumstances, the Austrian courts have jurisdiction to assist with the establishment of the arbitral tribunal and may play a role where arbitrators are challenged (see Chapter 3, ss 586–591).

72 M/A Belgium v X/B France – Partial Award of 1992 in Case No. 7146.

The parties must have equal rights in choosing the arbitrators. There is a requirement of independence in Article 1678, 1 of the BJC, which ensures an independent panel of arbitrators[73] by stating that an arbitration agreement shall not be valid if it gives one party a privileged position with regard to the appointment of the arbitrator[74]. According to the approach taken by some courts, a lack of independence might be a sufficient ground for setting aside an award under Belgian law. A lack of independence and impartiality could also be considered contrary to public policy and thus reside under Article 1704, 2.a, BJC, which states that an arbitral award may be set aside if it is contrary to public policy. To that extent, the French *Cour de Cassation* annulled the decision of the *Cour d'Appel* on the grounds that, in its view, the principle of equal treatment in the designation of the arbitrators form, part of public policy and that parties cannot, in advance, waive that principle[75].

The Court of Appeals of Brussels recognized that an arbitral panel consisting of five arbitrators out of which four were members of the same organization as one of the parties, was established contrary to the rules of public policy[76]. In another case, the Brussels Court of Appeals held that a lack of independence of the arbitral tribunal leads to an award made by an irregularly constituted tribunal, which is a ground for annulment pursuant to Article 1704, 2.f, BJC[77]. On the other hand, paragraph 5 of Article 1704 declares that an argument for the challenge and exclusion of arbitrators provided for under Articles 1690 (which in paragraph 1 says that arbitrators may be challenged if conditions exist that indicate valid doubts as to their impartiality or independence) and 1692, shall not comprise the basis for setting aside an award within the meaning of paragraph 2 (f), even when the reasons Article 1690§ 1 in become known only after the award is made, which means that impartiality should not be considered as a reason for setting aside the award. For instance, an arbitrator's participation in six preceding arbitration proceedings, all dealing with comparable situations condemning the same bank for the same misconduct, raised serious doubts as to the arbitrator's impartiality and independence[78]. Besides, the Court in *The Republic of Poland v Eureko bv*[79] held that nothing evidenced that the arbitrator was involved in the Cargill case and that the simple fact that the arbitrator has his office in Washington B.L., in the same

73 Justice of the Peace Izegem, Dec. 27, 1991, Tijdschrift voor Arbitrage 1992, 85–86.

74 Court of Appeal Mons, June 15, 1995, Journal des Tribunaux 1996, 80; Court of Appeal Brussels, June 23, 1992, Res et Jura Immobilia 1993, 86–96; Commercial CFI Louvain, Sept. 19, 1989, Tijdschrift voor Belgisch Handelsrecht 1990, 1022–1028; CFI Brussels, Feb. 20, 1990, *Journal des Tribunaux* 1990, 744.

75 ICC Case No. 5836/MB in re: *Dutco Construction Co. v BKMI Industrieanlagen GmbH and Siemens AG.*

76 Court of Appeals Brussels, Sept. 9, 1959, Pasinomie 1961, II, 59.

77 Court of Appeals Brussels, Oct. 8, 2001, *Journal des Tribunaux* 2002, 635–636.

78 *A (the bank)) v M (arbitrator), H (arbitrator), B. C*, Case no: R.G. 99/11732/A, CFI of Brussels (71 Chamber), Belgium.

79 *The Republic of Poland v Eureko bv*, Case no: R.G. 2006/1542/A, CFI of Brussels (4th Chamber), Belgium.

building as the Claimant opponent's counsels in another case is not adequate to maintain a suspicion with regard to his independence and impartiality. The Court declared that the request for recusal was ill-founded.

Belgian national law is silent as to the qualifications of arbitrators[80] but Article 1680 specifies the basic legal conditions for a person to act as an arbitrator– the capacity to contract. In the arbitration agreement the parties can prohibit particular categories of persons from being arbitrators (Article 1692) and so if exclusion has been disregarded with respect to the composition of an arbitral tribunal, the misdeed will be invoked according to the provisions of Article 1691. Moreover, Article 1691(1) of the Judicial Code compels a party to challenge an arbitrator as soon as the challenging party is aware of the reasons justifying the challenge[81]. Hence, if the notification is made four months after the date on which the challenging party was made aware of the reasons for the challenge, such a delay is disproportionate and the challenge is as a result untimely, and is inadmissible.

If the challenged party does not resign within ten days, the challenger has to bring the matter before the Court of First Instance (CFI) and the decision of the court is subject to appeal according to Articles 843–847 BJC. For instance, if parties exclude foreigners for being appointed as arbitrators and such a contractual exclusion were disregarded during formation of the arbitral tribunal, then the arbitrator would be subject to challenge. This irregularity would not be grounds for setting aside the award, even if the existence of the exclusion clause became known after the making of the award (Article 1704§5 BJC). Additionally, if the arbitrator resigns or the challenge is upheld by the judge, the arbitrator will be replaced according to the rules governing his appointment or nomination. Nevertheless, if he/she has been named in the parties' arbitration agreement, the agreement will normally lapse *ipso jure*. To that extent, Austrian, Canadian and French national laws are all silent as to the qualifications of arbitrators[82].

80 Belgium: Judicial Code, 6th Pt: Arbitration (adopted July 4, 1972 and amended Mar. 27, 1985), Article 1680 (providing that any person who has capacity to contract may be an arbitrator).

81 CFI of Brussels (Tribunal de Première Instance de Bruxelles, 32ème Chambre), 14 July 2000 www kluwerarbitration.com

82 Austria: Code of Civil Procedure (as modified by Federal Law of Feb. 2, 1983) Ch. 4, Article 580; New 2006 Act 586–590. Canada: An Act to Amend the Civil Code and the Code of Civil Procedure in respect of Arbitration SQ 1986, c. 73 (assented to and in force Nov 11, 1986), Ch. II, Article 941; France: Code of Civil Procedure, bk. 4: *Arbitration*, Article 6. French law allows, unless otherwise agreed, the president of the Tribunal de grande instance to assist the parties facing difficulties in the constitution of the arbitral tribunal, provided that the place of arbitration is in France or that French law governs the procedure. Courts construe this provision broadly. The president of the Tribunal de grande instance has jurisdiction to resolve any difficulty that may occur in the course of the constitution of the arbitral tribunal. Moreover, a French court may award provisional measures when the arbitral tribunal is unable to do so. French courts have sole jurisdiction where it comes to interim measures aiming to facilitate the enforcement of an award, such as attachment orders and other coercive measures. If the arbitral tribunal does not abide by such specifications, the validity of the award or its enforcement in France may be challenged before French courts. In *Excelsior Film TV, SRL v UGC-PH* the French Cour de Cassation (Supreme Court) denied Excelsior's appeal and

The arbitral tribunal must always be composed of an uneven number of arbitrators. Belgian national law provides that, should the parties fail to agree on the number of arbitrators, three shall be appointed. If the parties have not appointed the arbitrators and have not agreed on a method of appointment, each party shall appoint its arbitrator or an equal number of arbitrators. Moreover, according to Article 1684, if the party or third person to whom note has been given according to Article 1683 in a month from the note, has not appointed an arbitrator or arbitrators whom the party or third person is allowed to appoint, the President of the CFI shall make the nomination at the demand of either party, which means that the court intervenes in the appointment of arbitrators or if there is a parties' agreement to that extent, a single arbitrator. The arbitrators nominated or appointed shall then appoint another arbitrator to be chairman of the arbitral tribunal. Additionally, in accordance with Article 1685 the President of the CFI will make the necessary nomination of another arbitrator to be president of the arbitral tribunal where the appointed arbitrators are even in number at the request of either party. Likewise, if the arbitrators appointed are uneven in number and do not agree to nominate one of themselves to be President of the arbitral tribunal–unless the parties have agreed on another method of appointment, the nomination will be made by the President of the CFI (Article 1685 §2). Furthermore, the judgment taken by the President of the CFI about the appointment of arbitrators according to Article 1684–5 is not subject to any other means of recourse (Article 1686§1 BJC)[83]. Hence, the President of the CFI has jurisdiction to resolve any difficulty that may occur in the course of the constitution of the arbitral tribunal and so the court rather than the arbitral tribunal intervenes to solve matters of arbitrators' appointment.

To that extent, the appropriate Austrian, Canadian, Japanese and Spanish national laws all provide that, should the parties fail to agree on the number of arbitrators, three shall be appointed[84]. Moreover, according to 586 of CCP of

affirmed the lower court's decision to refuse enforcement of the arbitral award rendered in Rome on grounds of public policy for lack of impartiality of one of the arbitrators.

83 Article 1686(1) of the Judicial Code provides that, if Article 1684 or 1685 is applicable, the decision of the President of the CFI cannot be appealed. The legislative intent of Article 1686(1) is to guarantee the efficiency of arbitration by not permitting objections to a court regarding the arbitration procedure prior to the conclusion of the arbitration. Belgian Supreme Court (Cour de Cassation), 15 December 2000, www.cass.be.

84 Austria: Code of Civil Procedure (as modified by Federal Law of Feb. 2, 1983) 4th ch., Article 580; New Act 2006 Article 586–88. Canada: An Act to Amend the Civil Code and the Code of Civil Procedure in respect of Arbitration SQ 1986, c. 73 (assented to and in force Nov 11, 1986), Ch. II, Article 941; Japan: Draft Arbitration Law of Japan, Ch. 3, Article 14; Spain: Law 36/1988 on Arbitration of 5 Dec. 1988, tit. III, Article 13. Italian Code of Civil Procedure Book Four, Article 815, the party can challenge the arbitrator by petition to the president of the tribunal indicated in Article 810, paragraph 2, within the peremptory time-limit of ten days after the appointment has been notified or from the time the ground for the challenge came to the party's knowledge, if later. The president shall issue an order against which there shall be no recourse. Austrian Code Of Civil Procedure, 4th Chapter (Article 582–1983). If an appointment is not made within the proper time or if the arbitrators cannot agree upon a chairman, the Court shall upon application make the appointment). 2006 Act Article 587 "any party may request the court to take the necessary

Austria (582–1983 Act) if the arbitrators cannot agree on a chairperson, the court shall upon application appoint of an umpire. In the absence of any provisions in the arbitration agreement or in the rules of arbitration referred to by the parties, the court at the place of arbitration has jurisdiction to appoint the arbitrators in Swiss law. Moreover, in international arbitration, the court at the place of arbitration would intervene only upon a valid request based on a provision of the 1987 Act. With respect to the constitution of the arbitral tribunal, a Swiss court would have jurisdiction for the appointment, removal or replacement of arbitrators (Article 179) or for the challenge of an arbitrator (Article 180) in the circumstances contemplated in those provisions. A Swiss court could also have jurisdiction to order interim relief or to assist an arbitral tribunal or provide assistance for taking evidence. Furthermore, German courts can appoint an arbitrator if the respondent fails to do so. The court noted that generally, German courts only have jurisdiction if the seat of arbitration is in Germany. However, they also assume jurisdiction if the seat of arbitration is outside Germany, but has not yet been determined and one of the parties is based in Germany[85]. Hence, German courts may intervene in an arbitral tribunal's jurisdiction, appointment of arbitrators, challenge of arbitrator, and assistance in taking evidence. Therefore, there is a convergence among the Belgian, German, Austrian, and Swiss regarding the appointment of arbitrators by courts.

It has to be taken into consideration that the President's choice does not influence either the arbitrator's power to rule in respect of his/her own jurisdiction, or a party's right to appeal to the arbitral tribunal's lack of jurisdiction (Article 1686 §2). Hence, the arbitral tribunal can rule on its own jurisdiction. On the other hand, the appointment of an arbitrator by a party will not take away a party's rights to challenge the jurisdiction of the arbitral tribunal (Article 1697 §4), showing that courts, instead of the arbitral tribunal, safeguard legality because they have the trust of state which is inherited by tradition and practice and the parties' agreement for private resolution of their dispute is overruled by the mandatory demand of law.

measure, unless the agreement on the appointment procedure provides other means for securing the appointment. (4) The written request for the appointment of an arbitrator must also state which claim is being asserted and on which arbitration agreement the party is pleading. (5) When more parties that are to jointly appoint one or more arbitrators have not agreed upon such appointment within four weeks of receipt of a respective written notification from these parties, the arbitrator is or the arbitrators are to be appointed by court upon application of one of these parties, unless the agreed appointment procedure does not provide otherwise for the securing of the appointment." Netherlands Code of Civil Procedure – Book Article 1026 – Number of Arbitrators 2**.** If the parties have not agreed on the number of arbitrators, or if the agreed method of determining that number is not carried out and the parties cannot reach agreement on the number, the number shall, at the request of either party, be determined by the President of the District Court. Article 1029 – Arbitrator's Acceptance and Release of Mandate 2**.** An arbitrator who has accepted his mandate may, at his own request, be released from his mandate either with the consent of the parties or a third person designated by the parties, or in the absence thereof, by the President of the District Court.

85 Case No. 4 Z SchH 09/04. Court Allows Challenge of Arbitrator, Case No. 11 SchH 1/04. Court Declares Validity of Arbitration Clause, Case No. I–26 Sch 5/04.

An explicit right of recourse against a decision denying jurisdiction is also provided for in Article 1697(3) BJC: The arbitral tribunal's ruling that it has jurisdiction may not be contested before the judicial authority except at the same time as the award on the main issue and by the same procedure. The judicial authority may at the request of one of the parties decide whether a ruling that the arbitral tribunal has no jurisdiction is well founded. While it is clear that the tribunal's decision can be reviewed, it is not clear what form it should take. Article 1697(3) uses the term "ruling" instead of "award" and appears to make a distinction between both forms of decision. Furthermore, the explicit regulation of the right to recourse implies that the ordinary means of recourse against awards, i.e. the setting aside proceedings in Article 1704 BJC, are not available. This may also be seen as an indication that the decision is not considered to be an award.

If an arbitrator dies or cannot for a reason of law or fact function in his/her office, or if he/she refuses to agree to his/her appointment or does not carry it out, or if his/her office is terminated by common agreement of the parties, he/she will be replaced according to the rules governing his/her appointment or nomination. Nevertheless, if the arbitrator or arbitrators are named in the arbitration agreement, the agreement will cease *ipso jure*. A difference arising out of any case envisaged in paragraph 1 of Article 1687 will be brought before the CFI on the application of one of the parties. If the Court decides that there are reasons for replacing an arbitrator, it shall appoint his/her successor, taking into consideration the objective of the parties, as specified in the arbitration agreement. Therefore, a court's involvement is needed instead of an arbitral tribunal, not only in the appointment of arbitrators but also their replacement for the above-mentioned reasons. Besides, the arbitrator who has accepted his office resigns only by the authorization of the CFI at his/her demand. The Court decides after parties have been heard or summoned under judiciary notice by the clerk of the court and the Court's decision is not subject to any other means of recourse (Article 1689).

Prior to the amendment of Article 1690 BJC arbitrators were challenged on the same grounds as judges (Article 1690 §1) and arbitrators were considered as judges for the case for which they were appointed, and so arbitrators had to be treated equally to judges regarding their authority to deal with the case and their award should be considered equal to a court's judgment. Thus, arbitrators had to have the same powers as judges in court proceedings. The question is if the reference of Article 1690 BJC for challenging arbitrators on the same grounds as judges had and has in practice a substance in arbitration in Belgian law. On the other hand, there was no reason for the courts to get involved so often in arbitration in order to deal with a parties' disagreement. Courts have to leave arbitrators to deal with all problems throughout arbitration in order to be able to say that there is equality in legal authority between the two alternative systems of dispute. Arbitrators may be challenged for circumstances giving rise to justifiable doubts as to their impartiality or independence. Currently, according to the amended Article 1690§1 BJC arbitrators can be challenged for impartiality or independence and these reasons are compatible with the reasons established in US law, but the arbitrators' impartiality or independence are not, reason for setting aside of the

award by a court (Article 1704§ 5) in contrast with the US–law where the award can be set aside for impartiality of arbitrators.

Arbitrators are not protected by judicial immunity and so if they have made a serious mistake, they can be liable to the parties for damages resulting from such a mistake. Fraud, misrepresentation or a serious offence equivalent to fraud are reasons for arbitrators' liability[86]. The arbitrator is only liable in case of a serious offence equivalent to false representation or fraud[87].

5 Applicable law

Either the state court or the arbitral tribunal has jurisdiction over a case but this does not prevent state courts from being involved in the arbitration process whenever necessary. If the parties do not authorize arbitrators to apply rules of equity, the arbitrators must apply the law chosen by the parties. In other words, the parties may agree to grant the arbitrators the power to render an award based on the principles of equity, which means that the award need not strictly conform to national law. An arbitrator who is given this power is referred to as *amiable compositeur*. Before the 1998 amendments of the BJC, the parties could authorize arbitrators to decide *ex aequo et bono* only after a dispute had arisen[88]. The amendment of Article 1700 allowed the parties to agree to *amiable composition* in the initial pre-dispute arbitration agreement[89]. The parties are free to determine the law applicable to the procedure[90]. Arbitrators decide the dispute in accordance with the rules of law, which shows that arbitrators are using the same rules of law to interprete the same kind of dispute as judges do in court cases (Art 1700 BJC). In the absence of any indication of the applicable law, the arbitrators will determine the law applicable to the merits of the case. In selecting the applicable law, the arbitrators must take into account several factors, such as the terms of the contract, the parties' expectations with regard to the applicable law, and the trade usages of the sector in which the dispute arose[91]. It is worth mentioning that reference to the law of a State is to the legal rules of that State with the exclusion of its rules

86 Civil Court of Brussels, 6 June 1980 cited by Huys and Keutgen, L' arbitrage Chronique de jurisprudence 1975–1982 *Journal des tribunaux* 1984 p 54 no 28.

87 Antwerp Court of Appeal, 21 January 1992, Keutgen, Chron. Jurisp. L'arbitrage 1987 a 1992 no 30.

88 Court of Appeal Brussels, Oct. 14, 1980, *Yearbook* VII, 1982, 316–318; CFI Mons, June 17, 1980.

89 G. Horsmans, "La loi belge du 19 mai 1998 sur l'arbitrage," *Revue de l' Arbitrage* 475–489 (1999).

90 Civil Court of Brussels, 13 March 1992, *Actualites du droit* 1992, 1377. Commercial court of Ghent, 12 October 1989, RDCB 1991, 548.

91 J. Erauw, "Private International Law," in H. Bocken & W. Debondt, *Introduction to Belgian Law* 437 (Kluwer Law Int'l, 2001). H. Van Houtte, "Arbitrage en toepasselijk recht," Tijdschrift voor Privaatrecht 710–717 (1982). There is Belgian case law that gives an indication as to what the applicable rule is in the absence of a clear choice of law clause. For case law with regard to this matter, see Court of Appeal Liege, April 28, 2003, *Journal des Tribunaux 2003*, 811–813, 862–863; Court of Appeal Brussels, Oct. 15, 1992, 1993 *Yearbook Commercial Arbitration* XVIII 612–615; Commercial CFI Hasselt, Dec. 24, 1996, 1997–98 Rechtskundig Weekblad 682–683; Commercial CFI Ghent, Oct. 12, 1989, Tijdschrift voor Belgisch Handelsrecht 548–551 (1991).

of private international law. Courts respect the express or even implicit choice of law made by the parties, but the parties' choice of law is disregarded if the choice of law is contrary to Belgian public policy. On 1 October 2004, the Belgian Code on private international law which co-ordinates and modernises existing Belgian rules on private international law in civil and commercial matters[92] came into force in Belgium. The Code has no impact on any of the Conventions to which Belgium is a party, or the effectiveness of EU legislation. In contracts such as an arbitration agreement the Belgian Code on private international law is superseded by the Rome convention, which determines in its Article 15 that there is no reference to the rules of PIL in the applicable law. Moreover, Belgian courts can be called upon to determine the law applicable to arbitration agreement on many different occasions. One of these occasions relates to the procedure for setting aside arbitral awards. The court will have to determine which law governs validity and applicability of the arbitration agreement. Arbitrability will be decided by courts in accordance with the law applicable to the substance of the case. The issue of arbitrability of a dispute will be governed by Belgian law if Belgian law governs the main contract. The arbitrability of a dispute will be governed by Belgian law where the Belgian court applies the NYC on the recognition and enforcement of foreign awards. The NYC submits the arbitrability of a dispute in enforcement proceedings to the law of the forum where an award will be enforced.

Disputes relating to exclusive distribution agreements in which the parties had not selected to apply Belgian law were not arbitrable, and lower courts limited the effect of that decision applied to cases in which a foreign award was the subject of an enforcement action. Hence, courts atributed arbitrability to the subject of exclusive distribution agreements according to the Belgian law as applicable law in the dispute rather than merely by the fact that disputes on exclusive distribution agreements are arbitrable according to the applicable law of the place of arbitration and so the award should be enforceable. When determining whether they had jurisdiction over a dispute involving the termination of a distribution agreement, some courts applied the law of the contract (and not the *lex fori*) to determine

92 La matière contractuelle continuera par exemple à être régie par la Convention de Rome du 19 juin 1980, dont l'application est d'ailleurs élargie aux contrats non visés par la Convention (Article 98 du Code). Law of 16 July 2004 holding the code of private international law Article 16. Renvoi www.ibr.be The Code contains several new rules relating to the jurisdiction of the Belgian courts. One of the most important pieces of legislation that supersedes the Code is Council Regulation no. 44/2001 of 22 December 2000 which concerns jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Thus, if a defendant is domiciled in another EU-country (excluding Denmark) the Regulation will, as a general rule, apply instead of the Code. Besides, if the defendant is domiciled in a non-EU Member State such as the US or Canada, the Code will as a rule apply. Article 98. The law applicable to the contractual obligations § 1. "The law applicable to contractual obligations is determined by the Convention on the law applicable to contractual obligations concluded in Rome on 19 June 1980. Except in the cases otherwise provided for by law, the contractual obligations who are excluded from the scope of application of that Convention are governed by the law that is applicable by virtue of the Articles 3 until 14 thereof."

the issue of arbitrability. In *Société Van Hopplynus v Société Coherent Inc.*,[93] which concerned a distributorship contract between the Belgium plaintiff and the United States defendant, one of the issues raised was the law applicable to the validity of the arbitral clause under Article V(1)(a) NYC. The defendant objected to the validity of the arbitral clause relying on the Belgian Law on Exclusive Distributorship of 27 July 1961, but the court accepted the validity of the arbitration clause according to Article II of the NYC. Thus, the choice of law of parties in an arbitration agreement should also be accepted in exclusive distribution agreements. Should an Arbitral Tribunal sitting in Germany in respect of a dispute between an Italian supplier and a Belgian distributor, notwithstanding the choice of law in favour of the Italian substantive laws, apply the (well known) Belgian mandatory laws protecting agents and distributors in Belgium (by requiring a 36 month notice period and by providing a local forum)? The applicability of Belgian law was denied[94]. Thus, courts in Belgian law in contrast with the view of the arbitral tribunal refuse to accept the choice of law of parties in exclusive distribution agreements' arbitration. The Belgian Act of 1961 protects exclusive distributors with activities in Belgium and permits them to sue their principals before a Belgian court, which will then apply this Act to the dispute, regardless of the parties' choice of another law. The BSC[95] held that Article II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), although not explicit about the law under which arbitrability is to be decided, allows a national court to decide the question of arbitrability by reference to its own legal system. Therefore, where the arbitration clause is governed by a foreign law, a national court may rule against arbitrability if local public policy is offended by the parties' choice of law. Several courts of appeals upheld arbitration clauses by deciding the question of arbitrability according to the law chosen by the parties[96] and the

93 Tribunal de Commerce of Brusseles, 5 October 1994, YCA, Vol. 22 (1997), pp. 637–642, "it suffices, however, to note that the common intention of the parties was to submit the contract between them to the law of the State of California […]. The NYC recognizes the principle of contractual autonomy (Article V(1)(a)) and in fact gives the parties the freedom to agree on the applicable law. In the present case, the arbitral clause is valid according to California law. Article II of the NYC requires, therefore, that the court recognize the validity of the arbitral clause."

94 The Award in ICC Case No. 6379, 1990, discussed in ICCA Yearbook 1992, 212–220. The arbitrator disregarded the mandatory Belgian law which claimed to be applicable in respect of the exclusive distributorship agreement between the Italian claimant and the Belgian defendant (who initiated a counter-attack against the Italian company before the Belgian courts). The law applicable to the merits of the case determines whether a dispute may be referred to arbitration. Belgian courts in disputes relating to the termination of an exclusive distributor operating in whole or part of the Belgian territory have often decided that if the distribution agreement is governed by foreign law and provides for arbitration, such a dispute may not be referred to arbitration.

95 *Colvi v Interdica* (Court of Cassation, 15 Oct. 2004). *In S.R.L.ALTA/Societe Anonyme Trachet-Soberac*, Case No: R.G. N 2002/AR/867, Brussels Court of Appeal. Brussels Court of Appeal held that the Belgian Law of 1961 cannot be considered as being an instrument of public policy in the Belgian legal system neither it can be considered as being an instrument of the international public policy.

96 Court of Appeal Liege, 28 April 2003 *Journal des Tribunaux* 2003. p. 811.

Antwerp court of appeals held that the 1961 Act on distributorship agreements is not part of the Belgian public policy. The BSC does not specify that Belgian law always applies to determine the arbitrability of disputes relating to exclusive distribution agreements. Moreover, an arbitration clause may be ignored by a Belgian court before which it is sued if the agreement is governed by a law of a country other than Belgium. Additionally, merely locating the arbitration proceedings outside of Belgium would not protect a party from the effect of the 1961 Act if the award is to be enforced in Belgium. Thus, the parties'arbitration agreement on arbitrability is ignored by Belgian law, courts alter the content of arbitrability of an exclusive distribution agreement and probably consider that as a matter of public policy, which makes foreign awards on exclusive distribution agreements unenforceable in Belgium. On the other hand, it could be said that matters of exclusive distribution agreement are arbitrable under the BJC if the parties choose the Belgian Act 1961 as applicable law. Under Article 4 of the 1961 Act, a Belgian court has to apply Belgian law to the substance of the dispute. Moreover, Article 6 of the 1961 Act provides that the rules contained in the Act will be applicable regardles of any agreement to the contrary concluded before the termination of the exclusive distributorship contract. Disputes that do not relate to the unilateral termination of an exclusive distributorship agreement can be submitted to arbitration under an arbitration clause[97]. If the arbitral tribunal in the distributorship agreement provides for the Belgian statute of 1961, it will be valid even if the arbitral tribunal sits abroad. The arbitrability of such dispute depends on whether one must rule over the validity of the arbitration agreement[98] or over the recognition or the enforcement of an award. In the first occasion, the arbitrability of the dispute will have to be ruled under the chosen law and in the second occasion regarding recognition and enforcement of an award, the *lex fori* will apply. The Supreme Court indicates that it may not *a priori* the judge disregard the mandatory rules of the *lex fori* and so the judge rules on the arbitrability of the matters regardless of the parties' agreement for a foreign law as the applicable law. The same matter is arbitrable under the national law and non arbitrable when applied to a foreign law regardless of the view of the arbitrators about the arbitrability of the matter[99]. In other words, the nature of the subject matter of the dispute is not considered to be the key element in deciding arbitrability by the judges. The annulment of the arbitrators' view on arbitrability by judges shows the status between arbitration and courts as dispute systems.

Is the Distributorship Act 1961 part of Belgian public policy? Application of Belgian law in distributorship agreements is needed while taking into account the position in other states regarding the importance of distributorship agreements[100].

97 Tribunal de commerce de Bruxelles, 22 September 1962, 1962 *Journal des tribunaux* 588.

98 Commercial Court of Brussels, 5 October 1994, JLMB 1996 p. 1568. Liege 29 October 2003 JT 2003 p. 811.

99 M. Piers, "Colvi v Interdica: The law applicable to the arbitrability of distributorship disputes," March 2005 *Arbitration Committee Newsletter* 15.

100 Johan Erauw, "The law applicable to distribution agreements," 2005 in *Arbitration and Commercial Distribution*, Bruylant 61.

It is essential to change this notion of public policy regarding distributorship agreements. The Distributorship Act 1961 is not part of public policy (supra) and so the dispute should remain arbitrable[101]. The Belgian Cour de Cassation (BCC) specifies the need to relax the public policy when a dispute has international elements. The rule of national public policy cannot be strictly applicable to a case with foreign elements[102]. Furthermore, the legislator protects a party that is presumed to be the weaker party[103]. Following this approach, any arbitration clause incorporating into adhesion contracts where a party is always weaker could be unenforceable in order to protect the weaker party. Some scholars in Belgium consider that arbitrability is to be decided according to the *lex causae* and others that arbitrability to be decided by the *lex fori*. Several courts have accepted that the test of arbitrability is to be made according to the law applicable to the distributorship agreement[104]. Additionally, there are courts that have decided the application of the law of the judge (the lex fori) giving power and authority to state sovereignty expressed by courts rather than to the arbitration agreement and so not allowing arbitration to be developed as a co-equal to courts dispute mechanism. According to the current prevailing view the arbitral tribunal's refusal to apply Belgian law (Act 1961) would constitute a ground for setting aside of the award by a Belgian court.

The arbitrability of disputes arising out of the termination of exclusive distribution agreements has been brought again before the BSC[105]. The distributorship agreement contained an arbitration clause providing for arbitration under the rules of the AAA and for California law to apply. The distributor invoked a 1961 Belgian law making arbitration clauses unenforceable against exclusive distributors with activities in Belgium. The Commercial Court refused to apply Belgian law and

101 Johan Erauw, The arbitrability of disputes concerning the termination of distribution agreements under Belgian law in light of European Community law, in Liber Memorialis Petar Sarcevic 2006, Selier European Law Publishers p. 436, p. 430 "Arbitrability … the right of the parties to agree to commercial arbitration for a dispute that exists or may arise, is broadly admissible under Belgian law."

102 Cour de Cassation 17 May 1999, Recktskundig Weekblad 2000–2001, 657–660 comment by J. Erauw.

103 Johan Erauw, The law applicable to distribution agreements, 2005 in Arbitration and Commercial Distribution, Bruylant 61, p. 68.

104 H. van Houtte, "Larbitrabilite de la resilation des concessions de vente exclusive, in Melan ges vander Else," Brussels 1986 Vol II p 820. Court of Appeal of Brussels, 4 October 1985, *Journal des tribunaux* 1986, p. 93.

105 *Van Hopplynus Instruments v Coherent Inc*., Nov 16, 2006, C.02.0445.F. See *S.R.L. Alta (Italy) v Société Anonyme Trachet-Soberac (Belgium)* 25 April 2006 – Brussels Court of Appeal R. no 2006/3195. According to the Belgian jurisprudence, the application of the *lex fori* is limited to the situation where this law prevails over the contract law, i.e. when it deals with matters of "international public policy" or when this law must be regarded as being a "law of direct applicability." The Brussels Court of Appeal noted that as the Belgian Law of 27 July 1961 intends to protect the agent, it also protects a private interest. Therefore, the Belgian Law of 1961 cannot be considered as being an instrument of public policy in the Belgian legal system, neither can it be considered as being an instrument of the international public policy.

the Court of Appeal affirmed. The Court of Appeal stated that, taking into consideration that Article II (3) of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards is silent about the law applicable to deciding a dispute's arbitrability, the court has to apply the law chosen by the parties. The law of California allowed distribution disputes to be settled by arbitration and so the Belgian courts had to decline jurisdiction. Belgium's Supreme Court quashed this decision, stating that when the arbitration agreement is governed by a foreign law that does not permit specific kinds of disputes to be arbitrated, the court has to decide that the dispute is not arbitrable. In *Van Hopplynus*, the Supreme Court went further than it did in *Colvi v Interdica*[106] which stated that, under Article II (3) of the NYC, when the arbitration clause is governed by foreign law, a national court can rule against arbitrability if public policy is offended by the parties' choice of law. The Supreme Court implicitly ruled out arbitrability if the arbitration permits for evasion of mandatory Belgian law. It also found that the 1961 Act protecting distributors is mandatory law and not part of public policy. Therefore, foreign parties entering into exclusive distribution agreements with Belgian distributors should take into consideration that under a 1979 Supreme Court ruling (*the Audi* case)[107],distribution contract disputes are arbitrable only if Belgian law applies, and arbitrators have to apply Belgian law to those disputes. So, an arbitration clause could be ignored by a Belgian court only if the parties did not agree to apply Belgian law[108]. Public policy relates only to the fundamental interests of the state or the community, or to private laws that set forth the legal basis on which the economic or moral order of the community rely. Without a doubt the Articles of the Constitution or the international conventions ratified by Belgium and relating to human rights, civil or political rights, or to the elimination of racial discrimination relate to public order. Is the exclusive distribution agreement of such a calibre to be considered as mandatory law that can nullify arbitration awards? This decision minimizes the contractual character of commercial arbitration, taking into account that exclusive distribution agrements could not be considered to be part of the content of international public policy.

On October 8, 2002, the Court of Appeals of Brussels[109] held that when an arbitral tribunal has been convened at the request of the parties and not by legal provisions, the guarantees of Article 6, paragraph 1 of the Human Rights Convention

106 (Oct. 15, 2004, C.02.0216.N).

107 Cour de Cassation 28 June 1979, *Audi-NSU Auto Union AG v S.A. Adelin Petit Cie*, *Yearbook Commercial Arbitration v* 1980 pp. 257–259.

108 According to the Supreme Court of Austria, the question, whether an arbitration agreement is valid or not, is to be solved according to the law the parties have subjected it to or, failing any indication thereon, under the law of the place of arbitration (decision of 22. 9. 1994, 2 Ob 566/94, RdW 1995 99, and of 19. 2. 2004, 6 Ob 151/03d, Schieds VZ 2005 53). This is in conformity with the international treaties (see Article V paragraph 1 lit a NYC and Article IX paragraph 1 lit a Geneva Convention). In accordance with Article VII par 1 NYC, Article 614 ZPO permits enforcement of awards on the basis of an arbitration agreement complying with Article 583 ZPO and the formal requirement of the law applicable to the arbitration agreement.

109 Ferrera c. S..A. A.G. 1824 & S.A. A.G. Belgium.

(HRC) cannot be validly invoked. Article 6 of the Convention states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal" and the Court held that in as much as the arbitrators are in possession of their authority by the will of the parties, they must fully exercise their proper and exclusive authority to judge and ensure, under their own responsibility, that the conditions of fair trial conform to the general and fundamental principles of the legal system and the provisions of the HRC. Thus, arbitrators must ensure that the conditions are fair and conform to the general and fundamental principles of our law and, as long as it is necessary, to the Articles of the ECHR[110].

Hans van Houtte[111] considers that a Belgian court seized with termination of a distributorship agreement governed by the mandatory Belgian 1961 Act "may hold the arbitration agreement in such contract null and void and will decide on the merits, applying the 1961 Act. Arbitrators, sitting outside Belgium, on the other hand, will assess the validity of the arbitration clause under the law chosen by the parties for their distribution contract and/or under the law of the arbitration seat." The award issued by the arbitrators will probably be incompatible with the Belgian court judgment because the Belgian judge is likely to grant substantial compensation on the basis of the mandatory 1961 Act, and the arbitrator may decide that the agreement is not subject to the 1961 Act and that the agreement has been correctly terminated. Therefore, the judge will disregard the parties' choice of law but on the other hand the arbitrator will decide according the parties' agreement, showing the supplementary and inferior nature of arbitration as a dispute mechanism and in fact nullifying arbitration as the dispute mechanism chosen by the parties.

6 Arbitration procedure

It is a mandatory stage that the party demanding arbitration has to notify the other party of its intention. In the notification, this party should refer to the arbitration agreement, set out the object of the dispute and, when appropriate, appoint the arbitrator (Article 1683 of the Code). Belgian law does not impose confidentiality on either the hearings or the arbitration award. It is up to the parties to specify whether they wish the hearings and award to remain confidential. Belgian arbitration law grants the parties and the arbitrators much freedom to organise the arbitral proceedings. The parties by their arbitration agreement decide on the rules of the arbitral procedure and on the place of arbitration. If the parties do not point out their intention, the decision shall be a matter for the arbitrators (Article 1693). If parties fail to agree on the rules of the arbitration procedure and place of arbitration, then the arbitral tribunal will decide about these matters. Moreover, if the parties and the arbitral tribunal have not decided about the place of arbitration,

110 Court of Appeal (Cour d'Appel de Bruxelles, Chambres Civiles, 7ème Chambre), 8 October 2001.

111 H. Van Houtte, J. Decoker, "The Brussels I Regulation and the arbitral procedure: Jurisdiction and Enforcement" in *Arbitration and Commercial Distribution*, 2005 Bruylant p. 205.

the place mentioned in the award is considered to be the place of arbitration. Thus, it is likely that arbitration proceedings will be conducted without a place of arbitration having been fixed, until the rendering of the arbitral award. Hearings and meetings can take place in any place which is deemed appropriate for the specific case. In other words, the place of arbitration which is referred to in Article 1693 shall not automatically be the place where the arbitration procedure really takes place. The parties' freedom is not absolute. The place of arbitration points to the connection between the arbitration proceedings and the legal system of the country. However, objections regarding the arbitral procedure are permitted only after the conclusion of the arbitration[112]. In French law, even if a foreign municipal law is chosen to govern arbitration, the arbitrators must comply with mandatory French rules of procedure as they are reflected in the grounds for setting aside the award[113].

Arbitrators always have to apply *rules of public policy* (i.e. mandatory rules, which cannot be derogated from, such as anti-trust laws) as States will, understandably, refuse to give effect to an arbitral award that disregards their public policy. Court review can occur either because the losing party decides to attack the validity of the award directly, or because the losing party resists an attempt by the winning party to enforce the award. Even when the award cannot be appealed, judicial review is not entirely excluded. The arbitral tribunal will control the hearings and conduct the proceedings and the arbitral tribunal will give each party an equal chance to present his case. Articles 1694, 1695 and 1696 clarify the arbitral proceedings and the arbitral tribunal can order a hearing of witnesses, an appraisal by experts and the production of documents held by a party according to the conditions provided in Article 877. Therefore, the wording of these Articles indicates that arbitration is formulated in a way which follows litigation instead of endorsing the characteristic and simplified way of arbitration proceedings adding to the qualities of arbitration as ADR. The arbitral tribunal can determine the admissibility of evidence and its evidential weight. It is worth mentioning that the arbitral tribunal can order provisional or protective measures with the exception of an attachment order (Article 1696§1 BJC) as in Italian law[114].

112 BSC (Cour de Cassation), 15 December 2000. *Minerva Underwriters S.A. v Naviga S.A.* – 15 December 2000 – Belgian Supreme Court (Cour de Cassation). In Austrian law when an arbitration procedure is pending, no other legal dispute shall be initiated before a state court or an arbitral tribunal in the same matter. Any action brought in on the grounds of the same claim is to be rejected (Article 584 paragraph 3 and decision of 2. 10. 2003, 6 Ob 41/03b, JBl 2004 387).

113 Article 1494(1) of the new French Code of Civil Procedure provides that the parties may "define the procedure to be followed in the arbitral proceedings," including the selection of "a given procedural law." An arbitration held in France could be submitted to foreign law and vice versa. Fouchard, Gaillard, Goldman, on international commercial arbitration 1589 (E. Gaillard & J. Savage eds., 1999).

114 Italian Code of Civil Procedure Book Four Article 819-bis the jurisdiction of the arbitrators is not excluded by the detail that the dispute referred to them is connected with an action pending before the court. The arbitrators cannot grant attachment or other interim measures of protection in arbitration according to (Article 818).

The arbitrator has the exclusive authority to decide that the facts offered as proof through testimony are not important in a case and that they could not, as a result, influence the decision[115]. Moreover, the arbitral tribunal does have the power to grant interim relief; its orders will be binding on the parties, but the tribunal will not have the power to directly enforce its order; this is the case in Belgium, the US, Switzerland, and a number of other countries. The arbitral tribunal decides on the proof of evidence without restraint and on its conclusive force increases the flexibility of arbitration proceedings and specifically of international arbitration proceedings.

If the arbitral tribunal has ordered a hearing, and the witnesses do not appear or decline to take the oath or to testify, the arbitral tribunal will give permission to one or both parties to ask for the CFI, within a fixed period, to appoint a juge-commissaire to preside over the investigation, and this hearing will take place in accordance with the formalities for civil cases–which proves that arbitrators, do not have the legal force of judges. The arbitral tribunal is not empowered to order the production of documents held by third parties. Moreover, arbitration is *ipso jure* suspended until the hearing is completed. Hence, the arbitrator lacks the power of a judge to carry out his/her duty in order to implement the arbitral process. Actually, the only limits lie in respect of the principle of due process and of Belgian public policy, since their violation constitutes grounds for setting aside or resisting the enforcement of the final award. To that extent, and according to Article 589 of CCP of Austria, if arbitrators have no jurisdiction to undertake acts considered necessary, then they will be carried out by the State Court that has jurisdiction on the application of the arbitrators[116]. Articles 1025§ (2) and 1050 of German law provide for court assistance even for foreign-based arbitrations or not-yet-seated arbitrations. Additionally, the State judiciary can be asked to provide assistance wherever necessary in Swiss law (Article 179 (2) and (3), Article 180 (3), Article 183 (2) and (3), Article 184 (2) and Article 185) showing positive assistance and involvement of state courts. The CFI in Paris plays a vital role in arbitration because it is called upon to grant orders as the judge who provides support to the arbitral procedure. Thus, there is a convergence among national laws regarding the role of courts in arbitration procedures.

Furthermore, the arbitral tribunal will leave the parties to bring the matter of the verification of signatures or allegedly forged documents and the production of

115 Court of Appeal (Cour d'Appel de Bruxelles, Chambres civiles, 8ème Chambre), 19 September 2001, http://www.cass.be.

116 The general framework for arbitration and the delineation of the scope of intervention of the state courts in the arbitral process is set forth in the Code of Civil Procedure (Zivilprozebordnung or "ZPO"), and principally in Articles § 577 et seq. thereof. The new arbitration law has come into force in Austria on July 1 2006. Austrian courts, as a general proposition, had shown themselves in the past somewhat reluctant to grant enforcement of foreign arbitral awards. The Austrian courts customarily infused the public policy concept, when deployed as a defense to arbitral agreements and awards, with a rather broad definition, setting aside all awards found to be at variance with virtually any mandatory rule in Austrian domestic law.

documents to the CFI within a specified period and the periods for arbitration are *ipso jure* suspended until the final decision concerning the incident (Article 1696) and so arbitrators cannot finish an arbitration process without the help of judges and courts on many occasions. Any third party affected by the arbitrated dispute can intervene in the proceedings, despite the strict conditions needed for the third parties' intervention. Not only should an arbitration agreement be between the parties to the arbitration and the third party but the arbitrators must also accept unanimously the intervention of the third party. A third party cannot be forced to participate in arbitration proceedings without his/her consent. Moreover, if one of these conditions is not complied with, the third party shall not be able to intervene in the arbitration proceedings. In fact, the arbitral tribunal can refuse the third party intervention, even if an agreement exists between the parties to the arbitration and the third party. The possibility of having an arbitration agreement between the third party and the original parties of the arbitration is unique, which is an element that can be used in the demand for equality of courts and arbitration (Article 1696 bis BJC)[117].

The court competent to deal with matters concerning arbitration is the court designated in the arbitration agreement, but failing such designation by the parties in the agreement, the competent court is the court located at the place of arbitration. If the place is not known, the court which would have been competent to hear the dispute in the absence of an arbitration agreement will be competent (Article 1717 BJC). Belgian courts, unlike some US courts, cannot consolidate two or more arbitration proceedings dealing with related issues.

Arbitrators may take interim measures as judges and so arbitrators can render interim awards. An arbitrator cannot order an attachment even if it is for the purpose of conservation–only the competent judge can order attachment, even during the arbitration proceedings. As mentioned earlier, the existence of an arbitration agreement is not an obstacle to the parties' right to petition a judge for interim measures, as it does not go to the substance of the dispute which judicial competence is supposed to end at the moment the arbitral tribunal is formed. The inability of arbitrators to order an attachment order makes the intervention of a competent judge to order such a measure necessary. The Court of Appeals of Brussels[118] held that an arbitral clause may not exclude the fundamental right to obtain a precarious title to the protection of the rights of the petitioner in summary proceedings even if the arbitration is commenced. An arbitration agreement does not constitute an obstacle to the right of the parties to request interim measures from a judge in summary proceedings, but the jurisdiction of the judge in summary proceedings terminates when an arbitral tribunal is seized of the dispute[119].

117 The principle of the third party intervention is taken from the Dutch arbitration law (Article 1045) and from the Swiss inter-cantonal arbitration law (Concordat – Article 28) of 27 March/29 August 1969.

118 Court of Appeal of Brussels 13 June 1987 Ann. Fac. Dr. Lg. 1990 p 242.

119 Court of Appeal of Liege 12 June 1985, Ann. Fac. Dr. Lg. 1990 p 233. Civil Court of Liege, 6 July 1989, Pas. 1990, III 18.

7 The award and its review

The last phase of the arbitration procedure only partially belongs to arbitration. It is national courts that enable the award to enter into the legal order, whatever the effects one wishes to infer from it[120]. Arbitrators can make interim awards before settling the entire dispute. If the arbitrators make an interim award in which they fail to rule on certain issues, their behaviour could be interpreted as a refusal to carry out their office and so the arbitrators can be replaced by the court. The interim award can be set aside if it omits to deal with issues which are inseparable from the subject matter of the award. If the arbitral tribunal delays in making the award and a period of six months has elapsed from the date on which all the arbitrators accepted office in respect of the dispute submitted to arbitration, the CFI may, at the request of one of the parties, specify a period for the arbitral tribunal and the Court's decision is not subject to any means of recourse (Article 1698). Moreover, the office of arbitrator expires if the award is not made within the pertinent period except when that period is extended by agreement between the parties and so if arbitrators are named in the arbitration agreement and the award is not made within the related period, the arbitration agreement ceases *ipso jure*, except when the parties have agreed differently. The office of the arbitrator terminates if the award is not made within the relevant period and an award made after the time limit has expired can be set aside (Articles 1698§3, 1704§2d). If an award has been rendered in Belgium, it can be challenged by way of an annulment procedure (particularly for lack of reason or public policy reasons), or in the context of the defence to an enforcement action. The law distinguishes between final awards and interim awards. Arbitrators can issue a preliminary award prior to ruling on the merits and such award must also be enforced, if the party concerned refuses to voluntarily execute it[121]. Under Belgian law, an arbitral award is considered final unless the parties have explicitly provided for the option of an appeal. Contrary to the common law jurisdictions, a number of civil law jurisdictions such as Belgium, Germany and France disallow the inclusion of a dissenting opinion – an opinion by one or more judges or arbitrators who disagree with the decision reached by the majority – in arbitral awards on the basis that deliberations of arbitrators are confidential[122]. It is not contrary to the principle of privacy of the deliberations to indicate that the award has not been rendered unanimously, principally when the identity of the dissenting arbitrator is not revealed[123].

According to Article 1701 the award must be written and signed by the arbitrators handwritten signatures. If the award is not written then it is void. It could be argued

120 Fouchard, Gaillard, Goldman, *Traite de larbitrage commercial international*, Paris 1996, no 1667.

121 Huys and Keutgen, *L'arbitrage en droit belge et international*, p. 264, no 387.

122 Van Den Heuvel, J., "Arbitrage: Capita Selecta" in: Liber Amicorum Lucien Simont, Bruylant, Brussels, 2002, p. 341.

123 S.a.r.l Génie Mécanique zaïrois et crts v S.A. A.I.G. Europe et crts Court of Appeal (Cour d'Appel de Bruxelles, chambre suppl. I), 6 December 2000 *Journal des Tribunaux*, 2001, p. 572.

that the existence of an electronic form of award could be signed by e-signature. The Article also defines the necessary elements to be included in the content of an award. The place and the time of the issue of an award are obligatory for the content of an award because the place of the issue defines the jurisdiction of the court, which will confirm the award[124]. The award must be reasoned by the arbitrators and so the award will be void if the arbitrators' reasoning of the award based on the facts of the case does not lead to the application of the substantive law regulating the dispute. The arbitral tribunal's duty to give reasons in support of an arbitral award and to respond to an argument does not raise an obligation to respond to all the arguments raised in support of the claim[125]. Lack of reasons constitutes a ground for setting aside (Article 1704 §2i). The BSC held that a violation of the evidential weight of a document produced by a party does not equal a violation of an arbitrator's duty to give reasons to the award within the meaning of Article 1704 (2)(i) of the Belgian Judicial Code (BJC)[126]. Moreover, the BCC reviewed the judgment of the Court of Appeal of Antwerp and held that the misunderstanding of the arbitral tribunal in its explanation and/or interpretation of a piece of evidence is not a violation of the duty to give a statement of reasoning pursuant to Article 1704 (2)(I) of the BJC. Moreover, the BCC ruled that the fact that the arbitral tribunal based its decision on a wrongful reading of the agreement does not equal, as wrongfully assessed by the Court of Appeal, to a situation where the parties were deprived of their right to be heard as guaranteed by the *due process* principle. As a result, the BCC ruled that the Court of Appeal of Antwerp breached Articles 1704 (2)(I) and 1704 (2)(G) of the BJC, overturned the lower court's judgment and sent the case to another Court of Appeal[127].

Furthermore, the president of the arbitral tribunal has to deposit the original of the award with the registry of the court having jurisdiction, notifying the parties of the deposit. Once an arbitration panel renders a decision regarding the issues submitted and the award has been notified and deposited according to the preceding provisions (Article 1702), it becomes *functus officio*. The doctrine of *functus officio* applies to situations where the provisions of Article 1702 are applicable. Moreover, the consequences of a final award are that the arbitral tribunal is *functus officio* in respect of the issues determined, the award is binding on the parties and has *res judicata* effect and the award may be registered and/or enforced. A request for interpretation of an arbitral award

124 Article 1701: "5. An award shall, in addition to the operative part, contain the following particulars: (a) the names and permanent addresses of the arbitrators; (b) the names and permanent addresses of the parties; (c) the subject-matter of the dispute; (d) the date on which the award was made; (e) the place of arbitration and the place where the award was made. 6**.** The reasons for an award shall be stated."

125 Court of Appeal (Cour d'Appel de Bruxelles, Chambres civiles, 8ème Chambre), 19 September 2001.

126 *BVBA naar Italiaans recht A.I.S. t/NVP, Belgian Supreme Court* (10 November 2005).

127 *Africa Industrial Services v Polytra*, Case no: C.04.0452.N, Cour de Cassation, Belgium. The BJC Limits the Grounds for Setting Aside an Arbitral Award.

must be brought before the CFI because the arbitral tribunal is *functus officio* except if Article 1702 bis will apply. The competence of an arbitral tribunal is terminated upon pronouncement of an award and they do not regain their initial power to decide even upon a mere interpretation of an award already rendered.

The award must be in writing, reasoned, dated and signed (at least by the chairperson of the arbitral tribunal) according to Article 189 of the 1987 Swiss Act and in French law[128]. In German law the award shall be made in writing and shall be signed by the arbitrator or arbitrators. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or that the award is an award on agreed terms. Hence there seems to be a convergence in the need for a reasoned award which shows the influence of court judgments upon awards imposed by law and not parties' agreement.

If the award is not contrary to *ordre public* or the dispute could not be settled– in other words the dispute is not arbitrable either in the general meaning of arbitrability or the dispute is not arbitrable according to the parties' arbitration agreement–an arbitral award has the authority of *res judicata* when it has been notified according to Article 1702 § 1 of BJC and so cannot be contested before the arbitrators. It could be argued that a signed award produces *res judicata* but in order to be enforced the original of the award has to be deposited with the registry of the court having jurisdiction but not be confirmed by a court. The BCC[129] stated the relationship between *res judicata* and *due process* and so in order to determine the scope of *res judicata* the judge has to verify whether the issue in question has been raised in the argument of the parties. It is worth mentioning that parties can ask the tribunal to correct the award, even to give an interpretation of a specific point or part of the award (Article 1702, bis BJC). The provisions of Article 1701 apply to the correction and interpretation of the award by the tribunal after the parties' demand. If the arbitral tribunal becomes *functus officio* then the parties can ask the CFI, whose president is competent to grant exequatur, to interpret or correct part of the award (Article 1702, bis §5 BJC). Hence, the court can intervene in a way in the final award even giving its interpretation of vital parts of the award. The reason for the production of *res judicata* is to avoid having the same dispute referred to any other type of dispute resolution (Article 1703). Where in principle *res judicata* attaches to an award, whether partial or final, upon its notification to the parties, an award may receive an enforcement order. Article 1703§2 BJC allows parties to appeal against the award, taking into consideration that there is a parties' agreement about it. Belgian law provides the time limit for lodging an appeal and the common time limit for appeals in general is applicable in arbitration as well[130].

128 France – Code of Civil Procedure – Book IV – Arbitration In force 14 May 1981 Article 1471 "The decision of the arbitrators shall give the reasons for which it is given."

129 Cour of Cassation 1th Chamber, 8 October 2001 commentary G. Glosset Marchal in Revue Critique de jurisprudence Belge 2nd Quarter 2002 pp. 231–254.

130 Award of 24 November 1991, *Actualites du droit* 1992 1403.

Thus, the law now plainly provides the possibility of an appeal against an arbitral award, but in practice an appeal against an arbitral award remains exceptional[131].

The BSC refused to annul an arbitral award despite the arbitrators' apparent misapplication of a key provision of the relevant contract.[132] The dispute concerned the calculation of the freight price for transporting minerals between the Shinkilobwe Mine in Congo and Dar-Es-Salaam in Tanzania, and the arbitrators ruled that the weight at departure should be the basis upon which the price was calculated. Their award was set aside by the Court of Appeal of Belgium, which found that the tribunal misread the relevant provision and this was equivalent to a "lack of reasoning" under Article 1704 of the Judicial Code, one of the grounds for setting aside an award. The Supreme Court held that the arbitrators may have misread the contract, but this was not the same as a lack of reasoning, ruling that the arbitrators' failure to submit their interpretation of the contract to the parties did not violate *due process*, as the parties had argued at length on the correct interpretation of the particular clause. Arbitrators do not have unlimited freedom to interpret the provisions of a contract as they wish–the grounds for setting aside an arbitral award under Belgian law must be construed very narrowly. An award can be challenged on public policy grounds if the arbitrators construe the contract in a way that manifestly departs from the text. A simple mistake in the arbitrators' reasoning will not be enough to set aside the award. Article 1704, 2 (d) cannot serve as a basis for recourse when the arbitral tribunal, in assessing its jurisdiction, makes an error of law that is independent of the arbitration clause[133].

There are two distinct ways in which a national court can deal with an arbitral award that violates EU principles or the applicable law. The first is an annulment procedure. In Belgium, this procedure is found in Article 1704 of the BJC. Article 1704 states that the CFI may, at the request of a party, order an award set aside in certain cases. A preliminary condition is that the award can no longer be contested before the arbitrators. Thus, the award must has *res judicata* effect. The parties do not have the right in their arbitration agreement to exclude certain grounds for setting aside or to provide additional grounds. A party has to raise the causes for setting aside an award (Article 1706 § 1 BJC). In France[134] and the Netherlands[135],

131 Parliamentary Documents, *Belgische Kamer van Volksvertegenwoordigers – Chambre des Représentants de Belgique, Explanatory Statement* (Memorie van toelichting – Exposé des motifs), draft Bill Nr. 1374/1 – 97/98, 19 January 1998, p. 9.

132 *Africa Industrial Services v Polytra*, Court of Cassation (No C040452N).

133 The CFI found that Article 1704, 2 (d) of the Judicial Code only covers violations of provisions accepted by the parties for the conduct of the arbitration. Therefore, the court dismissed the claim. *The Republic of Poland v Eureko bv*, case no: R.G. 2005/14005/A, CFI of Brussels (71 Chamber), Belgium.

134 Article 1706, 2 BJC. N.C.P.C. Art. 1504(1) provides for the jurisdiction of French courts over set-aside actions directed at awards rendered in France. Hence, the law of the place of arbitration, or of the award, submits the procedure before the arbitrators to certain minimum requirements such that the end result is identical to that in jurisdictions applying the objective or territorial test.

135 In the Netherlands, only final or partial final awards may constitute *res judicata* and do so from the date of the making of the award (Article 1059(1) of the Code of Civil Procedure). The Supreme

a defence based on *autorité de la chose jugée* is to be raised by a party and not by a court on its own motion. Such a defence is also deemed to be waived if a party fails to raise it[136]. Article 1703 of the Belgian Judicial Code provides that the arbitral award has *autorité de la chose jugée* if it has been notified to the parties, provided it does not violate public policy and if the subject-matter of the dispute can be settled by means of arbitration. Taking into account the fact that courts are currently intervening in the arbitration procedure, when a party's obligation to arbitrate is challenged, every legal system has to make some difficult procedural choices[137]. It is worth mentioning here that US[138] legislation permits an objecting party to look for judicial determination of the scope of consent either before, during, or after an arbitration–showing the impact of courts upon the whole process of arbitration.

More relevant are the grounds for setting aside an award in Articles 1704.2. a and b. These provisions hold that an award may be set aside if it is contrary to public order and if the dispute could not be settled by arbitration. Public policy relates only

Court narrowed the grounds for setting aside an arbitral award for lack of reasons (22 December 2006) – *Case no: C05/260HR, Supreme Court, Netherlands.* Article 1476 of the French NCPC states (in translation): "The arbitral award, from the moment that it has been given, shall carry the authority of *res judicata* in relation to the dispute which it has determined." This provision also applies to "awards made abroad or made in international arbitration" (per Article 1500). Article 1055 of the German Code of Civil Procedure provides that an arbitral award has the same effect between the parties as a final and binding court judgment. The Italian Code of Civil Procedure also states that an award may be annulled if it is contrary to a preceding court decision entered into force amongst the parties, provided that such objection has been raised in the arbitral proceedings (Article 829(8)). It is understood that the Italian courts and arbitral tribunals must recognise the *res judicata* effect of a foreign arbitral award if such award is recognised in Italy under the NYC. The Austrian Supreme Court for the first time held that an arbitral award rendered on a non-arbitrable matter was not merely voidable but actually void. *OGH 13.1.2004, 5 Ob 123/03d.*

136 Article 1351 of the French Civil Code also states (in translation) that: "It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity." This triple identity test also applies in Belgium and The Netherlands.

137 In France, if the arbitration clause is not "manifestly null or non-existent," the courts are not to intervene and the rule of kompetenz-kompetenz gives only "chronological priority" to the arbitrators; they are not the only ones to pass on their authority, but they are the first to do so, and state courts may not determine questions going to the jurisdiction of the arbitrators before the arbitrators "have themselves had the chance to do so." On the first sight seems that arbitrators' decide and so we do not have a court's intervention but after the award is rendered, however, judicial review of the arbitrator's authority is possible on a *de novo* basis which means that the rule of kompetenz-kompetenz "does not in the least abandon to the arbitrators themselves the verification of their own authority," which is the task of state courts "whenever it is sought to vacate or enforce the award." Cf. Emmanuel Gaillard. "Il est interdit d'interdire: réflexions sur l'utilisation des anti-suit injunctions dans l'arbitrage commercial international," [2004] *Rev de l'arb.* 47, 60–61 ("the principle of compétence/compétence" should govern situations where national courts "may be tempted to resort to the technique of the anti-suit injunction"; anti-suit injunctions "ignore the principle" that gives arbitrators the power to determine their own jurisdiction and that requires parties, "at least initially, to submit any grounds for the invalidity of the arbitration clause to the arbitrators themselves").

138 *Grad v Wetherholt Galleries*, 660 A.2d 903, 908 (D.C. App. 1995).

to the essential interests of the state or the community, or to private laws that set forth the legal basis on which the economic or moral order of the community rely. Without a doubt, the Articles of the Constitution or the international conventions ratified by Belgium and relating to human rights, civil or political rights, or to the elimination of racial discrimination also relate to public order. In other words, the matter of arbitrability is vital for the legitimacy of an award. Thus, supposing that a law of public policy is violated by a challenged award, the setting aside of the award should be determined according to Article 1704, section 2(a) of the BJC[139]. An award with contradictory provisions can be set aside (Article 1704§2j BJC). Thus, Article 1704, section 2(j) of the Judicial Code permits the setting aside of an award that is not justified (reasonable). A contradiction in the reasons is equivalent to an absence of reasons[140]. The duty to give reasons in support of a judicial or arbitral decision brings with it the obligation to answer the legal arguments raised by the parties[141]. A Belgian court in receipt of an application to set aside an award on one of these grounds is obligated to examine the grounds *proprio motu* (on its own initiative). There is no express statute of limitations to which the parties need to adhere or be barred from bringing an action for annulment on these grounds. However, Article 1712.1 provides that a motion to set aside an award must be filed within one month from the notification of the decision granting enforcement. The Court, when deciding on a request for annulment, does not examine the case on the merits, nor does it examine the reasons that have been given to support this decision[142]. The Supreme Court[143] rejected the plea against a decision annulling an arbitral award and the leave for enforcement which had been brought by a third party, because the dispute submitted to arbitration had been simulated with the sole purpose of affecting the rights of a third party. The court confirmed that the right of access to the court would be misapplied if the request for annulment had not been admitted for the benefit of the interested third party.

The BSC has refused to annul an arbitral award despite the arbitrators' obvious misapplication of a key provision of the relevant contract in *Africa Industrial Services v Polytra*[144]. The arbitrators ruled that the weight at departure should be the basis upon which the price was calculated, but for the Supreme Court the way of calculation was not the same as a lack of reasoning. The arbitrators' omission to submit their interpretation of the contract to the parties did not violate due

139 Court of Appeal (Cour d'Appel de Bruxelles, chambre suppl. I), 6 December 2000, S.a.r.l Génie Mécanique zaïrois et crts v/ s.a. A.I.G. Europe et crts – 6 December 2000 – Court of Appeal (Cour d'Appel de Bruxelles, chambre suppl. I).

140 Court of Appeal (Cour d'Appel de Bruxelles, chambre suppl. I), 6 December 2000, *Journal des Tribunaux*, 2001, p. 572.

141 Court of Appeal (Cour d'Appel de Bruxelles, Chambres civiles, 8ème Chambre), 19 September 2001, www.cass.be. The arbitrator must not, however, respond to arguments that could have been raised and could have lead to another decision, but which were not submitted.

142 Civil Court of Brussels 31 May 1991, JLMB 1992 230 and 13 March 1992, *Actualites du droit* 1992 1377.

143 Supreme Court 29 January 1993 Keutgen *Chron. Jurisp. L'arbitrage* 1987–1992, no 62.

144 Court of Cassation No. C040452N, www.cass.be.

process because the parties had argued at length on the right interpretation of the particular clause. Arbitrators have the freedom to construe the provisions of a contract as they consider right. The grounds for setting aside an arbitral award under Belgian law is construed very narrowly. By contrast, an award could still be challenged on public policy grounds if the arbitrators interpret the contract in a way that manifestly departs from the text. The BSC's ruling shows that a minor mistake in the arbitrators' reasoning will not be sufficient to set aside the award. Judicial restraint is needed when faced with a challenge to an award. By contrast, the Brussels District Court has recently set aside an ICC award on the ground that the arbitrators failed to correctly apply European competition law rules, showing that errors of law are considered to be a reason for annulment of an award, which totally dismantles arbitration as a dispute method[145].

The public policy exception may also be invoked in cases where the award contains no reasons[146]. The right to set aside is generally not subject to the parties' will. Since it entails judicial control over the activity of private jurisdiction carried out by arbitrators, the right to request the courts to set aside the award is considered to be a matter of public policy. The law in only a very few countries allows the parties to waive this recourse, and when they do, the waiver is subject to certain conditions. Belgian arbitration law requires that all awards contain the reasons on which they are based[147]. By contrast, the FAA of the US does not require reasons to be given in an award, and reasons are typically not given in domestic arbitrations.

Belgium amended its Uniform Law of 1972 on 27 March 1985, limiting, in a rather drastic and frequently criticized step, any possibility to set aside arbitral awards only to those procedures where a party with connections to Belgium is involved (see Article 1717 (4) of the BJC). However, the new Belgian law has been adopted on 2 April 1998 which, *inter alia*, removes the automatic suppression of the possibility to set aside an award. The new solution, therefore, is now quite identical to the solution prevailing in Switzerland. The old text of paragraph 4 of Article 1717 completely denied Belgian courts the authority to review international awards where the parties were non–Belgian, even if the situs of the arbitration was Belgium[148]. So, non–Belgian parties to international arbitration were not able to bring setting aside proceedings, even where there was clear evidence that the

145 *SNF v CYTEC Industrie* (March 8, 2007, R.G. 2005/ 7721/A) regarding the validity of a supply agreement. An ICC tribunal found that the agreement was void because it tied the purchaser (SNF) to the supplier (CYTEC), so infringing Article 81 of the EU competition law. To determine the entitlement to damages, the tribunal put the parties in the situation they would have been in had they not entered into the illegal tying agreement; this put them back under the regime of an earlier expired supply agreement. The tribunal awarded damages to CYTEC alone on the ground that SNF failed to prove that, without the impugned agreement, it could have obtained lower prices, either from CYTEC or from another supplier. SNF applied to the Brussels District Court for review of the award on the ground, among others, that the tribunal misapplied Article 81.

146 The BJC (Article 1701(6)), the Dutch Code of Civil Procedure (Article 1057(4)(e)) and the German ZPO (Article 1054(2)) require arbitrators to provide reasons in their decisions.

147 BJC, Article 1701(6).

148 A. Jaksic, *Arbitration and Human Rights*, p. 310–318 (Peter Lang, 2002).

arbitrator or the arbitral tribunal acted fraudulently or *ultra vires*. The new text of Article 1717§ 4[149] of the BJC clearly leaves the option to non-Belgian parties to exclude any application for setting aside of an arbitral award and so the exclusion is no longer automatic. However, an agreement to preclude an application to set aside the award under Belgian law will not have binding effect if the award violates public policy. For as noted above, parties cannot contract out of the application of public policy rules. Where a Belgian party is involved, the award may be challenged before the CFI[150]. There is no possibility for Belgian parties to opt out of the control through an annulment procedure up until the time that the award is rendered[151].

The NYC contemplates judicial review of the award at the arbitral situs, but does not mandate such a review. An arbitral award is binding under the NYC even if review is precluded at the situs of the arbitration[152]. The statute forces parties to seek judicial review during enforcement proceedings, which generally happens in the country of one of the parties. This raises the possibility of bias and subverting one of the main advantages of international arbitration that is; neutrality of the forum. By entirely precluding by parties' agreement the power of its courts to review awards where the parties are non–Belgian, Belgium has effectively barred any possibility of expanded judicial review. According to the old 1714 §4 BJC the preclusion of judicial review at the situs of arbitration did not result from the choice of the parties to the arbitration, but rather it was imposed by the legislature in Belgium. Hence, it could be argued that parties by their agreement could not alter the Article for precluding review of awards by courts for non-Belgian peoples and legal persons. Presently, Belgian parties or non-Belgian parties in arbitration can expand judicial review of awards by agreement. On the other hand it is argued that parties may not extend the scope of review of arbitral awards by courts in the framework of setting aside proceedings[153]. Nevertheless, the parties may agree to allow an arbitral award to be appealed.

Furthermore, an arbitral award may be contested before a court only by way of an application to set aside and may be set aside only in the cases mentioned in Article 1704. The award must not be against the public policy, the dispute has to be arbitrable, there is a need for a valid arbitration agreement, the arbitral tribunal

149 Article 1717, 4 BJC "The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there."

150 C. Longeval, *Dispute Resolution*, 2002, Van Bael & Bellis.

151 M. Storme & B. Demeulenaere, *International Commercial Arbitration in Belgium* 83 (Kluwer Law & Taxation Pub., 1989); Huys & Keutgen, *supra* n. 14, at 368–369; J. Lievens, De controle van de arbitrale uitspraak door de rechter, Tijdschrift voor Belgisch Handelsrecht 892–913 (1993).

152 William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," 63 *Tul. L. Rev* 647, 707 (1989) ("The place of the arbitration gives the arbitrator's decision a presumptive validity in any of the countries that have ratified the Convention."). J.M. Nelissen Grade, "The annulment of arbitral awards in Belgium," *International Financial Law Review*, 1986, p 35.

153 International Commercial Arbitration 2007 Chapter 18, Belgium. www.iclg.co.uk.

should not exceed its jurisdiction and powers as specified by the law and the parties' agreement, the tribunal should not omit making an award about all the aspects of the arbitrable dispute except if the omitted points can be part of an independent award, the tribunal has to be constituted according to the provisions of the BJC, the parties must have a fair and equal treatment in the presentation of their case before the arbitral tribunal, the award has to follow the formalities mentioned in Article 1701, be reasoned and not contain any conflicting provisions. These are the factors needed in order for the award not to be set aside. Otherwise the award will be set aside by a court.

To that extent, the setting-aside proceedings in international arbitration may only be brought before the SFSC (unless the parties have agreed that the court at the seat of the arbitration shall decide in lieu of the SFSC, Article 191 of the 1987 Act) for exhaustive grounds (Article 190(2) of the 1987 Act) which are similar to that of Belgian law. Similar reasons for setting aside an award by courts are also contained in the laws of Austria[154], Italy and France.

Additionally, fraud, false evidence determined by a court decision or a new piece of information having vital influence upon the award being withheld by parties, used to the issue of an award, contribute to a setting aside of the award by a court as well. Moreover, if a party does not invoke the absence of a valid arbitration agreement, jurisdiction of the arbitral tribunal and its powers and irregular constitution of the arbitral tribunal during the arbitration proceedings, then these reasons cannot be used to set aside the award by a court. To that extent, in Italian law if there is a lack of jurisdiction and exceeding the limits of submitting to arbitration, the party can not challenge the award for nullity[155]. In addition, reasons for the exclusion of arbitrators cannot be used in order to set aside an award. It is worth mentioning that a court will set aside an award and not another arbitral tribunal or a second degree arbitral tribunal. Hence, only for the reasons referred to in Article 1704 can an award be voided by a court's decision. In other words the parties cannot exclude certain grounds for setting aside or provide additional grounds by their agreement. Only arbitral awards rendered in Belgium can be set aside by the Belgian courts.

An award can be partly set aside by a court if there is a possibility to separate part of it award from the main award (Article 1705). An application to set aside an award has to be made only after the award cannot be contested before the arbitrators and the reasons for setting aside the award must be put forward in the same proceedings and not in a separate one, except that of Article 1704§ 3 when the reasons are discovered later (Article 1706). It is noteworthy that the court will examine *proprio motu* if the award is contrary to public policy and the dispute is

154 Code of Civil Procedure, 4th Chapter Article 611(section 611(2)(6) has no basis in the model law. It states that an award can be set aside should the preconditions occur under which the judgment of a court of law can be appealed by filing a complaint for revision pursuant to section 530(1).) Cancellation of the Award, Italian CCP Article 829, France – Code of Civil Procedure – Book IV – Arbitration In force 14 May 1981 Article 1484.

155 In Italian CCP (Article 817).

not arbitrable either in the general understanding or against the parties' agreement (Article 1707).

On the one hand, the decision of the arbitrators on the apportionment of the costs may be challenged only in the same way as the rest of the award. On the other hand, the amount of the arbitrators' remuneration may be disputed through a regular court action and consequently Belgian courts may reduce unduly high remuneration.

An arbitral tribunal can decide upon points of a dispute which can be decided separately after the expiration of the Article 1698 period and if this dispute referred to a court then the court refers the case back to the arbitral tribunal for an award only if the court considers that it is possible for an independent award about the omitted points of the dispute otherwise that award has to be set aside by the court (Article 1708). Thus, if the court decides that the issues are separable from the issues decided, it sends the parties back before the arbitral tribunal for a completion of the award[156].

On May 21, 2004, the Civil CFI of Brussels ruled on an application to set aside an arbitral award. The defendant to the application to set aside the arbitral award argued that the arbitral rules to which the parties subscribed waived all rights to any 'waivable' form of appeal and thus, the parties waived their right to set aside the award. However, referring to Article 1717.4 of the Judicial Code, the court noted that the right to set aside an award could only be waived when none of the parties to the award are of Belgian nationality. Both parties in this case were of Belgian nationality and thus, the court ruled, were incapable of waiving their rights to set aside an arbitral award[157].

The award can only be appealed before an Arbitral Tribunal, not before a national court. An appeal against an arbitral award is only probable if the parties have provided such possibility in the arbitration agreement. Unless provided otherwise, the time limit for an appeal is one month as of the notification of the award (Article 1703, 2° Jud. C.). Exclusion of an appeal is likely in the arbitration agreement and frequent in practice. Parties cannot modify the list of causes for the setting aside of the arbitration award. Nevertheless, after the notification of the award, the parties may leave out causes of annulment that do not violate public order. Parties can agree in the arbitration agreement to expand the scope of a possible appeal.

8 Enforcement of the award

The President of the CFI has jurisdiction for the enforcement of an award. The final award can be provisionally executed by the arbitrators' order regardless of the appeal of a party (Article 1709) and arbitrators can impose a fine for non-compliance (Article 1709 bis BJC). The judge who has been seized

156 Liege 29 June 1988 Pas. 1989 II 15.
157 Case No. R.G. 03/8267/A + 03/14084/A.

does not have the power to order the stay of an award that has been ordered provisionally enforceable[158]. Moreover, the judge seized of an action against a decision by which an award has been given leave for enforcement, and of a request for annulment of the award, may order, if requested by one of the parties, the enforcement of the award to be stayed or that the enforcement should be subject to the establishment of a guarantee. This stay can even be ordered for the first time at the appeal level[159]. The second way that a national court can deal with an award that does not comply with public policy or European public policy is in the statutory provisions for *exequatur* (i.e., enforcement of the award). The question which has to be answered is: what is the substance of the term public policy in national European and international law, in order to avoid discrepancies in nullifying awards based on various interpretations of the context of the notion of public policy. In Belgium, these provisions are contained in Articles 1710 et seq. of the BJC. They set forth the conditions under which the CFI and not an arbitral tribunal may grant an application for *exequatur* of the award. Enforcement of domestic awards will only be refused if the award or its enforcement violates public policy or if the dispute was not arbitrable.

The award can be enforced only if the President of the CFI rather than the arbitral tribunal envelopes the award with the enforcement formula on the application of a party (Article 1710 §1) but the other party cannot present his/her view at this stage. However, the President of the CFI will envelope the award with its enforcement formula only if the award cannot be contested before the arbitral tribunal or the arbitrators have granted provisional enforcement notwithstanding appeal which will be enforceable (Article 1710§2) and the decision will be notified to the petitioner by the clerk of the court. In other words, the parties can only lodge an application for exequatur if the award can no longer be contested before the arbitrators, or if the arbitrators have granted provisional enforcement notwithstanding an appeal.[160] Similarly, in French law when a party does not comply with the award, an action can be brought before the ordinary CFI ("Tribunal de Grande Instance") in order to obtain an "exequatur decision." In Italian Law, the court, after ascertaining that the award meets all formal requirements, declares the same enforceable by decree but a recourse against the decree denying the enforcement of the award may be filed by petition with the court within 30 days of notification; the court shall issue an order against which there shall be no recourse (*Article 825).* If the award has already been filed, the petition for correction is presented to the court (*tribunale*) of the place where the award has been filed (*Article 826).*

The application for an enforcement formula for an award will be rejected if there is no arbitrability of the dispute or the award and its enforcement are contrary to

158 Civil Court of Brussels 19 February 1991, *Actualites du droit* 1992, 1373.
159 Brussels 19 October 1989 Ann. Fac. Dr. Lg. 1990 p 251.
160 Article 1710, 2 BJC and Article 1723, 1 BJC.

public policy (Article 1710 §3). The President of the court has the duty to examine these points before granting an exequator. Hence, Article 1710.3 (which applies to Belgian awards) and Article 1723.2 (which applies to foreign awards) provide that enforcement shall be refused if the award or its enforcement is contrary to public policy or if the dispute could not be settled through arbitration. The NYC similarly provides a public policy exception to enforcement of awards in Article V, 2, b. Additionally, if the application for an enforcement formula is rejected by the court, the interested party can give notice of appeal to the court of appeal notified by summons to the other party served by a bailiff. Moreover, the party can make an application before the CFI to set aside the award and the Court of Appeal dealing with the appeal against the rejection of the application for the enforcement formula made by the President of the CFI will stay its proceeding until a judgment for setting aside the award is final. Furthermore, the decision granting exequatur is subject to appeal before the CFI and the party exercising his/her right of appeal must apply for setting aside the award by the CFI in the same proceedings (Article 1712). The party seeking enforcement can appeal against the decision of the President of the CFI to the court of appeal within one month of notification of the denial. The court of appeals must stay the proceedings concerning the appeal against the denial of the exequator by the President of the CFI. If the decision of the CFI concerning the setting aside is appealed, the two appellate procedures are to be consolidated. Article 1713 specifies the period for the application to the court for setting aside of an award if the legal reason for setting aside the award is the lack of a valid arbitration agreement. The court can order the staying of the enforcement of the award or the enforcement will depend on the consitution of a guarantee after a party's application. Besides, the enforceability of Belgian arbitration awards in other countries depends on the laws of the other countries.

Belgian law introduces the possibility for parties to reach a compromise before the arbitral tribunal prior to the issue of an award and this instrument takes the form of an enforcement formula by the CFI, but the president of the CFI will refuse the enforcement formula if the compromise or its enforcement is against the public policy and order, or the dispute is not arbitrable (Article 1705). The decision for the enforcement formula can be appealed before the CFI or the rejection of the application can also be appealed according to Article 1711 (Article 1716). The decision for granting enforceability becomes ineffective with the setting aside of the award.

Of course, a national court will only be charged with supervising an award through the exequatur procedure when the losing party does not voluntarily comply with the award. As discussed earlier, when no party has Belgian citizenship or residence, the parties may explicitly agree (in their arbitration agreement or in a later agreement) to preclude an application to set aside the award under Belgian law, which brings direct finality for the issued award for foreigners. This distinction might make Belgium a centre for arbitration, but this differentiation cannot be explained as a legal principle emerging from the nature of arbitration. Moreover, it could be more productive if the rule was applicable to all people, which would be

revolutionary for establishing finality. Article 1717 provides the jurisdiction of the court to hear the previous mentioned applications for the enforcement formula and appeals against decisions refusing the enforcement formula. There is no possibility for Belgian parties to opt out of the control through an annulment procedure up until the time that the award is rendered. However, such an agreement will not have binding effect if the award violates public policy, because parties cannot contract out of the application of public policy rules.

The President of the CFI decides on the request for exequatur of arbitral awards rendered abroad in pursuance of an arbitration agreement and paragraph 2 of Article 1719 specifies that jurisdiction has got the President of CFI in whose the party against whom enforcement is sought has its domicile, and in default of domicile, its residence. If this party has neither domicile nor residence in Belgium, the petition will be brought to the President of the CFI of the place where the award has to be enforced. The court's decision is notified by the clerk of the court to the petitioner for exequatur of the arbitral award rendered abroad in pursuance of an arbitration agreement (Article 1720). If the application for exequatur of arbitral awards rendered abroad in pursuance of an arbitration agreement is rejected, the petitioner can appeal to the Court of Appeal and this appeal is introduced by service of a bailiff and the party against whom enforcement is sought appears before the Court (Article 1721). The decision of the Court granting exequatur has to be served to the other party and the other party can appeal against the decision before the CFI (Article 1722), but the president of the CFI refuses to grant exequatur on the following occasions–if the arbitral award is still open to appeal before the arbitrators, if the arbitrators have not ordered provisional enforcement notwithstanding appeal; if the award or its enforcement is contrary to *ordre public*, or if the dispute is not capable of settlement by arbitration; if there exists a ground for setting aside as provided in Article 1704 (Article 1723).

Belgium has ratified the NYC on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the NYC will be applied on the basis of reciprocity to awards made in the territory of another contracting state. In a case concerning the enforcement of a Jordanian award, the Brussels Court of Appeal rejected all grounds for appeal and affirmed the lower court's decision that Jordanian law did not apply to this issue. The award must be binding in accordance with the agreement of the parties. As to the question of how to determine at which point an award becomes binding, the Court of Appeal found that, on the basis of Article V(1)[161], the enforcement of a foreign award will be refused if the award can still be challenged before arbitrators or if the arbitrators have not ordered the provisional enforcement of their award notwithstanding appeal, or

161 Decision of 24 January 1997, YCA, Vol. 22 (1997), pp. 643–668. "it clearly appears that the Convention considers the will of the parties to be fundamental to the arbitration proceedings." "The agreement of the parties provides that the award of the arbitral tribunal shall be final and binding, and thus immediately enforceable upon being rendered. It does not provide for an appeal. According to the agreement of the parties, the award has become binding upon being rendered. In fact, the arbitral award states that it 'is effective' as of the date hereof."

if it is established that there exists a ground for setting aside the award under Belgian law (application to the foreign award of the Belgian grounds for setting aside an award). The CFI of Brussels has allowed exequatur of a foreign arbitral award that has been annulled by the Court of Appeals of Alger by relying on the internal Belgian law[162]. The courts will not review the merits of a foreign or domestic award. To that extent German arbitration rules, including mandatory and *ordre public* rules, would become inapplicable and the award would be considered foreign for purposes of enforcement in Germany. German law has thus switched from a pure intent-based test to a strict territorial one[163].

9 Conclusions

Our analysis shows a great deal of courts' involvement in the process of review of the award and its enforcement, not mentioning the courts' intervention in various stages of the arbitration process. Moreover, Belgian law *ex proprio vigore* does not allow an arbitral tribunal to commence and end arbitration without the assistance of national courts not only in commencement and during the arbitration procedure but also in the stage of issue of the award and its enforcement. It is worth mentioning that there is a convergence in the role and impact of courts upon arbitration in its various stages in the national laws mentioned, showing the dependence of arbitration upon courts for its success as a procedural and dispute mechanism. In other words, the award produces *res judicata* by the notification to the parties but it has to go through a whole process before the courts in order to be granted the enforcement formula–not mentioning the actual problems caused

162 Bull ASA 1989 p 213.

163 Karl-Heinz Böckstiegel, "An Introduction to the New German Arbitration Act based on the UNCITRAL Model Law," 14 *Arb. Int'l* 19, 23 (1998). Under German law the award has the same effect on the parties as a final unappealable judgment (see section 1055 ZPO "German Procedural Code") The enforcement of an award is only possible if the award is declared enforceable by the court (see section 1060 ZPO). A foreign award which is binding pursuant to the applicable law will be declared enforceable under German law in accordance with the rules relating to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards of June 10th 1958, (see section 1061 ZPO). Enforceability of Award will only be Denied on Grounds of Violation of Public Policy if Clear Conflict between Award and German Law, Case No 11 Sch 01/05 of the Oberlandesgericht Dresden (Higher Regional Court of Dresden). The Bavarian Highest Regional Court declared the award enforceable as the arbitral tribunal had already considered the respondent's arguments regarding the assignment and the court was unable to review the decision *de novo*. The court further stated that a final and binding award must be declared enforceable without giving the debtor the opportunity to avoid enforcement by providing security. Case No. 4Z Sch 13/04, Italian CCP. The party wishing to enforce a foreign award in the Republic shall file a petition with the President of the Court of Appeal of the district in which the other party has its domicile; if that party has no domicile in Italy, the Court of Appeal of Rome shall have jurisdiction (*Article 839)*. The president of the Court of Appeal, after having ascertained the formal regularity of the award, shall declare by decree the efficacy of the foreign award in the Republic unless: (1) the subject matter is not capable of settlement by arbitration under Italian law; and (2) the award contains provisions contrary to public policy.

by the execution of the award itself. It is supposed that the award of an equally alternative dispute mechanism has to be applicable directly rather than having to go through an approval process by another independent dispute mechanism such as courts, which seems to safeguard the whole arbitration process featuring arbitration as an inefficient and inferior dispute mechanism.

7 Comparative analysis of the role of courts in US, English, Belgian and Greek law

1 Introduction

Even though arbitration appears in many respects to be similar to litigation, it is in fact *sui generis*. It is argued that arbitration is not a contractual creation by the parties' agreement, but arbitration is an instrument by law for dispute resolution equal to that of the courts. It could be said that arbitration is developed in the area of dispute of civil matters, which is occupied traditionally by courts with the blessing of states that have been forced by mercantile practice to accept arbitration as another route for solving civil disputes. At present to be under the guardianship of the courts and; however, it seems not developed into the second pole in a legal system. Arbitration acts as a speedy and informal alternative to litigation, resolving disputes without conferment to many of the procedural and evidentiary strictures that protect the integrity of formal trials. The FAA, enacted in 1925 and re-codified in 1947, however, required courts to enforce arbitration agreements related to commerce and maritime transactions[1]. Maritime arbitrations[2] are primarily governed by the FAA, the 1996 Act, the Greek CCP, and the Belgian JC. According to the US Supreme Court, the arbitration process might not have been strictly voluntary because it was imposed by statute–"the procedure by which rights may be enforced and wrongs remedied is peculiarly

1 At common law, an arbitration agreement was revocable by either party any time before the arbitrator issued an award. Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609); *Kill v Hollister*, 95 Eng. Rep. 532 (K.B. 1746); *Oregon & W. Mortgage Sav Bank v American Mortgage Co*., 35 F. 22 (C.C. Or. 1888); Richard A. Bales, "A Normative Consideration of Employment Arbitration at *Gilmer*'s Quinceañera," www.ssrn.com p. 55 "Arbitration is definitely faster than litigation, it can be cheaper for both parties so long as excessive fees are not levied on employees, and it can significantly enhance access for low-income employees so long as the arbitration agreement is fairly drafted." Richard A. Bales, "Normative Considerations of Employment Arbitration at *Gilmer's* Quinceañera," 81 331 (2006) (mandatory arbitration will not be a fair process until a clear set of due process rules are implemented and a penalty is imposed on employers who draft flagrantly one-sided arbitration agreements).

2 Keith Heard, "Can parties expand the scope of judicial review of arbitration awards?" *The Arbitrator*, SMA Inc. October 2005 p. 2. http://www.smany.org.

a subject of state regulation and control[3]." A federal court may consider only issues relating to the making and performance of the agreement to arbitrate[4]. Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far[5]. As discussed earlier, this author agrees with Mustill and Boyd that the authority of arbitration derives from law as specified in national laws.

Is arbitration preserved as a true alternative to the courts? Arbitration involves a substitution of forum, not of substantive law. While the statutory claims may be arbitrable, the substantive law to be applied in both forums is the same. A universal principle of contemporary arbitration law is that contract plays a vital role in the governance of arbitration. Arbitration is a creature of contract[6], representing the most absolute statement of the vigor of contract freedom in arbitration[7]. Contract's empire is founded upon a different rationale: in court doctrine, it serves to legitimate the privatization of adjudication by underscoring arbitration's apparently voluntary character.

Modern arbitration statutes allow courts to supervise the arbitral process on the basis of the enforceability of the arbitral agreement and award. The supervision that is ordinarily allowed is quite restricted and narrow; it generally results in the enforcement of the award, unless there has been a fundamental breach of adjudicatory legitimacy or the unconcealed use of excessive powers

3 *Hardware Dealers' Mut. Fire Ins. Co. v Glidden Co* 284 U.S. 151 (1931). In 1932, the Supreme Court upheld the constitutionality of the FAA. *Marine Transit Corp. v Dreyfus*, 284 U.S. 263, 277–79 (1932). *Salt Lake Tribune Publishing Co., LLC v Management Planning, Inc*., 390 F.3d 684, 689 (10th Cir. 2004) The Tenth Circuit has recently concluded that federal law must provide the statutory definition of "arbitration," since "applying federal law is the only way to ensure national uniformity"; to empower states "to define arbitration as they choose" would be to "[limit] the FAA's utility.". *Hartford Lloyd's Ins. Co. v Teachworth*, 898 F.2d 1058 (5th Cir. 1990) (held, it was error for the trial court to review an "appraisal award" under the standards of the FAA; "under Texas law, it appears that the validity of an appraisal award may be tried to a jury"). *Fit Tech, Inc. v Bally Total Fitness Holding Corp*., 374 F.3d 1, 6 (1st Cir. 2004) "That a uniform federal definition is required is obvious to us". *First Options of Chicago v Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary state-law principles that govern the formation of contracts"); *Spring Hope Rockwool, Inc. v Industrial Clean Air, Inc*., 504 F.Supp. 1385, 1388 (E.D.N.C. 1981) ("Although federal law is to be applied to the question of whether … there is a valid agreement to arbitrate, the court finds reference to the [UCC] to be appropriate in the absence of a well-developed federal contract law"). *Dean Witter Reynolds Inc. v Byrd*, 470 U.S. 213 (1985) ("arbitrable" claim joined with "nonarbitrable" claim; the FAA's primary purpose, to ensure judicial enforcement of private agreements to arbitrate, requires that courts "rigorously enforce" such agreements, even if the result is "piecemeal litigation" and the "possibly inefficient maintenance of separate proceedings in different forums").

4 *Prima Paint Corp. v Flood & Conklin*, *Mfg.*, 388 U.S. 395 (1967).

5 *Southland Corp. v Keating*, 465 U.S. 1 (1984).

6 *AT&T Tech., Inc. v Communications Workers of America*, 475 U.S. 643, 648 (1986); *United Steelworkers v American Mfg. Co.*, 363 U.S. 564, 570 (1960).

7 *Volt Info. Sci., Inc. v Bd. of Tr. of Leland Stanford Junior Univ.,* 489 U.S. 468, 496 (1989); accord *Mastrobuono v Shearson Lehman Hutton, Inc*., 514 U.S. 52, 57 (1995) (appearing to hold that party provisions will be followed and implemented as long as they validate the initial reference to arbitrate).

by the arbitrators. Court decisions are precedents influencing the approach of arbitrators, since previous arbitration awards are not considered as precedent. The availability of judicial review appears to be an integral part of the appropriateness of congressional delegations of legislative authority[8] and so it could be argued that keeping courts as the safeguards of legal order explains the authority given to arbitration. According to Rebecca Hanner White[9] the reviewing court has to ensure that arbitration is merely a substitution of forum and not a sacrifice of substantive rights. Moreover, Richard A. Bales[10] argues that arbitration enhances access, and strengthens the criticism that arbitration functions as a prospective waiver of substantive rights. Will we have a sacrifice of substantive rights when an arbitrators will be appointed who is an experienced lawyer or a retired judge? There is a demand for judicial review of arbitral determinations of statutory claims, which means that arbitrators are not considered to be knowledgeable enough to interpret substantive law and formulate the substance of novel legal issues. In *Barrentine v Arkansas-Best Freight System, Inc.*[11], the US Supreme Court held that "Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [statute], thus depriving [a party] of protected statutory rights." Moreover, it is argued that an arbitrator's role is merely to effectuate the intent of individual parties. Unlike a federal judge, the arbitrator "has no institutional obligation to enforce federal legislative policy[12]". On the other hand, arbitration does not stand apart from the law, but in arbitration we have a flexible procedure and interpretation of the law either formal or customary[13]. Experts in the arbitrated subject are appointed as arbitrators, and so there is no possibility for the occurrence of a sacrifice of substantive rights. This author considers that judicial review of arbitral determinations of statutory claims shows the attitude of states towards arbitration as being an incomplete dispute system and not an equal substitution of the courts.

8 Jonathan T. Molot, "Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation," 96 *Nw. U. L. Rev.* 1239 (2002) (criticizing the Supreme Court's inconsistent application of *Chevron* analysis): "As the only constitutional actor to play no formal role in legislation or law execution, the judiciary is the only institution available to ensure that political officials comply with lawmaking procedures and separation-of-powers principles that are central to our system of limited government."

9 Rebecca Hanner White, "Arbitration and the Administrative State," 2003 *Wake Forest Law Review* 1283, at 1326.

10 Richard A. Bales, "A Normative Consideration of Employment Arbitration at *Gilmer*'s Quinceañera," www.ssrn.com p. 5.

11 450 U.S. 728 (1981). At 744.

12 In *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc* 473 U.S. 614 at 614 (Stevens, dissenting).

13 Delissa A. Ridgway, "International Arbitration: The Next Growth Industry," 54 Feb. *Dispo. Resol. J.* 50, 50–51 (1999) (suggesting that international commercial arbitration is a growth industry because of parties' perceived fairness in the process and the predictability and certainty of the result).

Is it time for arbitration to contribute to the establishment of principles of law? Will two independent legal networks of dispute resolution such as courts and arbitration contribute to the establishment of divergent principles of law applicable to identical kinds of disputes? It should be taken into account that the same principles of law established by law and the court's interpretation of legislation are applicable to both arbitration and courts. On the one hand, a judgment has direct effect on third parties rights in the subject of a judgment. On the other hand, an award has direct effect upon the parties to arbitration but the award affects the third parties rights in the arbitrable subject indirectly. The decision of an arbitrator, however, does not necessarily result in the resolution of a dispute. Parties to an arbitral proceeding will often resort to domestic proceedings in local courts to enforce either the agreement to arbitrate or the award reached by the arbitrator[14].

The common law in England and the US traditionally rejected arbitration as a deprivation of the jurisdiction of the courts and, therefore, contrary to public policy. Has this attitude of courts for arbitration changed? Is arbitration a mere surrogate, perhaps for a desire to streamline judicial dockets or for a conservative strategy of privatization and deregulation? Is arbitration second-class justice? Katherine Van Wezel Stone[15] argued that arbitration was indeed a form of second-class justice.

The belief that arbitral agreement ousts courts of jurisdiction was the most crippling problem[16]. Other explanations for the historical distrust of arbitration are the fear that it is more likely to result in a miscarriage of justice, and the public policy argument that the state should maintain a monopoly over the resolution of disputes. In 1854, the Supreme Court showed signs of recognizing the importance of arbitration when it held that arbitrators should be given a broad discretion subject to limited judicial review[17]–thus the court was still considered to be the guardian of legality. However, in 1874, the Supreme Court echoed the common law sentiment by holding that pre-dispute agreements oust courts of jurisdiction and are illegal and void[18].

14 Andreas Bucher, "Court Intervention in Arbitration in International Arbitration in The 21st Century: Towards 'Judicialization' And Uniformity?" 29, 29–44 (Richard B. Lillich & Charles N. Brower eds., 1994). Section 71 EAA 1996. Article 1067 CCP Netherlands "the jurisdiction of the court shall revive".

15 Katherine Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow-Dog Contract of the 1990s," 73 *Denver U. L. Rev.* 1017 (1996).

16 William M. Howard, "The Evolution of Contractually Mandated Arbitration," 48 *ARB. J.* 27, 28 (1993) (noting that before the American Revolution, arbitration was restricted in its application by statute).

17 *Burchell v Marsh*, 58 U.S. 344, 349–50 (1854). *Red Cross Line v Atlantic Fruit Co*, 264 U.S. 109, 120–21 (1924) ("In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced …. If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress.").

18 *Home Ins. Co. v Morse*, 87 U.S. 445, 451 (1874). *Condominiums Mont St-Sauveur Inc. c. Constructions Serge Sauvé Ltée*[1990] A.Q. (Quicklaw) No. 2052; [1990] *R.J.Q.*2783 (C.A.) (an arbitral tribunal is a private adjudicative body and is thus separate from the public judicial

While the popularity of arbitration is approaching that of litigation, unfortunately, arbitration is becoming more like litigation, with many formalities and inefficiencies. Benefits of arbitration can be lost because of forceful adversarial arbitration by the parties and their lawyers. The comparison in this chapter will show the role of courts in commercial–maritime arbitration in the compared legal systems. The convergence or divergence in the approach of courts in specific matters of arbitration and their impact on the various stages of the arbitration procedure will be highlighted. The comparison of the four legal systems will allow us to estimate the equality of arbitration versus the courts as dispute mechanisms.

2 Arbitrability in US, English, Belgian and Greek law

Arbitrability involves the question of what types of issues can and cannot be submitted to arbitration. Internationally, arbitrability is divided into objective and subjective inarbitrability[19]. In the US, the term "arbitrability" is used in covers the whole issue of the tribunal's jurisdiction[20]. In other words, the parties' agreement is essential for a dispute in order to be considered as arbitrable. Hence, the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute[21]. The distinction is roughly comparable to substantive and contractual inarbitrability. Objective inarbitrability (*ratione materiae*) prohibits arbitration by reason of the subject matter of the dispute, while subjective inarbitrability relates to deficiencies in contractual capacity or other problems in the formation of the agreement. Whether a dispute to which a state or other public body is a party may be submitted to arbitration is referred to as subjective arbitrability (*ratione personae*)[22]. The capacity of some parties or entities to conclude an arbitration agreement could not be seen as a matter

system;) *Desputeaux v Éditions Chouette (1987) Inc.*[2003] 1 S.C.R. 178 (Quebec rules relating to consensual arbitration must be interpreted in light of the legislature's desire to promote this extrajudicial means of dispute resolution).

19 The French law on arbitrability is based upon express provisions of law. Articles 2059 and 2060 of the Civil Code contain abstract formulations that outline the general contours of substantive inarbitrability. Recourse to arbitration is permitted in contractual matters, impliedly prohibited in the adjudication of statutory rights and the application of mandatory law, and expressly prohibited for matters that pertain to public policy. French authors have suggested a distinction between "objective" and "subjective" arbitrability. While the former refers to the suitability of arbitration to the dispute, the latter concerns the competency of a party, in particular the state and its subdivisions, to conclude binding arbitration agreements. Philippe Fouchard *et al., Traité de l'arbitrage commercial international.* 329–30 (1996).

20 J. Lew, "Comparative International Commercial Arbitration," 2003, *Kluwer Law International* Chapter 9. Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law Through Arbitration," 83 *Minn. L. Rev.* 703, 731 (1999) (arguing that "the 'ground' for inarbitrability must be judged [in each case] on its substance, not merely its label").

21 *First Options v Kaplan* 514 US 938.

22 L. Fortier, "Arbitrability of Disputes," in G. Alsen, *International law, Commerce and Dispute Resolution*, 2005, ICC, 2005.

of arbitrability, but the subject of the dispute is the theme of being or not being arbitrable. The underlying purpose of objective inarbitrability is to preserve the integrity of the public interest in adjudication. Subjective inarbitrability regulates the contractual validity of agreements to arbitrate in the context of particular arbitral proceedings. Substantive inarbitrability represents the classical function of arbitrability. It curbs the contractual right to arbitrate by holding that certain subject matters are precluded from arbitration as a matter of law.

The concept of arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins. It establishes a dividing line between the transactional pursuit of private rights and the courts' role as custodians and interpreters of the public interest. Whenever contractual rights become intertwined with the exercise of sovereign state authority, designated juridical institutions are generally necessary to effect justice. The FAA only recognizes contractual inarbitrability, and the grounds for reviewing domestic arbitral awards do not include the public policy exception to enforcement. Substantive inarbitrability in the domestic context is usually more restrictive than its international counterpart, because the regulatory authority and interests of the state are stronger domestically. The NYC provides for the law of arbitrability only from the perspective of enforcement, but the NYC does not contain a rule as to what law governs the question of arbitrability at the pre-award stage.

Since arbitration is based on the contractual agreement of the parties, there are two reasons why the arbitral tribunal may lack jurisdiction – either the parties have not agreed to submit the specific dispute to arbitrability or the dispute cannot be submitted to arbitration at all. The former is basically a question of contract interpretation, while the latter pertains to complex considerations of public policy[23]. It is clear that because of the public policies involved, states wish to apply their own law to the issue of arbitrability. The NYC of 1958, by far the most important convention on arbitration, recognizes this desire in Article V(2) (a). Under this provision, courts are directed to apply the laws of their own states when determining the arbitrability of a dispute[24].

23 Matthias Lehmann, "A plea for a transnational approach to arbitrability in arbitral practice," *42 Colum. J. Transnat'l L.* 753.

24 Article V(2)(a) applies only when recognition and enforcement of an award is sought. Belgian courts and commentators have suggested that a different conflict of laws rule would apply to the issue of arbitrability under Article II(1) of the NYC, which governs the recognition of arbitration agreements. See Court of Appeals of Brussels, 14 Y.B. *Com. Arb.* 93, 94 (1989); Commercial Court of Brussels, Parbelux c/ Jean Patou Parfums, *Revue du droit commercial belge* 1118, 1119 (1993); Société Van Hopplynus c/ société Cohérent, *Revue de l'arbitrage* 311, 315–16 (1995); Bernard Hanotiau, "The Law Applicable to Arbitrability in Improving the Efficiency of Arbitration Agreements and Awards" 146, 163 (ICCA Congress Series No. 9, 1999). According to this view, when courts are asked to enforce an arbitration agreement (as opposed to an arbitration award) as an exception to their jurisdiction they should apply to arbitrability the law applicable to the arbitration agreement in general i.e., the law chosen by the parties. The basic argument is that Article II(1), in contrast to Article V(2)(a), is silent on the issue of which law governs the question of arbitrability. This silence, however, cannot simply be interpreted as referring to a uniform conflict of laws rule.

Thus, an important recurring question in the law of arbitration is "arbitrability" – whether a court or an arbitrator will decide the merits of the case[25]. Arbitrability goes to the jurisdiction of the arbitral tribunal over a dispute. In the majority of cases, courts have determined the question of arbitrability at the pre-award stage according to their own national law[26]. Moreover, an arbitrability decision is a determination of the jurisdictional boundary between the arbitrator and the court. Since arbitration is a creation of contract, and the power of an arbitrator flows from the parties' agreement, arbitrability is a question of contract interpretation. "Arbitrability" is of course a much-abused and much-litigated concept–showing the depth of courts' involvement in the establishment of the status of arbitration. Statutory claims may be arbitrated on the assumption that contracting parties are free to choose a forum for resolving disputes and arbitration clauses are little more than specialized forum selection clauses[27].

Courts have kindly attributed some privileges to arbitration, forced by the need for an alternative dispute resolution mechanism imposed by merchants. A long line of court decisions has distinguished domestic and international arbitrability, recognizing a hierarchy of values that make it inappropriate in international arbitration to impose flat prohibitions on arbitration of public law questions such

Rather, absent any indication to the contrary, it has to be assumed that the same conflict of laws rule should apply to arbitrability under Article II(1) as under Article V(2)(a). See Commercial Court of Brussels, Matermaco S.A. c/ PPM Cranes, Inc., 25 *Y.B. Com. Arb.* 673, 675 (2000); Van den Berg, *The NYC of 1958 – Towards a Uniform Judicial Interpretation* 152 (1981).

25 *Howsam v Dean Witter Reynolds, Inc*., 537 U.S. 79, 82–83 (2002); *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995). Although there is some confusion surrounding the term, it is best defined as either of the following two questions: (1) whether the arbitration agreement covers the parties, or (2) whether the arbitration agreement extends to the substantive issues raised. *Shearson/Am. Express, Inc. v McMahon*, 482 U.S. 220, 226 (1987) (stating that the federal statutory claim is not arbitrable if Congress evinces an intent to preclude arbitration). In *Rodriguez de Quijas v Shearson/American Express*, 490 U.S. 477 (1989), the Court overruled its earlier holding in *Wilko v Swan*, 346 U.S. 427 (1953), to the effect that a generic anti-waiver provision in section 14 of the Securities Act of 1933, 15 U.S.C. § 77n (discussing a provision virtually identical to the one in *Southland*) precluded enforcement of predispute agreements to arbitrate securities fraud claims.

26 Belgium, Tribunal de Commerce, Brussels, 20 September 1999, *Matermaco S.A. v PPM Cranes Inc. et al.*, XXV YBCA 673 (2000) 675; Switzerland, Tribunal Fédéral, 28 April 1992, XVIII *YBCA* 143 (1993) 146. Tibor Varady *et al., International Commercial Arbitration: A Transitional Perspective* 208 (2nd edn. 2003) ("[C]ountries have traditionally been reluctant to allow arbitration in spheres where there is a strong public interest at stake. Even after the early hostility towards arbitration was reversed, countries continued to distinguish between domains in which public interest and public control are relatively weak, and areas in which society (the state) has strong vested interests and policies. Disputes belonging to the first domain are arbitrable; lawsuits falling into the latter area are reserved for courts and other state authorities. The issue of arbitrability is thus one of the most important threshold questions in the arbitration process."). Belgium, Tribunal de Commerce, Brussels, 20 September 1999, *Matermaco S.A. v PPM Cranes Inc. et al.*, XXV YBCA 673 (2000) 675; Switzerland, Tribunal Fédéral, 28 April 1992, XVIII *YBCA* 143 (1993) 146.

27 Christopher R. Drahozal, *Commercial Arbitration: Cases And Problems* 191–204 (2002) (quoting the Court in *Gilmer* and addressing how parties challenge arbitration of statutory claims based on procedures required by a particular arbitration agreement).

as anti-trust and securities regulation. Where some of the issues in dispute are subject to the arbitration clause and others are not arbitrable, courts may exercise discretion to stay the non-arbitrable issues pending arbitration[28]. Hence, if there is only one small, arbitrable issue amid many other non-arbitrable ones, nevertheless, the court may decide to continue with the trial of all the issues. Every national law determines which types of disputes are the exclusive domain of national courts and which can be referred to arbitration. This differs from country to country and reflects the political, economic and social prerogatives of the state and the general attitude towards arbitration.

Arbitrability is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law. The parties, by their arbitration agreement, specify which dispute will be arbitrable. So, it could be said that although a matter is in general arbitrable, there is a need for a parties' agreement in order the particular dispute to be arbitrated. The question is for whether a specific dispute does or does not fall within the scope of the arbitration agreement. In the US, the term "arbitrability" is used to describe this question. The EAA 1996 does not preclude parties from agreeing that matters which are objectively not arbitrable should be determined by arbitration. Redfern[29] and Hunter argue that arbitrability involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. The courts have indicated that any kind of civil law dispute, which fulfills the demand of the articles of the CCP in Greek law regulating arbitration, may be subject to arbitration[30]–satisfying a further condition in order to be submissible to arbitration that the parties must be able to act freely upon the object of the dispute, because some matters are compulsorily regulated by statutes regardless of the parties' will (Article 867 CCP). Hence, aspects that are defined by public order rules as objects of compulsory law cannot be the subject of arbitration. It could be argued that arbitrability is an exception to the court's monopoly to deal with dispute resolution.

28 *Moses H. Cone Memorial Hospital v Mercury Construction Corp*. 460 U.S. 1 at p. 21, note 23 (1983); Genesco, Inc. v Kakiuchi, Ltd. 815 F.2d 840 (2nd Cir. 1987); *F.D. Import & Export Corp. v M/V Reefer Sun* 2003 AMC 67 at p. 71 (S.D. N.Y. 2002). *Desputeaux v Éditions Chouette (1987) Inc.* [2003] 1 S.C.R. 178 (there are few limits to the arbitrability of disputes and statutory provisions will only be interpreted as excluding arbitration if they contain explicit language to that effect; the scope of the arbitration agreement and the arbitrators' mission have to be interpreted in a broad and liberal manner) *Dell Computer Corporation c. Union des consommateurs* 2005 QCCA 570 (C.A.) (an arbitration clause which is not explicitly brought to the attention of a person as he or she is entering, through the Internet, into a consumer contract or a contract of adhesion cannot be invoked against that person; disputes concerning consumer law are arbitrable).

29 A. Redfern & M. Hunter, *Law and Practice in International Commercial Arbitration*, 1999 Sweet & Maxwell at par. 3–21, See *Porter Hayden Co v Century Idem Co.* 136 F3d 380. *Spear, Leeds & Kellong v Central Life Co*. 85 F3d 21. Thomas E. Carbonneau & François Janson, "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability," 2 *Tul. J. Int'l & Comp. L.* 193, 221–22 (1994) (arguing that "the dilution of [restrictions limiting] arbitrability in US law is also occurring in France and other European civil law jurisdictions").

30 Supreme Court 875/76 25 NV 336, Supreme Court 825/77 26 NV 673.

As discussed in the relevant chapters, labor/employment arbitration is not regulated by the FAA, the 1996 Arbitration Act[31], the BJC[32] and the CCP of Greece[33]. It seems that there is a convergence of the legal systems on treating the majority of labor disputes exclusively by the courts. In contrast it could be argued that fully co-equal and alternative dispute systems means that both systems can deal with all kind of disputes as long as there is a parties' agreement.

As arbitrability of a dispute is based on contract interpretation it raises a legal question reviewable by courts of appeal *de novo*[34]. Parties might challenge arbitrability in the courts[35] after unsuccessfully making such a challenge in arbitration, which is of particular significance to companies that wish to arbitrate with third parties in multi-party disputes. Therefore, unless the agreement clearly states that the arbitrator shall decide whether a dispute is arbitrable, the parties may bring that issue before a judge for resolution. In determining arbitrability of a dispute, the court must first decide whether the parties agreed to arbitrate, and if so, whether the agreement's scope encompasses the asserted claims[36]. The arbitrability of a dispute is examined after a court is satisfied that an arbitration agreement is valid[37]. Allegations of illegality and fraud have raised serious problems as to the arbitrability of a dispute[38]. The court may hear a dispute despite the presence of arbitral agreement if the court determines that the arbitral agreement is null and void, inoperative or incapable of being performed[39].

The question of arbitrability has generally been a matter for domestic determination rather than international agreement. In effect, the concept of arbitrability is a public policy limitation upon the scope of arbitration as a method of settling disputes. For instance, disputes arising out of the termination of exclusive

31 The Employment Rights (Dispute Resolution) Act, 1998 in England provides for the possibility of adjudicating claims for alleged unfair dismissal by means of a voluntary ACAS arbitration scheme rather than by an Employment Tribunal where both parties are agreed, and so the 1998 Act empowered ACAS to prepare an arbitration scheme for unfair dismissal claims which would as a rule be made to an Employment Tribunal. The ACAS arbitration scheme for unfair dismissal disputes is fully voluntary. The Scheme was designed to originally operate in England and Wales and was extended to apply to Scotland from April 2004. www.acas.org.uk.

32 Without prejudice to the exceptions provided by law, any dispute which falls within the competence of the Labour Tribunal as determined in Articles 578 to 583 (tribunal du travail) is jure null (Article 1678 §2 Code judiciaire Belge).

33 D. Bastas, "Settlement of Individual Labor Disputes," 1995 Sakkoulas at 122 *Circuit City Stores v Adams*, 121 S. Ct. 1302 (2001) (holding that employment agreements, other than for transportation workers, are covered by the FAA). Maltby, "Private Justice: Employment Arbitration and Civil Rights," 30 *Columbia Human Rights L. Rev.* 29 at 55 (1998). Arbitration cases involving employment discrimination are, on average, resolved in under nine months, while the discrimination cases filed in federal courts, on average, take almost two years for resolution.

34 *Cogwell v Merrill Lynch* 78 F3d 474.

35 *First Options of Chicago Inc v Kaplan* 115 S. Ct 1920.

36 *Berger v Cantor Securities* 967 Fsup 91, *Gutierrez v Academy Corp* 967 Fsup 945.

37 *Hoffman v Aaron Kamni Inc* 927 F Sup 640, *Svedala Industries Inc v The Home Insurance Company* 921 F Sup 576.

38 *Heyman v Darwins Ltd* [1942] AC 356.

39 *Quasem Corp v W/D Mask Cotton* 967 Fsup 288.

distributorship are not arbitrable under Belgian law[40] but their arbitrability poses no question under US law[41]. If the arbitration agreement covers matters incapable of being settled by arbitration under the law of the agreement, under the place of arbitration, or under the law of the country of enforcement, the agreement is ineffective since it will be unenforceable. When the determination of the arbitrability is entangled in the merits of the dispute, then it is likely to be decided by arbitration.

As mentioned above, certain areas of law are deemed inarbitrable on the ground that they implicate public policy questions that should be decided through the public system of dispute resolution rather than through a private process. An alternative interpretation of the arbitrability issue is that certain issues should be resolved by courts because there are third-party effects that the parties to a transaction will not take into account. It could be argued that there is a need for the establishment of the right of third parties to take part in arbitration voluntarily when their rights are indirectly affected by an award, and so this possibility will attribute to arbitration the authority of a co-equal dispute system.

The presumption of arbitrability could be overcome only by showing that the state intended to preclude arbitration of the particular statutory claim. For instance, the FAA[42] presumption of arbitrability applies to statutory claims arising under federal and state law including, notably, civil rights claims. Are statutory rights forfeited through arbitration agreements? Arbitration involves a substitution of forum and not a waiver of substantive rights[43]. Where a party opts for litigation instead of relying on his/her right to arbitrate under a charterparty, a bill of lading or any other contract, and then suddenly invokes the arbitration clause after engaging in prolonged pre-trial discovery over many months, he/she will often be held to have waived the right to arbitrate, particularly where permitting the overdue recourse to arbitration would unlawfully prejudice the other party. Denying the right to arbitrate in such cases, in effect, forestalls bad-faith conduct[44]. Does courts' intervention call into question the approach that arbitration means substitution of forum? Since courts are involved in every step of the arbitral process, then we

40 Tribunal de commerce Brussels, 20 September 1999, XXV YBCA 673, 2000, 675. *Van Hopplynus Instruments v Coherent Inc*., Nov 16, 2006, C.02.0445.F.

41 *JJ Ryan Inc v Rhone Paulenc* XV YBCA 549, 1990.

42 *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc* 467 U.S. 837 (1984). *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc* 473 U.S. 614 (1985). *EEOC v Waffle House, Inc*., 534 U.S. 279, 295–98 (2002) (stating that although the EEOC was not bound by employee's promise to arbitrate claim under ADA, the employee could be compelled to arbitrate his claim). *Circuit City Stores, Inc. v Adams*, 532 U.S. 105, 114–19 (2001) (holding that the FAA applies generally to employment contracts other than those involving transportation workers). *Gilmer v Interstate/Johnson Lane Corp.,* 500 U.S. 20, 23 (1991) (holding that an ADEA claim could be subject to pre-dispute agreement to arbitrate).

43 In *Mitsubishi*, the Court stated: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

44 *Expofruit S.A. v M/V Aconcagua* 280 F.Supp.2d 374, 2003 AMC 2308 (E.D. Pa. 2003).

have a pseudo-substitution of forum and the establishment of pseudo-independent private dispute resolution process.

Do arbitrators not comply with statutory law? Jackson J in *Kershaw Mechanical Services Ltd. v Kendrick Construction Ltd.*[45] concluded that the arbitrator had come to the right conclusion and he denied he had jurisdiction to review factual questions that are dressed up as questions of law–confirming that arbitrators do apply the law. Michael A. Scodro[46] argues that the potential for injustice in the arbitral resolution of statutory claims, both to the parties and to society more generally, arises when statutory claims raise novel legal questions. Additionally, Paul D. Carrington & Paul H. Haagen argue that: "Commercial arbitration, at least as it is practiced in America, is a method of dispute resolution, but not necessarily a method of enforcing legal rights[47]." By contrast, this author thinks that arbitration by being an independent alternative dispute resolution system, is capable of defending the substantive rights arising from different statutes, taking into consideration that arbitrators are distinguished experts in every field in the same way that judges are. In addition, arbitration is a voluntary method of dispute, and people will disregard an untrustworthy system unable to interpret statutes in a socially acceptable way that brings justice and satisfaction to the society. Arbitrators do comply with statutory law giving their interpretation because in any other case their awards will be void if they are totally outside of the legal principles established nationally and internationally, or against matters that are part of public policy taking into account the international harmonization in enforcing foreign awards. Original legal matters should be examined by arbitrators as well and their view should create precedent applicable to courts in order for courts and arbitration to be co-equal dispute mechanisms. Courts acknowledged that arbitrators are competent to manage complex factual and legal issues without direction or instruction from the court. The Supreme Court in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*[48]. held that arbitration meets the parties' requirements just as well as a court would and arbitrators are as competent as judges, and in so doing shifted the burden to a party seeking to display the inferiority of arbitration. On the other hand, according to the courts, the judicial review of arbitration awards, while limited, is still adequate to guarantee that arbitrators comply with the law[49].

45 [2006] EWHC 727 (TCC). Philip G. Phillips, "Rules of Law or Laissez-Faire in Commercial Arbitration," 47 *Harv L. Rev* 590, 599–600 (1934)("the attention of business has been on arbitration as an escape from the jury method of fact determination and not as an escape from substantive law").

46 Michael A. Scodro, "Note, Arbitrating Novel Legal Questions: A Recommendation for Reform," 105 *Yale L.J.* 1927, 1927–28 (1996).

47 Paul D. Carrington & Paul H. Haagen, "Contract and Jurisdiction," 1996 *Sup. Ct. Rev* 331, 344–45, at 401 (arguing that the Supreme Court's arbitration jurisprudence will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees").

48 473 U.S. 614, 627–28 (1985)

49 *Cole v Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1468–69 (D.C. Cir. 1997) (regarding cases of contracts to arbitrate statutory claims, the court stated it had "assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law").

Statutes have seldom dealt expressly with the subject of non-arbitrability, thus leaving development of the doctrine largely to the courts[50]. In other words, courts formulate the scale of arbitrability and so give space to arbitration. Arbitral tribunals have sometimes invoked "international" public policy as a basis for refusing to exercise jurisdiction[51]. Claims of illegality are based upon national law prohibitions against the arbitration of particular claims. The law of the judicial forum where enforcement of an agreement is sought determines non-arbitrability. Where a claim is allegedly non-arbitrable under foreign law, US courts appear to require that foreign non-arbitrability doctrines satisfy "international" standards[52].

The consensual nature of voluntary arbitration empowers the arbitrators to act with authority stemming solely from the agreement of the parties[53]. Separability, or the autonomy of the arbitration clause, "provides that the agreement to arbitrate is separable from and independent of the main contract[54]". *Kompetenz-Kompetenz* is distinct, empowering the arbitral tribunal to determine whether these very allegations of invalidity encompass the arbitral agreement or not. The doctrine of *Kompetenz-Kompetenz* is recognized in most countries and has made its way into a great number of arbitration laws[55]. While an arbitral tribunal has the primary power to rule on the issue of arbitrability, that does not mean that such jurisdiction is in all circumstances exclusive[56].

50 *Alexander v Gardner-Denver Co* 415 US 36, *Barrentine v Arkansas-Best Inc.*450 US 728.

51 *Shearson v McMahon* 482 US 220, *Rodriuez v Shearson Inc* 490 US 477, *Riley v Kingley Underwriting Ltd* 969 F2d 953, Decision of the Bologna Tribunal on July 18, 1987 XVII *Y.B. Comm. Arb.* 534 (1992). *Georgia Power Co v Cimarron Coal Corp* 526 F2d 101. G.H. Sampliner, "Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin", 11 *Int'l Arb. Rep.* 22 (September 1996); H.G. Gharavi, "The Legal Inconsistencies of *Chromalloy*", 12 *Int'l Arb. Rep.* 21 (May 1997).

52 *Ledee v Ceramiche Ragno* 684 F2d 184.

53 Peter Gross, "Competence of Competence: An English View," 8 *Arb. Int'l* 205, 205 (1992).

54 Tom Carbonneau, "Cases and Materials on Commercial Arbitration" 20 (Adams & Reese Legal Services, 1997).

55 Under German law, which for a long time recognized this concept of binding *Kompetenz-Kompetenz* in relation to the assumption of jurisdiction, the doctrine was abolished with the entry into force of the new arbitration law in 1998. Section 1040(3) ZPO; Lachmann, Handbuch für die Schiedsgerichtspraxis (2nd edn., 2002), para. 467 et seq. BGH (German Supreme Court), Case III ZB 44/01 of 6 June 2002, in (2003) SchiedsVZ (*German Arbitration Journal*) 39. The Supreme Court held that even if the denial of jurisdiction by the arbitral tribunal was incorrect, it did not constitute a violation of the German *ordre public* according to section 1059(2) no.1 lit. (c) ZPO. Consequently the court did not address the finding of the Higher Regional Court concerning the invalidity of the revocation of the arbitration agreement. An error of the tribunal in regard to the denial of jurisdiction is of no concern, as the aggrieved party is referred to its lawful judge.

56 B. Hanotiau, "The law applicable to arbitrability," ICCA Congress Series No 9 Paris 1999, p. 146. B. Hanotiau, *Larbitrabilite* 2002, 296. The arbitral tribunal has jurisdiction to rule on its own *Kompetenz-Kompetenz* subject to review by the courts. (S 592,611 ZPO Austria). Article 592 explicitly provides that the ruling on jurisdiction can be included in the final award or made by a separate arbitral award which then has to be challenged immediately. See C. Koller, N. Tunkel, "An Outline of the New Austrian Arbitration Act Based on the UNCITRAL Model Law," 2006 *Vindobona Journal* 27, *Bailey v Ameriquest Mortgage Co*., 346 F.3d 821, 823–24 (8th Cir. 2003)

Without separability, dilatory tactics would allow parties to use allegations of contract invalidity to delay arbitration until courts ruled on whether a valid contract of arbitration existed. Under separability, the reference to arbitration remains intact, unless the allegations are directed specifically towards the invalidity of the arbitration clause[57]. The importance of separability is recognized throughout the world, including in the US[58].

The judicial concept of separability posits two "virtual" contracts in the place of the one actual contract – the contract governing the substantive rights and obligations of the parties, and a second, separate agreement to arbitrate any disputes, factual or legal, arising out of the underlying contract. Moreover, this second agreement governing arbitration is a clean judicial construct and, as such, is a legal fiction[59] enabling the court to pass legal matters to the arbitrator; which means that the court takes the initiative to allow the arbitrator to deal with the dispute and so despite the parties' agreement to arbitrate, the arbitral tribunal seems not to be able to act primary and entirely with the dispute. For instance, in *Sphere Drake Ins. Ltd. v All Am. Ins. Co*[60]. the court held that "as arbitration depends on a valid contract, an argument that the contract does not exist can't logically be resolved by the arbitrator". In the US, when courts do rule on the issue of

(reversing the district court's denial of arbitration based on a cost challenge because such questions of arbitrability were for the arbitrator under the parties' agreement).

57 *Denney v BDO Seidman*, L.L.P., 412 F.3d 58, 67–68 (2nd Cir. 2005). If a contract is "void," a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically; if a contract is "voidable," the party must show that the arbitration clause itself is unenforceable. *Fiona Trust & Holding Corporation & ors v Yuri Privalov and ors*, [2007] EWCA Civ 20, 24 January 2007, Reversing: [2006] EWHC 2583 (Comm), 20 October 2006. The Court of Appeal confirmed that, as a consequence, a matter affecting the validity of the contract has no effect on the arbitration clause unless the arbitration clause is itself directly impeached. According to the Austrian Supreme Court (decisions of 6. 9. 1990, 6 Ob 572/90, RdW 1991 327, 22. 9. 1994, 2 Ob 566/94, ZfRV 1995 35, 17. 4. 1996, 7 Ob 2097/96z, RdW 1997 135, 10. 4. 2003, 8 Ob 24/03t and 19. 2. 2004, 6 Ob 151/03d, SchiedsVZ 2005 53), an unilateral cancellation or termination of an arbitration agreement or of a contract with an arbitration clause has no impact on the arbitration agreement or on the arbitration clause. The arbitration clause relative to the arbitration agreement shall remain valid and the agreed arbitrator shall be competent for all disputes in regard to the contract including all disputes in regard to its cancellation or revocation.

58 *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that under section 4 of the FAA, though the main contract never came into existence or was voided, the arbitral tribunal may exercise jurisdiction as long as the existence, validity, and enforceability of the arbitration agreement itself is not in dispute). See Austrian ZPO Article 592 (3). Even while a request for the setting aside of an arbitral award with which the arbitral tribunal accepted its jurisdiction is still pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

59 Stephen J. Ware, "*Arbitration and Unconscionability after Doctors' Associates v Cassarotto*," *31 Wake Forest L. Rev.* 1001, 1010–11 (recognizing that separability is both fictional and the only major deviation from contract law principles in the Supreme Court's arbitration jurisprudence). S. Ware, "Employment Arbitration and Voluntary Consent," 25 *Hofstra L. Rev.* 83, 135–138 (concluding that separability is inconsistent with a "contractual" approach to arbitration, because it does not allow policing for voluntary consent to arbitration.)

60 256 F.3d 587, 591.

Kompetenz-Kompetenz, it is referred to as an issue of who decides the arbitrability of the case. The acute influence of the arbitrability question on the rights of parties opposed to arbitration requires judicial resolution of the issue. Under the FAA, the courts may intervene in response to a motion to stay concurrent court proceedings. Similarly, the courts may be faced with the arbitrability issue under a motion to compel a party to arbitrate under section 4 of the FAA. Furthermore, the courts may contemplate the arbitrability issue after a final decision of the arbitral tribunal under a motion to vacate the award in accordance with section 10 of the FAA.

The US Supreme Court specified that: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator[61]." The issue of whether a party entered into an arbitration clause in the first place is for the court to decide[62]. Moreover, the Supreme Court in *Howsam v Dean Witter Reynolds, Inc*[63], explained that not all "arbitrability" issues are deserving of the *AT&T* presumption that they are for the court to decide; and so "procedural" questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide. The issue is that parties seldom have a preconceived notion about which arbitrability questions should be arbitrable. Therefore, matters of the kind of arbitration proceedings the parties agreed to concerns contract interpretation and arbitration procedures which arbitrators are well situated to decide[64]. Hence, contract interpretation and arbitration procedures are decided by arbitrators rather than courts. It cannot be said that there is a category of arbitrability questions that, a priori, "should" be decided by a court rather than an arbitration panel, which means that courts will probably come to decide in case by case circumstances, examining the facts of every case and deciding on the jurisdiction of a court or arbitrators to deal with a matter related to arbitrability. In fact, the question of what claims are and are not arbitrable is a widespread cause of disputes in commercial cases – one that is repeatedly raised in court even before the arbitration has begun. In contrast, recent decisions in the US and England appear to allow the parties to empower the tribunal to decide with binding effect on the courts[65].

61 *AT&T Technologies, Inc. v Communications Workers*, 475 U.S. 656 (1986).

62 *First Options of Chicago, Inc. v Kaplan* 514 U.S. at 944–45 (1995).

63 537 U.S. 79 (2002).

64 *Green Tree Financial Corp. v Bazzle* 123 S.Ct. 2402 (2003).

65 For the US *see First Options of Chicago v Manuel Kaplan and MK Investment, Inc.* (115 S.Ct. 1920, 1943 (1995)); Park, "The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Has Crossed the Atlantic?" in (1996) 12 *Arb. Int.* 137, at p. 143 *et seq. See* for England: *LG Caltex Gas Co. Ltd and Contigroup Companies Inc. v China National Petroleum Co. and China Petroleum Technology and Development Corp.* [2001] EWCA Civ 788 and [2001] 1 W.L.R. 1892 at [13], where the Court of Appeal overruled the High Court which had assumed an ad hoc agreement to empower the tribunal to make a final decision on its jurisdiction, holding that such a second arbitration agreement should only be assumed if the parties explicitly said so. Otherwise it is only a recognition of the tribunal's general power to decide on its own jurisdiction.

Arbitrability refers firstly to the specific dispute of the parties and secondly whether the disputes arising out from specific relations can be arbitrated. Disputes outside the scope of the parties' arbitration clause cannot be referred to arbitration and so there is no arbitrability, although the subject in general is arbitrable. The analysis shows that certain matters specified by the national law are non-arbitrable mainly based on the public policy of a country. This is not mutually acceptable in every state, because the term of "public policy" does not have the same meaning in all countries and there is a need for an international approach regarding the meaning of the term "public policy" related to arbitration. Regardless of the arbitrability of the subject matter in general, the parties' agreement for the arbitrability of a dispute is necessary. It could be argued that the term "arbitrability" has two frameworks which in fact remind homocentric cycles which coexist. If there is no state prohibition about the arbitrability of a disputes then the homocentric cycle of the arbitrability established by parties' agreement cannot be outside the one referring to the general arbitrability established by the state's power. On the other hand, our analysis has shown that courts, instead of allowing the arbitral tribunal to deal exclusively with the matter, in many cases examine the arbitrability of a dispute which shows the degree of courts' involvement in arbitration.

3 The arbitration agreement

Can all parties be compelled to arbitrate their disputes? An agreement by the parties to submit to arbitration any disputes or differences between them, is the foundation of arbitration[66]. The FAA forbids federal courts from applying state statutes and decisions which limit arbitration agreements[67]. Thus, the court may not impose arbitration on a party who has not agreed to be subject to it[68]. Moreover,

66 *Manhattan Construction Company v Rotec Inc. 905* F Sup 1142, *Paine Webber Inc v Charles Landay* 903 F Sup 193, 9 US 2 Article 867 CCP of Greece, Article 1676–77 Code Judiciaire Belge. S 6 1996 ACT. *Laurentienne-vie (La), compagnie d'assurance Inc. c. Empire (L'), compagnie d'assurance-vie* [2000] R.J.Q. 1708 (C.A.) (resort to arbitration is a fundamental right and constitutes an expression of the parties' contractual freedom). Amy J. Schmitz, "Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith," 56 *Depaul L. Rev.* 55 (2006) (critiquing ambiguity regarding enforceability of ADR agreements, and proposing that courts use implied duties of good faith to properly enforce them).

67 *Houlihan v Offrman*, 31 F3d 692, *Prudential Securities Inc v Emerson*, 905 Fsup 1038, *Doctor's Association v Casaroto*, 134 Led2d 902.

68 *Fleet Tire Service v Oliver Rubber Corp* 118 F3d 619. It is a characteristic of the view of the Italian Supreme Court that parties can use or not, their arbitration agreement to solve their dispute. According to the Supreme Court of Italy (*Corte di Cassazione*), when drafting an arbitration agreement, the parties determine that, if a dispute arises, the interested party has a right – not an obligation – to set the arbitration in motion. Thus, the arbitration agreement establishes an *opportunity* for the claimant to obtain an award by commencing arbitral proceedings. The Court described this opportunity as an option. Such an option recognizes the parties' final will to choose arbitration to settle their disputes but it does not imply any obligation to exercise this right. Therefore, the Court ruled that the parties are not required, when drafting an arbitration agreement,

arbitration is a matter of consent, not coercion, and the parties are generally free to structure their agreement as they see fit[69]. Article 1676 of the BJC provides that a person who has the capacity or is empowered to compromise may conclude an arbitration agreement for any dispute that has arisen or may arise out of a specific legal relationship for which it is permissible to compromise. Thus, only if the parties agree to arbitrate will arbitration be an acceptable forum for dispute settlement. Therefore, it is of utmost importance that the intent of the parties be clear. As a delaying tactic, parties resisting arbitration often challenge the validity and/or scope of the arbitration agreement they have signed. It is worth mentioning that the English Commercial Court ruled, in a decision dated 13 October 2004, that an arbitration agreement need not be mutual. Thus, a one-sided option to arbitrate is enforceable. The court found that if an arbitration clause gives one party "better" rights in the form of an arbitration option, the advantaged party has the right to exercise that option by seeking a stay of court proceedings commenced by the other side. However, if the advantaged party takes a step in the court action or leads the other party to believe that it will not exercise its arbitration option, it may be deemed to have waived its right to arbitrate[70].

The arbitration agreement can not only specify the substantive law but also choose to use or modify existing procedural rules and link them to an established body of law[71]. Consequently, a prudently drafted arbitration clause allows the parties to abolish costly and time-consuming disputes, which will help the parties make reality one objective in choosing arbitration – efficiency[72]. Arbitration is a creature of contract, and parties can add procedures that copy those obtainable in litigation, adding expense and forfeiting finality and so making arbitration too costly for non-commercial litigants[73].

to use any terms expressing an 'obligation to arbitrate'. *Soc. Vigel v Soc. China Int'l Machine Tool Corp., Case No. 6947.*

69 *Goodwin v Ford Motor Credit* 970 Fsup 1007.

70 *Three Shipping Limited v Harebell Shipping Limited* [2004] EWHC 2001 (Comm).

71 *Prudential Securities, Inc. v Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996) (court vacates the arbitration award and finds that the arbitration panel is guilty of misconduct and exceeded its powers in refusing to hear pertinent evidence by deciding the case without a hearing).

72 *Baravati v Josephthal*, *Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (noting parties may stipulate to whatever procedures they want, "short of authorizing trial by battle or ordeal or, more doubtful, by a panel of three monkeys"). *LaPine Tech. Corp. v Kyocera Corp*., 130 F.3d 884, 888 (9th Cir. 1997) (holding court must honor arbitration agreement under which parties agreed to standard of judicial scrutiny exceeding that allowed by the FAA). *Gilmer v Interstate/Johnson Lane Corp*., 500 U.S. 20, 31 (1991) (conceding that arbitration procedures limit discovery). Richard Delgado, *et al.,* "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution," 1985 *Wis. L. Rev.* 1359, 1388 (noting that informal procedures expose minorities to biases of decision-makers).

73 *Caley v Gulfstream Aerospace Corporation*, 428 F.3d 1359 (11th Cir. 2005) (Arbitration of claims under the FAA should provide the parties with some measure of confidence that the resolution of their dispute will be less costly and less time-consuming than resolving matters in the courts). Jeffrey W. Stempel, "A More Complete Look at Complexity," 40 *Ariz. L. Rev.* 781, 826 (1998) (discussing how an arbitrant can increase the cost of arbitration by being continually unavailable for the limited window of hearing dates established by the arbitrator(s) and how most arbitrators allow

The national laws simply give effect to the parties' agreement and do not in themselves compel arbitration and the parties' arbitration agreement is based upon the national law[74]. The national laws create uniform, national standards for the validity of arbitral agreements and perhaps their enforcement, leaving to party choice the remaining terms, such as the process of arbitration and standards of decision. Courts have refused to enforce arbitration agreements where the arbitration procedures are grossly unfair and one-sided[75].

There must be written evidence of the agreement to arbitrate. The requirement of writing is to be found both in international treaties and in national law. In fact, agreement in writing is sufficient for enforcement as an agreement to arbitrate disputes need not be signed or subscribed by parties[76]. A submission agreement can take the form of a brief agreement to submit an existing dispute to the procedures of an arbitral institution. It could be argued that arbitration clauses in "point and click" electronic contracts are enforceable, notwithstanding the FAA (9 U.S.C. 4) requirement of a "written" agreement. Courts have held that the parties' acceptance – either orally or by conduct – of an unsigned, written contract containing an arbitration clause satisfies section 2 of the FAA[77]. Exchange of written submissions in court proceedings in which an oral agreement is alleged by one party and not denied by the other party in his response constitutes an agreement in writing[78].

the delay "[u]nless the foot-dragging is blatantly obvious."); Monica L. Warmbrod, "Comment, Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?," 27 *Cumb. L. Rev.* 791, 796 (1997) ("If the arbitrator grants broad discovery similar to that permitted by the rules of civil procedure, the costs skyrocket and the benefit of [arbitration] as a low-cost solution may disappear.").

74 Stephen J. Ware, "'Opt-in' for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act," 8 *Am. Rev Int'l Arbi.* 263 (1997) (asserting that parties can specify extrastatutory grounds for judicial review of arbitral awards, such as for consistency with "public policy," since judicial function in arbitration cases is to effectuate parties' agreement). Margaret M. Harding, "The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process," 77 *Neb. L. Rev.* 397 (1998) (arguing that to create legitimacy for arbitration in contracts of adhesion, either the FAA must be amended to require notice of arbitration clauses, states must amend contract law to allow consensual defenses, or arbitration service providers can refuse to administer arbitrations that do not meet minimum requirements).

75 *Hooter of America, Inc. v Phillips*, 173 F.3d 933 (4th Cir. 1999); *Floss v Ryan's Family Steak Houses*, 211 F.3d 306 (6th r. 2000).

76 *Ocean Industries Inc. v Soros Associates* 328 F Sup 944.

77 Imptex International Corp. v lorprint Inc. 625 FSupp 1572.

78 See *Dew Group Ltd v Costain Building and Civil Engineering Ltd* (1996) *The Times*, 20 December 1996. The court held that the parties had agreed upon a person who might be approached to act. Once that had happened the agreement was binding and the declaration sought by the plaintiffs would accordingly be granted. Linea Naviera de Cabotaje, *C.A. v Mar Caribe de Navegacion*, C.A. 169 F. Supp. 2d 1341 at p 1346, 2001 *AMC* 2756 at p 2760 (M.D. Fla. 2001). Bills of lading are "standard form contracts" rather than "contracts of adhesion", which latter, as in the case of a train ticket or an automobile parking ticket, have no words or terms added to them. *Sun Oil v Fotini Carras* 1981 AMC 1554 (E.D. Penn. 1980). A bill of lading is a "standard-form" contract being a printed form, to which the carrier usually adds the specific details of the particular shipment. The shipper, in consequence, has little occasion to negotiate the bill of lading terms. In *Kahn Lucas*

Most new laws of arbitration define the requirements for writing as widely as possible. For instance, the English 1996 Act, where "writing" includes an agreement made orally provided that there is reference to a written form which itself contains an agreement to arbitrate. An oral agreement to written terms that contain an arbitration agreement is sufficient. Moreover, there is no express reference to the need for writing, but it is made clear by section 5.1 that the legislation applies only to an arbitration agreement which is in writing. An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement (section 5(4)). Thus, an oral agreement could become an agreement in writing by being recorded at any stage. What constitutes writing? An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another and not denied by the other in his response constitutes an agreement in writing to the effect alleged (section 5(5)). To that extent article 1677 of the BJC specifies the need for a written agreement in a broad sense.

The obligation to arbitrate is distinct and will not be carried by general words of incorporation unless the wording and intention are clear[79]. On the other hand, the strict reference to the written form of the agreement is bypassed when the parties voluntarily take part in the arbitration procedure[80]. Only the non-existence of a written agreement is repaired and not the void of the agreement for an other reason[81]. Taking part in arbitration does not mean that the inability to conclude an arbitration agreement or the non-existence of any arbitration agreement is repaired. It could be said that the writing is still *ad solemnitatem* for the conclusion of an arbitration agreement and so a security policy containing an arbitration clause signed by both parties (Article 160 CC) qualifies as a written agreement for the commencement of a valid arbitration[82]. Hence, in case of disagreement, a security policy containing an arbitration clause and not signed by both parties is not considered to be a legal arbitration agreement because the writing is *ad solemnitatem* for the conclusion of an arbitration agreement needed to be signed by both parties according to Article 158, 159§1, 160 CC and 447 CCP[83]. There is no need for a signature if the arbitration agreement is concluded before a court and the arbitration agreement is included in the court's record signed by the judge (870§2 CCP). If the arbitration agreement is concluded before a judge, then it must

Lancaster, Inc. v Lark International, Ltd. (2nd Cir. 7/29/99). The US Court of Appeals for the Second Circuit declined to enforce an arbitration clause under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where the clause was on a purchase order that was not signed by the party who was resisting arbitration.

79 *Jardine Birshe Ltd v Cathedral Works Ltd* [1996] ADRLN 14. Final Award in Case No. 6784 (1990) *reprinted in* ICC International Court of Arbitration Bulletin, vol. 8/no 1 (May 1997) at 53. Request for arbitration sent by facsimile is permitted under Article 3 of the ICC Rules.

80 Supreme Court 1143/74 23 NV 642, Supreme Court 1481/77 26 NV 1194.

81 Supreme Court 844/84 34 Armenopoulos 979.

82 Court of Appeal of Athens 3259/1999, 2000 NV 1421.

83 Court of Appeal of Athens 168/2004 2004 DEC 569. Supreme Court 550/96 39 HD 549.

be signed by the parties as well. The need for a written agreement for reference to arbitration is established in the systems being examined. Arbitration agreements must also be in writing by virtue of most arbitration statutes[84] as well.

Is there a divergence or convergence regarding the signature? There is a divergence regarding the need for a signed document by both parties in order to have a valid arbitration agreement. English and US law accept written documents, and writing is considered to be necessary for a valid arbitration agreement. The EAA 1996 states that there is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties (section 5.2.a). Without the signature, however, it may be more difficult to prove that the party against whom it is invoked consented to it. They converge in the need for a written agreement. It could be argued that the signatures are necessary as long as, according to the applicable law and the national laws, it is compulsory for the legitimacy of the written parties' agreement. When an agreement is oral, the contract will be valid. Nevertheless, the oral agreement to arbitrate is not enforced under the US Arbitration Act. Moreover, Article 1677 of the BJC seems to exclude an oral arbitration agreement but there are different views. Hence, an oral arbitration agreement is valid in Greek law and even in Belgian law, but the 1996 Act and the FAA are not applicable when there is an oral arbitration agreement.

84 According to Italian CCP Book Four *Article 807* the assent to arbitration shall be made in writing and shall designate the subject matter of the dispute and the written form requirement is considered complied with when the intent of the parties is expressed by telegram or telex. Austrian CCP, 4th Chapter Article 583. The arbitration agreement must be in writing or be contained in telegrams, telexes or in electronic representations exchanged by the parties. Netherlands CCP – Book Four Article 1021 – Form of Arbitration Agreement–The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. France – CCP Article 1443. An arbitration clause to be valid shall be in writing and included in the contract or in a document to which it refers. *Chambre Arbitrale Maritime de Paris,* sentence no. 531, March 29, 1984, DMF 1985, 115; *Cour d'Appel de St. Denisde-la Réunion,* November 29, 1985, DMF 1986, 471. *Zodiak International Productions Inc. v Polish People's Republic* [1983] 1 S.C.R. 529 (to be valid under Quebec law, an undertaking to arbitrate has to be evidenced in writing and has to mention explicitly that the arbitration process envisaged is mandatory, final and binding). Commercial Arbitration Act R.S., 1985, c. 17 (CA) *Article 7* "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties". In the UK, the EAA 1996, U.K. 1996, c. 23, whereby there is an agreement in writing if it is made in writing (whether or not it is signed), or by exchange of communications in writing or evidenced in writing (sections 5(2)(a), (b) and (c)). Thus faxes, telexes and e-mails are included, because "in writing" means recorded by any means (section 5(6)). An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement (section 5(4)). An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in their response constitutes as between those parties an agreement in writing to the effect alleged (section 5(5)). By section 6(2), the reference in an agreement to a written form of arbitration clause or to a document containing such a clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

It is recommended that parties insist on written evidence (traditional paper or electronic form) signed (traditional signature or electronic signature in the case of e-contracts) by both parties in order to avoid the complete process for evidencing the conclusion of the written agreement/contract according to the applicable law.

Arbitration agreements are in essence a type of forum selection agreement that attempts to avoid many of the problems related to jurisdiction. The legitimacy of the arbitration process – and any comparative advantage that it may possess over litigation – may be weakest when arbitrators attempt to follow national courts in laying down disputed legal norms[85].

Historically, arbitration clauses were treated as separable parts of the contract, although such treatment generally meant the agreement was being deprived of its efficacy[86]. All contracts containing arbitration clauses actually constitute two agreements: the underlying business transaction and a separate, independent agreement to arbitrate[87]. As mentioned earlier, an arbitration agreement is a distinct legal obligation and the principle of separability was recognized by English law and was given statutory force by section 57 of the 1996 Act[88]. Additionally, Article 1697§ 2BJC indicates that the nullity of the contract does not automatically entail the nullity of the arbitration agreement. Moreover, an arbitration agreement may be spelt out in the main contract, as an arbitration clause, or it may be set down in a separate "submission to arbitration". Principally a foreign arbitration clause in

85 L. Sayre, "Development of Commercial Arbitration Law," 37 *Yale L.J.* 595, 615 (1928)("arbitration works much more cheaply and quickly when the arbitrators confine themselves to their specialty, that of passing on technical questions of fact in modern business"). Philip G. Phillips, "Rules of Law or Laissez-Faire in Commercial Arbitration," 47 *Harv L. Rev.* 590, 599–600 (1934)("the attention of business has been on arbitration as an escape from the jury method of fact determination and not as an escape from substantive law"); *Paul Wilko v Swan*, 346 U.S. 417, 435 (1953)(customer's claim under the Securities Act was not subject to predispute arbitration agreement; "determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved," but findings must be made by the arbitrators "without judicial instruction on the law"). *Mott v Gaer Bros., Inc.* 174 A.2d at 552 ("Arbitration presupposes a quasi-judicial hearing with witnesses, oaths, and the taking of testimony"); *Jacob v Seaboard, Inc.,* 610 A.2d at 192. (As a "quasi-judicial proceeding" arbitration "is adversarial in nature, and implies that the parties will present witnesses and evidence, if they want, after notice of a hearing date, and argue their positions to an impartial decision maker".) *Sutcliffe v Thackrah*, [1974] A.C. 727, 759 (H.L.) ("Judges and arbitrators have disputes submitted to them for decision. The evidence and the contentions of the parties are put before them for their examination and consideration … None of this is true about the valuer or the architect who were merely carrying out their ordinary business activities") (Lord Salmon). *Salt Lake Tribune Publishing Co.,* 390 F.3d at 690 ("[p]arties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA").

86 *Hamilton v Home Insurance* 137 US 370; *Crester Ltd v Carr* [1987] 2 FTLR 135; G. Oikonomopoulos, "Independence of the Arbitration Agreement," 5 Diki 691. Supreme Court 1425/1999 2001 DEC 405. Supreme Court 877/2000 2001 DEC 408. Italian CCP Book Four Article 808 the parties may ascertain, in their contract or in a detached document, that the disputes arising out of the contract be decided by arbitration, provided such disputes may be the subject of a submission to arbitration.

87 *Prima Paint Corp. v Flood & Conklin Mfg*., 388 U.S. 395, 402 (1967) ("arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded").

88 *Harbour Assurance Ltd v Kansa Insurance Ltd* [1993] 1 Lloyd's Rep 455.

a contract such as a bill of lading contract or a charterparty acceptably incorporated into a bill of lading contract, benefits from a *prima facie* presumption of validity and enforceability[89] affirmed in *Vimar Seguros y Reaseguros v M/V Sky Reefer*[90], where the US Supreme Court upheld a Tokyo arbitration clause in a bill of lading covering a shipment from Morocco to the US, largely on the basis of the US FAA and the public policy it embodied promoting arbitration of international commercial disputes[91]. Reference to an arbitration clause, which is contained in another written agreement of the parties, should be specific[92]. A clause can qualify as an arbitration agreement even though it does not provide for immediate reference to arbitration[93]. As mentioned earlier, the courts have similarly held that the illegality of part of the contract does not nullify an agreement to arbitrate. Nor does the alleged breach or repudiation of the contract preclude the right to arbitrate[94].

An arbitral tribunal can exercise such powers as the parties are entitled to confer and do confer upon it. Thus, it is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal. The parties are masters of the arbitral process to an extent impossible in proceedings in a court of law. It must be taken into consideration that an arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate the specific disputes but also is the basic source of the powers of the arbitral tribunal in the analysed systems.

Who interprets the clause? Does the arbitrator decide on the existence of a valid arbitration agreement between the parties? Arbitration agreements are no more than contracts to which usual rules of contract interpretation apply. In interpreting any contract, the court must be confident that the contract is not ambiguous. The court will not resort to rules of construction where the intent of the parties is

89 *M/S Bremen v Zapata Off-Shore Co.* 407 U.S. 1 at p. 10, 1972 AMC 1407 at p. 1414 (1972), on which *The Sky Reefer* decision was very largely based; and many other more recent decisions on foreign forum selection clauses, including *Mitsui & Co. v Mira M/V* 111 F.3d 33 at p. 35; 1997 AMC 2126 at p. 2127 (5th Cir. 1997); *Asoma Corp. v M/V Southgate* 2000 AMC 399 at p. 400 (S.D. N.Y. 1999); *Allianz Ins. Co. of Canada v Cho Yang Shipping Co., Ltd.* 131 F. Supp.2d 787 at p. 790, 2000 AMC 2947 at p. 2950 (E.D.Va. 2000); *Tokio Marine & Fire Ins. Co. v M/V Turquoise* 2001 AMC 1692 at p. 1694 (D. S.C. 2001); *Hartford Fire Ins. Co. v Novocargo USA Inc.* 2002 AMC 314 (S.D. N.Y. 2002).

90 515 U.S. 528, 1995 AMC 1817 (1995).

91 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 at p. 638 (1985), concerning the need for national courts to "'shake off the old judicial hostility to arbitration' (*Kulukundis Shipping Co. v Amtorg Trading Corp.* 126 F.2d 978, 985 (2nd Cir. 1942)), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal"; and also citing *Scherk v Alberto-Culver Co.* 417 U.S. 506 at p. 516 (1974): "A parochial refusal by the courts of one country to enforce an international arbitration agreement" would frustrate "the orderliness and predictability essential to any international business transaction".

92 Supreme Court 553/79 27 NV 1595, Supreme Court 238/78 35 EEN 446.

93 *Channel Tunnel Ltd v Balfour* [1993] 1 All ER 664. *The Messiniaki Bergen* [1983] 1 All ER 382. G. Oikonomopoulos, *Independence of the Arbitration Agreement*, 5 Diki 691. Supreme Court 1425/1999 2001 DEC 405. Supreme Court 877/2000 2001 DEC 408.

94 *Wilko v Swan*, 201 F2d 439.

clear and unambiguous. Besides, silence or ambiguity with respect to whether a particular claim is within arbitration agreement is interpreted in favor of arbitration. For instance, if the arbitration agreement falls within the scope of the FAA, the court must engage in two-part inquiry to ascertain whether a dispute is arbitrable before it and it orders the parties to proceed with arbitration. The court cannot expand the parties' agreement to arbitrate even in the interest of preventing piecemeal litigation. An arbitration clause should be enforceable even if the dispute is over validity of a contract containing such a clause. A choice of law provision will not be construed to impose restrictions on parties' rights.

Is the existence of a valid agreement containing an enforceable arbitration provision a question reserved for the court?[95] Unless the parties explicitly provide otherwise, it is argued that the court, rather than the arbitrator, determines whether the parties agreed to arbitration[96]. In the US the Supreme Court establishes that certain aspects of arbitration are the main area where courts have the authority to interpret and establish precedent[97]. The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts[98]. In *Green Tree v Bazzle*[99] Justice Stevens' interpretation of the parties' agreement is to be made in the first instance by the arbitrator, rather than the court[100]. The validity of the arbitration clause is not primarily dependant on the validity of the main contract in which the clause is incorporated. The arbitrator decides on the validity of the main contract incorporating the arbitration clause[101]. By contrast, in the same case it is stated that the court examines the validity of the arbitration clause when there is a lawsuit before the court for the voidance of the arbitration clause. Therefore, the validity of an arbitration clause can be examined both by the arbitral tribunal and the court. It could be argued that if a court has examined the validity of an arbitration clause then there is a *res judicata* (precedent) and

95 *Pollux Marine Agencies v Louis Dreyfs Corp*. 455 F Sup 211, *IDS Life Ins. Co. v SunAmerica Life Ins. Co.* 136 F3d 537.

96 *Thomas v A Baron Co.* 967 Fsup 783. *Green Tree Fin. Corp. v Randolph*, 531 U.S. 79, 91 (2000) (declining to invalidate arbitration agreement based on speculative evidence of its high costs, which "would undermine the 'liberal federal policy favoring arbitration"' *Asplundh Tree Expert v Bates*, 71 F.3d 592, 600 (6th Cir. 1995).

97 *John Wiley & Sons v Livingston* 376 U.S. 543.

98 *Major League Baseball Players Assn. v Garvey,* 532 U. S. 504, 509–510 (2001). *Perry v Thomas*, 482 U.S. 483 (1987) (preempting state statute that prohibited arbitration in wage disputes). *Red Cross Line v Atlantic Fruit Co*., 264 U.S. 109, 120–21 (1924). ("In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced …. If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress.").

99 *Green Tree Financial Corp. v Bazzle*, 123 S.Ct. 2402 (2003).

100 *Howsam v Dean Witter Reynolds, Inc.,* 537 U. S. 79 (2002). A parties' debt-restructuring agreement is "a contract evidencing a transaction involving commerce" within the meaning of the FAA. 9 U.S.C. §2. *The Citizens Bank v Alafabco, Inc.* laws.findlaw.com/us/000/02-1295.html. In *Telectronics Pacing Systems Inc. v Guidant Corp*,143 F.3d 428 (8th Cir. 1998).

101 Court of Appeal of Piraeus 702/2003 2004 DEC 936, Court of Appeal of Piraeus 923/2003 2004 DEC 566.

the arbitral tribunal does not examine the validity of the arbitration clause. In other words, the court also decides about its jurisdiction to deal with the dispute and consequently the jurisdiction of the arbitral tribunal in which the dispute is referred. The parties before the beginning of the arbitral process can ask the court to examine the existence of a valid arbitration agreement[102]. Lord Diplock[103] indicated that the arbitrator must determine the proper law of the contract and apply that proper law to the interpretation of the arbitration clause. Where there is not a different agreement contained in the contract, the arbitrators can decide about their jurisdiction and the arbitrability of the dispute[104]. In Belgian law the judge declares that he has no jurisdiction after he/she has examined the validity of the written arbitration agreement, but Article 1697 clarifies that the arbitral tribunal can examine its jurisdiction with a right of a party to challenge the jurisdiction of the tribunal before a court. On the one hand, the parties with their agreement decide about the above-mentioned matters. On the other hand, it seems that courts have a supervisory role, which fundamentally authorizes and validates arbitration agreements[105]. Moreover, courts have not regarded the FAA as comprehensively listing the remedies available to enforce arbitration agreements, but have used the FAA's policy objectives as a mandate to acquire alternative remedies[106]. According to *Amy J. Schmitz*[107] "the same pro-arbitration impulses that have driven expansion of arbitration are also fuelling courts' misapplication of arbitration remedies, which actually dilutes the significance of arbitration and threatens the integrity of the functional scheme underlying arbitration statutes."

The conclusion of an arbitration agreement means that the courts have no jurisdiction to deal with the differences referred to arbitration. Enforcing a private commitment to pursue out-of-court settlement should not have to go forward encumbered with all the trappings of full-scale litigation[108]. The law

102 Supreme Court 91/93 1996 Dikaio of Enterprises and Companies (DEC) 781. Arios Pagos 1561/1998 1999 DEC 793. K. Kerameus, "The examination of an arbitration agreement by state courts while arbitration pending," 1989–90 RHDI 42. If a party raises the objection of submission of a case to arbitration during the first hearing (Article 263 CCP), the court will refer the case to the private jurisdictional authorities (Article 264 CCP).

103 *The Morviken* [1983] 1 Lloyd's Rep. 1 at pp. 7–8 (H.L.).

104 Court of Appeal of Athens 3057/93 1996 DEC 782.

105 *Prima Paint Corp v Flood Cocklin* 388 U.S. 395, 9 U.S.C 4.

106 *Borden, Inc. v Meiji Milk Products Co*., 919 F.2d 822 (2nd Cir. 1990).

107 *Amy J. Schmitz*, "Ending a mud bowl: defining arbitration's finality through functional analysis," 2002, *Georgia Law Review*, Vol. 37:123, p. 124.

108 *O.R. Securities, Inc. v Professional Planning Associates, Inc*., 857 F.2d 742 (11th Cir. 1988)(the filing of a complaint, which could "develop into full scale litigation, with the attendant discovery, motions, and perhaps trial," is not appropriate); *Moses H. Cone Memorial Hosp. v Mercury Construction Corp.*, 460 U.S. 1, 22 (1983)(stays under §3 and orders to compel under §4; the Act envisages that judicial decisions will be made after "an expeditious and summary hearing, with only restricted inquiry into factual issues"). *Health Services Management Corp. v Hughes*, 975 F.2d 1253 (7th Cir. 1992)(motion to vacate award under § 10; a court is not "obligated to give all the due process owed to parties filing actions of a civil nature and deserving of Federal Rule 16 treatment, e.g., a scheduling conference, hearings, etc."); *Jack B. Anglin Co., Inc. v Tipps*,

of arbitration apparently emphasizes individual responsibility and accountability when it provides that arbitration agreements will be enforced as written, reducing the role of the state and the prospect of state regulation[109]. Courts refuse to enforce arbitration agreements by finding them unconscionable under state contract law[110]. It has to be taken into account that *Carbajal v H&R Block Tax Servs., Inc*[111]., held that: "The cry of 'unconscionable!' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication." Has practice proven that arbitration is a second-class dispute system?

In the US, there are four basic conditions of enforceability of an arbitration agreement under the NYC as enacted in the FAA[112]: (1) the agreement must be in writing to arbitrate the subject of the dispute; (2) the agreement must provide for the dispute to be arbitrated in the territory of a signatory to the Convention; (3) the agreement must arise out of a legal relationship, whether commercial or not, which is considered as commercial; and (4) at least one party to the agreement must *not* be an American citizen, or else the commercial relationship must have

842 S.W.2d 266, 268–69 (Tex. 1992)(state law; the trial court could "summarily" decide whether to compel arbitration "on the basis of affidavits, pleadings, discovery, and stipulations").

109 *Volt Info. Sciences v Bd. of Tr. of Leland Stanford Junior Univ*., 489 U.S. 468, 500 (1989). *Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (holding that the arbitral award should have been enforced as within the scope of the contract between the parties). (Courts are bent on the enforcement of agreements rather than giving effect to the parties' freedom of contract.) Courts often turn a blind eye to the unilateral and adhesionary character of arbitration agreements.

110 *Walker v Ryan's Family Steak Houses, Inc*., 400 F.3d 370, 383–84 (6th Cir. 2005) (mutual assent lacking); *Broemmer v Abortion Services of Phoenix, Ltd*. 840 P.2d 1013, 1016–17 (Ariz. 1992) (reasonable expectations under an adhesion contract preclude enforcement of arbitration agreement); *Cheek v United Healthcare of Mid-Atlantic, Inc*., 835 A.2d 656, 661–62 (Md. 2003) (lack of mutuality precludes enforcement of arbitration clause); *cf. GreenPoint Credit, LLC v Reynolds*, 151 S.W.3d 868, 875 (Mo. App. S.D. 2004) (reasonable expectations regarding mutuality of exception to arbitration agreement preclude enforcement to the extent not mutual).

111 372 F.3d 903, 906 (7th Cir. 2004).

112 *Maranan v LMS Ship Management, Inc.* 2003 AMC 42 (E.D. La. 2002). *Federico v Charterers Mut. Assurance Ass'n Ltd.* 2002 AMC 475 at p 481 (E.D. Pa. 2001): "The [New York] Convention governs the enforcement of arbitration agreements arising out of maritime contracts when at least one of the parties to the contract is not an American citizen." See also *Brier v North Star Marine, Inc.* 1992 AMC 1194 at p 1203 (D. N.J. 1993): "The legislative history of §202 makes it clear that where the matter is solely between citizens of the United States it will fall outside the Convention unless there is a reasonable relation with a foreign state." *Cargill International S.A. v M/T Pavel Dybenko* 991 F.2d 1012 at p 1018, 1994 AMC 2258 at p 2265 (2nd Cir. 1993), requiring that the legal relationship under 9 U.S.C. 202 be "… not entirely domestic in scope", and citing *Ministry of Defense of the Islamic Republic of Iran v Gould, Inc*. 887 F.2d 1357 at p 1362 (9th Cir.1989), cert. denied, 494 U.S. 1016 (1990). *US Titan, Inc. v Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 146 (2nd Cir. 2001) ("Arbitration agreements subject to the Convention are enforced in accordance with Chapter 2 of the FAA."). *Intergen N.V v Grina*, 344 F.3d 134, 142 (1st Cir. 2003) ("[S]o long as the parties are bound to arbitrate and the district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the NYC as provided in chapter 2 of the FAA, even though the agreement in question requires arbitration in a distant forum.").

some reasonable connection with a foreign state. It is this last condition that makes the agreement "non-domestic". These conditions have also been endorsed in the national arbitration laws of Greece, Belgium and the UK.

A non-signatory to an arbitration agreement may require enforcement of that agreement if he/she is bound by agreement under ordinary contract and agency principles[113]. An assignee of a party's rights under a contract containing an arbitration clause can become party to an arbitration which has already commenced after he/she notifies the other party at the tribunal[114]. The court, relying on the legal doctrine of equitable estoppel, ruled that when a person who has signed an arbitration agreement alleges substantially interdependent and concerted misconduct by the non-signatory and one or more signatories, the non-signatory may compel arbitration of the dispute[115]. The court in Sunkist stated that both a substantial nexus must exist between the non-party that wishes to compel arbitration and one of the parties, and that the dispute at issue be "intimately founded in and intertwined with" the arbitration agreements or the underlying contract[116]. Moreover, section 7 of the FAA provides that, "the arbitrators … may summon in writing any person to attend" and to bring documents requested, which means that, a third person who was a non-party to the arbitration if summoned has to attend[117].

An arbitration clause is assignable even after arbitration proceedings have commenced[118]. A person claiming subrogation rights has the option of proceeding arbitration in his own name. If the party exercising subrogation rights proceeds in the name of the original party there is no change of party and no issues arise[119]. If notice to the arbitrator is not given within reasonable time, the assignee loses the right to participate in the proceedings and so the arbitration agreement lapses[120]. Moreover, English courts have refused to accept the group of companies' doctrine in the absence of consent on the part of the third party or possibly an estoppel[121] to bind non-signatories to arbitration agreements[122]. In Greek law third parties cannot

113 *Valdiviezo v Phelps Smelter Inc* (1997) 995 F Sup 1060. *EEOC v Waffle House, Inc*., 534 U.S. 279, 289 (2002) (stating that liberal policy favoring arbitration does not require binding nonparties to arbitration agreement).

114 *Bayfur S.A. v Finagro Holdings S.A.* [1992] 1 QB 610.

115 In *MS Dealer Corp. v Franklin* (11th Cir. 5/28/99).

116 *Sunkist Soft Drinks Inc v Sunkist Growers* 10 F3d 753. *Thomson CSF v AAA* 64 F3d 773. See *Daval Aciers v Armare SRl* in March 1997 *Mealey's Int'l Arb. Rep* 17.

117 In the Matter of Arbitration between Trammochem, *et al.* and A.P. Moller, (S.D.N.Y., June 15, 2005). An international arbitration tribunal sitting in the US derives its power over individuals or companies who are not party to the arbitration ('non-parties') exclusively from the US FAA (the 'FAA').

118 *The Jordan v Nicolov* [1990] 1 LR 11.

119 *Dettev von Appen v Voest Alpine* [1997] 2 LR 279.

120 *Baytur S.A. v Finagro Holdings S.A.* [1991] 4 All ER 129.

121 *Bay Hotel v Cavalier* [2001] UKPC 34.

122 *Roussel-Uclaf v GD Searle & Co.* [1978] 1 Lloyd's Rep. 225. *Bay Hotel v Cavalier* [2001] UKPC 34. *Peterson Farms Inc. v C&M Farming Ltd* [2004] All ER (D) 50. Effectiveness of an arbitration agreement on a third person in Austrian law. There are situations where during the business relation a party of the contract changes. According to the Austrian Supreme Court (decisions of 5. 8. 1999,

take part in arbitration if there is no arbitration agreement between the parties of the arbitration and the third party. A third party can submit a lawsuit to void an award if he/she has a legal interest according to 899§ CCP. To that extent, Belgian law also allows a third party to intervene in arbitration proceedings [123]. Since parties' arbitration agreement is valid only against the contracting parties[124], parties' arbitration agreement is not valid against third parties except in the case that third parties agree to be obliged. Arbitrations being private proceedings cannot affect the rights of third parties but this does not mean that they could not be alternative dispute mechanisms. An arbitrator cannot award the costs of arbitration against a person who is not party to the arbitration proceedings[125]. Besides, third parties can become parties of an arbitration according to the four examined national legal systems, which means that arbitration can be developed into a co-equal to the courts dispute system.

Finally, courts have a role to play in the interpretation of the arbitration agreement although there is an effort by legislation to redistribute a fair role to arbitrators. To that extent, coequality between arbitration and courts should attribute a sole role for arbitrators to deal with the interpretation and validity of an arbitration agreement.

4 Initiating the arbitration and stay of proceedings

The FAA does not mandate notice or a particular form of notice of arbitration. It is in the claimant's interest that the respondent receives notice of the commencement of the arbitration process because commercial arbitration is a consensual process. To the extent that a contracting party perceives that the other party is not willing to nominate an arbitrator, then it may seek recourse to the court by filing a petition seeking a court order to compel the other party to proceed to arbitration[126], which means that the court will examine and interpret the parties' arbitration agreement. Under US law, a party is not ordinarily required to commence arbitration before the adverse party files suit and so it could be argued that parties should be able to directly compel arbitration, rather than having to go through courts which will compel arbitration by staying proceedings[127]. A dispute arises when one party

1 Ob 163/99y, SZ 72 122, and 26. 4. 2001, 8 Ob 179/00g, JBl 2001 732) this has no influence on the arbitration agreement. Both a single successor (for example, a transferee) and a general successor (for example, an heir or an buyer of the enterprise) is bound by the arbitration agreement. The same applies to an interested third person, favoured by the contract (decision of 13. 6. 1995, 4 Ob 533/95, SZ 68 112, and 5. 8. 1999, 1 Ob 79/99w, ZfRV 2000 31).

123 Article 1696 bis BJC 1. Any affected third party may request the arbitral tribunal to intervene in the proceedings. Such request shall be addressed in writing to the arbitral tribunal that shall communicate it to the parties. 3. In any event, in order to be admitted, the intervention of a third party requires an arbitration agreement between the third party and the parties in dispute. Furthermore, it is subject to the unanimous consent of the arbitral tribunal.

124 Supreme Court 980/86 18 Diki 995.

125 *The Vimeira No 2* [1986] 2 LR 117, RSC ord 4 r 9.2.

126 *East v M/V Alaia* 673 F Sup 796.

127 *General Guaranty Ins. Co. v New Orleans General Agency* 427 F2d 924.

makes a claim against the other, which is denied by the other. If a defendant has failed to respond to a claim, the defendant's silence is not to be construed as an admission of liability, and there remains a dispute between the parties[128]. In the absence of a formal claim, the existence of a dispute can be proved by the exchange of correspondence between the parties (1996 AA). There is no specific procedure for the commencement of arbitration and so there is no need for delivery of the lawsuit to the party–as happens for a lawsuit before courts in accordance with the rules specified in the CCP of Greece. Article 1683 of the BJC specifies the need for giving a notice specifying the subject matter of the dispute to the other party for bringing a dispute before an arbitral tribunal. Moreover, the parties are not free to agree that contractual time bars are absolute, and under the AA 1996, the court is still empowered, on application by a party to an arbitration agreement, to make an order extending the time fixed by a provision of the agreement for beginning arbitral proceedings (section 12(2))[129].

128 *Ellerine Brothers Ltd v Klinger* [1982] 2 All ER 387.

129 The court may grant the extension for such period and on such terms as it thinks fit, whether or not the time previously fixed by agreement or a previous order has expired (section 12(4)). The court may make such an order, however, only if it is satisfied: "(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time; or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question." (section 12(3)). Where the Hague or Hague/Visby Rules apply by virtue of the UK's *Carriage of Goods by Sea Act 1971*, U.K. 1971, c.19, or a foreign law, the one-year time for suit may not be extended under section 12 of the AA 1996, whereas such an extension might be possible where the Hague Rules are merely incorporated into a contract as contractual terms, although even in that case, they opine that the court "… may be reluctant to exercise its discretion to extend such a well-established time limit." When the Hague/Visby Rules are incorporated into a bill of lading, they doubt that section 12 would apply, because such incorporation is given statutory force by section 1(6)(a) of the Carriage of Goods by Sea Act 1971. *The Seki Rolette* [1998] 2 Lloyd's Rep. 638 (where Hague Rules were incorporated into a time charter, extension of time to commence arbitration refused, because existence and application of the time bar was held not to be outside the parties' reasonable contemplation). Speaking of section 12 of the AA 1996, Steel, J., in *Thyssen Inc. v Calypso Shipping Corp. S.A.* [2000] 2 Lloyd's Rep. 243 at p. 248, 2001 AMC 198 at p. 206, observed: "It is common ground (indeed it is notorious) that the provision was introduced with a view to restricting the circumstances in which time might be extended as compared with the scope of section 27 of the Arbitration Act, 1950." *Harbour and General Works Ltd. v Environment Agency* [2000] 1 Lloyd's Rep. 65 at p. 80 (C.A. *per* Waller, L.J.), citing the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law (1996), chaired by Saville, L.J., and observing that section 12 of the 1996 Act was intended to be more restrictive than section 27 of the 1950 statute, out of respect for the principle of party autonomy underlying the new enactment. The one-year COGSA time limit is to be strictly applied only to legal actions, not to arbitration claims, which latter are governed rather by the doctrine of laches (Laches is a doctrine with its historical roots in courts of equity (beginning with the English Court of Chancery), but now applied by common law courts, whereby a claim may be barred by the unreasonable conduct of a party (e.g. the plaintiff's inexcusable delay to take suit), where such conduct causes prejudice to the defendant or third parties) and the rule of reasonableness. *Son Shipping Co. v De Fosse & Tanghe*, 199 F.2d 687, 1952 AMC 1931 (2nd Cir. 1952). *Cargill B.V v S/S Ocean Traveller* 1989 AMC 953 at p. 958 (S.D. N.Y. 1989). *Shearson Lehman Hutton, Inc. v Wagoner* 944 F.2d 114 at p 121 (2d Cir.1991): "It is left up to the arbitrators, not the court, to decide the validity of time-bar defenses."

The AA 1996, at section 14(1), permits the parties to agree when arbitral proceedings are to be regarded as commenced for the purposes of Part I of the Act[130]. In *Gulf Guaranty*[131], the court said: "[The] purpose of the [Federal Arbitration Act] is to 'move the parties … out of court and into arbitration as quickly and easily as possible"', which shows that the arbitration process starts from a court's decision to refer a case to arbitration. Some courts merely dismiss or stay proceedings, rather than directly referring or ordering the parties to engage in arbitration[132].

Commencement of arbitration brings all the legal results arising from a lawsuit before a court[133] in Greek law. According to Article 884 CCP the court can define a time for commencement of arbitration or the issue of the award. The court examines the conditions for the initiation of the arbitral process. Moreover, after a party's application, the court decides the extension of the time for the initiation of arbitration or the issue of the award–taking into account the change of the conditions as in the case of litigation. According to Article 261 CC, a lawsuit before an arbitral tribunal means first the start of the arbitration proceedings and second the stoppage of the outlaw of the claim of the arbitration. In Greek and Belgian law, if the difference for which an arbitration agreement is concluded is before a court, then the objection must be submitted in the first discussion and in any other case the difference will be solved by the court[134]. The parties must raise the objection about an arbitration agreement because the court does not examine it by itself (Article 284 CCP)[135]. Besides, the court examines the existence of arbitration agreement about a difference if the agreement is concluded before it. Moreover, the court simultaneously examines the validity of the arbitration agreement and arbitrability in order to refer the dispute to arbitration. During the arbitration proceedings the court should not examine the jurisdiction, validity of the arbitration agreement and arbitrability because there would be two alternative dispute systems dealing with the same case regardless of the fact that only the arbitration agreement and the award have procedural results upon a court case considering the same dispute, while the commencement of an arbitral procedure has no effect upon a procedure before a court. If there is no objection about the existence of arbitration agreement, it does not mean that the party abandons his right for arbitration.

The court has the duty to stay its own proceedings irrespective of the seat of the arbitration if an action is brought in the English courts, concerning the argument that an arbitration clause exists. Section 9 removes the discretion of the court to refuse to stay its own proceedings, and enables the judicial action to go ahead in certain circumstances where the arbitration agreement itself is unenforceable. The

130 *Seabridge Shipping AB v AC Orssleff's EFTF's A/S* [1999] 2 Lloyd's Rep. 685.

131 *Gulf Guaranty Life Ins. Co. v Connecticut Gen. Life Ins. Co.,* 304 F.3d 476, 489 (5th Cir. 2002) ("Gulf Guaranty"), citing *Moses H. Cone Hosp. v Mercury Constr. Corp*., 460 U.S. 1, 22 (1982).

132 NYC Article II(3). Van de Berg, "Consolidated Commentary NYC," *YB Com. Arb* Vol XVI 1991, pp. 463–464.

133 Supreme Court 111/71 19 NV 604.

134 Supreme Court 2040/84 33 NV 1160.

135 Supreme Court 272/83 50 EGL 795.

grant of a stay of judicial proceedings does not amount to a judicial reference of the dispute to arbitration[136]. Moreover, the obligation on the courts to stay their proceedings remains the primary method for the enforcement of arbitration clauses, and has to be observed by the English courts, irrespective of whether the seat of the arbitration is in England or whether the arbitration agreement or the procedure is governed by English law (section 2.2). The Act retains for the courts the essential minimum of assistance to and supervision of arbitrations. English courts have the power to grant an injunction preventing a party to an arbitration agreement from participating in judicial proceedings in some other jurisdiction and to refuse to recognise or enforce any judgment obtained in breach of an arbitration agreement. Arbitrators themselves can stay any existing proceedings pending the outcome of the application to the court. A court can refuse to stay judicial proceedings if the arbitration agreement is illegal.

The onus is placed on the party bringing the legal proceedings to challenge the arbitration agreement and persuade the court to allow the legal proceedings to continue. Hence, there is an active involvement on matters that should have been argued before an arbitral tribunal rather than the court. The tribunal will rule on the validity of the arbitration clause, subject to final determination by the court as a preliminary point (section 32) or on a challenge to the award (section 67). Hence, it seems that there is a need for a final appeal to court. If the court permits the arbitration to proceed, it would appear that a challenge to the validity of the agreement might be raised again under section 30 before the tribunal, subject to considerations of *res judicata*.

Assuming that suit has been taken in court and that a motion is made to stay or dismiss the action because of an arbitration clause in a contract, the following are the steps that the court must take to decide the motion: (1) The court seized with a motion to stay the suit has first to decide if it has jurisdiction in respect of the suit in order to hear the motion; otherwise it must dismiss the suit out of hand. Nonetheless, the court may have jurisdiction to stay the suit by virtue of: (a) its inherent jurisdiction[137]. The UK's AA 1996 indirectly recognizes this inherent jurisdiction[138] (b) a provision of law[139]. (2) Assuming it has jurisdiction,

136 *The Star Texas* [1993] 2 LR 445.

137 Such jurisdiction was declared to exist in *Williams & Glyns Bank v.Astro Dinami Co*. [1984] 1 Lloyd's Rep. 453 at p. 456 (H.L.). *The Sylt* [1991] 1 Lloyd's Rep. 240 at p. 243; *Deaville v Aeroflot Russian International Airline* [1997] 2 Lloyd's Rep. 67 at pp. 70 and 71.

138 UK 1996, c. 23, section 1(c), which provides that: "In matters governed by this Part the court should not intervene except as provided by this Part" has been interpreted to mean that the inherent jurisdiction to stay proceedings will survive as a residual power, but only where there is a gap in the statutory jurisdiction. The inherent jurisdiction would therefore apply where there is an oral agreement to arbitrate, especially because section 81(1)(b) of the Act preserves the common law where it is consistent with the statute, in particular as to the effect of an oral arbitration agreement. See C. Ambrose & K. Maxwell, *London Maritime Arbitration*, 2nd edn., LLP, London, 2002 at pp. 72–73.

139 An application for a stay of proceedings under section 9 must be made by way of an application notice, pursuant to rules 62.3(2) and 62.8 of the *Civil Procedure Rules 1998*, adopted December 10, 1998 and in force April 26, 1999. Federal Arbitration Act, July 30, 1947, c. 392, section 1; 61

the court must next decide whether there is any prohibition in domestic law preventing the stay of suit in order to arbitrate. (3) The court must determine whether arbitration is prohibited in the forum that the clause invokes. (4) The arbitration clause must be scrutinized to determine whether it validly calls for arbitration of the claim at hand. (5) If the arbitration clause is incorporated by reference into, for instance. a bill of lading contract, the court must validate that the incorporation is proper and legitimate. (6) If third parties are to be bound by the arbitration agreement, the court must confirm that the particular third parties have been justifiably included into the terms of that agreement. (7) The court must then decide if it has the discretion to stay or not stay. For example, the NYC 1958 imposes a mandatory stay, as does the UNCITRAL Model Law and the UK's AA 1996[140]. (8) The court, if it has discretion, may then declare that (a) the forum; or (b) arbitration *per se* is or is not convenient for the parties in the circumstances. (9) If the court does exercise its discretion in favour of arbitration, it should stay the court proceedings under terms and conditions which protect the rights of the parties, including the right to security already provided, and confirmation that the delay for suit will not expire.

A court has discretion to decide whether or not the arbitration agreement is valid and should be complied with, and whether or not it should order a stay of court proceedings[141]. In fact, courts can aid in the contractually-agreed process:

1 to grant a stay of litigation pending compliance with the contractual undertaking;
2 to grant an order to compel actual participation in the process, under provisions such as § 4 of the FAA; and
3 in any event, to name a neutral when the parties' own mechanism has failed.

The FAA requires a court to stay litigation that is commenced in violation of a valid arbitration agreement, but nowhere does the FAA provide for a stay of arbitration. Judges in the US will regularly grant a stay of proceedings or dismiss the suit taken in the US in violation of such a clause, and refer

Stat. 670; 9 U.S. Code, sect. 3; Public Law No. 91–368, sect. 1, July 31, 1970, 84 Stat. 692, 9 U.S. Code sect. 201, making the NYC enforceable in the US.

140 In the UK, the jurisdiction of the court under the AA 1996, UK 1996, c. 23, to grant a stay for arbitration, which is applicable in all cases of arbitration agreements in writing, is mandatory for the court and also for the parties, who may not contract out of it, pursuant to section 4 and Schedule 1. A stay may also be granted where a party, by unequivocal representations or conduct, has waived his right to apply for a stay or where his conduct gives rise to an estoppel precluding the right to arbitrate.

141 Arbitration Act 1996, UK 1996, c. 23, sections 100 and 101. Section 9(4) of the Act provides for the *mandatory* staying of court proceedings where the party proves the written arbitration agreement, regardless of the nationality of the parties. *The Halki* [1998] 1 Lloyd's Rep. 465 at p. 481 (C.A.), citing the Departmental Advisory Committee's Report on Arbitration Law (1986), para. 54 on the mandatory nature of the stay, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

the parties to arbitration before the particular arbitral tribunal, unless the party challenging the clause can prove that its enforcement would be unreasonable or unjust, tainted with fraud, or overreaching or contrary to a strong public policy of the US forum. Dismissals for arbitration are appealable under the FAA, 9 U.S.C. 16(a)(3), because they are final judgments, while stays for arbitration, being simple interlocutory orders, are very seldom appealable (9 U.S.C. 16(b))[142].

The court cannot exercise its freedom of choice to reject a request to stay proceedings when there is a non-domestic arbitration agreement, and so the court's discretion is severely curtailed; but the court can only refuse to stay proceedings[143] if the agreement is "and void, inoperative or incapable of being performed". If the forum is inconvenient, that does not render the agreement "null and void, inoperative or incapable of being performed[144]." A court in deciding whether to stay proceedings in order to permit arbitration must decide if arbitration is reasonable in respect to all the parties[145]. Both the FAA and state arbitration acts allow courts to stay judicial proceedings and compel arbitration. The court, however, retains a limited jurisdiction to refuse a stay of proceedings where required on grounds of equity or fairness (especially, where a party has waived its right to apply for a stay, specifically or unconditionally, or by its conduct has given rise to an estoppel precluding the

142 *Green Tree Financial Corp. Alabama v Randolph* 531 U.S. 79 at pp. 86–89 (2000). *Salim Oleochemicals v M/V Shropshire* 278 F.3d 90, 2002 AMC 2854 (2nd Cir. 2002), cert. denied, 123 S.Ct. 696 (2002). We review *de novo* the District Court's denial of the motion to stay litigation pending arbitration. *Mediterranean Shipping Co. S.A. Geneva v POL-Atlantic*, 229 F.3d 397, 402 (2nd Cir. 2000).

143 *Riley v Kingley Underwriting Agency*, *Ltd.* 969 F.2d 953 at p. 959 (10 Cir. 1992), cert. denied, 506 U.S. 1021 (1992); *US Titan, Inc*. v *Guangzhou Zhen Hua Shipping Co., Ltd*. 241 F.3d 135 at p. 146, 2001 AMC 2080 at p. 2094 (2nd Cir. 2001).

144 *Antco Shipping Co., Ltd*. v.. *Sidermar S. p. A.* 417 F. Supp. 207, 1976 AMC 988 (S.D. N.Y. 1976); *Ledee v Ceramiche Ragno* 684 F.2d 184 at p. 187 (1st Cir. 1982); *Rhone Mediterranee Compagnia Fiancese di Assicurazioni e Riassicurazioni v Lauro* 712 F.2d 50 at p. 53, 1984 AMC 1575 at p. 1580 (3rd Cir. 1983): "… an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, … or (2) when it contravenes fundamental policies of the forum state."

145 In *Vimar Seguros y Reaseguros v M/V Sky Reefer* 515 U.S. 528, 1995 AMC 1817, maintaining the *prima facie* validity of foreign arbitration clauses and foreign jurisdiction clauses, it has been held that: "To overcome this presumption of enforceability, a party that seeks to bring a suit in a forum other than the one designated by the forum selection clause must show that enforcement would be 'unreasonable under the circumstances.' *M/S Bremen*, 407 U.S. at 10, 1972 AMC at 1414 (internal quotation marks omitted). Such circumstances may exist when: (1) the incorporation of the choice of forum and law provisions into the agreement was induced by fraud or overreaching; (2) the complaining party will for all practical purposes be deprived of its day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the provisions contravene a strong public policy of the forum in which the plaintiff has brought suit." *Acciai Speciali Terni USA, Inc. v M/V Berane* 181 F. Supp.2d 458 at p. 462, 2002 AMC 528 at p. 531 (D. Md. 2002).

right to arbitrate), or if the dispute does not fall within the scope of the arbitration clause.

Judicial discretion to reject enforcement of an arbitration agreement which undoubtedly covers the dispute at hand exists only where there is proof that the consent of a party to the arbitration clause was induced by fraud or duress[146]. The fact that the forum may have been inconvenient was held not to be sufficient grounds for refusing to stay court proceedings[147]. Courts are also sometimes reserved in denying enforcement to an arbitration clause by refusing a stay at the beginning of legal proceedings, because they preserve the jurisdiction to refuse enforcement of the eventual arbitral award[148].

When the court stays proceedings because of an arbitration agreement, the claim form *in rem*, though not invalidated, loses its effect and so the court, by virtue of the stay, loses its jurisdiction to deal with the claim and as a result any further action becomes unjustified. The FAA does not provide procedures for interlocutory appeals of arbitrator decisions prior to, or during the course of, an arbitral hearing. In granting the stay pending arbitration, the US court retains its jurisdiction to refuse enforcement to the eventual arbitral award to be rendered by the foreign tribunal[149]. Complications[150] when a defendant seeks both to compel arbitration and to stay the action pending arbitration. The court merely enters an order staying proceedings until such arbitration proceedings are completed[151]. In Belgian law, if the court seized of a dispute which is the subject of an arbitration agreement

146 *Seguros Banvenez S.A. v S.S. Oliver Drescher* 761 F.2d 855 at p. 862, 1985 AMC 2168 at p. 2177 (2nd Cir. 1985): ("The court may not refuse to grant a stay under [9 U.S.C.] section 3 based on considerations of judicial economy."). *Vimar Seguros y Reaseguros v M/V Sky Reefer* 29 F.3d 727 at p. 731, 1994 AMC 2513 at p. 2519 (1st Cir. 1994), aff'd 515 U.S. 528, 1995 AMC 1817 (1995): "Arbitration agreements are unenforceable under §2 of the FAA only where the agreement would be revocable under state contract law. *Southland Corp*. v *Keating*, 465 U.S. 1, 11 (1984) (party may assert general contract defenses, such as fraud and duress, to avoid enforcement of arbitration agreement).

147 *Sam Reisfeld & Son Import Co. v S.A. Eteco* 530 F.2d 679 (5th Cir. 1976). *Seri Agricultural v Pacific Importer* 1981 AMC 253 (S.D. N.Y. 1980). *Lederman v Shapiro*, 385 N.J. Super. 307 (2006) ("Public policy favoring arbitration cannot sanction what here became essentially secret proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders.")

148 *Lucky Metals Corp. v M/V Ave* 1996 AMC 265 at p. 270 (S.D. N.Y. 1995), citing *Vimar Seguros y Reaseguros v M/V Sky Reefer* 515 U.S. 528 at p. 540, 1995 AMC 1817 at pp. 1825–1826 (1995).

149 *Continental Ins. Co. v M/V Nikos* 2002 AMC 1287 (S.D. N.Y. 2002); *Steel Warehouse Co., Inc. v Abalone Shipping Limited of Nicosai* 141 F.3d 234, 1998 AMC 2054 (5th Cir. 1998). *Vimar Seguros y Reaseguros v M/V Sky Reefer* 515 U.S. 528 at pp. 539–540, 1995 AMC 1817 at p. 1826; *Salim Oleochemicals, Inc. v M/V Shropshire* 177 F. Supp.2d 159 at pp. 161–162 (S.D. N.Y. 2001). The law governing the arbitration agreement is the law which governs such matters as the validity, scope and interpretation of the agreement itself, the validity of the appointment of the arbitrators, the notice of arbitration and the constitution of the arbitral tribunal, as well as the jurisdiction of the arbitrators to make the award.

150 *Tolaram Fibers Inc v Deutsche Engineering*, 1991. US Dist Lexis 3656.

151 *Zenol Inc v Carblox Ltd.* 334 Fsup 866. *Connecticut General Life Ins. Co. v Son Life Assurance Co. of Canada.* 210 F. 3d 771, 2000 WL 490692 (7th Cir. 2000).

declares that it lacks competence (Article 1679 BJC), it will stay proceedings and refer the case to arbitration[152].

The analysis shows a duty of courts to stay proceedings and compel arbitration– indicating the depth of courts, involvement even in the commencement of arbitration. Taking into account the current status of arbitration and the fact that an arbitral tribunal is established some time after the commencement of arbitration, not mentioning that the commencement of arbitration in many occasions might not be able to take place without the assistance of courts, the role of courts in allowing the current arbitration practice to be workable is vital; displaying again that arbitration is not a self-contained dispute mechanism co-equal to courts.

5 Jurisdiction

Parties to a contract may freely select a forum that will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable[153]. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements. The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning, and the plain meaning of the words used by the parties to this contract do not manifest an intention to limit jurisdiction to a particular forum[154]. The consent of a party to a contract is adequate to establish jurisdiction over that person or entity[155]. In point of fact, an arbitration clause is solely a jurisdiction clause sending a dispute to a different *type* of forum calling for a different territorial jurisdiction. Jurisdiction and arbitration clauses calling for suit or arbitration

152 In Austrian law Article 584 clarifies that if the arbitration proceedings intiated first, no other legal action concerning the same claim can be taken before a court or another arbitral tribunal. A court has to reject the claim on this occasion. On the other hand, if an arbitral tribunal has refused to decide on jurisdiction then it is possible to bring a claim before a court. Article 584 ZPO 3. When an arbitration procedure is pending, no other legal dispute may be carried out before a court or an arbitral tribunal about the asserted claim. Any action brought on the grounds of the same claim is to be rejected. This shall not apply if an objection to jurisdiction of the arbitral tribunal was raised to the arbitral tribunal at the end together with entering an appearance in the case and a decision of the arbitral tribunal cannot be obtained within a reasonable period of time.

153 *M/S Bremen v Zapata Off-Shore Co.*, 407 US 1; *Columbia Casualty Co v Bristol-Meyers Squibb Co.*, 215 AD2d 91 [overruling *Rokeby-Johnson v Kentucky Agric. Energy Corp.*, 108 AD2d 336]; *Price v Brown Group*, 206 AD2d 195. *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234.

154 *Brooke Group Ltd. et al., Appellants, v Jch Syndicate* 488, *et al.*, Respondents. 488, 87 N.Y.2d 530, 663 N.E.2d 635, 640 N.Y.S.2d 479 (1996).

155 Andreas F. Lowenfeld, "Can Arbitration Coexist with Judicial Review? A Critique of LaPine v Kyocera, ADR Currents," Sept. 1998, at 1, 15 n.28 (noting a large New York law firm's experience with international transactions involving investments, joint ventures, technology licenses, and trade in goods). Thomas E. Carbonneau, "The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi," 19 *Vand. J. Transnat'l L.* 265, 297 (1986).

in the principal place of business of the carrier tend to be upheld, as long as that place can be determined from the documents and circumstances of the case. Who examines the jurisdiction of an arbitral tribunal? The doctrines of separability and (*Kompetenz–Kompetenz*) are related, but they are distinct. The concept of separability means that the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained[156]. Hence, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity. (*Kompetenz–Kompetenz*) firstly means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence and secondly the arbitration agreement ousts the initial jurisdiction of ordinary courts.

The jurisdiction[157] of the civil courts is abolished when the parties have agreed to resolve any dispute arising out of their contract by arbitration. It is supposed that the civil courts intervene only to help in the progress of an arbitration procedure. Even if a civil law dispute has been taken to arbitration, civil courts have jurisdiction to review it when there is an objection by a party to the jurisdiction of the arbitration tribunal[158]. On the other hand, arbitration cannot intervene in courts to assist in deciding matters of jurisdiction.

The terms of an arbitrator's jurisdiction and powers in any particular case depends on a proper construction of the arbitration agreement. A valid agreement to arbitrate excludes the jurisdiction of the national courts and means that any dispute between the parties must be resolved by a private method of dispute resolution, which should mean that the whole process has to take place totally within its ambit it.

It is accepted that a tribunal has power to investigate its own jurisdiction[159]. It is generally recognized that any decision given by an arbitral tribunal as to its jurisdiction is subject to control by the courts of law, which in this respect have the final word. In practice, recourse to the courts on issues of jurisdiction is likely to take place at the beginning of the arbitral process, during the actual course of the process and following the making of the award. A challenge to the jurisdiction can be partial or total. A partial challenge raises the question of whether certain

156 Carl Svernlöv, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, (1991) 8(4) JIA 37.

157 Article 3 of CCP, Court of Appeal of Piraeus 77/1985 1985 *Epitheorisis of Maritime Law* 446.

158 A. Foustoukos, *Thesmos of Permanent Arbitrators in Greek Law*, 1977 NV 1300.

159 *Seacoast Motors Of Salisbury, Inc. v Daimlerchrysler Motors Corporation*, 2001 No. 01–1262 www.kscourts.org. *Hart Surgical, Inc. v Ultracision, Inc*., 244 F.3d 231 (1st Cir. 2001) "district court properly exercised its jurisdiction". *Green Tree Fin. Corp. v Randolph*, 531 U.S. 79, 88–89 (2000), held that it lacked jurisdiction over *Seacoast's* appeal because the arbitrability decision was "embedded" in the underlying substantive dispute and thus interlocutory. *Seacoast*, 143 F.3d 626, 628–29 (1st Cir.), cert. denied, 525 U.S. 965 (1998). *Rosa v Park West Bank & Trust Co*., 214 F.3d 213, 215 (1st Cir. 2000). *GAF Corp. v Werner*, 485 N.E.2d 977, 979 (N.Y. 1985) (upholding arbitrability of indemnity claim by the CEO of a public corporation, even though arbitration raised issues of fiduciary duty normally subject to judicial review during litigation).

claims are within its jurisdiction. In the US a court order appointing an arbitrator is not final order and is, therefore, unappealable[160].

It is worth mentioning that the Supreme Court of India in *SBP v Patel Engineering Ltd.*[161] held that the court, when asked to appoint an arbitrator, has to go into the question of the validity of the arbitration agreement, the arbitrability of the claim and other jurisdictional matters–and so the rule of *Kompetenz-Kompetenz* operates only in respect of those arbitrations where an arbitrator has not been appointed by the court, although the arbitral tribunal has the sole power to deal with *Kompetenz-Kompetenz* in the initial stage of arbitration[162]. Hence, the view of the Indian Supreme Court indicates an understanding of arbitration as an inferior dispute mechanism[163]. On the one hand, in Hong Kong and in *Private Company "Triple V" Ltd. v Star Co Ltd.*[164] it was held that the court examines the validity of the arbitration agreement only prima facie and a party is not precluded from challenging the existence of the arbitration agreement before the arbitral tribunal itself. On the other hand, in Germany[165] the court has to determine the existence of the arbitration agreement before appointing an arbitrator and in order to save money and time the court has to conduct a complete review to ascertain the existence of a valid arbitration agreement.

In English law the power of the court to examine the existence of an arbitration agreement even when while appointing an arbitral tribunal is judicial because of the nature of the power prescribed by the AA 1996[166]. The court has the ability to exercise its power under the 1996 Act in order to support the arbitration in the limited case in which the seat has yet to be determined (section 2.4b). Any ruling by the arbitrators on their jurisdiction is subject to judicial review in any action on the agreement[167]. An arbitration that had its seat in England was recognized as being within the English legislation even though various parts of the arbitration were conducted abroad.[168] The 1996 Act, consistent with the

160 *OPC Farms Inc v Conopoco Inc.* 154 F3d 1047.

161 2005 (9) Scale 1 (26th October 2005, Supreme Court of India).

162 Section 16, Arbitration and Conciliation Act 1996.

163 A. Sen, "The Role of the court in the appointment of arbitrators," 2006 *Vindobona Journal* 45.

164 Case No 109 CLOUT (Hong Kong Court of Appeal 7th July 1995). *Pacific International v Tsinlines Ltd* 1993 HKLR 249. For instance, in India the Supreme Court in *Wellington Associates Ltd. v Kirti Mehta*, held that, See. 16 of the Act did not eliminate the jurisdiction of the nominee of the Chief Justice of India to settle on the question as to the existence of a valid arbitration agreement.

165 Bayerrisches oberstes landdesgericht, Germany, 4 Z SchH 01/01, February 23, 2001. In Austrian law Article 589 ZPO regulates the challenge procedure specifying that the final decision on the challenge of an arbitrator is subject to review by the courts (589§ 3 ZPO).

166 *Atlanska provilda v Consignaciones Astrurianas* S.A. QBD Commercial Court 27th May 2004. *Welex AG v Rosa Maritime Ltd* 2002 Lloyds Reports 701.

167 *Chimiport Plc. v D'alesio* [1994] 2 Lloyd's Rep 366. *Belgravia Property Company Limited V S & R* (London) *Limited And Taylor Woodrow Management Limited* 2001 HT 01/043. The determination of the jurisdiction of an arbitral tribunal, pursuant to section 32 of the AA 1996. *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 AC 266.

168 *Sumitomo Heavy Industries v Oil Natural Gas* [1994] 1 LR 45.

common law, does not permit the arbitrators to have the final word on their own jurisdiction and sections 30–32 lay down a procedure for challenging the arbitrators' assertion or denial of jurisdiction. In the 1996 Act the party favouring arbitration but concerned about wasteful proceedings would control, in effect, whether to insist on an early arbitrator decision on jurisdiction followed by rapid court review. Even before the arbitrators render a decision on jurisdiction, a party may petition a court for an immediate determination of the jurisdictional issues.

Participation in arbitration without objection to jurisdictional or procedural errors prevents subsequent challenges to the award on these grounds. The mandatory provisions of the 1996 Act apply to an arbitration agreement which has its seat in England, Wales and Northern Ireland, and the fact that the agreement is not governed by English law is immaterial (section 4.4). The mandatory provisions show that arbitration is not a totally private and independent mechanism, but the imposition of mandatory rules indicates the control of the state via courts upon the dispute mechanism and the parties' choice of the arbitrator as their judge of the dispute is limited.

As discussed earlier, the jurisdiction of an arbitral tribunal may be examined either by a court or an arbitral tribunal. Arbitrators examine their jurisdiction and the relation to the dispute matters, unless there is a different view expressed by the parties' agreement (887§2 CCP) in Greek law. The court examines the jurisdiction of an arbitral tribunal when the arbitrability of a dispute is raised before a court procedure (264 CCP), when the arbitration agreement is concluded before a court, when the court appoints an umpire or replaces an arbitrator or excludes an arbitrator. It could be argued that the arbitrator's decision about their jurisdiction creates *res judicata* and the possibility of the courts to decide about the arbitrators' authority in many occasions (264, 887§2, 897§1, 2, 901§1 CCP) does not mean that on every occasion the court will examine their authority repeatedly. The authority of arbitrators to deal with the merits of a case and the arbitral proceedings is based on the law, the arbitration agreement and the parties' demand, and will mean that one source of authority does not preclude the other. As mentioned above, the civil court can investigate arbitrators' jurisdiction according to Article 1697 of the BJC. Moreover, Article 1679 of the BJC indicates that if a judge is seized of a dispute subject to arbitration by parties' arbitration agreement and declares the absence of jurisdiction, this means that the court declares jurisdiction or not according to the validity or not of the arbitration agreement[169].

169 According to section 1032(1) German ZPO a state court has to deny jurisdiction and to declare an action inadmissible, if it is subject to an arbitration agreement and the latter is invoked by the defendant. The court may only retain jurisdiction if it determines that the arbitration agreement is null and void, inoperative or incapable of being performed. The objection may be raised until the beginning of the oral hearing on the merits, irrespective of whether time limits the court may have set for the submission of the statement of defence have already expired. In German arbitration law any challenge of the court's jurisdiction will lead to a full review by the court. BGH, 10.5.2001 – III ZR 262/00, NJW 2001, 2176 = Yearbook XXVIII (2003) 247;

The analysis of the systems shows that regardless of the initial authority of arbitrators to decide on their own jurisdiction, there is a convergence among the examined jurisdictions on a court's intervention in finally investigating and ruling on arbitrators' jurisdiction.

6 Applicable law

Arbitration does not exist in a legal vacuum and it is itself governed by the rules of arbitration that the parties have adopted and by the law of the place of arbitration. The modern tendency both nationally and internationally has been to give great weight to the autonomy of the parties and courts should not intervene in the first instance but only where so provided in the law. If they are to be effective, law must back up arbitration rules and the relevant law in this context is the law of the place referred to as the *lex arbitri* or *curial* law.

Choice of law questions arise in proceedings before both national courts and arbitral tribunals. Additionally, choice of law questions can be referred either to national courts concerning the enforcement of the arbitration agreements and awards or to obtain ancillary judicial assistance. Moreover, choice of law involves a two-stage process. In the first instance, the system of law applicable to the dispute must be determined. Secondly, when it has been determined, the relevant substantive rules of law of the applicable system of law must be used to resolve the dispute.

Taking into account the fact that the Rome Convention 1980 excludes a number of agreements, including, under Article 1.2d "arbitration agreements and agreements on the choice of court", the choice of law governing an arbitration agreement is to be determined by established principles relating to proper law (applicable law) in England, Greece and Belgium as members of the EU[170]. The starting point is whether the parties have made an express choice of applicable law. The choice will be regarded as conclusive even if the applicable law has no connection with the contract[171]. The choice must not be meaningless and offend public policy. Hence, the choice must be "bona fide and legal" and must not give reason "for avoiding the choice on the ground of public policy". English law allows a choice of different applicable laws for different parts of the agreement[172]. If there is no express choice of law clause, the courts will examine the remaining provisions of the contract for evidence of an implicit choice. In the absence of any express or implied choice of law, the courts will seek to ascertain the intention of the parties. The courts are concerned with finding the system of law with which the contract has its closest connection. The factors to be taken into account include

for an English summary of the case see Kröll, "German Supreme Court: Missed Deadline Does Not Bar Defendant from Invoking Existence of Arbitration Clause," 17(4) *Mealey's IAR* 25 et seq. (2002).

170 Court of Appeal of Piraeus 1071/1999 2001 DEC 409.

171 *Vita Food Inc v Union Shipping Ltd* [1939] AC 277.

172 *Vesta v Buteher* [1989] 1 AllER 402.

the domicile of the parties, the place at which the contract was made and the place at which the contract is to be performed[173].

If parties do not specify the applicable law in their arbitration agreement, then Greek private international law defines the applicable law (890 CCP). Additionally, parties cannot reject the application of rules of public policy. The applicable law defines the terms and the type of the arbitration agreement. The court upholds an arbitration clause for arbitration by a foreign arbitral tribunal using a foreign law[174]. Arbitrators have to apply rules of public policy and they cannot ignore them (890§2 CCP) even if there is a parties' agreement. In any other case, the court will void an award that is against public policy and morals. To that extent, in Belgium, the national rules for the applicable law of contracts apply, excluding *renvoi*.

Whether or not the arbitrators have applied the substantive rules of the chosen system of law to the relevant issue is a question of law, which can be reviewed by the English courts, but only where the arbitration has its seat in the UK (section 2). The UK AAct 1996 authorizes the tribunal to decide the dispute according to the applicable law chosen by the parties (section 46(1)(a)), or "such other considerations as are agreed by them or determined by the tribunal" (section 46(1)(b)), thus honouring "honourable engagement clauses" or clauses requiring disputes to be determined in accordance with principles of international commercial law or general considerations of justice and fairness. Where the parties have not chosen or agreed on a law, the tribunal applies the law determined by the conflict rules that it considers applicable (section 46(3)). Section 46(2) excludes from the choice of law of a country its conflict of law rules, including only its substantive law. The procedural law governing the arbitration itself will almost always be the law of the arbitral forum. Where the parties have chosen London as the "seat" (i.e. the principal or "legal" place) of the arbitration, for example, they are commonly taken to have agreed that English procedural law will apply to their arbitral proceedings[175]. The choice of a given place as the "seat" of the arbitration does not, nonetheless, preclude the holding of meetings or even hearings elsewhere, for instance, for the taking of evidence[176]. Where the principal focus of proceedings relates to an arbitration, the exemption in Article 1(2)(d) is triggered and the Brussels Regulation does not apply and the court of the place of arbitration is the correct forum in which to decide upon those arbitration-related matters[177].

173 *Atlantic Underwriting Agencies v Compagna di Milano*]1979] 2 LR 240.

174 *Court of Appeal of Athens* 2712/78 27 NV 421.

175 *ABB Lummus Global Ltd. v Keppel Fels Ltd.* [1999] 2 Lloyd's Rep. 24 at p. 33 and 35–36. The AA 1996, UK 1996, c. 23, section 2(1) whereby the whole of part I applies where the seat of the arbitration is in England, some of the Part I provisions being mandatory pursuant to section 4.

176 Naviera *Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116 at p. 119 (C.A.).

177 *Through Transport Mutual Insurance v New India Assurance* [2004] EWCA (Civ) 1598.

Parties to international business transactions often include a choice of law clause to the law of a particular country[178]. Choice of law clauses judicialize arbitration and so the cost of arbitration increases as a result of enhanced judicialization achieved by mandating various pre-trial procedures. Courts have generally applied the FAA and federal common law, notwithstanding a foreign choice-of-law clause, apparently on the theory that these issues are procedural or remedial and subject to the law of the forum[179]. Except where statutory protections or public policy issues are involved, US courts seldom disturb an arbitral tribunal's selection of conflicts rules or substantive law. In the US, the traditional view was that, in the absence of a choice of law clause, the arbitrators should ordinarily apply the substantive law of the state in which the arbitration is sited. A number of US courts have refused to apply foreign law to determine the validity of arbitration agreements in actions under the NYC or FAA[180].

Lex mercatoria is not merely an extension of what we are ordinarily accustomed to recognize as law but about the social function of law against the background of a largely differentiated world of states. *Lex mercatoria* is law that is just as autonomous as it is endangered and *Lex mercatoria* is – just like formal law – endangered in its presumed autonomy by re-politicizations. Modern *lex mercatoria* is increasingly invoked by both ad hoc and institutional arbitrators in rendering awards in international commercial disputes[181]. The possibility of applying different national laws to different substantive and procedural issues raised in arbitration can be seen as a peculiarly complex example of depecage[182]. Depecage refers to the application of different national laws to different aspects of a contractual or other legal relationship. But of much greater significance is the effect of the local law of the arbitral situs of the arbitration.

Is it time to have the intricate relationship between arbitration's legality and legitimacy established by reconstructing the conditions for the emergence of binding legal norms and the framework in which validity is allotted to them? The main function of most national laws on arbitration today demonstrate the twin effects of affirming the legitimacy of the arbitral process *per se* and clarifying its feasibility as a means of dispute resolution, while defining the crossing point of that process with the function and role of the conventional courts and the legal regime as a whole, predominantly with respect to the recognition of arbitration agreements and the enforcement of awards consequent to arbitration.

The analysis shows that in the compared systems arbitrators apply the same rules as courts in choosing the applicable law. In fact, they apply either the choice of law or they decide the applicable law according to their PIL rules. Arbitrators pay

178 Ole Lando, "The Law Applicable to the Merits of the Dispute, in Contemporary Problems in International Arbitration" 101–105 (*Julian D.M. Lew* ed. 1987).

179 *Moses H. Cone Mem'l Hosp. v Mercury Construction Corp*., 460 U.S. 1, 4 (1983).

180 *Meadows Indemnity Co v Baccala Ins.*, 760 FSupp 1036.

181 O. Lando, "The Lex Mercatoria in International Commercial Arbitration," (1985) 34 *I.C.L.Q*. 747;

182 R. Reese, "Depecage: A common phenomenon in Choice of Law," 1973 *Colum. L Rev* 58.

respect to parties' choice of law but on many occasions courts' have altered the applicable law based on debatable national public policy reasons, diminishing the contractual role of arbitration, parties' autonomy and the validity of arbitration as a dispute method–which allows us to consider it as an underlying effort to compel and preserve judicial sovereignty.

7 Arbitrators

Arbitration is a consensual process. Therefore, allocating jurisdiction between courts and arbitrators remains a vexing problem with significant implications for arbitral autonomy, efficiency, and access to justice. Arbitrators, like judges, have the power to decide cases. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. Unlike judges, arbitrators are not selected by a formal institutional process designed to insure their competency and disinterest. Does the fact that the same institutional process not select arbitrators as judges mean that they are not able to correctly implement the substantive law? Arbitrators as judges can be equally good or bad because their legal knowledge is not sufficient to solve serious legal problems[183] and critical legal issues. It is worth mentioning that according to article 8§1 of the Greek Constitution, the legitimate judge is not only the state judge (87 Greek Constitution), but also the arbitrator of Article 867 CCP. Arbitrators exercise a public function according to Article 438 CCP because they act as a substitution of the judges and courts, but they lack the powers of a state court. In fact, an arbitral tribunal is not a court with full power but a powerless court that needs the back up of the court. It is worth mentioning here that parties can conclude to submit a dispute to arbitration, renouncing their right for a legal competent judge (Article 101 of the German Constitution) and favor a decision by a private arbitral tribunal. Hence, arbitrators are considered as judges in both the Constitutions of Greece and Germany, indicating a basis for arbitrators equipped with the same power of sovereign to deal with disputes and for arbitration and courts to be developed as self-contained mechanisms co-equal to each other co-existing in the same sovereign[184]. In the US, England and Belgium arbitration is not an unconstitutional thesmos as well and so arbitrators in these legal jurisdictions also derive authority from their constitution.

183 John D. Shea, "An Empirical Study of Sexual Harassment/Discrimination Claims in the post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?" 32 *Suffolk U. L. Rev.* 369, 388 (1998) ("A party may indeed 'forego' his or her statutory rights if the arbitrator deciding the dispute lacks the requisite training and experience to properly address the critical legal issues involved in the dispute.").

184 See, The Constitution of the State of Texas contains explicit pro-arbitration language. Texas Const. Article XVI, §13 ("It shall be the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial.")

The powers of a tribunal are those conferred upon it by the parties' agreement within the limits allowed by the applicable law and those powers must be sufficient for the tribunal to carry out its task effectively. The arbitral tribunal owes its existence to the parties. Moreover, the parties' authority to choose arbitration and assign jurisdiction to arbitrators stems from a constitutional law. Furthermore, the parties and the institutional rules of arbitration can impose specific duties upon an arbitral tribunal. Terms of appointment of arbitrators are imposed by operation of law and include the duty to act with diligence and the duty to act judicially. The duty of the arbitrators to act judicially is a duty which extends to all aspects of the proceedings. Arbitrators derive their powers and duties from a combination of the parties' agreement, the contract between the parties and the arbitrators, and the law applicable to arbitrations. The appointment of arbitrators will follow the parties' agreement but the law provides a variety of consensual and judicial powers of appointment in respect of arbitrators. Hence, an agreement[185] to arbitrate before a particular arbitrator may not be disturbed unless the agreement is subject to attack under general contract principles "as exist at law or in equity."

Arbitrators can be given the exclusive power to determine the legal consequences of all of the aspects of the dispute between the parties. Whether or not such power has been given depends upon the proper construction of the arbitration agreement and upon whether the power of the courts to review a decision for error of law under section 69 has been excluded. Where an arbitrator fails to act judicially, the immediate sanction is that the arbitrator be removed. Arbitrator's removal can be conducted either under the rules of the relevant arbitral institution or by a national court. The court should have regard to any agreed qualifications of arbitrators but again there is no requirement on either the parties or the court to appoint legally qualified arbitrators and, therefore, section 24 of the English Act further provides that an arbitrator may be removed by the court at any time on the ground that he or she "does not possess the qualifications required by the arbitration agreement."

Parties do not always agree upon an arbitrator or appointing authority and so they authorize a district court to designate the appointment of an arbitrator. US courts have exercised this power by appointing arbitrators[186]. In the US, the appointment of an arbitrator signals the commencement of arbitration. If a party has failed to appoint an arbitrator, the other party seeking arbitration can apply under section 4

185 *Aviall* 110 F.3d 892. *Evanston Insur. Co. v Kansa Gen'l Int'l Insur. Co. Ltd.*,No. 94 C 4957 (N.D. Ill. 1994), (court had authority to disqualify arbitrator who was not "disinterested," as required by the contract, prior to hearing in order to conserve resources). *First State Ins. Co. v Employers Ins. Of Wausau*, No. 99-12478-RWZ (D. Mass. 2000) (enforcing contract provision requiring "disinterested" arbitrator prior to award). *Lloyd's v Continental*, 1997 US Dist. LEXIS 11934, *12 (court was empowered to hear a pre-award challenge in order to enforce the contract). *Third Nat'l Bank v Wedge Group, Inc.*, 749 F. Supp. 851 (M.D. Tenn. 1990) (allowing a pre-award challenge based on the fiduciary relationship between the arbitrator and a party, which essentially required the arbitrator to be partial to the defendant).

186 *Zechman v Merrill Lynch* 742 Fsup 1359, *Schulze v Tree Top* 642 Fsup 1155. Section 5 of the FAA.

of the FAA for a court order directing the reticent party to arbitrate and at the same time apply under section 5 of the same Act for the appointment by the court of an arbitrator. The fear of being subject to a court-appointed arbitrator generally convinces the unwilling party to appoint an arbitrator before the application is heard[187]. Belgian law provides that, should the parties fail to agree on the number of arbitrators, three shall be appointed[188] by the court. To that extent Belgian law (1684–1692 BJC) specifies the fact that the president of the CFI not only appoints an arbitrator in case of a failure to be appointed by the parties, but also replaces them. Additionally, there is a whole process before the courts for the challenge against an appointed arbitrator. Detailed rules regarding the nomination of arbitrators are laid down in the CCP in Greek law and in case of disagreement among the parties concerned, the arbitrators are appointed by the court. The power of the court to appoint an arbitrator where the agreed procedure has failed is discretionary and the court may refuse to exercise it in the applicant's favour in appropriate circumstances[189].

According to Articles 867, 871§ 1 CCP parties can agree on arbitration and appoint a court as an arbitrator. So, a court can be appointed as an arbitrator in spite of the fact that the court as a state institution has no jurisdiction for the specific dispute. Therefore, it is possible to have a state court appointed to act as arbitrator and it is obvious that it will transfer all the litigation' tradition to the arbitration procedure. Article 871 A CCP specifies the conditions in the appointment of judges as arbitrators, showing the depth in which courts and judges are involved in arbitration[190]. They influence the whole arbitration procedure because it is obvious that judges will bring and apply their judicial tradition to the arbitration procedure. It is worth mentioning here that according to section 578 ZPO (1983 modification) in Austrian law, active judges were excluded from being arbitrators[191], which is equally applicable under the new Austrian law. In English law the effect of Schedule 2 is to allow a judge-arbitrator to exercise powers not otherwise available to an arbitrator in the event of an order of the courts, and to remove the narrow range of supervisory powers that the court would otherwise possess over ordinary arbitrators. Hence, we have firstly ordinary arbitrators and secondly judges acting as arbitrators more power than ordinary arbitrators and– a newly-shaped status wielding, which does not comply holding with the idea of voluntary arbitration. In other words, courts conquer arbitration once more via judges-arbitrators. Thus, in both English and Greek law a judge can be an arbitrator or a state court can be an arbitrator and they have more power to deal

187 Nicholas J. Healy, "An Introduction to the Federal Arbitration Act," (1982) 13 *JMLC* 223 at p. 226.

188 Belgium: Judicial Code, 6th Pt: Arbitration (adopted July 4, 1972 and amended Mar. 27, 1985), Article 1680 (providing that any person who has capacity to contract may be an arbitrator).,

189 *The Frotamorte* [1995] 2 LR 254, *The Sargasso* [1994] 1 LR 162.

190 Supreme Court 242/90 31 HD 1004.

191 Section 63§5 of the Act on professional rights and Duties of Judges. Judges may not accept an appointment as arbitrator during their tenure of judicial office.

with the dispute than an ordinary arbitrator. This power is inherited because of their background as judges or state courts and shows the depth of the roots of the idea that courts and judges offer legitimacy and justice regardless of the fact that in reality and practice many problems in litigation have arisen because of the incompetence of judges and courts, shaped by various factors having to do either with knowledge or socio-political requests.

Most institutional rules require that arbitrators shall be "impartial" and "independent". These are vitally important requirements that go to the heart of the arbitral process. Independence and impartiality are also requirements of national law in virtually all developed jurisdictions, including the US. Similarly, the NYC implicitly recognizes the lack of independence or impartiality as a basis for declining enforcement of an arbitral award. Despite the central importance of the impartiality and independence of arbitrators, there is remarkable uncertainty about the meaning and application of these principles. Firstly, there is the choice-of-law question of what standards govern the arbitrators' impartiality. It could be said that the answer will be the standards contained in any applicable institutional rules, plus the standards imposed by national law in both the arbitral situs and the places where enforcement of the award may be sought. Secondly, there is disagreement between and within different jurisdictions concerning the standards applicable to party-nominated arbitrators. The acceptance of non-neutral party-appointed arbitrators was explicit in US judicial decisions, which not infrequently contain comments like: "As everyone knows, the party's named arbitrator in this type of tribunal is an amalgam of judge and advocate"[192]–showing a tendency to consider arbitrators as inferior to judges in their implementation of duties as judges of the arbitrated disputes.

The need for an impartial tribunal is fundamental for maritime/commercial arbitration in order to achieve efficiency. At the time of the first hearing, arbitrators are required to make disclosure of such circumstances (personal ties and business relations with any of the parties) that might preclude any of them from rendering an unbiased award based merely upon an objective and impartial consideration of the evidence presented to the panel. An arbitrator could use knowledge that one would reasonably expect him to have acquired given that he was presumed to be experienced in the letting and valuation of properties of a similar nature[193]. In *Guardcliffe Properties Ltd v City & St James Property Holdings*[194] the court held

192 *Cia Navegacion v Hugo Neu Corp.* 359 Fsup 898, *ATSA of California Inc v Continental Ins.* 754 F2d 1394.

193 *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 Jonathan Parker LJ in Warborough *Investments Ltd v S Robinson & Sons* (Holdings) Ltd [2003] EWCA Civ 751 "… the courts should accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions".

194 [2003] EWHC 215 (Ch). The Swiss Federal Tribunal has recently held (Docket No. 4P.247/2006, *ASA Bulletin* 1/2007, p. 166) that an arbitrator who published a scholarly article showing that he had made up his mind irrevocably on a certain issue (one that was central to the arbitration) can be disqualified on the ground of impartiality. Arbitrator's direct contact with witnesses is, on an objective test, biased and so the court removed him from the case.

that the arbitrator was under a duty to inform the parties that he was considering making such a substantial discount and to give them an opportunity for comment and so the arbitrator had failed to act in accordance with section 33 which imposed a duty upon him to act fairly and impartially and give each party a reasonable opportunity of putting his case.

No arbitrator shall sit on a panel where the dispute concerns a claim in which to his knowledge, he or his employer may have a direct or indirect interest in the outcome of the arbitration[195]. If a party seeks to challenge one of the arbitrators, he/she has to do so as soon as the information is disclosed. Any further challenge to the arbitrator can be made in the courts after an award is issued[196]. Thus, disclosing the facts or relationship prior to the arbitration hearing may rebut the appearance of partiality. If the other party is notified and fails to object, then that party has waived its right to object after the award. An arbitrator should unveil any and all prospective conflicts or relationships prior to the arbitrator's appointment; however, failure to do so will not automatically result in vacation of the award. Parties[197] cannot avoid arbitration by making allegations of bias prior to arbitration taking place. An alleged "bias" of the arbitration administrator will not prevent arbitration, provided that a valuable selection process is in place.

The court has the power to remove an arbitrator who is not impartial, who is physically or mentally incapable of conducting the proceedings, or who has refused or failed to act appropriately in the conduct of the proceedings or to use all reasonable dispatch. Additionally, the court can remove an arbitrator at any time on the ground that he/she does not possess the qualifications required by the agreement (section 24). An application to remove a judge-arbitrator (section 24) and an application by a judge-arbitrator for relief from liability after his resignation (section 25) would both have to be made to the court of appeal (section 93). Furthermore, a party can make an application to the court under section 24.1a to

Norbrook Laboratories Ltd v (1) A. Tank (2) Moulson Chemplant Ltd [2006] EWHC 1055 (Comm).

195 *Positive Software Solutions, Inc. v New Century Mortgage Corp*., 476 F.3d 278 (5th Cir. 2007), a case in which an arbitration award was firstly vacated because the arbitrator failed to disclose his prior contact with an attorney for the prevailing party. An arbitrator's failure to disclose must entail a significant compromising connection to the parties.

196 *International Produce Inc v A/S Rosshavet* 638 F2d 548, *Sun Refining & Marketing Co. v Statheros Shipping Corp.*, 761 F.Supp. 293 (S.D.N.Y. 1991), *aff'd without opinion*, 948 F.2d 1277 (2nd Cir. 1991). "Full and early disclosure increases the probability that successful attacks on the award for 'evident partiality' can be avoided." *Certain Underwriters at Lloyd's, London v Argonaut Ins. Co*., 264 F. Supp.2d 926 (2003) (refusing to disqualify umpire pre-award on evident partiality grounds); *Alexander v Minnesota Vikings Football Club, LLC*, 649 N.W.2d 464 (Minn. Ct. App. 2002) (a court may vacate an arbitration award for "evident partiality," but the FAA does not permit "pre-award removal of an arbitrator"); *Folse v Richard Wolf Med. Instrum. Corp*., 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, section 10 authorizes court action only after a final award is made by the arbitrator.").

197 *Alter v Englander*, 901 F. Supp. 151, 154 (S.D.N.Y. 1995); *Nationwide Mut. Ins. Co. v Home Ins. Co*., 429 F.3d 640, 647 (6th Cir. 2005) (stating the rule that nondisclosure of a material relationship can constitute evident partiality).

remove the arbitrator on the basis of justifiable doubts as to his impartiality[198]. The court must make its judgment on the basis of the circumstances as it found them to exist and is not concerned with whether the arbitrator did or did not in fact allow his mind to be affected by them. The circumstances must be such as to objectively justify genuine doubts as to the arbitrator's impartiality (Article 1690§1 BJC). The grounds for impartiality are the same as those that can be brought against judges[199] in both Belgian and Greek law (Article 828 BJC, 883§2 and 52§1 CCP). Many other national laws refer to the necessary impartiality[200] and/or independence of arbitrators but not to any prerequisite qualifications. Belgian, Austrian, Canadian and French national laws are all silent as to the qualifications of arbitrators[201].

As discussed earlier, arbitrators' authority, in contrast with judges' authority, does not stem directly or indirectly from the state but from the parties' agreement, which means that their award does not have *erga omnus* against third parties in contrast with a judgment. Any party can demand the replacement of an arbitrator or umpire by the court[202]. The court of the place where arbitration takes place in accordance with the procedure specified by Article 741 CCP has jurisdiction for the exclusion of an arbitrator. Arbitrators cannot impose punitive damages or decide compulsory measures regarding evidence, but this can be done if a state court has been appointed to act as the arbitrator (888 CCP). Hence, superiority of courts acting as arbitrators over ordinary arbitrators means direct recognition of court's superiority even when they act as arbitrators. All disputes between the contracting parties are to be arbitrated, but the arbitrator cannot award punitive damages[203]. Moreover, an arbitrator cannot order, alter or recall an injunction,

198 *Thomas Dobbie Thomson Walkinshaw & Ors v Pedro Paulo Diniz Qbd* (Commercial Court), Thomas J., 19/5/99 *R v Gough (1993) 2 WLR 883; R v Bow Street Magistrates, ex parte Pinochet (No.2) (1999) 2 WLR 272; Pilkington plc v PPG Industries Inc (1989) (Unreported, 1/11/89); Nye Saunders & Partners v Bristow (1987) ILR 13/4/87, Cathiship SA v Allansons Ltd (1998) 3 AER 714 and Grimaldi Compagnia di Navagazione SpA v Sekihyo Lines Ltd (1998) 3 All ER 943 Cook International Inc v BV and Meadows* [1985] 2 LR 225.

199 Antwerp 11 February 1991, Pas. 1991, II, 108.

200 On 4 August, 2006, the Swiss Federal Tribunal (Docket No. 4P.105/2006) (available on the Internet at www.bger.ch) held that an arbitrator who, along with counsel for one of the parties, concurrently serves as an arbitrator in an unrelated arbitration is not considered to be biased unless further specific circumstances exist showing that the arbitrator is not independent or impartial. An arbitrator–just like a judge can be expected to remain neutral even if he or she has friendly contact with or works with counsel for one of the parties as a co-arbitrator in another arbitration. So, these circumstances did not need to be disclosed to the parties to the arbitration.

201 Belgium: Judicial Code, 6th Pt: Arbitration (adopted 4 July, 1972 and amended March 27, 1985), Article 1680 (providing that any person who has capacity to contract may be an arbitrator); Austria: CCP (as modified by Federal Law of 2 February, 1983) Chapter 4, Article 580, *New Austrian Arbitration Law Federal Gazette* I 2006/7 chapter 3.; Canada: An Act to Amend the Civil Code and the Code of Civil Procedure in respect of Arbitration SQ 1986, c. 73 (assented to and in force 11 November, 1986), Chapter II, Article 941; France: CCP, Bk. 4: Arbitration, Article 6.

202 Supreme Court 78/76 24 NV 606.

203 *PacifiCare Health Sys, Inc. v Book*, 583 U.S. 401, 405 (2003). *Bradley v Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001). Thomas J. Stipanowich, "Punitive Damages and the Consumerization

but order, alter or recall of an injunction can be made only by a court (889 CCP).

It is worth illustrating again here that in Greek law the court will investigate arbitrators' power on the following occasions: when an objection for the existence of an arbitration agreement arises in court (264 CCP); when the arbitration agreement is concluded before a court or a judge responsibly for the case (870§2 CCP); when the court appoints or replaces an arbitrator or umpire (878 CCP); when the court allows the resignation of an arbitrator or umpire (880 §2 CCP); when the court decides about excluding an arbitrator or umpire from an arbitration panel (883 § 3 CCP); sixth when the court decides about the timescale within which the arbitration must take place (884 CCP); when the court contracts discovery or any kind of evidence on behalf of an arbitral tribunal (888§ 3 CCP); when the court decides about the void of an award (897 CCP) or the non-existence of an award (901 CCP); when the court also decides about the *res judicata* of an award and when the court decides about the reprieve against the enforcement of an award. The court decides about the arbitrators' power when it examines the confirmation and enforcement of a foreign award according to 903 & 906 CCP. Under current Greek law arbitrators are not attributed with the authority to deal with arbitration unaided. At which stage does the court not intervene in arbitration?

Arbitrators exceed their authority if they do not decide about the object of the dispute according to the arbitration agreement. There is no exceeding of authority if arbitrators wrongly interpret the difference or wrongly estimate the difference or decide the object in a different way from the arbitration agreement or they leave part of the difference unsolved[204]. In fact in Greek law arbitrators exercise their duties under the constitutional guarantee[205] which can be seen as the starting point for absolute equality in the judicial functioning between arbitrators and judges.

It is essential that the parties to an arbitration agreement should be able to seek the assistance of the courts in order to prevent difficulties encountered in the constitution of the arbitral tribunal from frustrating the efficacy of the parties' undertaking to arbitrate. Hence, co-equality of the two alternative dispute systems could not be achieved by the way arbitration is presently implemented. Once an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to re-examine that decision[206]. The doctrine of *functus officio* applies to situations where the award is "final as to one issue, but not as to others.[207]" Courts remand to the original arbitrator for clarification of

of Arbitration," 92 *Nw. U. L. Rev.* 1, 15–22 (1997) (noting competing policy arguments for and against arbitral awards of punitive damages).

204 Supreme Court 1661/80 29 NV 1074.

205 Supreme Court 1059/82 31 NV 1355.

206 *Colonial Penn Ins. Co. v.The Omaha Indem. Co*., 943 F.2d 327, 331 (3rd Cir. 1991).

207 *Glass, Molders, Pottery, Plastics and Allied Workers International Union v Excelsior Foundry Co.,* 56 F.3d 844, 846 (7th Cir. 1995). *M & C Corp. v Behr & Co.,* 326 F.3d 772, 782 (6th Cir. 2003) *quoting Green v Ameritech Corp.,* 200 F.3d 967, 977 (6th Cir. 2000) (recognizing that

an ambiguous award when the award fails to address an incident that later arises or when the award is subject to more than one interpretation[208] but prior to the *functus officio*. The doctrine of *functus officio* does not allow a panel to re-visit the merits of the issues adjudicated. On the other hand, the introduction of an appellate arbitral tribunal will allow a revisit regarding the merits of the issues adjudicated.

The US courts have generally addressed challenges to arbitrators for three reasons: (1) bias[209], (2) qualifications; and (3) conflict of interest. Bias is normally alleged where arbitrators have issued an opinion in prior arbitrations on an issue similar to the one arising in the current arbitration, or have ruled against one of the parties in the past. Qualifications are typically challenged where a party alleges an arbitrator does not meet a contractual specification, such as "officer of a reinsurance company." Conflict of interest is as a rule challenged where an arbitrator has a current or prior relationship with one of the parties, above all if the contract specifies arbitrators shall be "disinterested." Parties cannot challenge an arbitrator for bias before an award is issued. Courts have looked infrequently more favourably on claims to disqualify an arbitrator for not meeting contractual qualifications, rather than for alleged bias. The FAA does not allow for challenge to an arbitrator's qualifications or partiality pre-award. Under general contract principles, a biased arbitrator selected as a result of unequal bargaining power might render the agreement to arbitrate invalid[210].

"a remand is proper, both at common law and under the federal law of arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award").

208 *American Centennial Ins. Co. v Arion Ins. Co.,No. 88 Civ.* 1665, 1990 U.S. Dist. LEXIS 4209 (S.D.N.Y. April 13, 1990) (allowing clarification but not modification of final arbitration award). The new Austrian Law provides for Correction and Interpretation of Award Article 610.

209 *Nationwide Mut. Ins. Co. v First State Ins. Co.*, 213 F. Supp. 2d 10 (D. Mass. 2002) ("Evident partiality requires more than just an appearance of bias; there must be some actual evidence of bias."). *Nationwide Mut. Ins. Co. v Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator."). *The Andersons, Inc. v Horton Farms, Inc*., 166 F.3d 308, 328–29 (6th Cir. 1998)("[E]vident partiality will be found only where a reasonable person would have to conclude that an arbitrator was partial to one party …. This standard requires a showing greater than an 'appearance of bias' but less than 'actual bias.'"); *Fed'l Vending, Inc. v Steak & Ale of Florida, Inc.*, 71 F. Supp.2d 1245, 1247 n.1 (S.D. Fla. 1999) (commenting on the distinction between a "mere appearance of bias" and "a reasonable impression of bias or partiality," and the difficulty of drawing this line) *Montez v Prudential Sec. Inc.*, 260 F.3d 980, 984 (8th Cir. 2001) (arbitrator's pre-arbitration use of a party's law firm in business dealings unrelated to the arbitrated dispute did not necessarily require finding of bias in NASD arbitration). *Lopez v 21st Century Ins. Co.,* 2003 Cal App. Unpub. Lexis 2366 (Cal. App. 2d Dist. Mar. 10, 2003) (appointments in 18 arbitrations over six years leads to an impression of impartiality). *Ash v Kaiser Foundation Health Plan*, 2003 WL 21751207 (Cal. App. 2d Dist. 30 July, 2003) (declining to vacate award based on arbitrator's ex parte communications with opposing counsel, because "such communications did not go to the substance of the matter").

210 *Mintze v American Gen. Fin., Inc*., 288 B.R. 95 (Bank. E.D. Pa.2003). *Jefferson- Pilot Life Ins. Co. v Leafre Reins. Co*., 2000 WL 1724661 at *2, who " 'can ask no more impartiality than inheres

An arbitrator in order to fulfill his/her duty has to contract the arbitration proceedings taking into consideration the information before them but cannot ignore this information and base the evaluation on personal knowledge about the case, because in this instance the award can be voided[211]. It is worth mentioning that the personal knowledge of an arbitrator about events that they have not presented during the proceedings, rather than personal legal knowledge and understanding of facts, will cause the void of an award. An arbitrator cannot use a voided award as precedent to decide a case because it is a reason for voiding the award, as in the case of a court judgment based on Article 544 CCP for rehearing. Thus, the complications of court proceedings and litigation are applicable to arbitration awards, and consequently arbitrations are becoming a replica of courts.

The comparison indicates courts' involvement and assistance in the appointment of arbitrators, a divergence in qualifications, a kind of convergence regarding the need for impartiality against the parties and most importantly the appointment of judges in Greek and English law or even a court in Greek law as an arbitrator–showing a tendency towards closer control of arbitration rather than leaving arbitration to walk towards a total independence, co-equality and alternativeness.

8 The arbitration procedure

The arbitration hearing process is adjudicatory in nature and trial-like in character[212]. Moreover, arbitrations are less formal trials than they are private adjudicatory trials[213]. In a contractual model of arbitration, legislation constitutes

in the method they have chosen.' " *Nationwide Mut. Ins. Co. v First State Ins. Co*., 213 F.Supp.2d 10, 17 (D. Ma. 2002).

211 Court of Appeal of Athens 6839/86 27 HD 1489.

212 Philip G. Phillips, "Commmercial Arbitration Under the N.R.A.," 1 U. Chi. 12 *L. Rev*. 424, 425 (1934) (defining arbitration as the adjudication of disputes by private judges of the parties' "own choosing" and the "business man's substitute for trial"); 426–429 (describing use of arbitration to resolve disputes between merchant members of trade associations); Philip G. Phillips, "Rules of Law or Laissez-Faire in Commercial Arbitration," 47 *Harv L. Rev.* 590, 599–600 (1934)("the attention of business has been on arbitration as an escape from the jury method of fact determination and not as an escape from substantive law"); Edward Brunet, Charles B. Craver & Ellen E. Deason, *Alternative Dispute Resolution: The Advocate's Perspective* 429 (3rd edn. 2006) (defining arbitration as involving reasoned presentations of proof to an expert decider). William Catron Jones, 15 ones, "Three Centuries of Commercial Arbitration in New York: A Brief Survey" 1956 *Wash. U. L. Q.* 193, 217 (describing arbitrations between textile merchants in nineteenth century New York City); Wesley A. Sturges, "Commercial Arbitration or Court Application of Common-Law Rules of Marketing?" 34 *Yale L.J.* 480 493 (1925) (describing program of intra-industry arbitration in the silk industry).

213 Martin Domke, *Domke on Commercial Arbitration*, § 30.01 (Larry Edmundson editor, 3rd edn. 2003) (stating that "arbitrators, in reaching their determination, may disregard the strict and traditional rules of law"); Morton Horowitz, *The Transformation of American Law*, 1760–1780, at 147–54 (1992) (noting that American settlers used arbitration to avoid the common law). Zipporah Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules," 100 *Harv L. Rev.* 465,511–512 (1987) (describing UCC draft of Llewellyn that called for merchant arbitrators

a set of default rules that apply only when the parties fail to legislate the terms of arbitration[214]. The parties can lay down specific procedural rules in their agreement[215]. The subject of the arbitration can change during the process, in contrast with a procedure in courts where the subject is defined by the lawsuit of the parties. Additionally, arbitrators can ask for courts to contribute to the arbitration proceedings and discovery. The precise format for discovery is set forth in an agreement between the parties or by a procedural ruling from the tribunal. Courts rather than arbitral tribunals find that the lack of public disclosure of arbitration results may favour repeat players over individuals[216]. It is important to note that any flexibility bestowed on an arbitrator is derived wholly from the agreement of the parties, as affected by the arbitration agreement. If there is nothing in an arbitration clause to differentiate the arbitration from a court proceeding, then arbitration rules require arbitrators to follow the law, holding them to the same standards as judges[217].

The general powers exercisable by an arbitral tribunal run in parallel with the corresponding powers of the court. The court's powers are more extensive and extend to certain areas where it would not be appropriate or possible for the tribunal to act. Hence, the court should act where the tribunal has no power or is unable for

to decide issues regarding substantial breach using realities of the market); Lon L. Fuller, "The Anatomy of Law 70–74 (1968) (noting and explaining the limited, narrow conditions that call for customary law); Philip G. Phillips, "A Lawyer's Approach to Commercial Arbitration," 44 *Yale L.J.* 31, 40 (1934) (noting that "the paramount and only indisputable advantage in arbitration consists in the 'expert fact finders' one can obtain").

214 Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tul. L.Rev.* 39 (1999). *Mastrobuono v Shearson Lehman Hutton, Inc.* interpreted the arbitration agreement to empower the arbitrations to award punitive damages by reasoning that "parties are generally free to structure their arbitration agreements as they see fit" 514 U.S. 52 (1995). *First Options of Chicago, Inc. v Kaplan* 514 U.S. 938 (1995). Harry Jones, *The Efficacy of Law* 15–18 (1969) (stressing the need to publicize laws in order to make laws effective and urging government to "use every effort to make legal provisions as intelligible as possible to laymen"). Joseph Raz, *The Authority of Law*, 214 (1979) (asserting that "if the law is to be obeyed it must be capable of guiding the behavior of its subjects").

215 *Bowles Fin. Group, Inc. v Stifel, Nicolaus & Co*., 22 F.3d 1010, 1011 (10th Cir. 1994) at 1011 ("agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting *Gilmer v Interstate/Johnson Lane Corp*., 500 U.S. 20, 29–33 (1991)) (quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985))); ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system …. One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law.").

216 *Ting v AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003*); Plaskett v Bechtel Int'l, Inc*., 243 F. Supp. 2d 334, 343 (D.V.I. 2003); *Acorn v Household Fin. Corp*., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002); *Luna v Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1182–83 (*W.D. Wash.* 2002).

217 Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tul. L. Rev.* 39, 57 (1999). Katherine V.W. Stone said that "in recent years, courts have begun to scrutinize arbitration procedures more carefully and refuse to enforce those that lack basic due process features" Katherine V.W. Stone, Arbitration – National, Research Paper No. 05–18 p. 5.

the time being to act effectively, showing the inequality of the alternative dispute systems. Besides, the arbitral tribunal alone has the power to order security for costs instead of the court (section 35) in English law. On the other hand, in Belgian law a judge is appointed to deal with verification of signatures and matters of discovery (Article 1696 BJC).

The court also has the power in aid of arbitration to order the issue of a request for the examination of a witness outside of its jurisdiction (section 44(2))[218]. Additionally, section 7 of the FAA permits court-ordered discovery in aid of arbitration from the district court in the district where the arbitrators sit. Some courts have interpreted FAA § 7 (which is silent on the subject) as permitting arbitrators to compel pre-hearing discovery from third-party witnesses[219]. How can an order to a court be made against a defendant who is not present or domiciled within the jurisdiction? An application for service out of the jurisdiction may be made[220]. The court has the power to order the preservation of evidence and measures involving the urgent search of a party's premises and the seizure of materials found there. The usual rules of evidence do not apply in arbitration proceedings, and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. The disclosure and discovery of factual information are as important in international arbitration as they are in litigation. Discovery in arbitration differs from discovery in litigation[221] and the availability and scope of discovery in arbitration is subject to the parties' arbitration agreement, any applicable national law and the discretion of the arbitrators[222]. On the other

218 R. Briner, "Domestic arbitration: Practice in continental Europe and its lessons for arbitration in England," 1997 *Arbitration International* 155.

219 *American Federation of Television and Radio Artists AFL-CIO v WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999). The Fourth Circuit has decided such discovery is available only on a showing of special need or hardship. *Comsat Corp. v Nat'l Sci. Found*., 190 F.3d 269, 278 (4th Cir. 1999). The Fourth Circuit reasoned that parties to an arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes, p. 276. Given the FAA's silence, those courts willing to infer an arbitrator's authority to order pre-hearing discovery must struggle with how the court's subpoena powers can be used to compel a reluctant third-party witness.

220 The rules of the Supreme Court (Amendment No 2) order 1996 SI 1996 No 3219, RSC Ord 73 r 8.1.

221 *Burton v Bush* 614 F2d 389, *Great Scott Markets Inc v Local Union* No 337 363 Fsupp 1351 C. Edward Fletcher, *Arbitrating Securities Disputes* 2 (1990); at 848–49 ("Much like litigation, arbitration is characterized by trial-like adversarial confrontation, but it is conducted privately and employs more relaxed rules of evidence and procedure than litigation."). *Am. Arbitration Ass'n,* "Introductory Guide To AAA Arbitration And Mediation" 2, http://www.adr.org/si.asp?*id*=2216 (last visited 27 November 2006) ("Arbitration is a submission of a dispute to one or more impartial persons for a final and binding decision. The arbitrators may be attorneys or business persons with expertise in a particular field. The parties control the range of issues to be resolved by arbitration, the scope of the relief to be awarded and many of the procedural aspects of the process. Arbitration is less formal than a court trial. The hearing is private.").

222 *C. Melchers GmbH & Co. v Corbin Assocs*., No. 1:05-CV-349, 2006 WL 925056, at *7–8 (E.D. Tenn. Apr. 7, 2006) (noting the wide discretion granted to arbitrators by federal courts); *InterChem*

hand, it is worth mentioning here that before constitution of the arbitral tribunal, in German law each party may apply to the state courts for a decision on the inadmissibility of the arbitral procedure (section 1032(2) CCP), which is binding on the arbitral tribunal, if such a tribunal is formed later. The same binding effect exists where a party instigates court proceedings relating to a subject matter that has already been submitted to arbitration after a tribunal has been formed, and the state court decides that it has jurisdiction on this matter[223]. Thus, it seems that even the informality of procedure that is the cornerstone of arbitration has been put under the court's scrutiny. Consolidation of arbitration is allowed in US and English law with a party's agreement but its use in Belgian and Greek law is disallowed.

As mentioned above, there are opportunities for a tribunal to seek enforcement of its order through national courts. Despite the fact that the arbitral tribunal has a freedom in the means of evidence, the support of courts in many instances is essential. Therefore, a fully independent arbitration system needs to have the power to complete evidence without any help from courts. It should be taken into consideration that an arbitration process with lengthy "legalisms", procedural details, and endless arrays of data that result in hearings with no focus means that we are losing the advantages of arbitration[224].

The presence of an expert in control of the arbitral process – in place of the traditional judge – represents savings in terms of time and resources and concurrently enhances prospects for a more commercially informed and accurate resolution of the dispute on its merits. The tendency of modern statutory forms of arbitration is to rationalize and make straightforward the arbitral process itself and to restrict and more tightly define the circumstances in which the formal courts are permitted to intervene in that process.

During the course to arbitration, it may be necessary for a national court to issue orders intended to preserve evidence, to protect assets and to maintain the status quo pending the outcome of the arbitration proceedings themselves. The arbitral tribunal cannot deal with interim measures until it has been established and national courts may be expected to deal with such urgent matters, which is a fundamental defect in the course to an independent arbitration. Moreover, the assistance of a national court may be necessary because the tribunal's powers are limited to the parties involved in the arbitration itself[225].

When a dispute is subject to arbitration, however, the filing in a court of a request for interim relief is not without its own drawbacks. First and foremost, litigation may be considered contrary to the parties' expectations, which is after all to have the

Asia 2000 Pte. Ltd. v Oceana Petrochemicals AG, 373 F. Supp. 2d 340, 352 (S.D.N.Y. 2005) ("The handling of procedure during an arbitration is committed to the discretion of the arbitrator.").

223 P. Huber, *Das Verhältnis von Schiedsgericht und staatlichen Gerichten bei derEntscheidung über die Zuständigkeit*, in: SchiedsVZ 2003, 73, 74.

224 M.F. Hill, Jr. & E. DeLacenserie, "Interest Criteria in Fact-Finding and Arbitration: Evidentiary and Substantive Considerations," (1991) 74 *Marquette Law Review* 399 at 444.

225 *McCreary Tire & Rubber Co v Sear SpA* 501 F2d 1032.

dispute arising from the contract between them resolved in arbitration. Secondly, the enforcement of interim relief issued by a court is limited to the geographical reach of the court's jurisdiction.

Prior to the onset of arbitration the courts have granted injunctive relief. The rules of most international arbitral regimes authorise a tribunal to order interim measures, but a tribunal has no executory authority to enforce the order against the assets of a party. Provisional measures are needed at the outset of the parties' dispute as ordinarily no arbitral tribunal will be in place and functioning at the beginning of the parties' dispute and so courts cover the lack of jurisdiction. Another approach could be that a state arbitration institution merely administering arbitration can take provisional measures until an ad hoc arbitral tribunal is established and so courts will be kept out of the arbitration process.

An arbitrator will grant provisional relief if he/she is satisfied that the law allows him to do so. Where provisional measures take effect at places outside the arbitral situs, arbitrators will inquire whether they are permitted to issue and enforce provisional measures in such places. US courts have recognized the power of an arbitrator under the FAA to order provisional measures, provided that this is consistent with the parties' agreement. The arbitrator can order provisional measures against the parties to the arbitration and not against a third party[226]. In *Pacificare Health Systems, Inc. v Book*[227] the US Supreme Court cast doubt on setting limits on an arbitrator's ability to award punitive damages. It is important to note that any flexibility bestowed on an arbitrator to ignore the law is derived wholly from the agreement of the parties in the arbitration agreement. To that extent, the amended Belgian law also allows arbitrators to order necessary provisional or protective measures[228].

According to the 1996 Act the court has the same powers as it would have in judicial proceedings (in so far as the arbitral tribunal cannot itself do so) the court will make orders preserving the subject matter of the proceedings, to order the sale of any goods which form the subject matter of the proceedings and to grant an interim injunction or appoint a receiver. The court's powers are subject to contrary agreement by the parties[229]. So, the court's order will be made at a time at which the arbitrators have not been appointed. Additionally, the court can, on the application of a party, make an order preserving the subject matter of a claim in the case of urgency without the tribunal's permission or the consent of the

226 *Carolina Light Co. v Uranex* 451 Fsup 1044 *Compagnie Nationale Air France c. MBaye* [2003] R.J.Q. 1040 (C.A.) (Courts can only intervene during the arbitral proceeding in cases provided for in Title 1 of Book VII of the CCP). Microtec Sécuri-T Inc. c. Centre d'arbitrage commercial national et international du Québec [2003] J.Q. (Quicklaw) No. 2918 (C.S.); [2003] J.Q. (Quicklaw) No. 6844 (C.A.) (Decisions rendered by an arbitral institution cannot be challenged in court while arbitration proceedings are ongoing).

227 538 U.S. 401 (2003).

228 Article 1696 BJC "1. Without prejudice to Article 1679.2, the arbitral tribunal may, at the request of a party, order provisional or protective measures, with the exception of an attachment order."

229 *Coppee-Lavalin v Ken-Ren Ltd* [1994] 2 AllER 449.

other parties. Sections 38 and 39 allow parties the ability to grant the arbitrators competence to order interim measures of relief.

Arbitration tribunals do not have the power to adopt any measure necessary for the provisional relief of any claim relating to substantive rights (Article 889.1 CCP). Hence, the arbitrator has neither power to grant provisional relief nor power to amend or revoke existing measures of provisional relief under Greek law. The rules of procedure for obtaining provisional relief are common for all kinds of measures and are laid down in Articles 683–703 CCP. Moreover, the court may require the applicant to provide security. Court decisions rejecting applications for provisional relief are not subject to judicial review. Greek law will be applied in the enforcement of protective measures. To that extent Belgian law (1679 BJC) clarifies that provisional or interim measures are imposed by courts but they must not be in contrast with the implementation of the arbitration agreement.

The courts that assume jurisdiction with respect to a provisional measure do not also assume general jurisdiction over the subject matter of the dispute, which continues to fall within the jurisdiction of the competent court or arbitral tribunal[230].

Regardless of the fact that arbitrators have a freedom in the arbitral procedure our analysis shows that arbitral tribunals lack the force of courts in matters of provisional and interim measures–not only in taking them, but also considering their implementation which might be vital for the success of the arbitration–adding to our argument for current inequality of arbitration versus courts as dispute mechanisms.

9 Award and review of awards by courts

Can the arbitration process be considered merely as an extension of the parties' contractual relationship and is the award equivalent to a contract term? It is argued that a challenge procedure is a guarantee that state courts can review the award if a party has a good reason to be dissatisfied or aggrieved with the arbitration and the way in which the award was rendered[231].

The role of the courts in reviewing arbitral awards is fixed and strictly defined[232]. In raising the issue *sua sponte*, the court[233] held that Congress, through the FAA, had provided the exclusive grounds of review of arbitral decisions. It seems that under the UNCITRAL Model Law, contractually expanded judicial review would

230 S. Tzifras, *Provisional Measures*, 1980 Athens, A. Brinias, *Law of Execution/Enforcement*, 1978 Athens. Court of Appeal of Athens 7725/2000 2001 DEC 907.

231 Redfern & Hunter, *International Commercial Arbitration*, paras. 9–03, 9–06.

232 The institutional integrity advocates that the grounds for review mentioned in the FAA are the exclusive grounds offered to a reviewing court in examining arbitral awards, and that congressional intent in this matter was to exclusively preclude any review under differing, more expansive, standards.

233 *Kyocera Corporation v Prudential–Bache Trade Services, Inc., et al.*, 2003 WL 22025130, at 5 (9th Cir. 2003).

not be available, given the very restrictive language of Articles 5, 34 and 36[234]. A final award is binding on the parties to the arbitration as a court judgment is on the parties to the litigation. In the case of a judge-arbitrator the application for the release of the award is made to the judge-arbitrator rather than the court and so the arbitral tribunal is attributed with a higher authority because of the identity of the arbitrator as a judge–revealing again the underlying basis of trust in the judicial identity of a judge arbitrator, and superiority and trust in courts rather than in arbitrators and arbitral tribunals.

The 1996 Act adopts a more formal and written type of award. A final award will dispose of all matters that have been raised in the arbitration and failure to deal with all issues is considered a serious irregularity for English law and ground for setting aside the award, but the FAA does not define a final decision with respect to arbitration. It seems to be an accepted truth that in the vast majority of cases arbitrators reach a fair and just result in resolving disputes between parties in a somewhat shorter time and at somewhat less expense than would be the case with litigation in court. On the other hand it could be argued that a tendency to copy procedures from litigation in order to give a formality to arbitration will lead to legalization of arbitration rather than making arbitration a more concise and effective mechanism which will be at the same time co-equal to courts[235]. There is no deadline imposed by the courts or by the FAA for issuance of an arbitration award, but in Belgian and Greek laws parties can request courts to impose a deadline for the issue of the award in arbitration. In *Associated Const. Co. v Moliterno Stone*, an arbitrator's failure to issue written findings was not abuse of powers, or such imperfect execution that a mutual, final and definite award was not made[236].

If the arbitrators are more than one and there is not a different parties' agreement, arbitrators decide together with the umpire and the award is voidable if Article 891 CCP or 1701 BJC is not followed[237]. Moreover, the conflict between the reasoning of an award and the core (essence) of the award does not mean that the award is void[238] and if it is corrected by arbitrators, the award creates *res judicata*.

The award must be written and signed by hand-written signature by the arbitrators. Parties can agree in a different way, for example, to decide that the award will be signed only by the umpire (Article 892 CCP, 1701 § 4 BJC). If the award is not written then it is void. A written and signed award is considered

234 Vikram Raghavan, "Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on Some US Developments," 15 *J. Int'l Arb.* 103, 123 (1998).

235 Michael G. Weisberg, "Note, Balancing Cultural Integrity against Individual Liberty: Civil Court Review of Ecclesiastical Judgments," 25 *U. Mich. J.L. Rev.* 955, 995 (1992) (explaining "formal agreement to arbitrate requires a minimum standard of appropriate conduct from the arbitrators in order for the proceeding to be legally valid").

236 *Associated Const Co v Moliterno Stone*, 782 F Sup 15.

237 Supreme Court 1661/80 29 NV 1074.

238 Court of Appeal of Athens 201/95 1997 HD 883, Court of Appeal of Pireaus 611/2006 (Nomos Database 415791).

to be final and it has to be submitted before a court for its confirmation in order to be regarded as a judgment. Article 892 CCP also defines the necessary elements to be included in the content of an award. The parties can agree that there will be reference to the arbitration agreement in the content of the award and in the legal analysis of the decision without any further analysis and reasoning. The place and the time of the issue of an award are obligatory for the content of an award because the place of the issue defines the jurisdiction of the court, which will confirm the award. If there is no mention of the place of issue, then this is a reason for the award to be voided after a court's decision. According to articles 892§2 CCP and 1701§5 BJC similar factors are considered to comprise the obligatory content of an award. The award must be reasoned by the arbitrators in Greek and Belgian laws and so the award will be void if the arbitrators' reasoning of the award based on the facts of the case does not lead to the application of the substantive law regulating the dispute[239]–showing that the two systems follow the courts and in a way copy the tradition of court judgments. It could be argued that awards' reasoning should be concise and not as detailed as in courts' judgments.

The award is to contain reasons unless it is an agreed award or the parties have agreed to dispense with reasons. If the reasons are given, but are inadequate to allow the court to determine whether an error of law is contained in the award for the purpose of hearing an appeal on a point of law, the court has jurisdiction to order a new reasoning, provided that there is no agreement to exclude judicial review. A court can order reasons to be given for the purpose not just of an appeal on a point of law, but also for the purpose of determining whether the arbitrators have exceeded their jurisdiction or the proceedings were conducted under serious irregularity. Additionally, if the parties agreed that the award should be unreasoned, that agreement is enough to oust the jurisdiction of the court to hear an appeal on a point of law (section 69). Notably, section 70.4 extends the court's ability to order reasons beyond appeal on point of law under section 69, to applications under sections 67 and 68. In the absence of a contrary agreement a party can apply to the court for an order requiring reasons to be given (section 68).

It could be argued that reasoned awards by arbitrators will lead to expanding judicial supervision of the process. On the other hand, a basic legal reasoning of an award will mean that arbitral awards can create precedent equal and parallel to a judgment[240]. Therefore, arbitration will create a legal background for reference and

239 Supreme Court 1306/82 24 HD 410, Art 1701 §5,6 BJC. Italian law Article 823.

240 John Beechy, "International Commercial Arbitratiion: A Process Under Review and Change," 55 October *Disp . Resol. J.* 32, 34 (2000) ("Not long ago, I heard an eminent international arbitrator suggest that recourse to what he described as 'constructive ambiguity' in the drafting of an arbitral award was appropriate and justified if the arbitrator felt that it might bring about a position in which the parties settled their differences."). Bernardo M. Cremades and Steven L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions," 2 *B.U. Int'l L.J.* 317, 336–37 (1984) (suggesting "the formation of institutions which give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*"). Thomas E. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce," 19 *Tex. Int'l L. J.*

so arbitration will rise as a co-equal dispute resolution system with a legal status equal to that of courts, safeguarding at the same time the advantages of arbitration. For example, in a dispute respondents[241] applied to the court, under section 68 of the Arbitration Act 1996, that there was a serious irregularity in the award. The judge at first instance determined that the judgment should remain private because it contained sensitive matters of great confidentiality and that the summary should also not be published. The Court of Appeal decided to uphold the decision of the judge and publication of the judgment was forbidden. The summary, which was published online, was a brief and factually neutral insight into the legal issues in the case and did not disclose any sensitive or confidential information and so was of some interest to lawyers and others interested in arbitration–therefore it should be published. Thus, the award had to go through the first instance court and Court of Appeal in order to solve a dispute about matters of irregularity, showing the inferior position of arbitration as a dispute mechanism and indicating the inequality of arbitration versus courts. Courts have found that a confidentiality provision in an arbitration agreement is unconscionable for the reason that such provisions favour the repeat participant in the arbitration process by making it difficult to determine whether the arbitrator or the arbitration process was biased and the lack of public disclosure of arbitration results may favor repeat players over individuals[242].

Most international arbitral awards remain confidential and some are not reasoned[243]. In Greece and Belgium, many awards are published in various

33, 39 (1984); Kenneth Michael Curtin, "Redefining Public Policy in International Arbitration of Mandatory National Laws," 64 *Def. Couns. J.* 271, 279 (1997) ("Publication of arbitral awards … is becoming more common, thus alleviating the difficulties associated with a lack of precedent."); Klaus Peter Berger, "International Arbitration Practice and the Unidroit Principles of International Commercial Contracts, 46 *Am. J.. Com. L.* 129 (1998) (stating that "arbitral awards more and more assume a genuine precedential value within the international arbitration process"), William Tetley, "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)," 60 *La. L. Rev.* 677 (2000) ("With each passing year there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the US), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus developing a system of arbitral precedent."). Cindy G. Buys, "The Tensions Between Confidentiality and Transparency in International Arbitration," 14 *Am. Rev Int'l Arb.* 121, 137 (2003) (arguing for a presumption in favor of publication that can only be overcome by objection by both parties); Dora Marta Gruner, "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform," 41 *Colum. J. Transnat'l L.* 923, 960 (2003) (proposing establishment of an official international regulatory body to require and oversee award publication except in those cases involving exclusively "issues of a private, consensual nature").

241 *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Company* [2004] EWCA Civ 314.

242 *Ting v AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003); *Plaskett v Bechtel Int'l*, Inc., 243 F. Supp. 2d 334, 343 (D.V.I. 2003); *Acorn v Household Fin. Corp.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002); *Luna v Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1182–83 (W.D. Wash. 2002).

243 Edward Brunet & Charles B. Craver, "Alternative Dispute Resolution: The Advocate's Perspective" 324 (1997) (explaining that only in specialized arbitrations, like labor, international commercial, and maritime arbitrations, do arbitrators write opinions). (Article 1693–1696 BJC).

journals. Those awards that are published do not command *stare decisis* respect comparable to that of US common law decisions. Thus, awards should be written and be concisely reasoned in order to be regarded as arbitral precedent. Unlike the judicial process, the doctrine of *stare decisis* is not applied to arbitration awards even when they are published with reasons, but publishing reasoned awards decreases the likelihood of inconsistent awards. The issuance of reasoned awards and the willingness of arbitrators to be guided by precedent promote the efficiency of arbitration. Thus, arbitration should accomplish the goals of fairness and efficiency informally through custom and practice rather than by a formal structure and legal sanction. It should be taken into consideration that arbitrators have no obligation to the court to give their reasons for an award[244] but in English, Greek and Belgian law there is a need for a reasoned award according to the mandatory content of the law[245]. While in US law arbitration awards could not be set aside merely because arbitrators choose not to provide parties with reasons for their decision[246], according to section 68 of the 1996 Act and Articles 1704 § 2i BJC and 897 CCP, the award will be set aside if there is a lack of reasoning. Additionally, an award with contradictory decisions can be set aside (Article 1704§2j BJC, Article 897 (7) CCP). On the other hand, Article 52 of the 1996 Act provides that the parties may also agree that the award does not have to contain reasons or the date of its making or the seat of the arbitration.

It is argued that arbitration involves a form of contractual 'lawlessness' that affects the parties to each dispute and the entire legal system[247]. Besides, the claim

244 *United Steelworkers of Am. v Enter. Wheel & Car Corp*., 363 U.S. 593, 598 (1960); *see* also *Halligan v Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2nd Cir. 1998) (holding that arbitrators have no obligation to explain their award in writing). Ian Macneil *et al.*, Federal Arbitration Law § 2.6.2, at 2:37 (stating that arbitrators are not required to provide a written opinion with reasons supporting their decision).

245 James T. Peter, "Med-Arb in International Arbitration," 8 *Am. Rev Int'l Arb.* 83, 86 & n.21 (1997) (noting that some civil law systems treat unreasoned awards as unenforceable violations of public policy).

246 *Raytheon Co v Automated Business Systems*, 882 F 2d 6. *Green Tree Financial v Randolph*, 121 S.Ct. 513, An arbitration award reinstating a union employee who tested positive for illegal drugs on more than one occasion was confirmed notwithstanding the employer's contention that the award exceeded the arbitrator's authority because it violated public policy. The district court found that there was no well-defined and dominant public policy which prohibited reinstatement of an employee, whose drug use was found to be occasional and not likely to recur, to a position which was not safety sensitive. The fourth circuit affirmed in an unpublished opinion. The US Supreme Court affirmed. *Eastern Associated Coal Corporation, et al., v United Mine Workers of America, District 17*, *et al*., 66 F. Supp.2d 796 (S.D.W.Va. 1998); affirmed, 188 F.3d 501 (4th Cir. 1999); 121 S.Ct. 462.

247 Kenneth S. Abraham & J.W. Montgomery, III, "The Lawlessness of Arbitration," 9 *Conn. Ins. L.J.* 355, 357 (2003). Philip J. McConnaughay, "The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration," 93 *Nw. U. L. Rev.* 453, 453 (1999): "[i]nternational commercial arbitrations today are virtually lawless, or at least they can be, at the election of the parties or the private arbitrators who serve them." Linda Silberman, "International Arbitration: Comments from a Critic," 13 *Am. Rev Int'l Arb.* 9, 11 (2002) ("An even more basic flaw of international arbitration is its almost "lawless" character as regards national law …. [T]here

that arbitrators are permitted to be lawless is at odds with the existence of "manifest disregard of the law" as a standard for judicial review, and is contradictory with the provisions of many arbitration rules[248]. In consequence, even if a court determines that the arbitrators did not follow the law, in most cases the court will uphold the award[249]. The Supreme[250] Court's repeated admonition that "there is no reason to assume at the outset that arbitrators will not follow the law … although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute". There is no reason to take for granted that arbitrators will make errors at the same rate as trial court judges. Arbitrators might, in fact, make fewer errors. There is no way to know for sure as a matter of theory who is going to make the most mistakes[251]. Arbitrators as judges have to apply legal principles to the facts revealed in a dispute[252]. According to Christopher R. Drahozal[253]: "The attitudes of arbitrators toward following the law do not appear all that different from the attitudes of judges … the effect of arbitration on the development of the law is likely limited to certain substantive areas (in industries with extensive use of arbitration clauses), and even then published arbitration awards may serve as persuasive precedent in some cases".

Parties can agree on legal principles to guide their arbitration results[254]. If the parties assign particular duties to the arbitrator, courts should defer to such explicit

is no real context for and no real check on arbitrators' rulings"). Richard M. Alderman, "Consumer Arbitration: The Destruction of Common Law," 2 *J. Am. Arb.* 1, 11 (2003) ("Even assuming an arbitrator is committed to following the law, however, he or she cannot make it. Therein lies the problem …. Arbitration eliminates litigation in a public forum, precedent-establishing decisions, and stare decisis.").

248 William W. Park, "The Specificity of International Arbitration: The Case for FAA Reform," 36 *Vand. J. Transnat'l* L. 1241, 1290 n.217 (2003). Robert P. Burns, "The Lawfulness of the American Trial," 38 *Am. Crim. L. Rev*. 205, 205 (2001) ("Much of the recent criticism of the American trial focuses on its perceived 'lawlessness.' Commentators have accused juries of making decisions based on emotion and prejudice, all the way up to explicit nullification."). Philip G. Phillips, "Rules of Law or Laissez-Faire in Commercial Arbitration," 47 *Harv L. Rev.* 590, 599–600 (1934)("the attention of business has been on arbitration as an escape from the jury method of fact determination and not as an escape from substantive law").

249 *Duferco Int'l Steel Trading v T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2nd Cir. 2003) ("since 1960 we have vacated some, part, or all of an arbitral award for manifest disregard in the following 4 out of at least 48 cases where we applied the standard"); *Dawahare v Spencer*, 210 F.3d 666, 670 (6th Cir.), *cert. denied*, 531 U.S. 878 (2000) (identifying only two US court of appeals cases vacating awards for manifest disregard of the law).

250 *Shearson/American Express, Inc. v McMahon*, 482 U.S. 220, 232 (1987). *DiRussa v Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2nd Cir. 1997), cert. denied, 522 U.S. 1049 (1998).

251 Christopher R. Drahozal, "Judicial Incentives and the Appeals Process," 51 *Smu L. Rev.* 469, 501–02 (1998); *see also* Christopher R. Drahozal, "A Behavioral Analysis of Private Judging," 67 *Law & Contemp. Probs.* 105 (2004) (comparing effect of behavioral biases on jurors and arbitrators).

252 *Goldberg v Kelly*, 397 U.S. 254 (1970).

253 Christopher R. Drahozal, "Is Arbitration Lawless?" www.ssrn.com p. 39–40.

254 *Harris v Parker Coll. Of Chiropractic*, 341 F. 3d 790, 794 (5th Cir. 2002) (enforcing the agreement of the parties seeking expanded judicial review); *Roadway Package Sys., Inc. v Kayser*, 257 F.

party choice and textual clarity, assuming no contrary policy of greater import[255]. There is *ratio decedendi* in arbitration that does not follow the road of certainty of courts. Custom of usage or trade usage, common trade terms or industrial practices are illustrative norms which comprise a sort of "rule of industry" that should be regarded as rule of law because the written law is the reflection of industrial norms and practice[256]. Customary law in the form of industry norms prevails and some merchants chose arbitration to plainly avoid the application of legal principles[257]. In other words, law in the form of written or customary form plays a role in the arbitration award[258]. In the words of Justice Blackmun: "[A]rbitrators are not bound by precedent[259]" but by the form of litigation precedent because arbitrators use a guidance regarding the interpretation of law applying to specific facts according previous awards[260]. Written arbitration awards can guide an arbitrator when deciding a similar case. It has to be taken into consideration that law is routed in custom ("customary law")[261].

Poorly reasoned decisions are reviewed by courts and judicial review is limited to issues concerning matters of law and fact[262]. Despite the role of the national

3d 287, 292 (3rd Cir.), *cert. denied,* 534 U.S. 1020 (2001) (holding that the FAA supports enhanced judicial review contracted for by the parties).

255 Edward Brunet, Richard E. Speidel, Jean R. Sternlight, & Stephen J. Ware*, Arbitration Law in America: A Critical Assessment* 79–83 (2006) (arguing that courts should uphold party choice of arbitration procedures and even the choice of enhanced judicial review). Carrie Menkel-Meadow, "Whose Dispute is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)," 83 *Geo.L.J.* 2663 (1995) (emphasizing ownership of dispute by the parties to the dispute themselves).

256 Lisa Bernstein, Private 5 "Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions", 99 *Mich. L. Rev.* 1724 (describing a system of intra-industry arbitration); Philip G. Philiips, "Rules of Law or Laissez-Faire in Commercial Arbitration," 47 *Harv L. Rev.* 590 (1934)(describing the custom of trade associations to use trade tribunals of fellow merchants to decide disputes).

257 W. Michael Reisman *et. al., International Commercial Arbitration* 383 (1997) (noting that motivation for international arbitration derives for unwillingness of contracting parties to accept the jurisdiction of the other side's courts).

258 *Czarnikow v Roth, Schmidt & Co*., [1922] 2 K.B. 478 (describing the English arbitration practice of arbitrators following the law as a system in which "the law retains sufficient hold … to prevent any injustice on the part of the arbitrator and to secure that the law that is administered by any arbitrator is in substance the law of the land, and not some homemade law of the particular arbitrator or the particular association").

259 *McMahon,* 482 U.S. 220, at 259 (1987) (Blackmun, concurring in part and dissenting in part).

260 Carlton J. Snow, "An Arbitrator's Use of Precedent," 94 *Dick. L. Rev.* 665 (1990) (noting that arbitrators and not courts should decide the precedential value of previous awards).

261 Lon L. Fuller, *The Anatomy of Law* 73–74 (1968).

262 *Prudential-Bache Sec., Inc. v Tanner*, 72 F.3d 234, 240 (1st Cir. 1995) ("[Because the] arbitrators do not explain the reasons justifying their award … '[the] appellant is hard pressed to satisfy the exacting criteria for invocation of the doctrine. In fact, when the arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law.'" (citations omitted)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) ("Where, as here, the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle.");

court in terms of enforcement, deference is given to the panel in other elements of the decision but expansion of judicial review will transform arbitration into a judicial arbitration rather than a consensual dispute mechanism[263]. Arbitrators are beginning to cite previous arbitral awards in rendering subsequent awards, in consequence gradually building up an arbitral case-law, an essential component of the modern *lex mercatoria* which should be considered as a first step towards a complete independence of arbitration from courts.

Should an appellate arbitral tribunal deal with the review of awards by law? Article 895§2 CCP states that an award is not appealable by any legal means, but the parties can agree for the award to be reviewed by other arbitrators as in Article 1703§2 BJC[264]. The court recognized the possibility that parties could resort to an appellate arbitration panel to review an arbitrator's award[265]. By contractually providing for an appeal, the parties normally do not give up the right to seek vacatur.

Advest, Inc. v McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (finding that, since "arbitrators need not explain their award … and did not do so here, it is no wonder that [the petitioner for vacatur] is hard pressed to satisfy the exacting criteria for invocation of the [manifest disregard] doctrine" (citations omitted)).

263 Norman S. Poser, "Judicial Review of Arbitration Awards: Manifest Disregard of the Law," 64 *Brooklyn L. Rev.* 471, 471–72 (Summer 1998) (finding that courts should only modify or vacate an arbitral award when there is a "manifest disregard for the law"). *Merrill Lynch, Pierce Fenner & Smith, Inc. v Bobker*, 808 F.2d 930 (2nd Cir. 1986). Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. *L. Rev.* 731, 731 (Spring 1996) (finding the US body of law regarding grounds for vacating an arbitral decision to be in "disarray" and unfortunately not contemplated in the FAA). Jonathan R. Bunch, "Comment, Arbitration Clauses Should be Enforced According to Their Terms—Except When They Shouldn't Be: The Ninth Circuit Limits Parties' Ability to Contract for Standards of Review of Arbitration Awards," 2004 *J. Disp. Resol.* 461 (arguing that parties should not be able to contravene by contract the limited standards of review set forth in the FAA); W. Tetley, "International Conflict of Laws," 1994 at pp. 417–419; Tetley, "The General Maritime Law – the *Lex Maritima*," (1996) 20 *Syracuse J. Int'l L. & Comm.* 105–145 at pp. 134–"International Maritime and Admiralty Law," 2003 at p 443. *Mich. Family Res., Inc. v SEIU*, 438 F.3d 653 (6th Cir. 2006) ("[T]he standard for reviewing [labor] arbitration awards is 'one of the narrowest standards of judicial review in all of American jurisprudence …' ") (quoting *Tenn. Valley Auth. v Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514–15 (6th Cir. 1999)); *Puerto Rico Tel. Co. v U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005) (FAA provides for "extremely limited judicial review"); *MACTEC, Inc. v Gorelick*, 427 F.3d 821 (10th Cir. 2005) ("As a general rule, judicial review over an arbitration award is very limited."); *Wallace v Buttar*, 378 F.3d 182 (2nd Cir. 2004) (arbitration decisions are entitled to "great deference" and a party who seeks to vacate an arbitration decision bears a heavy burden); *Hoeft, III v MVL Group, Inc.,* 343 F.3d 57, 67–68 (2nd Cir. 2003) (judicial review is "severely limited"); *Postlewaite v McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003) (judicial review is very limited).

264 Similarly in French law parties can agree for an appellate arbitral tribunal in order to review their first instance award: Article 1481. An arbitral award may not be the subject of opposition proceedings or of a petition to vacate before the Cour de Cassation. It may be the subject of third party opposition proceedings before the court which would have had jurisdiction had there been no arbitration, subject to the provisions of Article 588 (paragraph 1).

265 *Chicago Typographical*, 935 F.2d 1501. The Seventh Circuit then went on to categorically deny the possibility of federal judicial review of that award, by stating: "they [the parties] cannot contract for judicial review of that award: federal jurisdiction cannot be created by contract."

The only exclusion would seem to be at the confluence of errors of law and manifest disregard of the law. An appeals mechanism negates the possibility of vacatur based on that doctrine[266]. Judge Posner[267] explained that in depth scrutiny of arbitrator opinions would be damaging, because it might daunt arbitrators from writing opinions at all, but it could be argued that there is a need for a concise reasoning in order to have a fair picture of the legal principles upon which arbitrators based their awards. Moreover, in *Chicago Typographical Union No. 16 v Chicago Sun-Times, Inc.,*[268] it was held that "if parties desire broader appellate review, they can contract for an appellate arbitration panel to review the arbitrator's award." Additionally, Cole Sternberg[269] argues that without appellate review of flawed decisions certain attributes erode and parties are faced with a risk analysis between national courts and arbitration, and so an appellate arbitral tribunal would be an asset for arbitration. To that extent, Netherlands law allows parties' agreement for an appeal of the award by a second arbitral tribunal[270], showing an extensive acceptance of the prospect to have a second degree of arbitral tribunal to examine the award. This may lead to a more effective arbitration but it is not specified that a possible appeal to a second degree arbitral tribunal will mean no jurisdiction of courts to review the award. Currently, even if there is an agreement for appeal by an arbitral tribunal, parties still go to courts for court review of the award. The parties' agreement about the review of the award by other arbitrators means that the idea of a second arbitral tribunal for a kind of appeal of the first awards is understandable and so the acceptance of an appellate arbitral tribunal that can review the award[271] can be seen as a new solution for independence of arbitration from litigation, thereby achieving its role as a new dispute mechanism fully alternative to courts. It is worth mentioning here the existence of the possibility for the parties to provide

266 *Paul Bennett Marrow,* "Arbitration Awards: Understanding The Limitation of Vacatur And The Possibilities For An Appeal*," Westchester Bar Journal Vol.* 33, No. 2 p. 68.

267 Judge Posner explained that courts should "not create disincentives" preventing arbitrators from authoring written awards "because writing disciplines thought." *Chicago Typographical Union No. 16 v Chicago Sun-Times*, 935 F. 2d 1501, 1506 (7th Cir.1991).

268 935 F.2d 1501, 1504–05 (7th Cir.1991).

269 Cole Sternberg, "Chinese Courts: More of a Gamble than Arbitration?" 4 *Int'l Bus. L.Rev.* 31 (2004). Detlev F. Vagts, Contratación internacional, Comentarios a los principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autónoma de México – Universidad Panamericana 265, at 267 (1998) (finding that the lack of appeal prohibits the arbitration system from "generalizing" or "reconciling" the decisions of arbitral panels), *available at* http://www.cisg.law.pace.edu/cisg/biblio/vagts.html#b2.

270 Austrian CCP, 4th Chap. Article 594 (1983 Modification) The arbitral award has the effect between the parties of a final and binding court judgment unless the parties have agreed in the arbitration agreement that there shall be the possibility of an appeal against the award to a second-tier arbitral body. Application for Setting Aside an Award Article 611 ZPO (2006). (1) An appeal to a court against an arbitral award may be made only by means of an action for setting aside. This shall also apply to arbitral awards by which the arbitral tribunal has ruled on its jurisdiction. Netherlands CCP Article 1050 – Appeal to Second Arbitral Tribunal. An appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed thereto.

271 Supreme Court 468/79 46 EGL 397.

for an appeal or a second instance in the arbitration agreement as specified in the Netherlands, CCP Article 1050§1, in GAFTA commodity arbitrations (GAFTA rules 10, 11,12,13,15) and ad hoc rules Article 20c of the court of arbitration for sports.

An award as a court decision produces *res judicata* and a confirmed award can be enforced and produce the same legal results as a court decision. It could be argued that an award becomes a court decision and we have two types of decisions by two different dispute methods that should be two different poles in a legal system, but these decisions finally are transformed by courts only into judgments enforceable in the same legal system. We can have arbitral awards and courts' judgments directly enforced by the same mechanism and so avoid the courts' involvement needed to recognize and make arbitral awards enforceable and in fact diminishing the status and role of arbitration. It is characteristic that in Austrian law[272] an award is considered to be an equal judgment similar to a court's judgment without any recognition process, which is a right move towards an independent arbitration. An award creates *res judicata* for procedure matters as well (896, 322 CCP). Can parties nullify the *res judicata* of an award by their arbitration agreement? Parties can cease the force of an arbitration agreement until the issue of an award (896 CCP). It is characteristic that in English law (section 87) parties can exclude courts' jurisdiction to review an award and in Article 1717 § 4 BJC review of an award is allowed only for people having Belgian nationality or residing in Belgium or legal persons formed or having a branch and seat in Belgium, and all the other parties and entities concerned can exclude by agreement any review of the award. Lester Brickman[273] argues that "[a]rbitration awards should be reviewable by courts to ensure that ethical and fiduciary standards have been properly applied". The question to be answered is whether the absence of any type of review strengthens the trust of people in arbitration as a co-equal alternative to courts or whether it is essential to have a review stage by a second-degree of arbitral tribunal. The author considers that it is essential that the existence of a second-degree of review of an award be extant; in order to minimize any chance of unfair and unfounded award and consequently helping arbitration achieve its role as a well-founded dispute mechanism which can justifiably substitute litigation when the parties decide to do so. Moreover, Paul Bennett Marrow[274], Eric van Ginkel[275] and William

272 Effects of the Award Article 607ZPO (The award has between the parties the effect of a final and binding court judgment).

273 Lester Brickman, "Attorney-Client Fee Arbitration: A Dissenting View," 1990 *Utah L. Rev.* 277, 307.

274 Paul Bennett Marrow, "Appealing an Arbitrator's Award," 77 *N.Y.S. Bar J.* 14 (2005) (discussing whether parties may agree to process providing for appellate arbitration review by another arbitrator); Paul Bennett Marrow, "A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator," 60 *Disp. Resol. J.* 10 (2005) (advocating implementation of appellate arbitral review by another arbitrator).

275 Eric van Ginkel, "Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur," 3 *Pepp. Disp. Resol. L.J.* 157 (2003) (arguing that parties should be free to contractually agree to an arbitral appellate process).

H. Knull, III & Noah D. Rubins[276] also argue in favor of an appellate arbitral tribunal According to Katherine V.W. Stone[277] it is hoped that with further judicial policing, arbitration will live up to its guarantee of providing a fair procedure that provides just results and that is easy to get to all participants. This author thinks that the right of appeal before an appellate arbitral tribunal is the best policing for an effective arbitration co-equal to courts.

Are arbitration and courts parallel jurisdictions that replace each other according to the parties' agreement? It is certain that arbitration cannot replace courts but on the other hand, the independent and equal co-existence of arbitration and courts as dispute systems working in parallel in a national legal system could be achieved. It could be said that the jurisdiction of an arbitral tribunal to solve civil disputes is broader than that of court jurisdiction to solve civil matters, which means that disputes not solved before a court can be arbitrated[278]. Currently, the judicial review of awards is considered as part of the substance of an arbitration procedure. In the case of nullification of an award this means that the dispute is not solved and so it can be referred either to a court or to an arbitral tribunal. Besides, an appellate arbitral tribunal by issuing an appellate award will close the dispute and so achieve finality.

Each country that has a law governing arbitration has its own grounds for challenge of an award. By statute, courts have been given power to vacate awards for defects in the basic procedural integrity of the arbitration, but not with regard to either vague notions of public policy or the merits of a dispute[279]. An award may be challenged on either procedural grounds (failure to give proper notice) or substantive grounds (mistake of law)[280]. The court cannot review an award regarding the law and interpretation of the law by the arbitrator and their view expressed in the content of the award[281]. The legal part of an award can be reviewed

276 William H. Knull, III & Noah D. Rubins, "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option," 11 *Am. Rev Int'l Arb.* 531 (2000) (arguing that arbitration-providers in international arbitration should offer an appellate process).

277 Katherine V.W. Stone, Arbitration – National, Research Paper No. 05–18, p. 3.

278 Supreme Court 825/77 26 NV 273.

279 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 632 (1984). Justice Stevens, writing in dissent in the *Mitsubishi Motors* decision, developed the theme that the virtues of arbitration in the resolution of private contractual disputes render it less well-suited as a device by which to resolve claims based on rights stemming from public law "… the informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions," *The Gazette c. Blondin* [2003] *R.J.Q*. 2090 (C.A.) (notions of arbitral award and procedural orders; prohibition on judicial review of the merits of an arbitral award; exhaustive nature of the grounds of review of awards provided for in Article 946.4 of the *CCP*).

280 *Parsons & Whittemore Co. v Societe* 508 F2d 969, *Iran Aircraft v AVCO Corp*., 980 F2d 14.1. The model law (Article 34) states that an action for setting aside can only be brought in respect of an award made within the territory of the state concerned. It has to be brought before the designated court in the state and it can be brought on the grounds set out in the model law that are taken from Article V of the NYC (invalid agreement to arbitrate, lack of due process, issues of jurisdiction).

281 Supreme Court 1661/80 29 Nomiko Vima (NV) 1074.

by a court for matters of public policy and morals. Moreover, the ground upon which an award can be challenged is that of serious irregularity. The concept of serious irregularity encompasses the concept of misconduct, remission and defective awards and admitted mistakes. Misinterpretation of contracts will not, in itself, vacate an arbitration award[282]. An application can be made to the court for the setting aside or remission of an award on the ground that the proceedings were tainted by serious irregularity such as failing to comply with the general duty of fairness (section 33); failing to comply with the agreed procedure; and any irregularity in the conduct of the proceedings.

As discussed earlier, an award can be voided for a number of reasons: if the arbitration agreement is void; the award is issued after the cessation of the arbitration agreement. For reasons related to the improper appointment of arbitrators or exclusion of them; the arbitrators have not properly used their power attributed by the parties' agreement; no proper contract of the arbitration proceedings and so no fair hearing of both parties, no proper vote of the arbitrators and problems with the signing of the award and its content; the award is against the public policy and morals; the award does not make sense or there are conflicting parts of the content; if the reasons applicable for rehearing of a court decision under Article 544 CCP apply to an award (Article 897 CCP). To that extent, Article 1704 BJC, section 68 of the 1996 Act, and sections 10, 11 of the FAA specify identical and similar reasons for setting aside an award by a court's decision–which shows a convergence of the legal systems not only regarding the role of courts in arbitration and review of awards, but also in the factors needed for review of awards. It is worth mentioning that the reasons for review of awards can be expanded by parties' agreement in US law as analyzed above, but review of awards cannot be expanded in Belgian, Greek and English law. Is the existence of so many reasons of review by a court a kind of mistrust in the arbitrator's capacity? This author thinks that the reasons for setting aside of an award established by national laws could be examined by a second-degree arbitral tribunal rather having to go through courts after an appeal against the first award, and so a new award can be issued by the arbitral tribunal of appeal even in the case of annulment of the award issued by the first instance arbitral tribunal. Thus, we will expeditiously have a final award, thereby resolving the dispute rather than having the dispute unsettled, as happens currently. If the award is annulled, parties either have to go through a new arbitration process or go to the courts for a settlement.

An arbitral award can be set aside if the court of the place of arbitration finds that the claim cannot be settled by arbitration under its own law. Additionally, an award can be set aside if a national court of the place of arbitration finds that the award is in conflict with the public policy of its own country. Every country has its own concept of what is required by its public policy, which means that different states have different concepts of their own public policy and there is a risk that

282 *Federated Dep v JVB Industries* 894 F2d 862.

one country may set aside an award that other countries would regard as valid. National public policy binds individuals and thereby restricts contractual freedom within territorial limits. Domestic public policy is a ground for challenging an award and also refusing recognition and enforcement of it in the investigated legal systems[283].

To vacate an award on the ground of manifest disregard, a reviewing court[284] must find both that the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and that the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. An award should not be set aside under the "manifest disregard" standard unless the court finds that the arbitrator committed misconduct by ignoring what he/she knew to be the law. Section 10(a)(4) permits vacatur only if the arbitrator decided an issue he was not given authority to resolve[285]. Moreover, as discussed above, courts employ a two-part analysis in examining whether an arbitrator "manifestly disregarded" the law, firstly the clarity of an applicable legal principle and secondly the degree to which

283 *American Safety Corp v JP Maguire* 391 F2d 821, *Mitsubushi Motors v Soler Crysler-Plymouth* 473 U.S. 614, *Scherk v Alberto-Calver Co.* 417 U.S. 506. R. Fox, "Preemption of state law under the FAA," 1985 *Baltimore LR* 129, A. Brunel, "Mosel Law on International Arbitration," 1990 *Texas ILJ* 46.

284 *Salem Hosp. v Mass. Nurses Ass'n*, 449 F.3d 234, 237 (1st Cir. 2006) (citing *United Paperworkers Int'l Union v Misco, Inc*., 484 U.S. 29, 37–38 (1987) ("The hallmark of federal court review of an arbitrator's decision is extreme deference to the opinion of the arbitrator, whose interpretation of the contract has been bargained for by the parties to the arbitration agreement."); B.L. Harbert International, *LLC v Hercules Steel Company*, 441 F.3d 905 (11th Cir. 2006)(an arbitration loser must prove the arbitrator recognized a clear rule of law and deliberately chose to ignore it.) At 911 "Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions …. The warning this opinion provides is that in order to further the purposes of the [FAA] and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases". *Wachovia Securities, LLC v Vogel*, 918 So. 2d 1004 (Fla. 2d D.C.A. 2006) ("[t]he burden of persuasion falls upon the party seeking to vacate the award"). *Peebles v Merrill Lynch*, 431 F.3d at 1327 (a misinterpretation, misstatement, or misapplication of the law will not constitute manifest disregard of the law). *Greenberg v Bear, Stearns & Co.*, No. 99–9041 (2nd Cir. 7 August, 2000). At http://www.law.pace.edu/lawlib/legal/us-legal/judiciary/second-ircuit/test3/99-9041.opn.html. *Delaney v Dahl*, 121 *Cal. Rptr.* 2nd 663, 668 (Ct. App. 2002) (observing that the " 'award [of an arbitrator] will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source.' " *Patten v Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006) (vacating award in an age discrimination case).

285 Stephen L. Hayford, "A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur," 66 *Geo. Wash. L. Rev.* 443, 466–70 (1998). Stephen L. Hayford, "Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur," 1998 *J. Disp. Resol.* 117 (1998) (advocating uniform application of common-law standard by aligning with current statutory vacatur grounds). Michael H. LeRoy & Peter Feuille, "The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award," 19 *Ohio St. J. On Disp. Resol.* 861, 873 (2004) (examining vacatur where arbitrator behaves "arbitrarily and capriciously").

it was known and ignored by the arbitrator. The difficulty in uniformly applying the "manifest disregard" standard leads to erosion of the finality and legitimacy of arbitration proceedings[286]. *Montes v Shearson Lehman Brothers, Inc.*[287] represents one of the few cases vacating an arbitral award under the "manifest disregard" veil. The FAA limits the grounds for refusing to enforce an arbitral award to procedural irregularities in the arbitral decision-making process, such as when the arbitrator acts in excess of his/her authority. Thus, a court may not reverse an arbitral award because the arbitrator misunderstood or misapplied the law. According to Prof.

286 *Coors Brewing Co. v Cabo*, 114 P.3d 60, 65–66 (Colo. 2004) (stressing preservation of arbitration's integrity and cost-effectiveness); *La. Physician Corp. v Larrison Family Health Ctr*., L.L.C., 870 So. 2d 575, 577–78 (La. Ct. App. 2004) (presuming arbitral awards valid in "manifest disregard" context because parties accept risk when entering arbitration). *Harris v Bennett*, 503 S.E.2d 782, 786 (S.C. Ct. App. 1998) (requiring excess of mere error in misapplication of law for "manifest disregard" standard to apply); *Detroit Auto. Inter-Ins. Exch. v Gavin*, 331 N.W.2d 418, 430 (Mich. 1982) (expressing important judicial role in correcting material error of law); *Westminster Constr. Corp. v PPG Indus., Inc*., 376 A.2d 708, 711 (R.I. 1977) (noting "manifest disregard of the law" standard results from Supreme Court's *Wilko* decision); *City of Madison v Madison Prof'l Police Officers Ass'n*, 425 N.W.2d 8, 11 (Wis. 1988) (recognizing "manifest disregard" and "perverse misconstruction" as non-statutory grounds for vacatur). 21 Richard A. Lord, "Williston on Contracts" § 57:137 (4th edn. 2005) (noting some consensus in standard's requirement of blatant misapplication of law accompanied by knowledge of error*). Siegel v Prudential Ins. Co. of Am*., 79 *Cal. Rptr.* 2d 726, 739 (Cal. Ct. App. 1998) (employing California rule to prevent reviewing merits of arbitral award); *see also Action Box Co., Inc. v Panel Prints, Inc.*, 130 S.W.3d 249, 251–52 (Tex. App. 2004) (construing Texas's arbitration statute as prohibiting vacatur for "manifest disregard" without case law suggesting otherwise); *Coors Brewing Co.*, 114 P.3d at 65 (mandating award confirmation in absence of statutory prohibition); Brent S. Gilfedder, "Note, 'A Manifest Disregard of Arbitration?' An Analysis of Recent Georgia Legislation Adding "Manifest Disregard of the Law" to the Georgia Arbitration Code as a Statutory Ground for Vacatur," 39 *Ga. L. Rev.* 259, 264–65 (2004) *Jennifer Samsel,* "Evolving Judicial Review of Arbitration Awards: Is Massachusetts Lagging Behind in a "Manifest Disregard" of Arbitrators' Substantive Errors of Law?," Vol. XL:4 *Suffolk University Law Review 931* Stephen L. Hayford, "Reining in the 'Manifest Disregard' of the Law Standard: The Key to Restoring Order to the Law of Vacatur," 1998 *J. Disp. Resol.* 117, 127 (1998) (bypasses the *mens rea* component entirely and relies instead upon an inference of constructive knowledge of the law by the arbitrator based on the clarity of the relevant law and the degree of error reflected in the challenged award.")

287 128 F.3d 1456 (11th Cir. 1997). *B.L. Harbert Int'l, LLC v Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (observing *Montes* remains only case satisfying "exacting requirements" of this exception). The *Hercules* court recognized that four factors appeared in *Montes* that will "seldom recur": Those facts are that: (1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; (2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; (3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and (4) the evidence to support the award is at best marginal. *Humar Props., LLLP v Prior Tire Enters., Inc*., 605 S.E.2d 926, 927- 28 (Ga. Ct. App. 2004) (affirming written transcript of hearing required as evidence of "manifest disregard"). Hardy v Walsh Manning Sec., L.L.C., 341 F.3d 126, 127–28, 134 (2nd Cir. 2003); *Nationwide Mut. Ins. Co. v Home Ins. Co.*, 330 F.3d 843, 844, 845, 849 (6th Cir. 2003*); Gas Aggregation Servs., Inc. v Howard Avista Energy, LLC*, 319 F.3d 1060, 1062, 1069 (8th Cir. 2003).

William Tetley[288] "there should be no setting aside of arbitral awards on questions of fact or law adjudged in the award. To have agreed to arbitrate is to accept as final the decision of the arbitrators. To then proceed before the courts and to question the findings of the arbitrators is not good faith". Moreover, federal courts have created additional bases for judicial review of arbitral awards[289]. It is very encouraging that the Eleventh Circuit went so far as to warn litigants that it may impose sanctions on parties who seek to vacate awards without any legal grounds because the court "is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards.[290]" It is characteristic of the view expressed in the Third Circuit *Admart v Birch Foundation Inc.*[291] case where the court endorsed the notion that courts can adjust awards to adapt them to changed circumstances.

Arbitral awards are not to be judicially reviewed "on the merits" – and in particular are not to be reviewed for any "error of law.[292]" Karon A. Sasser[293] discusses the availability of error-of-law review that will entirely judicialize arbitration. An "error in the interpretation of the applicable law, or with respect to the appropriate legal classification," is not in itself a ground for vacatur. The usual outcome is that arbitrators are to be allowed a wide margin of creativity in resolving a dispute, or in devising a remedy. There is a boundary between arbitrators charged with "applying strict legal rules," and arbitrators authorized to decide *ex aequo et bono*; "without proper authorization by the parties, this boundary must never be transgressed" by a "normal" arbitrator, whose "power does not reach beyond the limits of strict law"[294] which means exceeding their powers and so vacating the

288 Prof. William Tetley, "Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering," (2004) 35 *JMLC* 561–616. http://tetley.law.mcgill.ca/comparative/goodfaith.pdf. *Gannet Shipping Ltd. v Eastrade Commodities Inc.* [2002] 1 Lloyd's Rep. 713.

289 *Halligan v Piper Jaffray, Inc*., 148 F.3d 197 (2nd Cir. 1998) (applying non-statutory ground for review of arbitral awards). Curtis D. Brown, "Increasing Arbitration's 'Appeal': Contracting For Greater Judicial Review of Arbitrator's Decisions", August 2003, The Metropolitan Corporate Counsel 28. Curtis D. Brown considers that while the standard of judicial review of arbitrators' awards is limited by the FAA and the judge made "manifest disregard" standard of review, these standards are more to be expected as a default standard or a "floor" rather than a "ceiling."

290 *B.L. Harbert Int'l, LLC v Hercules Steel Co.,* 441 F.3d 905 (11th Cir. 2006). 913–14 (threatening sanctions for frivolous appeals).

291 457 F.3d 302 (3rd Cir. 2006). *Admart v Birch, Civ.* No. 95-410-SLR (D. Del. 2004).

292 Philip J. McConnaughay, "The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration," 93 *Nw. U.L. Rev*. 453, 466–67(1999) ("most nations are alike," and will bar review "of all but the most egregious procedural or ethical violations") *Desputeaux v Éditions Chouette (1987) Inc.* [2003] 1 S.C.R. 178 (reviewing the merits of arbitral award is prohibited as a matter of principle; an error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with fundamental principles of public order).

293 Karon A. Sasser, "Comment, Freedom to Contract for Expanded Judicial Review in Arbitration Agreements," 31 *Cumb. L. Rev*. 337 (2000/2001) (discussing necessity for available error-of-law review versus traditional statutory limitation on appeal).

294 Otto Sandrock, "How Much Freedom Should an International Arbitrator Enjoy? The Desire for Freedom From Law v The Promotion of International Arbitration," 3 *Amer. Rev. of Int'l Arb.*

award (Art. 1704 § d BJC, Art 897 CCP, S 68 1996 Act). While appeal on the merits exists in a few civil law systems[295] in most common law jurisdictions there is a risk of court control on the merits in the exceptional cases where there is an appeal on a question of law. The right to appeal under English law "ignores modern international arbitration practice and is out of line with the Model Law[296]."

Arbitrators exceed their authority in refusing to make findings of fact and conclusions of law in the face of the arbitrating parties' contract calling for such findings and conclusions[297]. Arbitrators should limit their rulings to those issues that parties have submitted for arbitration[298]. A court may not interfere with an award as long as there is reasonable basis for the arbitrator's refusal to grant postponement[299]. Thus, courts follow precisely the demands of the contracting parties, except in the case of mandatory provisions imposed by the legislator.

Where dealings between an arbitrator and a party to arbitration proceedings might create the impression of possible bias, the arbitrator must disclose them[300]. A party seeking to vacate an award must show that a reasonable person would have to conclude that the arbitrator is partial to one party[301]. Failure to disclose dealings that might create an impression of possible bias is grounds for vacating an award[302]. A court must ascertain whether the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness[303]. To vacate an arbitration award for "evident partiality", a court must find that the arbitrator has a real and direct financial interest in the result of the arbitration or a direct relationship, particularly

30, 54 (1992). *Polk Bros., Inc. v Chicago Truck Drivers, Helpers, and Warehouse Workers Union*, 754 F.Supp. 608, 614 (N.D. Ill. 1990) ("it appears clear that the arbitrator did not act within the areas marked out for his consideration, but instead relied on law outside the Agreements").

295 France, NCPC Article 1483. Court control of the merits of the award is exceptional in civil law countries, though it is rarely stated expressly. The Quebec Law of 30 October 1986 amending the Civil Code and the CCP in matters of arbitration Article 946(2) provides that the "court cannot … examine the merits" ("le tribunal … ne peut examiner le fond du différend).

296 S. Shackleton, "Challenging arbitration award: Part III – Appeals on Questions of Law," *New L. J.* 1834 (2002) 1835. *Reliance Industries Ltd v Enron Oil & Gas India Ltd* [2002] 1 All ER (Comm) 59 (QBD): the leave to appeal was not granted as the questions were relating to Indian law, not English law. *Fence Gate Ltd v NEL Construction Ltd*, (2001) 82 Con LR 41, 56, *per* Judge Thornton QC.

297 *Columbia Aluminum Corporation v United Steel Workers of America* 922 F Sup 412. *C. Melchers GmbH & Co. v Corbin Assocs*., No. 1:05-CV-349, 2006 WL 925056, at *7–8 (E.D. Tenn. 7 April, 2006) (noting the wide discretion granted to arbitrators by federal courts); *InterChem Asia 2000 Pte Ltd. v Oceana Petrochemicals* AG, 373 F. Supp. 2d 340, 352 (S.D.N.Y. 2005) ("The handling of procedure during an arbitration is committed to the discretion of the arbitrator.").

298 *International Union of Operating Engineers v Murphy Co* 82 F3d 185. *E.spire Commc'ns, Inc. v CNS Commc'ns*, 39 F. App'x 905, 908–11 (4th Cir. 2002) (upholding arbitrator's ruling even if he had excluded relevant evidence).

299 *CT Shipping Ltd v DMI* 774 F Sup 146.

300 *Sanko Co v Coke Industries Inc* 495 F2d 1260.

301 *Ct Shipping Ltd v DMI Ltd* 774 F Sup 146.

302 *Graphics Arts v Haddon Inc* 489 F Sup 1088.

303 *Amerada Corp v AFL* 385 F Sup 279.

a business relationship, with one of the parties[304]. Fairness connotes something more than a lack of arbitrators' decision-making in individual cases and suggests the notion of equality, which means that persons in similar situations should be treated in the same manner. The mere appearance of bias is not sufficient to vacate an award but there must be clear evidence of partiality. The courts will intervene if there is obvious bias or if the circumstances give rise to a strong likelihood of want of impartiality[305]. By contrast in Belgian law impartiality is not considered to be a reason for setting aside an award (Article 1704 §5 BJC[306]).

Certain requirements must be met before the award may be appealed on a question of law before a court and not an arbitral tribunal and it must be shown that the determination of the question which is requested of the court "would substantially affect the rights of one or more of the parties", and that the tribunal's decision "is obviously wrong or, if the question is one of general importance, the decision is open to serious doubt" before the award may be appealed[307].

304 *Nationwide Mut. Ins. Co. v Home Ins. Co.,* 278 F.3d 621, 626 (6th Cir. 2002) (finding that the facts did not support the claims of five instances of alleged "evident partiality" by the umpire, one of the party-appointed arbitrators and/or the entire arbitration panel, the Sixth Circuit noted that "[t]he alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish improper motives on the part of the arbitrator."); *Gianelli Money Purchase Plan and Trust v ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (reversing a district court's order vacating an award based on "evident partiality" of a sole arbitrator, the Eleventh Circuit found that there cannot be "evident partiality" absent actual knowledge of a real or potential conflict and noted that "[t]he alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative."); *Employers Ins. Of Wausau v Nat'l Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir. 1991) (affirming a district court's decision that a panel was not biased when a party-appointed arbitrator had reviewed the case for a "couple of hours" prior to his appointment, the Ninth Circuit noted that a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"). *First State Ins. Co. v Employers Ins. of Wausau*, No. 99–12478 (RWZ) (D. Mass. Feb. 23, 2000), reported in 10 *Mealey's Litigation Reports: Reinsurance* Vol. 21 (March 9, 2000) (disqualifying a party-appointed arbitrator who acted as counsel for the party who appointed him). *Compania Portorafti Commerciale S.A. v Kaiser Internat'l Corp*., 616 F. Supp. 236, 240 n.1 (S.D.N.Y.1985) ("I construe 'disinterested person' to mean an arbitrator free of such relationships or conflicts of interest which would disqualify him from acting as an arbitrator.").

305 *Tuner v Stevenage Borough Council* [1997] ADRLJ 409.

306 Article 1704 BJC "5. Grounds for the challenge and exclusion of arbitrators provided for under Articles 1690 and 1692 shall not constitute grounds for setting aside within the meaning of paragraph 2 (f) of this Article, even when they become known only after the award is made." Article 1690 BJC "1. Arbitrators may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence."

307 *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 (C.A.). Austrian CCP (1983) Article 615 "For the action for setting aside an arbitral award and for the action for declaration of existence or non-existence of an arbitral award, as well as for proceedings under the third chapter, the Superior Court of First Instance ("*Landesgericht*") having jurisdiction in civil law matters that was specified in the arbitration agreement, respectively the jurisdiction of which was agreed upon in accordance with Article 104 of the Austrian Judicature Act ("*Jurisdiktionsnorm*"), or in case of failure of such specification or agreement, the Superior Court of First Instance ("*Landesgericht*") in whose district the arbitral tribunal has its place of arbitration, shall have jurisdiction in first instance, regardless of the value in dispute. Where the place of arbitration has not yet been determined,

The question of law subject to judicial review must be one of English law, otherwise no leave to appeal will be granted[308]. It could be said that the question of law in English law and manifest disregard of law in US law are similar reasons for setting aside an award. The English law allows judicial determination of legal questions arising during arbitration proceedings, and allows appeal on points of law under certain circumstances[309]. The FAA diverged from English law and "made it clear that errors of law were not grounds for setting aside an arbitration award.[310]" The parties to the arbitration can agree prior to the dispute whether the English courts will have the power to review the arbitral award on issues of law. Hence, the 1996 Act offers parties to arbitration the possibility of expanding judicial review beyond the grounds listed in the NYC, provided enforcement is not sought under the NYC, but rather under Articles 68 and 69 of the AA. The AA 1996 has restricted the availability of appeals and the additional restrictive approach has been viewed as in line with "the perceived Parliamentary aim of speedy finality in arbitration.[311]" In spite of a further restrictive approach to appeals, under the AA 1996, appeals over questions of fact or law are still permitted, if not prevailing, and are is a continuous risk to the finality of every award allowing judicial supervision of arbitration on the merits. Moreover, Jackson has argued that appeals are limited because of the fact that, aside from appeals on a point of law, the process of appeal is contained in mandatory provisions, the procedure for which is found in the CPR 1998[312]. Any appeal from a court's decision may be made with leave and if the tribunal is a judge-arbitrator, he may exercise the power conferred by section 50 himself, in which case any appeal from his decision will go to the court of appeal with the leave of that court (Schedule 2 paragraph 2). The agreed award will be enforced as a judgment or order of the court in the same manner as any other award (section 51). It could be argued that the arbitrators' decision not to make a partial award is an interim award that can be challenged before a court[313]. It is characteristic that under section 45 of the 1996 Act parties can apply to the court instead of the arbitral tribunal to determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties–showing mistrust of parties to the authority of arbitrators and the inferiority of arbitration to deal with legal issues.

If there is no arbitration agreement, the award refers to an object or subject not referable to arbitration and if the parties named on an award are not real people then

or where such is in the case of Article 612 not within Austria, the Commercial Court Vienna ("*Handelsgericht Wien*") shall have jurisdiction.

308 *Reliance Industries Ltd v Enron Oil* [2002] 1 All ER 59.

309 AA 1996, c. 23, §§ 45 & 69 (Eng.).

310 Soia Mentschikoff, "Commercial Arbitration", 61 *Colum. L. Rev.* 846, 855–56 (1961) (noting current English law that allows arbitrators to submit issues of law presented at arbitration to court for judicial determination).

311 D.C. Jackson, *Enforcement of Maritime Claims*, 3rd edn., (London: LLP, 2000), at 337.

312 S.I. 1998/3132, in force April 26, 1999, as amended in 2002, Part 62 (Arbitration) and Practice Direction 62 – Arbitration.

313 The Trade Fortitude [1992] 1 LR 169.

an award is non-existent (901 CCP). The lawsuit for declaring an award as non-existent is submitted before the Court of Appeal of the place where the award has been issued. The award can be enforced regardless of a lawsuit for a court's decision regarding its non-existence. A foreign award can be declared as non-existent by the court that has issued it or the court of the applicable law[314]. Hence, only for the reasons referred to in Article 897 CCP can an award be annulled by a court's decision. Greek courts cannot decide about the voiding or non-existence of a foreign award but they can refuse to confirm and enforce foreign awards according to the conditions specified by 903 CCP[315].

Is arbitration another forum in which statutory rights may be vindicated? It is argued that arbitration provides a sufficient alternative forum to litigation in court through which claimants can resolve their statutory claims[316]. Is there a "judicialization" or "legalization" of arbitration? Is arbitration moving toward a complete convergence with litigation? It could be argued that there is a tendency to remake all arbitration dispute resolution in the image of the courtroom[317] by enlarging the limited means of appeal and so expanding the control of the courts over private justice. Additionally, arbitration is becoming "internally" judicialized, with judicial interpretation of the FAA and many other rules narrowing the divergences between arbitration and court, rules that are imposed extra-contractually, by case law, statute and the arbitration providers themselves. Moreover, private justice combined with a great deal of judicial oversight of the merits represents some substantial intangible confusion, lessening the potential utility of arbitration to contracting parties. In other words, judicialization of arbitration is expressed by the increased insertion of law in the form of more litigation-like procedures and substantive rules of decision, and the increased requirement to make arbitrators more like judges[318]. The pressure is increased so that arbitrators will adhere to the applicable substantive law – a feature departing to some extent from the arbitral tradition of legal informality but not illegality. For instance, securities and complex commercial arbitration have

314 Supreme Court 899/85 39 NV 1399, Supreme Court 83/87 29 HD 667.

315 Supreme Court (Arios Pagos) 83/87 31 HD 327.

316 *Bradford v Rockwell Semiconductor Systems, Inc*., 238 F.3d 549. Luca G. Radicati di Brozolo, "Mondialisation, juridiction, arbitrage: vers des règles d'application semi-nécessaire?," 92 (1) *Rev. Critique de Droit Int'l Privé* (January 2003) at pp. 1, 12 (with respect to forum-selection clauses within the EU, "a substantial homogeneity in values—if it doesn't quite guarantee the application of a state's mandatory laws—nevertheless provides at least a reasonable probability that the actual results arrived at by the chosen tribunal will be roughly acceptable [*en gros acceptable]* according to the notions of the ousted forum").

317 Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tul. L. Rev.* 39, 62 (1999)("there is much reason to think that arbitration signatories are knowingly demanding judicialized arbitration by contracting to arbitrate under the available judicialized rules"; "case law presents anecdotal evidence that businesses now seek to a customized contract model of arbitration").

318 *Cole v Burns Int'l Security Services* 105 F.3d 1465 (D.C. Cir. 1997). *Armendariz v Foundation Health Psychare Services*, 99 Cal. Rptr. 2d 745 (Cal. 2000); *Rembert v Ryan's Family Steak Houses*, 596 N.W.2d 208 (1999).

become exceedingly formalized, with routine discovery and motion practice, the application of substantive legal rules, and written and reasoned awards[319]. David S. Schwartz[320] argues for arbitration that from "a system originally designed as an alternative, not only to court, but also to the formality of law, [it] has become increasingly ringed and infused with law".

There is an increase in contractual provisions expanding the grounds for the judicial vacatur of awards – whether born out of a need to ensure predictability in the application of legal standards, a desire to guard against a 'rascal tribunal,' or against the distortions of judgment that can often result from the dynamics of arbitration[321]. Expanding judicial review of arbitration judicializes the process, in so doing eroding the cost and time-savings that have been among the primary benefits of arbitration, which means that there is no need for the existence of

319 Edward Brunet, "Toward Changing Models of Securities Arbitration," 62 *Brooklyn L. Rev*. 1459 (1996). Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tulane L. Rev.* 38, 52–61 (1999); Jeffrey W. Stempel, "Reflections On Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, Or Fledgling Adulthood?," 11 *Ohio St. J. Disp. Resol.* 297, 334–42 (distinguishing between old and new arbitration).

320 David S. Schwartz, "If You Love Arbitration, Set it Free: How 'Mandatory' Undermines 'Arbitration'," Legal Studies Research Paper Series Paper No. 1052 August 2007 at 3.

321 Alan Scott Rau, "Contracting Out of the Arbitration Act," 8 *Amer. Rev. of Int'l Arb.* 225 (1997) Laurence Franc, "Contractual Modification of Judicial Review of Arbitral Awards: The French Position," 10 *Amer. Rev Int'l Arb.* 215, 219 (1999) ("There is a strict organization under French law of the different means of recourse against an award, and as the various grounds to vacate an award are an integral part of it, it seems difficult to modify this legal framework by an agreement"). Philippe Fouchard *et al.*, Traité de l'arbitrage commercial international 959–60 (1996) (arbitrators may have "exceeded their powers" within the meaning of the statute if they have failed to apply the rules of law chosen by the parties). In China only under exceptional circumstances will judicial review of a tribunal's decision be granted. The party seeking judicial review must show to the court of the place where the arbitration commission is located that the arbitration commission wrongly granted an award. The court in question, if satisfied with the adequacy of the evidence provided to this effect, may stay the enforcement of the award made by the commission. Judicial review may be obtained, if one litigant produces evidence to certify a ruling has one of the following instances: "(a) there is no written arbitration agreement; (b) one litigant does not receive any notice as to appointing his arbitrator to carry out the arbitration; (c) the composition of the tribunal or the arbitral process has violated legal procedure; (d) the dispute to be settled falls beyond the scope of subject matters specified in the arbitration agreement, or the dispute in question is one which arbitration commission is not empowered to arbitrate; and (e) the enforcement of the award granted, in the view of the court, will be detrimental to the public interest, e.g. where the evidence on which the arbitration is based is counterfeited, where one litigant has hidden evidence that may affect the impartiality of the final ruling, and where arbitrators have solicited or accepted bribes, taken side with one party and interpreted the law to suit one side." [Article 58 of the Arbitration Law, Article 260 of the Civil Procedure Law]. In general, where a judicial appeal has been granted, the court will not make any decision on the substance of the award but will simply refer the case to the original tribunal for reconsideration. The position in China is that the court's only role in regards to arbitration commissions is one of support and, therefore, they will be very reluctant to interfere with a decision of a commission. In fact, the powers of PRC courts include the power to rule on the validity of the arbitration agreement (Article 20), to offer measures for the preservation of property (Article 28), for interim protection of evidence (Article 46, 68), grant or reject application for setting aside the arbitration award (Article 58–61, 70).

arbitration as an alternative dispute mechanism[322]. The FAA's standard for vacatur on grounds of lack of impartiality "just states the presumptive rule, subject to variation by mutual consent[323]". Professor and arbitrator Dennis Nolan[324] has suggested that expanding judicial review could make arbitration a mere stepping-stone on the path to litigation, and permit employers to delay employees' access to statutory remedies. Moreover, Amy J. Schmitz[325] argues that "substantive review of arbitration awards would render arbitration a meaningless precursor to litigation". The decision in *Lesotho Highlands*[326] furthers proper equilibrium, affirming that English courts do not re-decide matters the parties entrusted to arbitrators. Their Lordships' decision reminds readers of the *Burchell v Marsh*[327] case handed down by the US Supreme Court a century and a half ago. After a series of harsh lawsuits (including arrest) filed by a New York merchant against an Illinois store owner, the two businessmen agreed to arbitrate their differences

322 Amy J. Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis," 37 *Ga. L. Rev.* 123, 183 (2002). "Comment, The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act," 46 *St. Louis L.J.* 509, 552 (2002) ("The time-saving aspects and cost-effectiveness of arbitration cherished by parties and the legal community would evaporate with expanded judicial review of arbitration awards"). The Supreme Court will likely seek to resolve this circuit split when it decides *Hall Street. Hall Street Associates, LLC v Mattel, Inc.*, Case no: 06–989, US Supreme Court, U.S.A..

323 *Sphere Drake Ins. Ltd. v All American Life Ins. Co*., 307 F.3d 617, 620 (7th Cir 2002). An effectively neutral tribunal can be safeguarded merely by "building in presumably offsetting biases." *Tate v Saratoga Sav & Loan Ass'n*, 265 Cal. Rptr. 440, 445 (Ct. App. 1989). *Merit Ins. Co. v Leatherby Ins. Co*., 714 F.2d 673 (7th Cir. 1983)(Posner, J.) (since the statutory grounds for setting aside an award on the ground of bias are "narrower" than the AAA standards, the latter cannot "have the force of law"; "[t]he fact that the AAA went beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention"). *Discover Bank v Vaden*, 396 F.3d 366 (4th Cir. 2005) (federal subject-matter jurisdiction "when the controversy underlying the arbitration agreement presents a federal question").

324 Dennis R. Nolan, "Employment Arbitration After Circuit City," 41 *Brandeis L.J.* 854, 877–80, 887–89 (2003). *Lapine Technology Corp. v Kyocera Corp.,* Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *3 (N.D. Cal. Apr. 4, 2000) (describing burdens of review on courts and parties due to added litigation and need for the requisite arbitration record); Amy J. Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis," 37 *Georgia L. Rev.* 123 (2002) (arguing that agreements that expand judicial review are not "arbitration agreements" enforceable under the FAA). Amy J. Schmitz, "Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm," 20 *Ohio St. J. Disp. Resol.* 291, 359 (2005); Amy Schmitz, discussing consumer arbitration of mobile-home claims, has pointed out that expanded review may saddle consumers/employees with the burdensome costs of preserving a record, and that companies may use such review to overwhelm consumers/employees with post-arbitration litigation. Calvin William Sharpe, "Integrity Review of Statutory Arbitration Awards," 54 *Hastings L. J.* 311 (2003) (proposing a standard in which courts give deference to "reasoned conclusions" even if the court would have reached a different result).

325 Amy J. Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis," 37 *Ga. L. Rev.* 123, 132 (2002).

326 *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43 (30 June 2005), reversing the Court of Appeal decision found at [2004] All ER (Comm.) 97 (CA 2003). The decision is reprinted in 20 *Int'l Arb. Rep.* C-1 (July 2005).

327 *Burchell v Marsh,* 58 U.S. 344 (1855). At 349.

before arbitrators who in the end awarded damages to the ill-treated storekeeper. When the New Yorker succeeded in having the award set aside, the Supreme Court reversed with the following reasoning: "if the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation."

Why try to impose all the reasons of review upon an award when arbitration is supposed to be a more elastic dispute mechanism applying informality as its key advantage compared with the more formal litigation? Expanding judicial review not only imposes on courts responsibilities that are more diverse than the work the legislature has assigned to them under the FAA's limited review scheme, but also transforms arbitration in to a litigation process under the name of arbitration. A decision[328] to contract for a *narrower* standard of review than the one courts normally apply is acceptable in the absence of a statutory command, but in Greek and Belgian law the parties cannot avoid the reasons for setting aside of awards. On the other hand, it is accepted that minimum contours of due process – the nature of essentially fair hearing – must be present before the state will lend its power of enforcement to the result, which means that any parties' agreement[329] does not foreclose judicial review on grounds of "manifest disregard of the law".

The comparison of the analyzed systems shows a convergence of the reasons for the review of awards by courts. There is a tendency to allow repeated expansion of reasons of review in US law. It appears that there are a great deal of court cases

328 *Kyocera Corp. v Prudential-Bache Trade Services, Inc*., 341 F.3d 987 (9th Cir. 2003). Victoria L.C. Holstein, "Co-opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards," 1 *J. Amer. Arb.* 127, 157 (2002) ("Notwithstanding the lack of consensus over the propriety of contractually expanded review, federal circuit courts that have definitively decided this issue unanimously agree that parties may limit the scope of review by private agreement"). *Tr. of the Boston & Me. Corp. v Mass. Bay Transp. Auth.,* 294 N.E.2d 340, 343 (Mass. 1973) (emphasizing arbitrators' autonomy in light of the narrow scope of judicial review available over decisions), at 344 "Where the parties have 'received what they agreed to take, the honest judgment of the arbitrator as to a matter referred to him,' the law is clear that the award is binding, and thus free from judicial interference …." (citation omitted) (quoting *Phaneuf v Corey*, 76 N.E. 718, 719 (1906)).

329 *Hoeft v MVL Group, Inc*., 343 F.3d 57, 64 (2nd Cir. 2003). "[T]here is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all"; "[t]he "manifest disregard standard together with §10(a) represent a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties' intentions." *Westinghouse Elec. Corp. v NYC Transit Auth.*, 623 N.E.2d 531 (N.Y. 1993)(allowing a single arbitrator to be named who was so closely allied with one of the parties as to be presumed partial to him). An arbitrator's decision shall be conclusive, final and binding on the parties," subject only to judicial review to determine whether the decision was "arbitrary, capricious or grossly erroneous to evidence bad faith".

concerning judicial review of awards indicating that parties, regardless of the fact that they have voluntarily chosen arbitration, still go for the court's authoritarian view in order to accept the award.

10 Recognition and enforcement of awards

An award is final and binding on the parties subject to judicial review on jurisdictional or procedural grounds or on the basis of an error of law under the meaning of manifest disregard in US and English law. An award cannot be directly enforced by the successful party and the court's assistance is necessary. An award can be enforced by bringing an action on it under section 66 applying to all awards whether made in England or in some other jurisdiction. Section 66 provides that enforcement of awards shall be refused where the court is satisfied that the arbitral tribunal lacked jurisdiction to make the award. The 1996 Act maintains the rules on recognition and enforcement of foreign awards, but restricts the right of the court to set aside or remit an award.

Furthermore, enforcement of any arbitration award requires confirmation of the award by courts (U.S.C. § 9, Article 893 CCP, Article 1718–1723 BJC). The recognition of an arbitral award refers to the decision of a national court to give preclusive effect to the arbitrators' disposition of the parties' claim. The enforcement of an award and the differences arising from the enforcement are not referred to arbitration because the enforcement of an award is not a difference that parties can freely refer to arbitration[330]. *Forum non conveniens* has also been applied to refuse the enforcement of an arbitral award[331]. The legal distinction of an award as domestic or foreign immediately determines the depth of the control performed by courts before the final incorporation of the award in a specific legal order[332]. It seems that civil courts have the final word, which makes the whole process slower than if formalities such as authorization had been transferred to the arbitration tribunals themselves as in Austrian law[333].

A NYC award which exceeds the scope of agreed matters to be submitted to arbitration or which was rendered by an arbitral tribunal not appointed in accordance with the parties' agreement or the law applicable in the place of arbitration may also be refused enforcement. The NYC as implemented in England allows arbitration awards to be enforced by the High Court[334].

330 Court of Appeal of Athens 6121/80 29 NV 113.

331 *Arbitration Between Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naptogaz of Ukraine and State of Ukraine* 311 F.3d 48, 2002 AMC 2782 (2 Cir. 2002).

332 See Arios Pagos 899/1995 1985 NV 1399.

333 Effects of the Award Article 607 ZPO (The award has between the parties the effect of a final and binding court judgment). It is worth noting that the new Austrian Arbitration Act also entitles the parties to request a declaratory judgment aimed at determining whether or not an arbitral award exists (section 612 CPC) showing the the new Austrian arbitration law following the modern tendency attribute authority to courts in a way that the process is under courts' supervision.

334 *Arab Business v Banque Franco_Tunisienne* [1997] 1 LR 531.

English courts will not enforce a judgment or award which is contrary to domestic public policy[335]. If illegality was not undisputed, the court would prima facie enforce the award unless the relevant facts were not put before the arbitrators. Hence, once the issue of illegality had been raised and dealt with by the arbitrators, and there was nothing to suggest that the question of illegality had not been properly dealt with by the arbitrators, then the award should be confirmed[336].

Public policy arguments should not be accepted by a court simply because they could be invoked in the forum if the same facts had been presented in a domestic context, unless the internal law of the forum is the *lex causae*. So, locally accepted prejudices are not always appropriate in an international context.

Belgium, England and Greece have to look at EU law that takes precedence over the municipal law of EU Member States. Community law seeks not to interfere with the procedural law of EU Member States. Article 234 EC provides for a system whereby questions as to the interpretation of Community law may be referred to the supreme Community judicial authority, the ECJ. The ECJ held that a domestic procedural rule preventing a court from raising the Euro-compatibility defence of its own motion must fall[337]. EU competition law would not entail a violation of the NYC, since under that Convention recognition and enforcement may be refused for incompatibility with public policy. Since the EU legal order abjures all active involvement with arbitral proceedings, one must understand *Eco Swiss* as requiring Member State courts to raise EU competition law of their own motion[338].

335 *Ed & F. Man Ltd v Haryanto* [1991] 1 LR 429, *US v Inkley* [1988] 3 WLR 304, *Soinco S.A. v Novokuznetsk* No 1 1997 *The Times* 29 December, *Westacre Investment Inc v SDPR Holdings Ltd* [1998] 2 LR 111, Case 393/92 Municipality of Almelo v Eneriebedriif NV [1994] ECR I 477.

336 Soinco v Novokuznersic 1998 unreported.

337 *Peterbroeck, Van Campenhout and Cie SCS* v *Belgian State* Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS* v *Belgian State* [1995] ECR I-4599, para. 13: 'a rule of national law preventing the procedure laid down in Article [234] of the Treaty from being followed *must* be set aside'. Case 166/73, *Rheinmühlen* v *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, paras. 2 and 3. Joined Cases C-295/04 and C-298/04, *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA and others* (nyr). At para. 31 the ECJ observed: 'Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts.

338 Arbitral tribunals are not able to make Article 234 EC references themselves, the fact that EU competition law was not considered in the arbitration proceeding (since the arbitrators did not raise it of their own motion), and the fact that Dutch law did not permit courts reviewing the award to raise competition law of their own motion. The ECJ declared that the principle of equivalence under Community law requires that EU competition law be treated under Dutch law as within that category of important norms that prevail over procedural barriers. Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055. This reference to EU Member State courts having automatically to apply Articles 81 EC and 82 EC looks like clarification, insofar as one was needed, that *Eco Swiss* requires that these provisions be applied even *ex officio*. Therefore, the ECJ held that, insofar as a Member State's law contained a public policy ground upon which to annul arbitration awards, it was a violation of the Community principle of equivalence not to accept in principle that an award's incompatibility with EU competition law could found its annulment.

Moreover, in the *Móvil*[339] case the ECJ characterises consumer protection norms as 'mandatory'. These norms are mandatory because they cannot be contracted out of by the parties. What cannot be contracted out of by parties begins to look like mandatory norms as understood in Article 7 of the Rome Convention, i.e. norms which a State wishes to be applied irrespective of what the *lex contractus* is. The ECJ declared that the nature and significance of the public interest underlying the consumer protection provision at issue requires the national court of its own motion to assess the fairness of the provision. The fact is that *Eco Swiss* and *Móvil* leave open the question of what EU norms must be treated as sufficiently important for their non-observance in an arbitral award to amount to a violation of public policy. Moreover, the fact that EU Member State courts have to raise at least certain elements of EU law of their own motion underscores how demanding the requirements on them must be to ensure that arbitral awards conform to EU law. EU law does not fit in its entirety in to a Member State's *ordre public* only provisions that serve key points of the Union, such as the free movement of capital, labour, services and goods belong to the *ordre public.* Which particular norms are mandatory, within the definition of this term in Article 7 of the Rome Convention[340]? On the other hand, review courts are not capable of revisiting facts, it would be too great an incursion into the finality of awards for them to do so. The duty placed on EU Member State courts to ensure the compatibility of arbitral awards with EU competition and consumer law may well entail the abrogation of EU Member State legal provisions limiting the intensity of such review. There is nothing in principle that prevents a state from allowing its courts to perform a full review of evidence within the confines of a legitimate public policy determination[341]. At all events, if *Eco Swiss* is clear on one point it is that it is to the EU Member State courts that the EU legal order looks to ensure the compatibility of arbitration awards with EU law, and not to the arbitrators, and not to the courts of non-EU Member States. The EU legal order is satisfied to let arbitrators deal with EU law as they see it suitable for application in arbitration, but

339 C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, judgment of 26 October 2006. Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 95/29. The objective of the ECJ is apparent to prevent circumvention of important elements of EU law through various contractual practices, such as choice of law clauses and arbitration clauses. *Case C-381/98, Ingmar GB Ltd. v Eaton Leonard Technologies Inc.* [9 November 2000] (application of EU law provisions protecting commercial agents regardless of choice of law clause selecting the law of a non-EU/EEA country).

340 Ph. Landolt, "Modernised EC Competition Law in International Arbitration" (*Kluwer Law International*, The Hague, 2006). G. Karydis, "L'ordre public dans l'ordre juridique communautaire: un concept à contenu variable" in *RTD eur.* 38(1) 2002. U. Haas, *Practitioner's Handbook on International Arbitration* (Dr. Frank-Bernd Weigand (ed.), Verlag C. H. Beck, Munich, 2002), p 515: "the award receives its binding effect or 'finality' not from the will of the parties but solely based on the national procedural law in which it is couched. Therefore, according to the Convention an award is always integrated into a national legal order." A. Bonomi, "Le norme imperative nel diritto internationale private" (Zurich: Schulthess Polygraphischer Verlag, 1998) 75.

341 The NYC has no bearing on this matter, not even indirectly.

the counterpart to this is that EU Member State courts are under a duty to guarantee the compatibility of what arbitrators do with EU law requirements[342]. Member State law on the level of scrutiny of arbitration awards does vary. In France, the case of *La S. A. Thalès Air Defence v Le G.I.E. Euromissile and La S. A. EADS France and La société EADS Deutschland GmbH*[343] is a statement that reviewing courts are not to enquire into the merits in relation to public policy matters. In fact, the Paris Court of Appeal[344] is firm in its position that the intervention of courts has to be restricted to manifest violations of the most fundamental principles, and that control should not go beyond a summary analysis of the award itself, which means that it is unworkable to hold that any infringement of a rule of public policy is adequate to set aside an award. Public policy is to be interpreted very restrictively, by reference to universally recognised values, and national courts are not allowed to review the merits of an award to establish its compliance therewith[345]. In the US, the Supreme Court in *Mitsubishi Motors Corp. v Soler Chrystler-Plymouth, Inc.*[346] also expressed opposition to intensive review in the

342 Joined Cases C-295/04 and C-298/04, *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA and others* (nyr), at §31 the ECJ observed: "Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts" Case C-126/97, *Eco Swiss* [1999] ECR I-3055, §§ 39 and 40.

343 Case 2002/19606, decision of 18 November 2004, *Marketing Displays International Inc. v VR Van Raalte Reclame BV*, Case 2003/1617, decision of 27 May 2004 of the Dutch *Hoge Raad.* In Switzerland, the Supreme Court has inferred that it will not review facts in actions to annul arbitration awards under Article 190(2) of the PIL Act decision of the Swiss Supreme Court of 7 March 2003, 4P.250/2002, also published in (2006) 24(1) *ASA Bulletin* 76 at p. 80. Moreover, public policy review by Swiss courts for the annulment of international arbitration awards illustrates the virtual impossibility of severing all connection with the state of the reviewing court (Switzerland). In a decision of 8 March 2006, 4P.278/2005 (24 *ASA Bulletin* 3/2006, 521), the Swiss Supreme Court ruled that an arbitration award is incompatible with public policy insofar as it "disregards essential and widely recognised values which, in accordance with views prevalent in Switzerland, must lie at the foundation of any legal order." Ph. Landolt, 'Arrêt du Tribunal fédéral du 8 mars 2006 dans la cause 4P.278/2005: commentaire' in (2006) 24(3) *ASA Bulletin* 535 at p. 538. The Court of Final Appeal in *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd.* [1999] 2 HKC 205 dealt with what is meant by public policy. It rejected that there would be some "international" "public policy" or "standard common to all civilized nations". The Court of Final Appeal stated that public policy "is those elements of a state's own public policy which are so fundamental to its notion of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other states are affected".

344 *Thalès (Thalès* v *Euromissile* A. Mourre, Casenote, Paris, November 18, 2004, J. Droit Int'l (Clunet) 357 (2005); Horatia Muir Watt & Luca G. Radicati di Brozolo, "Party Autonomy and Mandatory Rules in a Multistate World," in *International Law Forum de droit international* 88 (2004). A. Mourre, "Le libre arbitre, ou l'aveuglement de Zaleucus, in Mélanges en l'honneur de françois knoepfler" 283–323 (François Bohnet & Pierre Wessner, eds., 2005).

345 Luca G. Radicati di Brozolo, "L'illicéité "qui crève les yeux": critère de contrôle des sentences au regard de l'ordre public international," *Rev Arb.* 529 (2005).

346 473 U.S. 614, 638 (1985) "While the efficacy of the arbitral process requires that substantive review remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them".

context of the public policy enquiry. In England, the majority of a divided Court of Appeal held in *Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd and others*[347] held that, in circumstances which are not defined, the court will appropriately review evidence as part of the public policy enquiry. It is for states to determine what public policy is for the purposes of annulment actions and refusals to recognise and enforce. As mentioned above, the House of Lords in England[348] in a competition law case commented that European Commission decisions are only binding if they involve the same parties and the same agreement. If "public policy[349]" is treated satisfactorily broadly, it will function as a review for error of fact and law which will lead to the abolishment of arbitration as an effective dispute mechanism. The role of public policy is to serve as the guardian of the fundamental moral convictions or policies of the forum and the public policy reflects the fundamental economic, legal, moral, religious, political and social standards of every country. The EU has not yet established a common perception on EU public policy harmonising the context of international public policy or harmonised with it, if an internationally accepted standard of international public policy has already been shaped, applicable not only in arbitration awards but also in many cases of enforcement of international judgments. Thus, there is a need for a common concept of public policy grounds for refusing to enforce arbitral awards.

As many as 90 per cent of certain types of large international transactions include arbitration clauses[350] and in the past 30 years, many legal issues have customarily been considered "public law" and within the sole domain of courts have become arbitrable, significantly expanding the range of issues that can

347 [1999] EWCA Civ 1401 (12 May 1999).

348 *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38.

349 Public policy review is in fact often restricted by operation of a sort of negative "comity" in accordance with which "courts should refrain from applying domestic law to foreign cases". "Public policy" has a meaning in most legal systems, as well as in a great number of international legal instruments, where it is generally treated in a restrictive manner. A. J. van den Berg, "Application of the NYC by the Courts' in Improving the Efficiency of Arbitration Agreements and Awards: *40* Years of Application of the NYC," ICCA Congress Series no. 9 (*Kluwer Law International*, The Hague, 1999), p. 25 at p. 33: "One thing is not in doubt: The courts have almost unanimously affirmed the principle that the courts of the country in which, or under the law of which, the award was made (the country of origin) are exclusively competent to deal with an action for the setting aside of the award". A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Deventer, 1981), p. 360: 'A public policy provision can be found in almost every international convention or treaty relating to these matters.' Good faith interpretation in accordance with the ordinary meaning has tended to keep the NYC concept within narrow confines and has kept it from becoming elided with a general review for legal or factual error". J. Paulsson, "The Role of Swedish Courts in Transnational Commercial Arbitration" in (1981) 21 *Va. J Int'l L* 211 at p. 242: "[t]he fact is that setting aside awards under the NYC can take place only in the country in which the award was made." S. Kröll, *Setting Aside Proceedings in Model Law Jurisdictions: Selected Procedural and Substantive Questions from the Case Law*, (2005) *Int'l A.L.R.* 170 at 177–178.

350 Andreas F. Lowenfeld, "Can Arbitration Coexist with Judicial Review? A Critique of *LaPine v Kyocera,*" *ADR Currents*, Sept. 1998, at 1, 15.

be resolved through arbitration and, as a result, increasing the importance of arbitration[351]. As mentioned earlier, a court may refuse to enforce a contract that is contrary to law or public policy[352]. A court should not refuse to implement such a tainted contract or award based merely upon "general considerations of supposed public interests[353]." Hence, a court may refuse to implement a contract on public policy grounds only when that contract as interpreted by the arbitrator violates an "explicit," "well-defined and dominant" public policy that has been "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests."' The arbitration award itself violates a public policy and it is not adequate that the conduct that gave rise to the dispute that is being arbitrated violates public policy[354]. Courts have set aside an arbitration award on public policy grounds that involved a broad application of

351 Robert B. von Mehren, "From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law," *12 Brook. J. Int'l L.* 583, 627–28 (1986) (asserting that arbitrators should be entrusted with public law issues if they are able to establish their neutrality); William W. Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration," 12 *Brook. J. Int'l L.* 629, 630 (1986) (arguing that arbitral awards should be enforced without significant judicial review, even at the cost of making mandatory rules default rules); Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law Through Arbitration," 83 *Minn. L. Rev.* 703, 704 (1999) (stating that courts must either make mandatory rules inarbitrable or require *de novo* review of arbitral awards that implicate such rules); Christine L. Davitz, "Note, U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefer's Edict," 30 *Vand. J. Transnat'l L.* 59, 95 (1997) (suggesting that the Supreme Court has expanded the FAA) beyond congressional intent). *But see* Eric A. Posner, "Arbitration and Harmonization of International Commercial Law: A Defense of Mitsubishi," 39 *Va. J. Int'l L.* 647, 651 (1999) (contending that a middle ground of randomly reviewing some, but not all, arbitral awards may be preferable).

352 *Hurd v Hodge*, 334 U.S. 24, 34–35 (1948). Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," *30 Ga. L. Rev.* 731, 784–85 (1996) ("the true origin of the 'public policy' ground for vacatur [of commercial arbitration awards] lies in the doctrine of the common law of contracts that a court can refuse to enforce a contract if doing so would violate (a well-defined and dominant) public policy"). ("the 'public policy' standard for vacatur of commercial arbitration awards has been adopted intact from the law of labor arbitration by a number of circuit courts with no attempt to reconcile the standard with the language of section 10(a) of the FAA").

353 *W.R. Grace & Co. v Rubber Workers*, 461 U.S. 757, 766 (1983). *Exxon Shipping Co. v Seamen's Union*, 11 F.3d 1189 (3rd Cir. 1993) (public policy justified vacating arbitration award that ordered the reinstatement of an oil tanker worker who reported for work intoxicated); *Newsday, Inc. v Long Island Typographical Union*, 915 F.2d 840 (2nd Cir. 1990) (vacating on public policy grounds an arbitrator's order to reinstate an employee who engaged in acts of sexual harassment after being warned that further acts of sexual harassment would result in his termination).

354 *Eastern Associated Coal v United Mine Workers*, 531 U.S. 57 (2000). Thomas E. Carbonneau, *Cases And Materials On The Law And Practice Of Arbitration* at 500 (2nd edn. 2000) ("In general, the courts ignore the decisional origins and intended specific application of the public policy exception, deeming it applicable in all cases involving the enforcement of arbitral awards."); Ann C. Hodges, "Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law," 16 *Ohio St. J. On Disp. Resol.* 91, 92 (2000) ("The public policy standards developed in labor arbitration cases have been utilized by courts reviewing commercial and employment law arbitration awards.").

the doctrine, in which the court focused on the conduct that led to the dispute rather than focusing on the arbitration award[355]. The arbitration award itself violates or calls for the violation of positive law in order for a court to invoke the public policy exception but the award has to conflict with a public policy embodied in positive law. The public policy must be found in statutes, regulations or common law doctrines and not common knowledge or common sense[356]. Enforcement of foreign arbitral awards may be denied on the basis of public policy only where enforcement would violate the forum country's most basic notions of morality and justice[357]. Most private international law treaties, domestic legislation and judicial decisions contain public policy exceptions, which serve to protect the fundamental legal and other precepts of national legal orders. Arbitration does not mean that the parties will avoid the exequatur procedure altogether, but the NYC of 10 June 1958 has unquestionably made the enforcement of international arbitral decisions a less difficult task than the enforcement of non-EU foreign judgments.

It should be clear that the FAA preempts state public policies that single out arbitration awards for special disfavor, as compared to judicial judgments. A state public policy forbidding enforcement of arbitral awards for future disputes should be preempted. The Supreme Court declared that the question of public policy is ultimately one for resolution by the courts[358]. When public policy is asserted on the basis of vacating an arbitration award, the court is required to make its own independent evaluation[359].

National legislation and international commitments in support of arbitration continue to demonstrate deep-seated reservations – characteristically expressed as considerations of "public policy" – regarding the unrestrained resolution of commercial disputes by private means, principally where it touches on important public interests ranging beyond the more narrow and limited interests of the parties to a given international commercial or investment disagreement.

355 Judith Stilz Ogden, "Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?," 20 *Hofstra Lab. & Empl. L. J.* 87, 105 (2002) (noting that *Eastern Associated Coal*'s holding that a public policy analysis must focus on the arbitration award rather than on conduct that gave rise to the dispute "is inconsistent with numerous court of appeals decisions, which adopted the broader view and which often vacated the awards").

356 *United Paperworkers v Misco, Inc*., 484 U.S. 29, 44 (1987) (holding that although the "policy against the operation of dangerous machinery while under the influence of drugs" was "firmly rooted in common sense," such a "'general consideration of supposed public interests'" was by itself insufficient to set aside an arbitration award on public policy grounds). *Graham v Scissor Tail, Inc*., 623 P.2d 165, 172–73 (Cal. 1981) (vacating an arbitrator's award where the arbitration agreement, which was contained in a contract of adhesion, designated an arbitrator who, "by reason of its status and identity, is presumptively biased in favor of one party"); *In re* Cross & Brown Co., 167 N.Y.S.2d 573, 576 (N.Y. App. Div. 1957) (holding that an arbitration agreement between an employer and an employee which called for the employer to act as arbitrator "outraged public policy" and was void on its face).

357 *Parsons Overseas Co v Societte* 508 F2d 969.

358 *WR Grace & Co v Rubber* 461 US 766.

359 *Botany Indus Inc v New York Board* 375 Fsup 485.

The NYC permits non-recognition of an arbitral award if either: (a) the arbitration proceedings violated basic principles of fairness in the enforcing state; or (b) 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. At the stage of enforcement proceedings relating to a foreign arbitral award, the national exequatur judge should, according to Article V(2) NYC, examine questions of objective arbitrability of the dispute and of compatibility of the foreign arbitral award with public policy according to the yardsticks of his own national law (and not according to those of some internationally recognized standards and criteria).

United States courts have generally interpreted the Convention in keeping with the Convention's goals, thus making the enforcement of international arbitral awards quicker and easier than before. The very ratification of the Convention by the US has played a role in the development of the ever-more-favourable stance of the US courts vis-à-vis international arbitration.

In order for an award to be enforced there is a need for its confirmation by the court, which means that it becomes a judgment only by the court's confirmation[360]. In other words, all the Articles of the CCP for re-examination of a court decision are applicable to an award and so the court can scrutinize an award. The Court of Appeal of the place of issue of an award has jurisdiction to deal with the re-examination of an award. In general, the Greek courts could not re-examine a foreign award[361]. For instance, a foreign arbitration award is recognized if its object is arbitrable under Greek law[362].

The comparison of the examined systems shows a convergence on the grounds and need for the courts' recognition and enforcement of awards. There is a divergence on the core and essence of public policy which might lead to the unenforceability of foreign awards making imminent the standardization and harmonization of the essence of public policy and creating a standard context for international public policy. Additionally there is a convergence in the need for strict application of the NYC on the enforcement of foreign awards, but on many occasions the courts overturn awards clearly for national reasons, not complying with the global character of arbitration as a dispute mechanism.

11 Conclusions

Arbitration, like all other forms of ADR, operates outside the civil justice system but not outside the law, and it could be argued that it is an alternative dispute system that means independence and equality in resolution. As the Supreme Court has recognized, arbitration is not designed to be a perfect system of justice[363].

360 Supreme Court 424/83 31 NV 1593.

361 Supreme Court 899/85 18 Diki 501.

362 S. Kousoulis, *Acrual problems of international arbitration*, 1996 RHDI 49.

363 *Gilmer v Interstate/Johnson Lane Corp*., 500 U.S. 20, 31 (1991) ("[A] party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition

This author considers that neither courts nor arbitration can be perfect dispute methods, but both can improve their performance and can be the two diverse poles in a sovereign, delivering justice in a formal and an informal spectrum respectively. Mitchell H. Rubinstein[364] thinks that: "Arbitration is a substitute for private litigation in the commercial context, but it is a substitute for industrial strife in the labor context." Arbitration allows people to better control their own destinies. Arbitrators decide cases much as judges do, and with less cognitive distortion than juries suffer from[365]. Does the regulation of arbitration by the CCP of Greece and Belgium mean that arbitration is considered to be part of the whole court system rather than a co-equally alternative and independent dispute system? Has the arbitration process been transformed into a parallel civil justice system equal to litigation? Contractual arbitration is a private party arrangement and court's involvement occurs, if at all, prior to commencement of arbitration and after the completion of arbitration. The analysis reveals that arbitration as a dispute mechanism does not need the courts' intervention in order to achieve legal foundation because arbitrators, as experts on the type of dispute, have the knowledge and can issue a legally founded award as long as arbitrators are attributed with the same authority as court judges[366]. Diane P. Wood[367] considers

of arbitration.'") (Quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985)); *see also* Hoffman v Cargill Inc., 236 F.3d 458, 462 (8th Cir. 2001) ("Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication."); *accord* Spine Surgery v Sands Bros., Inc., 393 F. Supp. 2d 1138 (W.D. Okla. 2005) (discussing benefits of arbitration).

364 Mitchell H. Rubinstein, "Altering judicial review of labor arbitration awards," 2006 *Mich. St. L. Rev.* 235, p. 242. Stephen A. Broome, "An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act," www.ssrn.com at 5 "Arbitration came to be seen as a system of adjudication built, like the public justice system, on the foundation of fundamental fairness. Judges came to accept arbitration as a welcome supplement to the overworked judicial system. Congress also took this view and, in 1925, enacted the FAA, placing arbitration agreements on an equal footing with other valid contractual provisions."

365 Christopher R. Drahozal, "A Behavioral Analysis of Private Judging," 67 *Law & Contemp. Probs*. 105, 107 (2004).

366 Charles Knapp, "Taking Contracts Private: The Quiet Revolution in Contract Law," 71 *Fordham L. Rev.* 761, 766 (2002) ("Whatever else arbitration may be, it is not 'law': the kind of findable, studiable, arguable, appealable, Restateable kind of law that has characterized the Contract area[.]"). p 764 (describing the courts' virtually unanimous approval of arbitration clauses); Stanley D. Henderson, "Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice," 58 *Va. L. Rev.* 947, 952 (1972) ("[T]he [arbitration] system is created, administered and controlled by the written agreement …. The statutory scheme presumes the existence of an agreement created by mutual assent."). Note, "Commercial Arbitration: Expanding the Judicial Role," 52 *Minn. L. Rev.* 1218 (1967) ("recent decisions allowing arbitrators to determine threshold questions concerning the legality of commercial contracts have increased the separation of arbitration from the normal controls of a democratic society …. As a result, commercial conduct repugnant to many general societal norms has been encouraged."). Note, 46 *Tex. L. Rev.* 260, 265 (1967) ("The decision [in Prima Paint] construes the Act as making arbitration clauses immune to the normal grounds for rescission of contracts under state law.")

367 Diane P. Wood, "The Brave New World of Arbitration," 31 *Cap. U. L. Rev.* 383, 405 (2003).

that: "The field within which arbitration operates has expanded to cover virtually everything except the criminal law." On the one hand, W. Park[368] argues for different level of judicial supervision suitable to different types of arbitration cases. On the other hand, the introduction of appellate arbitral tribunal for the legal review of the first award could be the best solution for the introduction of arbitration as a co-equal and independent to courts dispute mechanism able to issue legally founded awards.

Vicki Zick[369] considers that federal courts' efforts to clear their own crowded dockets have transformed the arbitration process into a parallel civil justice system. Moreover, according to Adrian Winstanley[370] arbitration has taken on such status that there is "little doubt that arbitration is now the first-choice method of binding dispute resolution" and has "largely overtaken litigation." Furthermore, *Stroh Container Co. v Delphi Indus*.[371] held that "the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law". Taking into account that commercial practices arise and alter more rapidly than the laws which society has enacted to manage and guide business relationships, arbitration is the best qualified method transformed into a self-contained and co-equal to courts to be dispute mechanism to deal with commercial matters[372]–applying customs and norms endorsed by trade which eventually will be formalised into a written law. It is argued that arbitration should be used to supplement the over-burdened federal courts[373]. Thus, parallel civil justice systems mean that the one is independent and equal to the other without the possibility of intervention in each other's processes. The analysis shows that arbitration currently lacks the power and authority of courts and it is not yet a parallel civil justice system because we have presented the occasions in which

368 William W. Park, "The Specificity of International Arbitration: The Case for FAA Reform," Vol. 36 *Vanderbilt Journal Of Transnational Law* 1241.

369 Vicki Zick, "Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration," 82 *MA.R.Q. L. Rev.* 247, 247–48 (1998).

370 Adrian Winstanley, "Why Arbitration Institutions Matter, in 39 in European Bank of Reconstruction and Development," *Law In Transition: Contract Enforcement* (2001), at http://www.ebrd.com/pubs/legal/5083.htm. David E. Robbins, "Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You," *Disp. Resol. J.*, Feb–Apr. 2005, at 9, 9 (arguing that lawyers have "graft[ed] the implements of litigation onto the much simpler systems of arbitration").

371 783 F.2d 743, 751 n.12 (8th Cir. 1986).

372 Note, "Commercial Arbitration: Expanding the Judicial Role," 52 *Minn. L. Rev.* 1218, 1228 (1968) ("Commercial practices usually develop and change more rapidly than the laws which society has enacted to control and guide business relationships.").

373 *Barrentine v Ark.Best Freight Sys., Inc*., 450 U.S. 728, 746 (1981) (Burger, C.J., dissenting) (complaining that the Court's decision failed to remove "routine and relatively modest-sized claims … from the courts"). Richard M. Alderman, "Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform," 38 *Hous. L. Rev.* 1237 (2001). "The problem with the current use of pre-dispute mandatory arbitration … is that instead of being used as a means to resolve disputes, it is often employed as a means to an alternative end—the destruction of consumer rights."

courts are intervening in the arbitral process but arbitral tribunals do not intervene in courts' proceedings.

Stephen J. Ware[374] argued that arbitration presents an opportunity to privatize the creation of vast areas of law. It is an opportunity to create private legal systems of unwritten norms, written rules, and the precedents of private courts. Additionally, Thomas E. Carbonneau[375] says that: "Arbitration for the Court is a means for securing civil justice within the US legal system[376]." Moreover, Katherine V.W. Stone[377] said that "in recent years, courts have begun to scrutinize arbitration procedures more carefully and refuse to enforce those that lack basic due process features." To that extent Diane P. Wood considers that the court in *First Options of Chicago, Inc. v Kaplan* has taken strong positions on the acceptability of arbitration as a co-equal method of dispute resolution[378] but in practice arbitration still is not co-equal to courts. Jens Dammann and Henry Hansmann[379] consider that: "While private arbitration will surely continue to play an important role in resolving commercial disputes, there is strong reason to believe that it will not provide an adequate substitute for litigation in the public courts of well-established states." Additionally, according to Steven J. Burton[380]: "The critics apparently believe that arbitration provides second-class resolutions of such disputes to the prejudice of

374 Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law through Arbitration," 83 *Minn. L. Rev.* 703, 754 (1999).

375 Thomas E. Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements," Vol. 36 *Vanderbilt Journal Of Transnational Law* 1189, p. 1196. at p. 1200 "an agreement to arbitrate eliminates the parties' right to have recourse to courts" but national arbitration laws allow any party to an arbitration agreement to have recourse to courts for assistance in many stages of the arbitration process, review of award and enforcement of it." *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995). "A party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute …. Where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value."

376 Thomas E. Carbonneau, "Beyond Trilogies: A New Bill of Rights and Law Practice through the Contract of Arbitration," 6 *Am. Rev Int'l Arb.* 1, 4 (1995).

377 Katherine V.W. Stone, Arbitration – National, Research Paper No. 05–18 p. 5.

378 Diane P. Wood, "The Brave New World Of Arbitration," 2005 *Capital University Law Review* 383. *International Brotherhood of Electrical Workers, Local 176 v Balmoral Racing Club, Inc*., 293 F.3d 402 (7th Cir. 2002). The court ruled that the workers were covered by the arbitration agreement.

379 Jens Dammann and Henry Hansmann, "A Global Market For Judicial Services," 2006 www.ssrn.com, p. 67, p. 27: "just as arbitration might be restructured to adopt some of the advantages of courts, courts can be reformed to offer some of the advantages of arbitration, and hence become more competitive themselves." "if arbitration were a perfect substitute for courts, one would expect the number of cases filed in public courts per inhabitant to decline drastically in states with inefficient judiciaries."

380 Steven J. Burton, "The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate," 2007 University of Iowa Legal Studies Research Paper Number 07–01, p. 2. At 41 "Many courts, when asked to enforce an arbitration agreement, seize upon the unconscionability doctrine as a pretext to re-fuse enforcement. The dispute then goes to litigation despite the parties' agreement to arbitrate. By refusing to compel arbitration under a valid agreement, the courts manifestly prefer litigation to arbitration. This violates the policy favoring arbitration, which is based in section 2 of the FAA and several Supreme Court precedents".

employees and consumers". Besides, Thomas E. Carbonneau[381] says that: "The privatization and contractualization of arbitration, while they empower parties and unburden public institutions, should not eliminate completely the basis for the public regulation of the process … Judicial vigilance should not only ward off the flagrant abuses of process and procedure in arbitration, but it should also establish an "interests of justice" limitation upon the operation of the process and the rulings of arbitrators. The likelihood of exercising this judicial power should be as clear and unequivocal as it is restrained. It should, however, always remain meaningful." This author argues for the development of arbitration as a truly alternative to courts dispute resolution mechanism. In fact, arbitration has not been developed in a co-equal system where its precedent will formulate the substance of various principles of law. If arbitration's approach is considered to be more legalistic, effective and practicable, why does it not prevail over the interpretation of the courts?

Our analysis has shown that the US Supreme Court has recognized contractually agreed-upon arbitration between businesses and individuals to be a fair and efficient alternative to the court system[382]. State and federal courts overwhelmingly

381 Thomas E. Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements," Vol. 36 *Vanderbilt Journal Of Transnational Law* 1189, p. 1232. Katherine Van Wezel Stone, "Rustic Justice: Community and Coercion under the Federal Arbitration Act," 77 *N.C. L. Rev.* 931 (1999) (arguing that privatization of law through arbitration is bad, particularly when the parties occupy vastly different positions of bargaining power). Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law through Arbitration," 1999 *Minnesota Law Review* 703, at 711 "The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law" at 754 "Arbitration privatizes the creation of law". *DIAL 800 v Fesbinder*, 12 Cal. Rptr. 3d 711, 719 (Cal. Ct. App. 2004) ("[C]ontractual arbitration is in no sense … a usurpation or ouster of the judicial power vested in the trial court of this state …." (quoting *Brock v Kaiser Found. Hosp.,* 13 Cal. Rptr. 2d 678, 682 (Cal. Ct. App. 1992))). p. 720 (noting in Beth Din proceeding that if "there was an award on the merits … the action at law should be dismissed because of the *res judicata* effects of the arbitration award").

382 *Greentree Fin. Corp. v Randolph*, 531 U.S. 79, 95 n.2 (2000) (recognizing the National Arbitration Forum as a model of fair costs and fee allocation). *Johnson v West Suburban Bank*, 225 F.3d 366, 378 (3rd Cir. 2000) (arbitration procedures did not favor one party over the other in action between individual and bank); *Baron v Best Buy*, 260 F.3d 625 (11th Cir. 2001) (in action between consumer and bank, the National Arbitration Forum provided for all statutory remedies and its fees and costs were reasonable); *Marsh v First USA Bank*, 103 F.Supp.2d 925 (N.D. Tex. 2000) ("The Court is satisfied that NAF [National Arbitration Forum] will provide a reasonable, fair, and impartial forum within which Plaintiffs may seek redress for their grievances. In addition, an arbitration award is subject to review by the Court."); *Lloyd v MBNA Bank, N.A.,* 2001 WL 194300 (D. Del. 2001) (court found no persuasive evidence that the NAF was anything but neutral and efficient); *Bank One v Coates*, 125 F.Supp.2d 819 (S.D. Miss. 2001) (arbitration fair because any relief available to defendant in a judicial forum was also available in arbitration); *Hale v First USA Bank*, 2001 WL 687371 (S.D.N.Y. 2001) ("[N]umerous courts have found the NAF to be an adequate and fair arbitral forum and have upheld arbitration provisions requiring arbitration in the NAF"); *Garcia v Household Bank,* No. 00-4470-Civ-Huck/Brown (S.D. Fla. filed 17 August, 2001) ("[T]he NAF not only sets forth a reasonable fee schedule, but provides that those fees may be awarded to the prevailing party, and permits waiver of fees for indigent litigants."); *Bank One*

continue to acknowledge arbitration as a fair and viable alternative to litigation[383]. Arbitration is a legal procedure used to resolve legal disputes fairly and at low cost. It is argued that the arbitral forum presents only a procedural departure from judicial adjudication because judicial review will be sufficient to protect statutory rights[384] and therefore, according to this approach, arbitration is an unfounded dispute mechanism to protect legal rights, and arbitration is not an autonomous mechanism which can issue legally founded awards. On the one hand, Steven Shavell[385] considers that arbitration agreement enforcement increases social welfare. On the other hand, K. Abraham[386] argues that arbitration involves a form of contractual "lawlessness" that is undesirable in claims that involve new legal issues and "this lawlessness not only adversely affects the parties to each dispute, but the legal system as a whole". By contrast, it could be argued that arbitrators currently apply legal principles and issue legally founded awards, and consequently it is time to have arbitration as an autonomous dispute mechanism independent of courts that co-exists with courts as a parallel private dispute mechanism. To that extent, Katherine Stone[387] confirms that there is increasing judicial acceptance of arbitration as a legitimate alternative to judicial adjudication. Moreover, E. Thornburg[388] considers that: "the court tends to look at arbitration as if it were merely a change of venue". It could be argued that in *Lesotho*[389] the

v Williams, 2002 WL 1013161 (N.D. Miss., April 29, 2002) (arbitration provision was enforceable and procedurally fair).

383 *Hale v First USA Bank*, 2001 WL 68737 (S.D.N.Y., June 16, 2001) ("Numerous courts have found the NAF to be an adequate and fair arbitral forum and have upheld arbitration provisions requiring arbitration in the NAF"); see also *Green Tree Financial v Randolph*, 531 U.S. 79 (2000) ("Other national arbitration organizations (Example: The NAF) have developed similar models for fair cost and fee allocation.").

384 Jennifer J. Johnson, "Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration," www.ssrn.com, p. 3 "modern securities arbitration contains formal litigation-like procedures played out in front of lay arbitrators who may have no industry or legal expertise." *Shearson/American Exp., Inc. v McMahon*, 482 U.S. 220, 225–227 (1987) (discussing the policies of the FAA and holding that arbitration is appropriate for 1934 Act claims) at 231. Arbitrators are capable of handling complex legal issues and that it found "no reason to assume at the outset that arbitrators will not follow the law." *See also Rodriguez de Quijas v Shearson/American Exp.*, *Inc.*, 490 U.S. 477, 483–484 (1989) (expressly overruling *Wilko* and validating compulsory arbitration of 1933 Act claims). David S. Schwartz, "Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitrations Act," 67 *Law And Contemp. Probs.* 5, 29–31 (2004) (critiquing the current judicial treatment of the FAA as an "embarrassment" and suggesting that the current "national policy favoring arbitration" is a mere creation of the court).

385 Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis," 24 *J. Legal Stud.* 1, 8 (1995).

386 K. Abraham, "The lawlessness of arbitration," Research paper No 02–9 Dec 2002, University of Virginia school of law, p 3–4.

387 Katherine Stone, "Rustic Justice: Community Coercion under the Federal Arbitration Act," 77 *N.C. L. Rev.* 931, 943–969(1999).

388 E Thornburg, "Contracting with tortfeasors: Mandatory arbitration clauses and personal injury claims," 2004 *Law and Contemporary Problems* 253 at 253.

389 *Lesotho Highlands Development Authorit-y v, Inipregilo S,p,A,* and others, [2005] U.K.H.L. 43. Antonio Crivellaro, "All's Well that Ends Welt: London Remains a Suitable Venue for

House of Lords held that arbitration is to be regarded as a free standing system, free to settle its own procedure and to develop its own substantive law. In so deciding, the House of Lords fully recognized the autonomy of arbitration from national systems of law. Thus, a divergence of the scholars' views concerning the value of arbitration is observed, but there are voices calling for arbitration's independence.

A party seeking to arbitrate had no effective remedy against a party who refused to abide by an arbitration agreement. Historically, arbitration awards were not revered so much for their legal analysis, but more for their sense of fairness and industry knowledge. Nowadays, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts that promote the legitimacy of international arbitration[390]. The lack of a written, reasoned award is one of the more individuating features of arbitration. Privacy and the secrecy of awards hamper the additional development of the law because arbitration sets no precedents. By contrast, written, concisely reasoned awards will affect future arbitrators in analogous cases and provide important information to third parties.

Courts find arbitration to be fair where the parties agree to arbitration in a contract of adhesion – sometimes called a take-it-or-leave it contract – or in a bargained-for exchange[391]. So, courts have accepted arbitration clauses in standard form contracts and do not find involuntary submission in adhesion contracts. It is argued that the *only* issue left for consideration by the courts is whether parties have drafted the contract fairly and it can be examined if arbitration clauses are unconscionable. Courts have had good things to say about arbitration because

International Arbitration — But Only Thanks to the House of Lords," *Int'l Construction L. Rev.* 480 (2005).

390 Catherine A. Rogers, "The Vocation of the International Arbitrator," 20 *Am. U. Int'l L. Rev.* 957, 991 (2005) at 987 (arguing "modern international arbitration outcomes are like judicial outcomes in that they are produced by an objective tribunal's reasoned application of established rules to facts"); Jules L. Coleman & Brian Leiter, "Determinacy, Objectivity and Authority," 142 *U. Penn. L. Rev.* 549, 565 (1993) (suggesting that when judges are faced with the penumbra of general legal terms, "a judge has no option but to help fix the meaning through the exercise of a discretionary authority") Scott Allan Rau, "On Integrity in Private Judging," 14 *Arb. Int'l* 157 (1998) (suggesting impartiality is traded for expertise and asserting parties prefer a hearing that is more a form of "private self-government" than a form of private adjudication); Philip J. McConnaughay, "The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration," 93 *Nw. U.L. Rev.* 453, 457–58 (1999) (referring to parties desire in international arbitration to have a "neutral adjudicatory process" and not to opt out of legal rules but suggesting this approach is Western in orientation); Nathalie Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 7 *Am. Rev Int'l Arb.* 319, 356 (1996) (affirming that arbitrators can and should apply mandatory rules of applicable law as it supports the legitimacy of international arbitration).

391 Scott Burnham, "The War against Arbitration in Montana," 66 *Mont. L. Rev.* 139, 150 (2005) ("the mainstream of contract law recognizes the two spheres [of negotiated and adhesive contracts] and struggles mightily and, I would have to conclude, unsuccessfully, to reconcile them.") Robert M. Lloyd, "The Circle of Assent Doctrine: An Important Innovation in Contract Law," 7 Transactions: *Tenn. J. Bus. L.* 237 (2006) ("although scholars have written about [the problem of standard-form contracts] for decades, the law has yet to come up with a good solution.")

the judiciary's confidence in arbitration is further enhanced by the knowledge that arbitration awards are subject to judicial review and the FAA provides this protection[392]. Courts provide an integral component in ensuring that arbitrations comply with legal standards, because under the FAA, arbitration decisions are all subject to court review. Under the FAA, courts must also review arbitration awards before the awards can be reduced to judgment. Parties seeking a simplified method of arbitration are forced to submit to the federal standard when their arbitration award is taken for review before a federal court. Moreover, under Greek, Belgian and English law there are specific reasons for the review and setting aside of awards by courts and not an appellate arbitral tribunal. Presently, it is characteristic that there is a possibility to have awards reviewed by appellate arbitral tribunals if there is a parties' agreement but this does not mean that the awards of these appellate arbitral tribunals cannot be reviewed by courts afterwards. According to the 1996 Act, parties can agree for no review of an award by courts and there is also a possibility of no review of awards in Belgian law for parties having no connection with Belgium.

The comparison of the four legal systems has shown a divergence in some reasons of review by courts of an award and divergence in some others regarding the courts' involvement during the arbitration process. On the other hand, there is a convergence in the fact that courts not only intervene prior to the commencement of arbitration and during the procedure but also review and enforce awards, rather than the arbitral tribunal. Finally, our analysis demonstrates that commercial/maritime arbitration in the examined legal systems has not been established as a co-equal to courts dispute mechanism and it is far away from being a parallel civil justice system.

392 *Marsh v First USA Bank*, 103 F.Supp.2d 909, 926 (N.D. Tex. 2000) ("[a]n arbitration award is subject to review by the Court. 9 U.S.C. § 10. The Supreme Court has declared that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the [FAA]."). *AFSA v Burke*, 2001 U.S. Dist. LEXIS 17339 (D. Conn. filed Oct. 5, 2001) ("It is well established that litigation is a more costly method of dispute resolution than arbitration").

8 Arbitration co-equal and fully alternative to courts

1 Current status of arbitration versus courts

Can dispute resolution be privatized and informalised? Although the process used in arbitration is adjudicatory, it is a much more adaptable process than traditional litigation[1]. Arbitration achieved its superiority in the commercial field[2]. In addition, arbitration is expanding to lending[3], individual employment[4], maritime/commercial[5], international[6], statutory claims[7] and

1 Kenneth J. Rigby, "Family Law: Alternative Dispute Resolution," 44 *La. L. Rev.* 1725, 1733 (1984). Chris A. Carr & Michael R. Jencks, "The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision," 88 *Ky. L.J.* 183, 188–89 (2000) (differentiating between adjudication in court and before an arbitrator and criticizing the overexpansion of arbitration).

2 Thomas E. Carbonneau, "A Consideration of Alternatives to Divorce Litigation," 1986 *U. Ill. L. Rev.* 1119, 1119–22 (1986) at 1153. "The characteristics of arbitral adjudication mesh with the basic philosophy of a cohesive and interdependent commercial community. Merchants do not share lawyerly concerns with the litigation process. Adversarial wrestling for truth weakens the commercial ideals of good faith and arms'-length dealings, and might undermine the present or future basis for commercial relationships …. [T]he expertise, flexibility, and efficiency of arbitral adjudication can clearly favor the special interests of commerce".

3 *Buckeye Check Cashing, Inc. v Cardegna*, 126 U.S. 1204 (2006).

4 *Circuit City Stores, Inc. v Adams*, 532 U.S. 105 (2001).

5 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985). Richard E. Speidel, "Contract Theory and Securities Arbitration: Whither Consent?," 62 *Brook. L. Rev.* 1335, 1337 (1996) ("It is fair to say that securities arbitration is located on the dark side of the arbitration coin, since the contract to arbitrate is essentially a contract of adhesion."). Edward Brunet, "Toward Changing Models of Securities Arbitration," 62 *Brook. L. Rev.* 1459, 1493 (1996) ("In securities arbitration there is no real consent to arbitrate."); G. Richard Shell, "Fair Play, Consent and Securities Arbitration: A Comment on Speidel," 62 *Brook. L. Rev.* 1365, 1366 (1996) (stating that objective consent is "an inadequate foundation on which the ground the legitimacy of securities arbitration"); Murray S. Levin, "The Role of Substantive Law in Business Arbitration and the Importance of Volition," 35 *Am. Bus. L.J.* 105, 105–06 (1997) (noting trend of businesses utilizing voluntary binding arbitration as preferred method of dispute resolution).

6 *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 515 U.S. 528 (1995).

7 *Balt. & Ohio Chi. Terminal R.R. Co. v Wis. Cent. Ltd*., 154 F.3d 404, 410 (7th Cir. 1998) ("The arbitrability of statutory claims entails that arbitrators can decide questions of statutory interpretation ….").

technology disputes[8]. Moreover, arbitration developed into the "principal method of resolving disputes between employers and unions that arise in the course of administering collective bargaining agreements[9]." In fact, arbitration is praised as an economical and expeditious alternative to judicial recourse[10]. On the one hand,

8 *AT&T Corp. v Iowa Utilities Bd*., 525 U.S. 366 (1999).

9 Alan Scott Rau, "Resolving Disputes over Attorneys' Fees: The Role of ADR," 46 *Smu L. Rev.*2005, 2025 (1993). At 2027–28 ("Arbitration tends to be a speedier process in part because it allows the parties simply to bypass any queue at the courthouse door and to schedule hearings at their own convenience …."). At 2025–26 ("While the traditional attitude of judges towards arbitration was one of considerable hostility, statutes enacted in most jurisdictions have completely reversed the common-law position on arbitration and have made executory agreements to arbitrate enforceable.") *Buckwalter v Napoli*, *Kaiser & Bern LLP*, No. 01 Civ. 10868, 2005 WL 736216, at *7 (S.D.N.Y. Mar. 29, 2005) ("It is well settled that federal and New York State public policy favor the enforcement of arbitration agreements."); *Fredrick v Davitt*, No. Civ.A. 02–8263, 2003 WL 220287, at *2 (E.D. Pa. Jan. 31, 2003) ("Doubts are generally resolved in favor of coverage of the arbitration agreement."); Edward F. Sherman, "The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process," 15 *Rev. Litig.* 503, 503 (1996) ("Alternative dispute resolution (ADR) grew to prominence as an alternative to litigation.").

10 Stefano Cirielli, "Arbitration, Financial Markets and Banking Disputes," 14 *Am. Rev. Int'l Arb*. 243, 248 (2003) ("One of the major advantages of arbitration, in fact, is that the parties can agree to numerous substantive and procedural aspects, and are entitled to choose an informal and flexible process, which can be specially adapted to fit their dispute"). Edward Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tul. L. Rev. 39, 43* (1999) (noting that expertise of arbitrators has historically been regarded as a benefit to arbitration), Bruce L. Bensen, "An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States," 11 *J.L. Econ. & Org.* 479, 482 (1995) (noting that expert arbitrators were a widely perceived benefit of arbitration over litigation), at 486 ("the assumption of court hostility toward arbitration prior to passage of modern arbitration statutes in the 1920s is clearly unwarranted for some courts, and perhaps unwarranted for most."). Terry Bethel, "Wrongful Discharge: Litigation or Arbitration?," 1993 *J. Disp. Resol.* 289, 298 (1993) ("Perhaps the most heralded advantage of arbitration over ordinary litigation is the special competence of the arbitrator"). *Bradford v Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir. 2001): "[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve." *Plymouth-Carver Reg'l Sch. Dist. v J. Farmer & Co*., 553 N.E.2d 1284, 1285 (Mass. 1990) (citing *Marino v Tagaris*, 480 N.E.2d 286, 288 (Mass. 1985)) (claiming "predictability, certainty, and effectiveness" intertwined with voluntary arbitration). Myriam Gilles, "Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action," 104 *Mich. L. Rev.* 373, 393–96 (2005) (describing the ascendancy of an "arbitration hegemony" over federal statutory claims). Terenia Urban Guill, "Comment, A Framework for Understanding and Using ADR," 71 *Tul. L. Rev.*1313, 1313 (1997) (noting that arbitration is "the darling of the legal system" and promoted with "gushing enthusiasm"). Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," 72 *Tul. L. Rev.* 1, 17 (1997) (arguing that Supreme Court tells lower courts to "favor arbitration over litigation"); Thomas E. Carbonneau, "Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds" 105 (1989) ("Contemporary American statutory and decisional law on arbitration are in keeping with the unequivocal … acceptance of arbitral adjudication.").

arbitration's most discernible feature is its informality[11]. According to Laurie Kratky Doré[12]; "Although less formal than litigation, then, arbitration resembles litigation in that it constitutes an adjudicatory proceeding that substitutes for and 'orbit[s] fairly close to trial."' On the other hand, parties can misuse arbitration as public adjudication and undermine the virtues of arbitration[13]. Jan Paulsson and Georgios Petrochilos[14] consider arbitration to be a type of litigation without clarifying if both mechanisms are equally independent, keeping their individual characteristics as dispute methods, or whether arbitration has been judicialised, becoming a replica of litigation and still under courts' guardianship and control.

According to Darien Shanske[15], "Arbitration, as an informal alternative to the formal legal process, has, as is well-known, been in ever-increasing use over the last few decades". Arbitration now rivals court adjudication as the preferred means of resolving civil disputes based on expert knowledge[16] in the adjudication of disputes[17]. Furthermore, arbitration continues to thrive in

11 *Alston & Cole-Alston v UBS Fin. Serv., Inc*., No. 04-01798, 2006 U.S. Dist. LEXIS 656, at *4 n.2 (D.D.C. Jan. 2, 2006) (stating that the purpose of arbitration is to provide a less complicated alternative to litigation); Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 *Ga. L. Rev.* 731, 740–41 (1996) (describing arbitration process as sacrifice of legal precision for finality and certainty).

12 Laurie Kratky Doré, "Public Courts Versus Private Justice: It's Time To Let Some Sun Shine In On Alternative Dispute Resolution," 2006 *Chicago-Kent Law Review* 463, at 516. Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 *UCLA L. Rev.* 949, 1086 (2000) at 1048–49 (contending that arbitration substitutes for trial as a method of resolving disputes through "clash between adversaries"). Orna Rabinovich-Einy, "Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age," 7 *Va. J.L. & Tech.* 1, 39 (2002) at 19 (describing arbitration as "the form of ADR closest to litigation").

13 *Sawtelle v Waddell & Reed*, No. 115056/01 (N.Y. App. Div. (2005) (dispute over the award of punitive damages in arbitration appealed twice, only to have the arbitral award reaffirmed). Robert Post, "Case Pits Courts against Arbitration*," The National Law Journal*, Oct. 17, 2005, at p. 1.

14 Jan Paulsson and Georgios Petrochilos, "Does Ad Hoc Arbitration Require More Support? Session on Government Contracts and Dispute Settlement," 12 July 2007 Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9–12 July 2007 at 9 "Arbitration is a form of litigation. It is a process. As in litigation, the credibility and efficiency of arbitration as an institution depends in great measure on the soundness of the process".

15 Darien Shanske, "Hegel and the Justification for Arbitration in a Modern State," 2007 www.ssrn.com, p. 2.

16 Lee Goldman, "Contractually Expanded Review of Arbitration Awards," 8 *Harv. Negot. L. Rev.* 171, 172–73 (2003) (exposing concern regarding "industry" arbitrators lacking sophistication to appreciate legal issues beyond industry technicalities). John Berryhill, "Public Interest Considerations in Private Resolution of Patent Disputes," available at http://www.johnberryhill.com/patdis.html (claiming that it is unreasonable to expect judges and juries to properly evaluate the technical subject matter in patent suits and that savings in time and cost may be achieved by appointing an expert arbitrator). Steven J. Elleman, "Note & Comment, Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions," 12 *Ohio St. J. On Disp. Resol.* 759, 771 (1997) ("[A]rbitration of patent disputes under 35 U.S.C. Section 294 has not been utilized as much as expected by its drafters.").

17 *Kamaratos v Palias*, 821 A.2d 531, 535 (N.J. Super. Ct. App. Div. 2003) (stating that although there is a "strong judicial approval for the technique of arbitration, … New Jersey is equally

specialized industries, permitting determinations based on field-specific norms that are often not understood or applied in public courts[18]. Parties may want to privately resolve their disputes outside the politics of a nation's courts[19]. It is characteristic that Judge Posner stated that "[a]rbitration is a private self-help remedy[20]" but this method gets its authority from law and the constitution of the states. According to Matthew Eisler[21] "though it is substantively different than litigation, arbitration is an equally valid forum of dispute resolution". Justice Sandra Day O'Connor[22] has described the arbitral process as "the functional

committed, on the other hand, to assuring that a party does not unwittingly lose the 'timehonored right to sue"' (quoting *Garfinkel v Morristown Obstetrics & Gynecology Assocs*., 773 A.2d 665, 670 (N.J. 2001))); G. Richard Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 *UCLA L. Rev.* 623, 626–27 (1988) ("Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes."). *John Hancock Mut. Life Ins. Co. v Olick*, 151 F.3d 132, 137 (3rd Cir. 1998) ("[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties*."); Nat'l Union Fire Ins. Co. v Belco Petrol. Corp*., 88 F.3d 129, 133 (2nd Cir. 1996) ("The advantages of arbitration are well-known. Arbitration is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules …." *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.,*460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration …."). Edward F. Sherman, "The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process," 15 *Rev. Litig.* 503, 503 (1996) ("Alternative dispute resolution (ADR) grew to prominence as an alternative to litigation.").

18 Richard H. McLaren, "The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes," 35 *Val. U. L. Rev.* 379, 381 (2001). At 380–81 (highlighting the CAS arbitrators' application of widely accepted principles that may some day be recognized as the "*lex sportiva*"). Camille A. Laturno, "International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules," 9 *Transnat'l Law* 357, 369–71 (1996) (discussing the evolution of arbitration in intellectual property disputes and emphasizing that arbitration is particularly appropriate for resolution of such disputes because they involve specialized and technical issues); Christine Lepera, "What the Business Lawyer Needs To Know About ADR: New Areas in ADR," 13 *PLI/NY* 709, 711–14, 719 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights (IPRs), online technology, and entertainment issues). Judd Epstein, "The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation," 75 *Tul. L. Rev.* 871, 915–16 (2001) (discussing *lex mercatoria*); Kazuaki Sono, "The Rise of Anational Contract Law in the Age of Globalization," 75 *Tul. L. Rev.* 1185, 1185–86 (2001) (discussing the rise of delocalized contract law in international commercial arbitration). *But see* Christopher R. Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant," 80 *Notre Dame L. Rev.* 523, 524–26, 551 (2005) (explaining understandings of *lex mercatoria*but finding empirical evidence of limited use of such transnational commercial law in international commercial arbitration).

19 Victor Perez Vargas & Daniel Perez Umana, "The UNIDROIT Principles of International Commercial Contracts in Costa Rican Arbitral Practice," 58 *Unif. L. Rev.* 179, 179–98 (2006) (highlighting growth of arbitration in Costa Rica and application of accepted international contract standards in both international and domestic arbitration).

20 *Smith v American Arbitration Ass'n* 232 F.3d 502 (2000) at 507.

21 Matthew Eisler, "Difficult, Duplicative And Wasteful?: The NASD's Prohibition Of Class Action Arbitration In The Post-Bazzle Era," Vol. 28:4 (2007) *Cardozo Law Review* 1891 at 1897.

22 *Shearson/Am. Express v McMahon*, 482 U.S. 220, 257 n.14 (1987) Douglas E. Ray, "Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal," 28 *B.C. L. Rev.* 1, 1–2 (1986)

equivalent of the courts," providing the party equal protection regarding any substantive or statutory rights.

Case law has revealed courts' intrusion in to arbitration, showing the sense of independence established by courts which in fact is not independence but a pseudo-independence in order to diminish caseloads before the courts and not to establish arbitration as a co-equal to courts' dispute mechanism[23]. Thus, the possibility of judicial review alters the self-regulatory core of private autonomy that should characterize commercial arbitration. By contrast, P. Zumbansen[24] believes that the limited courts' review envelops arbitration "with an autonomy" but not autonomy with the meaning of independence. Markham Ball[25] thinks that "the involvement of the courts has been, and will continue to be, both important and necessary". The Supreme Court's[26] broad interpretation of the FAA welcomes arbitration as a practical auxiliary to the judicial system.

Is there a judges' paternalistic attitude that only they can make certain that individual plaintiffs will be afforded a fair opportunity to challenge corporate defendants? Arbitration has been seen as a system of adjudication built, like the public justice system, on the foundation of fundamental fairness, but judges have accepted arbitration as a supplement to the overworked judicial system[27]. According to David S. Schwartz[28] "the courts have created a complex web of

(describing the Board's deferral policy to private arbitration as negatively impacting the individual rights protection sought by the NLRA). Steven Walt, "Decision by Division: the Contractarian Structure of Commercial Arbitration," 51 *Rutgers L. Rev*. 369 (1999) (discussing allocation of responsibilities between courts and arbitrators).

23 *Nat'l Union Fire Ins. Co. v Belco Petroleum Corp*., 88 F.3d 129, 133 (2d Cir. 1996) (emphasizing that one key advantage of arbitration is that it helps to relieve crowded court dockets); *Mobile Oil Indonesia Inc. v Asamera Oil (Indonesia) Ltd.*, 372 N.E.2d 21, 23 (N.Y. 1977) (stressing that judicial intrusion in arbitration must be limited in order to conserve time and resources of both courts and parties*). Mich. Family Res. v Serv. Employees Int'l Union*, Local 517M, 475 F.3d 746, 751–52 (6th Cir. 2007) (reaffirming the Steelworkers Trilogy and the important role of arbitration by redefining the scope of inquiry and judicial intervention in appeals of arbitration decisions).

24 P. Zumbansen, "Piercing the legal veil: Commercial arbitration and transnational law," *EUI Working Paper Law* No. 2002/11 p. 12 "limited judicial review of tribunal decisions provides arbitral awards with an autonomy that underlines the bindingness of the arbitration for the parties. At the same time, it positively confirms the system of arbitration law".

25 Markham Ball, "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration," 2006 Arbitration International 73, Vol. 22, No. 1 at At 93 "In this process the involvement of the courts has been, and will continue to be, both important and necessary".

26 *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). *Perry v Thomas*, 482 U.S. 483, 492 n.9 (1987) (stating that state law may be applied to arbitration agreements only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"); *Doctor's Assocs., Inc. v Cassarotto*, 517 U.S. 681, 686–87 (1996).

27 Thomas J. Stipanowich, "Punitive Damages and the Consumerization of Arbitration," 92 *Nw. U. L. Rev.* 1, 6 (1997). Ian R. Macneil, "American Arbitration Law: Reformation, Nationalization, Internationalization" 172–73 (1992) (arguing that judicial policy on ADR is motivated by judicial self-interest in reducing caseloads).

28 David S. Schwartz, "If You Love Arbitration, Set it Free: How 'Mandatory' Undermines 'Arbitration'," Legal Studies Research Paper Series Paper No. 1052 August 2007 at 32.

doctrine surrounding the institution of arbitration, one that generates litigation before and after arbitration decisions". Does arbitration deprive parties of a jury trial which would be more favourable than arbitration? Since arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit[29], parties are not deprived by contractual arbitration. According to Diane P. Wood[30] "Arbitration is here with us to stay, and it has now become our duty to make it as fair, as cost-effective, as true to the law, and as accountable as possible". Moreover, civility, a function of the informality of the proceedings instead of the complexity of procedure in litigation where parties struggle exceedingly over the inclusion or exclusion of evidence, should characterize arbitration operating under a general rule of free admissibility of evidence[31].

Susan Randall[32], taking into account the use of the doctrine of unconscionability to nullify arbitration agreements says that "Despite legislative pronouncements and the strong national policy favouring arbitration, evidence points to continuing judicial hostility to arbitration." Unconscionability is a judicially created doctrine which is defined and determined by courts granting judges freedom of choice to void arbitration agreements for a broad range of reasons merely by labelling them unconscionable[33]. To that extent this author thinks that arbitration is guarded by courts in the whole process of arbitration as previously analysed and, therefore, arbitration currently runs as a supplementary to courts dispute mechanism rather than as a fully alternative, co-equal and independent mechanism. It is characteristic that William J.T. Brown[34] says that "While courts have often emphasized their duty to 'protect the arbitration,' they do not always find it easy to protect arbitration

29 *AT & T Technologies, Inc. v Communications Workers of America*, 475 U.S. 643, 648 (1986).

30 Diane P. Wood, "The Brave New World Of Arbitration," 2003 *Capital University Law Review* 383 at 412.

31 Louis L.C. Chang, "Keeping Arbitration Easy, Efficient, Economical, and User-Friendly" 61-Jul *Disp. Resol. J.* 15, 16 (2006) ("Arbitrators can set the tone for the arbitration by stating that they expect civility and cooperation from the parties and their attorneys."); Joseph L. Daly, "Arbitration: The Basics," 5 J. *Am. Arb.* 1, 55 (2006) ("… [i]n arbitration, the hyper-aggressive advocate is less effective than the advocate who is civil.").

32 Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability," 2004 *Buffalo Law Review,*Vol. 52, p. 185, at 223. (proposing that some courts' "expansion of unconscionability to avoid arbitration" may suggest that controls are needed).

33 *Armendariz v Found. Health Psychcare Servs., Inc.,* 6 P.3d 669, 689 (Cal. 2000) (the disparate bargaining power of the parties and the lack of any reciprocal obligation to arbitrate claims). *Morrison v Circuit City Stores, Inc*., 317 F.3d 646, 666 (6th Cir. 2003) (rejecting claims that a nearly identical arbitration agreement contained in an employment application was either procedurally or substantively unconscionable). Procedural unconscionability exists when one party uses deceit or superior bargaining power to compel a weaker party to sign a disadvantageous agreement. Substantive unconscionability exists when the actual terms of an agreement violate minimal fundamental notions of fairness. Larry H. DiMatteo, "The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law," 60 *U. Pitt. L. Rev* 839, 886 (1999).

34 William J.T. Brown, "California Arbitration Law Affirmed over Federal Arbitration Act," *New York Law Journal*, June 2, 2004 p. 4.

from themselves". Moreover, Markham Ball[35] considers that "To the extent, however, that the phrase 'alternative dispute resolution' suggests that courts have nothing to do with commercial arbitrations, the term is also a serious and misleading oversimplification. Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation's courts and judicial system. Under the laws that govern arbitration, the courts have a critically important role to play in making systems of arbitration work." Besides, a co-equal to courts arbitration system will mean that parties cannot protract the procedure by challenging arbitration matters before courts and so the whole procees will take place within the arbitration system rather than having to go back to courts in order to solve disagreements or to demand a court's enforcement and authority.

Do arbitrators not possess legal expertise[36]? The Supreme Court in *Marbury v. Madison*[37] stated that the interpretation of constitutional provisions was the province of judges[38]. Andrei Marmor argues that[39] "courts tend to possess legal expertise, they are the best kind of institution to be entrusted with constitutional interpretation". The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people of the entire nation. As discussed earlier, arbitration is deep-rooted in ancient Greek and Roman laws and since the French Revolution, arbitration was considered a *droit naturel*[40] but in modern days the established *forum* for all disputes are national courts created and maintained by the state to offer a dispute settlement service for parties. States make certain that courts exist as an expression of state prerogative and power. Arbitration is not a national court procedure but a private proceeding with public consequences. According to John O. McGinnis and Ilya Somin[41] "Judges thus often put aside their political and public policy preferences to enforce the law according to a set of rules." On the other hand, voting patterns in the Supreme Court back a "political" or "attitudinal" model

35 Markham Ball, "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration, Arbitration International," Vol. 22, No.1, 73 at 73.

36 *Alexander v Gardner-Denver*, 415 U.S. 36, 57 (1974) (stating that parties select a particular arbitrator "because they trust his knowledge and judgment concerning the demands" and customs of the field from which the dispute originates); Ian Macneil *et al., Federal Arbitration Law* § 2.6.2 (1994) (stating that an arbitrator is expected to be an expert in the norms governing the resolution of the dispute).

37 5 U.S. (1 Cranch) 137 (1803).

38 David Boies, "Judicial Independence and the Rule of Law," 22 *Journal of Law & Policy* 57.

39 Andrei Marmor, "Constitutional Interpretation," USC Public Policy Research Paper No. 04-4, p. 10

40 "Le droit des citoyens de terminer définitevement leurs contestations par la voie de l'arbitrage, ne peut recevoir aucune atteinte par les acts du Pouvoir législatif." (The legislative power [Parliament] cannot by any means hinder the right of the citizens to settle their disputes by means of arbitration). Title III, Chap V, Article 5, Constitution of 3 September 1791. "Il ne peut être porté aucune atteinte au droit de faire prononcer sur les différends par les arbitres du choix des parties", Constitution, 22 August 1795. See Constitution of Greece 1827, Article 139.

41 *John O. McGinnis, Ilya Somin, Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, Research Paper No. 04-08, p. 48.

that posits that judicial votes abide by political ideology[42]. Moreover, according to Richard C. Reuben[43] "Courts have a vested institutional interest in managing the size of their dockets, and individual judges may have ideological preferences that would cause them to steer certain cases or classes of cases into arbitration, rather than permitting them to proceed before judges or juries." It could be argued that arbitrators must put aside their political preferences and enforce the law and customs as well.

Constitutional prohibitions apply only to state action. If state action arises when a plaintiff is required to use the arbitration process, that process must satisfy the constitutional requirements of due process and equal protection. Federal courts concluded that there is no state action present in either securities or contractual arbitration[44]. No state courts have found state action in contractual arbitration [45]. According to the view expressed in the courts, private party use of a private dispute resolution system does not create state action, nor is state action present when one arbitral party seeks to enforce an arbitration agreement or award. Are arbitrators state actors[46]? Presently arbitration does not exist without statutory authorization and the right to force arbitration and enforce the resulting award clearly derives from state authority[47]. In other words the parties' right to choose arbitration instead of litigation derives from the law and the constitution and so the parties' right

42 Daniel R. Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis," 20 *Justice Sys.*J. 219 (1999) (citing studies and concluding that voting patterns support a "political" or "attitudinal" model which posits that judicial votes follow political ideology). Harry T. Edwards, "The Effects of Collegiality on Judicial Decisionmaking," 151 *U. Pa. L. Rev.* 1639, 1640–41 (2003) ("These scholars invariably ignore the many ways in which collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions."). Theodore W. Ruger, *et al.*, "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-making," 104 *Colum. L. Rev.* 1150, 1162 (2004) ("Because our study does not account for the content [of judicial decisions] there is much it does not, and cannot, say about the judicial process.").

43 Richard C. Reuben, "Process Purity and Innovation in Dispute Resolution: A Response to Professors Stempel, Cole, and Drahozal, Legal Studies Research Paper Series," Research Paper No. 2007–14 at 36–37. Ian R. Macneil, "American Arbitration Law: Reformation, Nationalization, Internationalization" 172–73 (1992) at 172–73 (US Supreme Court's arbitration jurisprudence based on its vested interest in "docket-clearing pure and simple."); Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)" 3 S. *Ct. Econ. Rev.* 1, 2 (1993) "[J]judges have a vested interest in reducing the workload of the courts, and they may attempt to advance that agenda without sensitivity to the impact on the system as a whole, particularly the impact on the attorney-client relationship."

44 *Perpetual Secs., Inc. v Tang*, 290 F.3d 132, 137–39 (2nd Cir. 2002); *Davis v Prudential Secs*., Inc., 59 F.3d 1186, 1190–92 (11th Cir. 1995); One federal district court states in *dicta* that it "respectfully doubts that the rationale for the result set forth in *Davis*… that an arbitration award involves no state action is well-founded." *Commonwealth Assocs. v Letsos*, 40 F. Supp. 2d 170, 177 n.37 (S.D.N.Y. 1999) (citing *Davis*, 59 F.3d at 1191).

45 *Hadelman v Deluca*, 876 A.2d 1136, 1138 (Conn. 2005).

46 Richard C. Reuben, "Public Justice: Toward a State Action Theory of Alternative Dispute Resolution," 85 *Cal. L. Rev.* 577, 619, 625 (1997).

47 *Edmonson v Leesville Concrete Co.* 500 U.S. 614 (1991). *Lugar v Edmondson Oil Co.* 457 U.S. 922 (1982).

does not appear from a vacuum. According to Paul F. Kirgis[48], "Arbitration is a substitute for public adjudication, at least in cases involving mandatory legal rules, and public adjudication is beyond doubt a traditional government function". Is the FAA providing the mechanism by which such enforcement actions take place in a neutral regulatory scheme? Is arbitration customarily a distinctive, if not sole, function of the state? R. Reuben[49] explains that binding dispute resolution, predominantly arbitration, is "traditionally an exclusive public function". The Supreme Court in *Boddie v. Connecticut*[50] stated that the state has a "monopoly over techniques for binding conflict resolution". An arbitral award is enforceable only after a judge enters the award as a judgment in accordance with the FAA or other national arbitration laws, and so arbitration does not operate autonomously from the state. Courts expressed the view that the fact that the court enforces arbitration agreements and awards does not turn the arbitrator or the parties to the arbitration into state actors[51]. Thus, courts have rejected arguments that either arbitration itself or the judicial confirmation of arbitral awards constitutes state action[52].

On the other hand, the right to compel arbitration and enforce the award derives from state authority. The *raison d'etre* for the FAA was that arbitration could not function successfully with non-judicial recognition and enforcement providing governmental assistance and benefits to parties in search of use-binding arbitration. Moreover, according to Richard Reuben[53] arbitrators are state actors. Additionally, Paul F. Kirgis[54] thinks that "Arbitration has existed as a method of dispute resolution for centuries, and for most of that time the formal courts have considered arbitrators to be minor league judges". The Supreme Court moved from suspicion[55] to a whole-hearted acceptance of arbitration as an alternative to the judicial process[56] and so there is a doctrinal change that has enhanced the role of arbitration as a substitute for judicial decision-making.

48 Paul F. Kirgis, "Judicial Review And The Limits Of Arbitral Authority: Lessons From The Law Of Contract," 2007 *St. John's Law Review* 99, at 108. Amy J. Schmitz, "Consideration Of 'Contracting Culture' In Enforcing Arbitration Provisions," 2007 *St. John's Law Review* 123.

49 Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 UCLA *L. Rev.* 949 (2000) at 997–98.

50 401 U.S. 371, 375 (1971).

51 *Flagg Bros. v Brooks.* 436 U.S. 149 (1978). *Lugar v Edmonson Oil Co.* 457 U.S. 922 (1982).

52 *MedValUSA Health Programs, Inc. v Member Works, Inc*., 872 A.2d 423, 428 (Conn. 2005). *Davis v Prudential Securities, Inc.* 59 F.3d 1186 (11th Cir. 1995). *Pacific Mutual Life Insurance Co v Haslip* 499 U.S. 1 (1991).

53 Richard C. Reuben, "Public Justice: Toward a State Action Theory of Alternative Dispute Resolution," 85 *Cal. L. Rev.* 577 589–91, 609–10 (1997) (critiquing US courts' consensus that private arbitration does not constitute state action subject to constitutional requirements).

54 Paul F. Kirgis,"Judicial review and the limits of arbitral authority: lessons from the law of contract," 2006 Legal studies research paper series paper #06-0057 p 1.

55 *Wilko v Swan*, 346 U.S. 427 (1953).

56 *Southland Corp. v Keating*, 465 U.S. 1 (1984), *Allied-Bruce Terminix v Dobson*, 513 U.S. 249 (1995*); Doctor's Assocs., Inc. v Casarotto*, 517 U.S. 679 (1995). *Sherk v Alberto-Culver*, 417 U.S. 506 (1974).

On the one hand, contractual arbitration gives rise to state action when courts enforce contractual commitments to participate in arbitration and when courts subsequently enforce arbitration awards[57]. Many scholars have argued in favour in the presence of state action in arbitration[58]. On the other hand, courts have rejected a finding of state action in contractual arbitration[59]. According to Sarah Rudolph Cole[60] "the mere fact that the court enforces arbitration agreements and awards does not turn the arbitrator or the parties to the arbitration into state actors. Simply put, the creation of a statutory scheme that 'permits but does not compel' private party action does not create state action."

Modern arbitration statutes allow courts to supervise the arbitral process on the basis of the enforceability of the arbitral agreement and of the award. Due process norms apply in arbitration.[61] The supervision that is allowed ordinarily is quite restricted and narrow; it generally results in the enforcement of the award unless there has been a fundamental breach of adjudicatory legitimacy or there was blatant use of excessive powers by the arbitrators. As analysed above,

57 Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," *72 Tul. L. Rev.*1493 (1997). Stephen J. Ware, "Employment Arbitration and Voluntary Consent," 25 *Hofstra L. Rev.* 83, 145–46 (1996) (noting that because "securities laws constitute an occupational licensing scheme that conditions a license to be a securities employee" on an agreement to arbitrate, state action is present.).

58 Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 *Ucla L. Rev.* 949, 1049 (2000); at 991; Edward Brunet, "Arbitration and Constitutional Rights," 71 *N.C. L. Rev.* 81, 109 (1992); at 109; Kenneth R. Davis, "Due Process Right to Judicial Review of Arbitral Punitive Damages Awards," 32 *Am. Bus. L.J.* 583 (1995); Jeffery L. Fisher, "State Action and the Enforcement of Compulsory Arbitration Agreements Against Employment Discrimination Claims," 18 *Hofstra Lab. & Emp. L.J.* 289, 295–96 (2000); at 295–96; Jean Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," 72 *Tul. L. Rev.* 1 (1997), at 40.

59 *Perpetual Sec., Inc. v Tang*, 290 F.3d 132, 138 (2nd Cir. 2002); *Desiderio v Nat'l Ass'n of Secs. Dealers, Inc*., 191 F.3d 198, 207 (2nd Cir. 1999); *Duffield v Robertson Stephens & Co*., 144 F.3d 1182, 1200–02 (9th Cir. 1998).

60 Sarah Rudolph Cole, "Arbitration and State Action," 2005 *Brigham Young University Law Review* 1 p 47. Maureen A. Weston, "Universes Colliding: The Constitutional Implications of Arbitral Class Actions," 47 *Wm. & Mary L. Rev.* 1711, 1745–65 (2006) (noting American courts' conclusion that private arbitration does not involve state action but critiquing this conclusion with respect to arbitral class actions).

61 Edward Brunet, "Arbitration and Constitutional Rights," 71 *N. Car. L. Rev.* 83 (1992) (arbitrators do apply due process norms in administering hearings); William W. Park, "The Procedural Soft Law of International Arbitration 145," in *Pervasive Problems in International Arbitration* (Kluwer International Arbitration Law Lib. (2006)) (asserting appropriately that "due process lies at the core of what litigants seek in both arbitration and litigation"). Judge Posner of the US Court of Appeals for the Seventh Circuit stated, "the standard due process entitlement to an impartial tribunal is relaxed when the tribunal is an arbitral tribunal rather than a court." *United Transp. Union v Gateway Western Railway Co.*, 284 F.3d 710, 712 (7th Cir. 2002) *Mathews v* Eldridge, 424 U.S. 96 (1976) (setting forth a balancing test for determining due process rights in informal administrative adjudications). *Goldberg v Kelly*, 397 U.S. 254, 271 (1970) (impartial tribunal an element of due process).

the state itself via courts intervenes very often in arbitration and if therefore, a state action emerges in every arbitration, national arbitration laws are not merely neutral regulatory schemes because the state via courts intervenes in arbitration. Regardless of the current guardianship of the courts, the essence of arbitration still amalgamates the prerogative of states' sovereignty. Of course, in a different scale than courts, otherwise the method would be considered an illegality and offence. The constitutional requirements of due process and equal protection are applicable in arbitration, otherwise the award will be reviewed and annulled by national courts.

Arbitration is built on the basis of a statutory allocation of the traditionally sole public function of binding dispute resolution. State action exists in binding arbitration under the public function and entanglement theories[62]. Disproportionate entanglement occurs because judicial involvement occurs in the whole apparently private process. Court enforcement attributes civil authority to private arbitrators. According to Michael C. Grossman[63], "A 'symbiotic relationship' exists between the lucrative arbitration industry and the economizing of judicial resources leading to reciprocal profiting". Court enforcement gives tribunal awards under the FAA *res judicata* effects. This author thinks that access to courts or arbitration has been deemed an essential right guaranteed by the constitutions. In consensual arbitration, parties have waived their right to court access, precluding due process challenges later[64], but parties' rights to conclude arbitration agreements is constitutional. The federal governments, through the FAA, generate a statutory right to a statutory standard of review, satisfying the fact that there is a "right" and it is "governmental." The Federal Abitration Act review as a statutory right means that courts qualify as state actors, in this manner creating the duty to protect procedural due process.

In the US, the popularity of arbitration is approaching that of litigation. Unfortunately, arbitration is becoming more like litigation as it is increasingly hostile and inefficient. In other words arbitration is starting to look much more like litigation[65]. Regarding proposals for a more formalistic model of arbitration

62 Sarah Rudolph Cole, "Arbitration and State Action," 2005 *BYU L. Rev.* 1, 4 & n.11 at 7 (arguing state action exists under public function and excessive entanglement theories, but noting that symbiotic theory of state action is not relevant to arbitration) (noting that "[c]ourt involvement occurs, if at all, prior to start of arbitration and after the completion of arbitration");

63 Michael C. Grossman, "Is this arbitration?: Religious tribunals, judicial review, and due process," 107 *Columbia Law Review* 169 p. 200. Amy J. Schmitz, "Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm," 20 *Ohio St. J. On Disp. Resol.* 291, 313–15, 371 (2005) (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

64 *Kovacs v Kovacs*, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993) ("[P]arties expressly waived application of Maryland law … when they agreed to arbitration under Jewish substantive and procedural law.").

65 C. Edward Fletcher III, "Learning to Live with the Federal Arbitration Act-Securities Litigation in a Post-McMahon World," 37 *Emory L.J.* 99, 133–34, 137 (1988) (warning of creeping legalization of securities arbitration). Commission On The Future Of Worker-Management Relations (Dunlop

David S. Schwartz[66] thinks that "they all make mandatory arbitration more and more like going to court. They trade off the speed, efficiency and simplicity of classic arbitration to make it more expensive, time-consuming and rule-bound"[67]. This author believes that arbitration cannot become an alternative court system, a system of public justice outsourced to private providers but an alternative dispute system co-equal to courts administered by the state and keeping its classical advantages of speed, cost effectiveness and efficiency, leading to justice and satisfaction. Arbitration now takes just as long, and is just as costly as litigation before national courts[68]. For instance, maritime arbitration is generally considered to be an alternative way to resolve disputes among shipping people but maritime arbitration has become too expensive and time-consuming[69]. In Greece, an arbitration process dealing with a large commercial dispute will last between 12 to 16 months on average[70].

Is arbitration a mere surrogate, perhaps for a desire to streamline judicial dockets or for a conservative strategy of privatization and deregulation? It could be said that,

Commission), Report And Recommendations 25–33 (1994) (urging written arbitral opinions and expanded judicial review); *Gateway Tech., Inc. v MCI Telecommunications Corp*., 64 F.3d 993 (5th Cir. 1995) (implementing parties' agreement to expand the scope of judicial review); *Roadway Package Sys., Inc. v Kayser*, 257 F.3d 287 (3rd Cir. 2001) (same). But *see Bowen v Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (holding that parties cannot contractually alter the FAA standard for judicial review*); Kyocera Corp. v Prudential-Bache Trade Serv., Inc*., 341 F.3d 987 (9th Cir. 2003) (same).

66 David S. Schwartz, "Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform, Testimony presented at the hearing on 'Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?"' before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, June 12, 2007, p. 20.

67 Arbitration is a contract's creation. Moreover, Arbitration is not mandatory when it arises out of all types of contracts because contracts are accepted voluntarily. *May v Higbee Co*., 372 F.3d 757, 763–64 (5th Cir. 2004) (stating that "arbitration is a matter of contract" and state contract law will determine whether a valid agreement to arbitrate was formed). Stephen J. Ware, "Default Rules from Mandatory Rules: Privatizing Law through Arbitration," 1999 *Minnesota Law Review* 703, at 711 "The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law" at 754 "Arbitration privatizes the creation of law". Stephen J. Ware, "Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights," 38 *U.S.F. L. Rev.* 39, 43 (2003) ("I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration."). Christine Reilly, "Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment," 90 *Cal. L. Rev.* 1203, 1225 (2002) (empirical research demonstrates that employees "do not understand the remedial and procedural consequences of consenting to arbitration" and that "[v]ery few are aware of what they are waiving.").

68 Christian Bühring-Uhle, "Arbitration and Mediation in international business" 140–48 (1996) (noting the mixed evidence as to the decreased cost and efficiency of international arbitration and suggesting that generally arbitration is not less expensive but it may be quicker).

69 Erhard Riehmer, *Maritime Arbitration – Does it still properly serve the interest of the user? A critical viewpoint,* 2005 GMAA. Josef Rohlik, "Arbitration as a Model for Resolution of Health Care Disputes Between Health Care Professionals and Health Care Organizations," 41 *St. Louis U. L.J.* 1005, 1006–07 (1997) (discussing reasons for the recent increase in arbitration hearings).

70 www.rokas.com

not only sporadically, national courts play a larger role in the arbitration process, usurping power from both the panel and the parties[71]. In certain circumstances, courts have determined the general applicability of the arbitration clause to the dispute or specified elements such as location and panel members and so judicial actions destruct control by the parties and judicialize the process[72]. Moreover, control is destructed through the discovery process, the majority of which is voluntary. It is argued that the problem with arbitration is that, as in the court system, arbitral panels make mistakes and so without appellate review, mistakes are not addressed, and speed and finality[73] become advantages only for the "winners" of arbitration[74]. The dispute resolution process, as well as the arbitrator's decision, can be tailored to the wishes of both parties, increasing their confidence in the impartiality of the decision–maker and of the expected outcome. Additionally, arbitrators are commonly experts in the field and as a result inspire a great deal of confidence as effective and impartial decision-makers. Therefore, the introduction of an appellate review by an arbitral tribunal will contribute to a more efficient arbitration.

As discussed earlier, the Supreme Court of the US has embraced arbitration as a valid alternative to judicial resolution of disputes, but not "without regard to the wishes of the contracting parties"[75] and so arbitration has brought relief to overcrowded judicial dockets. To that extent, G. Petrochilos[76] argues that "the users of the system are in the vast majority of cases unwilling to opt for arbitration unhinged from national law and destitute of support in the courts. Control and support by national courts, applying national law, is regarded as desirable".

71 Susan L. Karmanian, "The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts," 34 Geo. *Wash. Int'l. L. Rev.* 17 (2002). John R. Allison, "Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies," 64 *N.C. L. Rev.* 219, 276 (1986) ("[T]he relationship between the arbitral and judicial systems is symbiotic—the courts provide implementation and enforcement mechanisms for arbitration, and arbitration presents great opportunities for relieving court congestion and delay.").

72 "International Arbitration In The 21st Century: Towards 'Judicialization' And Uniformity?": Twelfth Sokol Colloquium, (Richard B. Lillich and Charles N. Brower eds., Transnational Publishers 1994) (providing a forum for the progression of arbitration and recognizing the movement towards a more judicial status of arbitration generally). Patrick Neill, "Confidentiality in Arbitration," 12 *Arb. Int'l* 287 (1996) (using the example of Australia in recognizing that nationally under the context of public interest, arbitration proceedings may loose their contractual confidentiality); Hans Smit, "Confidentiality," 9 *Am. Rev. Int'l Arb.* 233, 237 (1988) (finding that enforcement of the confidentiality agreement at the enforcement stage, is commonly left in the hands of the judiciary).

73 Amy Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis," 37 *Ga. L. Rev.* 123 (2002) (arguing that increased judicial scrutiny has undermined the finality of arbitration, muddying the distinction between arbitration and trial-court decision-making).

74 Martin Hunter, "International Commercial Dispute Resolution: The Challenge of the Twenty-first Century," 16 *Arb. Int'l.* 379, 382 (2000).

75 *Mastrobuono v Shearson Lehman-Hutton, Inc*., 514 U.S. 52, 56–57 (1995); *Volt Information Sciences v Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989).

76 G. Petrochilos, *Procedural Law in International Arbitration*, Oxford 2004, p. 386.

Additionally, regarding the relation of courts and arbitration, Kim Karelis[77] argues that: "No reason exists why the two systems cannot be partners rather than adversaries in this essential function". Moreover, regarding the application of law Paul F. Kirgis says that: "without effective judicial review, there are no assurances that arbitrators will get the law right"[78]. Thus, there is a strong hold towards courts' involvement in arbitration–showing a preference towards an auxiliary role for arbitration in the settlement of commercial disputes. In practice, parties' perceived fairness in the arbitration process and the predictability and certainty of the result is why arbitration is becoming more and more the preferred dispute mechanism for specific kind of disputes such as commercial, maritime, employment[79] and consumer protection issues[80].

According to Andre R. Imbrogno[81]; "As sophisticated as arbitration and other ADR mechanisms have become, judicial decision-making still possesses unique attributes. Most importantly, judicial decision-making is uniquely public in nature". Moreover, Harry T. Edwards[82] thinks that an asset of adjudication is its aptitude to guarantee the proper resolution and application of public values,

77 Kim Karelis, "Private Justice: how civil litigation is becoming a private institution–the rise of private dispute centers," 23 *Sw. U. L. Rev.* 621

78 Paul F. Kirgis, "The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards," 2006 *Oregon Law Review* 1, at 5.

79 Robert A. Gorman, "The Gilmer Decision and the Private Arbitration of Public-Law Disputes," *1995 U. Ill. L. Rev.* 635, 678 (fearing that the "*Gilmer* decision … represents the beginning of a potentially vast reallocation of jurisdiction over employment disputes from civil courts and administrative agencies to privately selected arbitrators"); Reginald Alleyne, "Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum," 13 *Hofstra Lab. L.J.* 381, 383 (1996) (arguing that the "*Gilmer* decision carries alternative dispute resolution to excess"); Paul H. Haagen, "New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration," 40 *Ariz. L. Rev.* 1039, 1039–40 (1998) (noting expansion of FAA to cover statutory civil rights and employment claims).

80 Delissa A. Ridgway, "International Arbitration: The Next Growth Industry," 54 *Feb. Dispo. Resol. J.* 50, 50–51 (1999) (suggesting that international commercial arbitration is a growth industry because of parties' perceived fairness in the process and the predictability and certainty of the result). Terenia Urban Guill, "Comment: A Framework for Understanding and Using ADR," 71 *Tul. L. Rev.* 1313, 1313 (1997) (noting that arbitration is "the darling of the legal system" and promoted with "gushing enthusiasm"). Katherine V.W. Stone, "Procedural Justice in the Boundaryless Workplace: The Tension between Due Process and Public Policy," 80 *Notre Dame L. Rev.* 501, 501–02 (2005) (describing increase in arbitration of workplace grievances). Jack M. Sabatino, "ADR as 'Litigation Lite': Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution," 47 *Emory L.J.* 1289, 1290–1303 (1998) (tracing the recent, dramatic growth of litigation alternatives and forms of ADR, including binding arbitration).

81 Andre R. Imbrogno, "Arbitration As An Alternative To Divorce Litigation: Redefining The Judicial Role," 2003 *Capital University Law Review* 413 at 438. Natalie C. Scott, "Note, Don't Forget Me! The Client in a Class Action Lawsuit," 15 *Geo. J. Legal Ethics* 561, 578 (2002) (describing judges as guardians of the class and as responsible to the public). *In re*[Sealed], 64 F. Supp. 2d 183, 184 (E.D.N.Y. 1999) (noting that "[c]ourts have obligations to the public that private arbitrators do not"); *Eagle v Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004) (recognizing that "generally arbitration forums should be treated differently from courts").

82 Harry T. Edwards, "Commentary, Alternative Dispute Resolution: Panacea or Anathema?," 99 *Harv. L. Rev.* 668, 675–82 (1986). Owen M. Fiss, "Commentary, Against Settlement,"

and public officers, not private individuals, have to interpret the values of the constitution and statutes. Judicial adjudication develops substantive law, creates precedent, produces uniform law, educates the public, and forms public values. This development through litigation before state courts of a uniform precedent that educates and informs public values is more likely than arbitration to balance integration of the legal system. Therefore arbitration has to take off from this point and establish its own precedent, uniform law integrating the legal system but not to mimicing the stereotype of courts' features relating to followed procedures. Why not also force courts to improve their efficiency by shortening multifaceted processes?

When the "law" is a statute, the court's interpretation of that statute itself becomes part of that statute[83]. Congress and legislatures can always alter the statute clearly if it disagrees with the court's interpretation[84]. Is it time for arbitral tribunals' interpretation of a statute to become part of that statute as well? Repeated use of arbitration generates institutional knowledge of a specific subject matter and enhances the arbitration's ability to resolve a company's disputes as efficiently as possible. Can the expansion of arbitration threaten public values? Harry T. Edwards[85] thinks that public values contained in legislation will be ignored by arbitration. On the other hand, arbitration was developed for decisions

93 *Yale L.J.* 1073, 1075 (1984) (urging that by resolving disputes through settlements rather than through adjudication, justice is sacrificed for peace).

83 *Douglass v Pike County*, 101 U.S. 677, 687 (1879) ("After a statute has been settled by judicial construction, the construction becomes … as much a part of the statute as the text itself …"); James J. Brudney & Cory Ditslear, "Canons of Construction and the Elusive Quest for Neutral Reasoning," 58 *Vand. L. Rev.* 1, 28 (2005) ("Judicial reasoning is highly situation-specific, reflecting sensitivity to the novelty and difficulty of issues presented [and] the nature of divisions among the Justices."). Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," 97 *Colum. L. Rev.* 1, 18–19 (1997) (describing the "rule of law" as requiring a "reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases"); Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353, 366 (1978) ("Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.").

84 *Patterson v McLean Credit Union*, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") *PacifiCare Health Sys., Inc. v Book*, 538 U.S. 401, 406–07 (2003). The Court enforced an arbitration provision barring punitive damages, although the applicable RICO statutes mandated the award of treble damages. ("[W]e should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved."

85 Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?," 99 *Harv. L. Rev.* 668, 676–79 (1986) (raising concern that public values reflected in legislation will be ignored in private processes of dispute resolution), at 669 ("My principal concern is that, in our enthusiasm over the ADR idea, we may fail to think hard about what we are trying to accomplish. It is time we reflect on our goals and come to terms with both the promise and the danger of alternatives to traditional litigation.") Stephen J. Ware, "Employment Arbitration and Voluntary Consent,"

based on the parties' contract, as applied in the framework of the norms of a specific society[86]. The Court in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*[87]*, Inc* set aside decades of unwillingness to arbitrate statutory claims by pronouncing that all statutory claims were presumptively arbitrable, unless mandatory arbitration of claims would deprive parties of sufficient opportunity to defend their statutory rights[88]. *Green Tree Financial Corp. v. Randolph*[89] held that a party resisting arbitration must prove that an arbitration forum was adequately expensive, on its face, to prevent an applicant from asserting his statutory rights. Thus, an applicant resisting arbitration must prove that *any* kind of arbitration provision would hamper the justification of his statutory rights[90]. Statutory claims are arbitrable when arbitration provides the same remedial and deterrent functions as litigation, and an agreement that limits the remedies obtainable cannot effectively serve those functions and so arbitration can function as a co-equal to litigation[91].

From our analysis in the previous chapters there is apparently a concern to leave arbitration unguarded by the court in the whole process, particularly the review of awards. Arbitration seems to be a half-independent alternative dispute mechanism since the law allows court intervention and permits losing parties to bring their dispute regardless of their agreement back to court. The idea that state power and sovereignty is represented only by courts seems to prohibit the establishment of arbitration as an equal alternative to courts. There is a need for a common route regarding power, administration and enforcement for arbitration and courts, and so the state has to be the single source of legitimacy for both courts and arbitration. Arbitration has to be an autonomous and alternative dispute mechanism, so the administration of arbitration should pass to the hands of the state. The dual independent representation of arbitration and courts as co-equal dispute mechanisms could work properly in representing state power and sovereignty. Currently, if parties agree, their dispute can be solved without a court's involvement, but in practice, this seems to be the exception rather than the rule. The different national laws regarding arbitration are endorsed in order to avoid the courts hostility against arbitration–keeping a certain degree of courts'

25 *Hofstra L. Rev.* 83, 113–26 (1996) (arguing that consent to most pre-dispute employment arbitration clauses is voluntary under the contract law doctrines of mutual assent and duress).

86 *United Steelworkers v Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960). (in the labor context, an arbitral award "is legitimate only so long as it draws its essence from the collective bargaining agreement.") Sarah Rudolph Cole, "Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution," 51 *Hastings L. Rev.* 1199, 1235–36 (2000) (discussing extrajudicial origins of arbitration). Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers, Sarah Rudolph Cole, "Dispute Resolution: Negotiation, Mediation, and Other Processes" 210 (4th edn. 2003).

87 473 U.S. 614 (1985).

88 *Shearson/Am. Express v McMahon*, 482 U.S. 220, 226–27 (1987). *Rodriguez De Quijas v Shearson/Am. Express*, 490 U.S. 477, 483 (1989).

89 531 U.S. 79 (2000).

90 *Booker v Robert Half Int'l*, Inc., 413 F.3d 77, 84 (D.C. Cir. 2005).

91 *Perez v Globe Airport Security Services, Inc*., 253 F.3d 1280 (11th Cir. 2001). *Paladino v Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1061–62 (11th Cir. 1998).

involvement in the arbitration procedure–but arbitration and courts have to be developed into independently alternative dispute mechanisms. There is a need for metamorphosis of arbitration from an auxiliary to the courts dispute mechanism as stands presently into a co-equal and independent alternative dispute mechanism.

Co-equality of courts and arbitration means that they have the same legal status and so their authority should be based on the state's power and sovereignty which means that there is a need for a kind of public authority exercised by arbitrators judges. In the same way as *Ethyl Corp. v. United Steelworkers of Am.*[92] held that arbitrators are judges selected by the parties. Therefore, arbitrators must have the authority to deal with all the functions needed to carry out the arbitral procedure and to enforce their decisions and so enforce the award.

It should be taken into account that in English law there is developed arbitral process that leads to a right to appeal, which is broader in England than it is in internationally recognized instruments such as the UNCITRAL Model Law.

Arbitrators' urge to render neutral and impartial decisions reflects the "judicialization" of arbitration. There is a need for the arbitrator's obligation to engage in impartial decision-making, and so irrespective of whether the decision-maker is a national court judge or an arbitrator, the neutral adjudicative function should be fostered to promote impartial analysis and decision-making[93]. According to Marion M. Lim:[94] "Arbitrators are touted as superior to a judge and jury because they can be selected based on their particular field of expertise relevant to the dispute. Supporters of ADR claim that an arbitrator's proficiency in the relevant subject matter of the dispute avoids the potential risks of uneducated and unfair verdicts that are present in litigation." It has to be taken into account that the arbitrator's role is "creative more than interpretive[95]" having wider autonomy than a judge. To that extent H. Shulman[96] urged the courts to let the process work without judicial involvement.

Arbitrators are decision-makers and perform a quasi-judicial function without exercising any (state) judicial power, as there is no act of delegation of state power–but they solve disputes and their decisions are given state judicial power at the

92 *Ethyl Corp. v United Steelworkers of Am*., 768 F.2d 180, 183 (7th Cir. 1985) ("Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. … If the award is within the submission … a court of equity will not set it aside for error either in law or fact." (quoting *Burchell v Marsh*, 58 U.S. (17 How.) 344, 349 (1855))).

93 Carrie Menkel-Meadow, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not," 56 *U. Miami L. Rev.* 949, 959–60 (2002) (recognizing that judges and arbitrators are adjudicators and that "impartiality and neutrality, are a necessary part of maintaining the integrity and legitimacy" of the dispute resolution process).

94 Marion M. Lim, "ADR of Patent Disputes: A Customized Prescription, Not an Over-The-Counter Remedy," 2004 *Cardozo J. of Conflict Resolution* 155 at 172.

95 Harry Shulman, Dean and Sterling Professor of Law, Yale Law Sch., "Reason, Contract, and Law in Labor Relations," Address at the Oliver Wendell Holmes Lecture at Harvard Law School (Feb. 9, 1955), *in 68 Harv. L. Rev.* 999 (1955).

96 Harry Shulman, Dean and Sterling Professor of Law, Yale Law Sch., "Reason, Contract, and Law in Labor Relations," Address at the Oliver Wendell Holmes Lecture at Harvard Law School (Feb. 9, 1955), in 68 *Harv. L. Rev.* 999 (1955).

time and place of enforcement. For this reason, the arbitrator's role is theoretically equivalent to the function of a judge, and while a judge is vested in principle with state authority, the arbitrator's decision is only in effect vested with the same power[97]. Judges and arbitrators share functional similarities which relate to their decision-making obligations, implicating the nature of the decision-maker's mandate, the independence of adjudication and internal checks on discretion, their administrative obligations, including effective case-management and giving parties notice and an opportunity to be heard. Arbitrators and judges have to carry out their role in a fair, efficient and impartial manner. Judges gain their jurisdiction and authority from the state; while arbitrators derive their jurisdiction from parties. Even so, the state ultimately sanctions arbitration to the extent that national legislation or judicial decisions permit arbitration. The state also retains residual jurisdiction on those occasions when it determines claims are not arbitrable[98]. Common law judges are bound by precedent while arbitrators are not automatically bound by precedent – nor do they create *de jure* precedent – simple obedience to precedent is not an indispensable element in the adherence to the rule of law[99]. Judges in civil law countries are constrained by rules articulated in the civil code and rely occasionally on precedent. Arbitrators are bound by two factors explicitly, the parties' agreement about the extent of their discretion and the rules of law the parties have chosen to apply[100]. While arbitrators and judges are subject to dissimilar review processes, both processes provide a prospect to evaluate their conduct. Judges' determinations are judicially reviewable for substantive and procedural errors. While some jurisdictions do permit a limited evaluation of the legal merits of a tribunal's award, the international trend is to review the procedural aspects of an arbitrator's award[101].

97 *Nordsee v Reederei* Judgment of 23 March 1982, ECR 1095 (1982) "only state courts exercise state power". Court of Appeal of Athens 6839/1986, 27 Helleniki Dikaiossyni 1489 (1986); Arios Pagos 1509/1982, 31 Nomiko Vima 1355 (1983). Bundesgerichtshof, 15 May 1986, BGHZ 98, 70.

98 Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 *Ucla L. Rev.* 949 (2000). Alan Scott Rau, "The Arbitrability Question Itself," 10 *Am. Rev. Int'l Arb.* 287(1999).

99 Celia Wasserstein Fassberg, "First Worldwide Congress on Mixed Jurisdictions," 78 *Tul. L. Rev.* 151, 172 (2003) (discussing the lack of common law precedential restraint and instead the notion of restraint and interpretation in civil law traditions). David Luban, "Settlements and the Erosion of the Public Realm," 83 *Geo. L.J.* 2619, 2622–23 (1995) (noting that private adjudications fail to produce rules or binding precedents). Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" *Arbitration International*, 23 No 3 (2007), pp. 357–378, William W. Park, :Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure," *Arbitration International*, 23 No. 3 (2007), pp. 499–504.

100 E.J. Cohn, "Commercial Arbitration and the Rules of Law: A Comparative Study," 4 U. *Toronto L.J.* 1, 1–2, 8–9 (1941) (decrying that respected legal scholars could regard it as preferable that commercial arbitrators be freed from deciding according to the rules of law and arguing that it is a pernicious innovation in western legal history that such extra-legal decisions should in fact be binding).

101 William W. Park, "Duty and Discretion in International Arbitration," 93 *Am. J. Int'l L.*805, 815 (1999) (explaining "most legal systems do not impose merits review).

An arbitrator is a private judge hired by the parties, tasked with performing the same sorts of functions that public judges normally perform: finding facts and applying predetermined rules (normally legal rules) to those facts in order to assign rights and obligations, resolving a conflict between the parties focusing on the parties' relationship and interests based on the application of rules to facts[102]. Arbitrators, like judges, do not like to have their awards annulled, set aside or denied enforcement; and arbitrators demonstrate a great deal of care to preserve the integrity of the process. The review process makes arbitrators and judges functionally similar; and such connection suggests that arbitrator's should strive to use the applicable law in a neutral and fair manner. Judges and arbitrators are being more and more called upon to supervise the process fairly and resourcefully. Judges have to hold on to rigid rules of civil procedure and evidence; but, subject to party agreement, arbitrators have discretion to articulate the applicable procedures. Judges in the US often have a great deal of discretion to engage in case management[103]. Judges and arbitrators have to manage the adjudicative process efficiently and fairly. A judge is not trained to handle technical issues, whereas an arbitrator is a person skilled in the subject-matter of the dispute or has a background which means that he/she is familiar with the relevant customs and usages needed in order to decide matters submitted to arbitration. Justice Black[104] analogized arbitrators to judges, stating that arbitrators have equally to keep away from actions that " 'reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct' ". Besides, Justice White[105] held that arbitrators should not be held to the "standards of judicial decorum of Article III judges". Like courts, an arbitrator possesses substantial and "broad judicial powers" to conduct proceedings and enforce arbitral orders. Like courts, arbitrators more progressively interpret, apply, and enforce anti-discrimination, consumer protection, and other statutory rights that defend important public values and goals. According to Laurie Kratky Doré[106]

102 Theodore J. St. Antoine, "Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny," 75 *Mich. L. Rev.* 1137, 1140 (1977) ("Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement.").

103 Deseriee A. Kennedy, "Predisposed With Integrity: The Elusive Quest for Justice in Tripartite Arbitrations," 8 *Geo. J. Legal Ethics* 749, 768 (1995) (suggesting that, unlike in arbitration, rules of evidence and procedure in court litigation result in consistent judicial processes and noting the flexibility inherent in arbitration).

104 In *Commonwealth Coatings Corp. v Continental Casualty Co*., 393 U.S. 145 (1968) (plurality opinion). At 150.

105 In *Commonwealth Coatings Corp. v Continental Casualty Co*., 393 U.S. 145 (1968) (plurality opinion). At 150.

106 Laurie Kratky Doré, "Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution," 2006 *Chicago-Kent Law Review* 463, at 492. Richard C. Reuben, "Democracy and Dispute Resolution: The Problem of Arbitration," 67 *Law & Contemp. Probs.* 279, 289 (2004) "Transparency is closely aligned with accountability as a democratic value because it is transparency that makes accountability possible by permitting witness to government

"the United States Supreme Court foreclosed these wholesale criticisms when it held that arbitration can serve remedial and deterrent functions". The arbitrator, however, does carry out a quasi-public function when he/she adjudicates statutory claims grounded on public policy or resolves controversies having third-party effects[107].

Is there a judges' paternalistic[108] attitude that only they can make certain that individual plaintiffs will be afforded a fair opportunity to challenge corporate defendants? Dean Larry Kramer thinks that courts force the "judicial supremacy"[109], and have embraced a "judicial sovereignty[110]".

Arbitrators should act in such a way as to maximize the likelihood that their awards will be enforceable in all jurisdictions where review is likely – a vacated or unrecognized award being a failure or irresponsibility that hardly enhances market credibility[111]. Arbitrators are in some sense "bound" to apply the provisions of mandatory law[112]. Moreover, arbitrators now routinely apply national mandatory rules, even *ex officio*. Of course, arbitration is an alternative dispute mechanism

actions." Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 *UCLA L. Rev.* 949, 1086 (2000) (acknowledging that "privacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum") at 986 (stating that "ADR does not provide a day in court, but rather an alternative to a day in court"); at 1086 (indicating that privacy is "an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum"); at 1005–06 "Arbitrators are often statutorily vested with broad judicial powers to administer depositions and discovery, including subpoena and sanction powers. In addition, arbitrators often receive the same 'judicial' immunity from civil liability that is reserved exclusively for the states' own constitutionally authorized judiciary."

107 Elizabeth G. Thornburg, "Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims," 67 *Law & Contemp. Probs.* 253 (2004) at 277 (contending that "[a]rbitrators perform public functions" in consumer cases). Richard A. Bales, "The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration," 52 U. *Kan. L. Rev.* 583, 619 (2004) at 604 (rejecting laissez-faire attitude toward arbitration of statutory claims grounded in public policy).

108 Preston D. Wigner, "The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2," 29 *U. Rich. L. Rev.* 1499, 1502 (1995).

109 Larry D. Kramer, "The Supreme Court, 2000 Term—Foreword: We The Court," 115 *Harv. L. Rev. 4* (2001); at 6, ("the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone") Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 *Colum. L. Rev.* 1919, 1921 (2003) (dismissing "judicial supremacy" as "a term of splendidly indefinite content").

110 Larry D. Kramer, "The Supreme Court, 2000 Term—Foreword: We The Court," 115 *Harv. L. Rev.* 4 (2001); at 13, (the belief that the Court can and must "wield its authority over every question".

111 *Evans Industries, Inc. v Int'l Business Machines Co*., 2004 WL 241701 (E.D. La.) at *5 ("manifest disregard of the law" is now a ground for vacatur "delineated and accepted by the Supreme Court"). *Chisolm v Kidder, Peabody Asset Management, Inc*., 966 F.Supp. 218, 219 (S.D.N.Y 1997)("the standard of judicial review of arbitral decisions in cases involving statutory rights is no different from the extremely limited review used in arbitration generally").

112 H. Grigera Naon, "Choice-of-Law Problems in International Commercial Arbitration," in 289 *Collected Courses of The Hague Academy Of International Law* 13 (2001). *Cole v Burns Int'l*

applying the same rules in a more informal way than the one followed by courts, and it is not an alternative mechanism in altering the rules of law but a different interpretation of law will be allowed creating the arbitral precedent.

The doctrine of precedent, or *stare decisis*, refers the doctrine under which a court, when deciding a point of law, is required to defer to a holding of a prior court on that point if that prior court is equal or superior in the judicial hierarchy[113]. The judicial system promotes uniformity in the law by requiring strong reasons to depart from prior decisions. Court decisions are a type of "state-sponsored dispute resolution" in which judges make decisions to confirm outcomes in disputes. Therefore, in democratic states, the constant existence of any system of state-sponsored decision-making eventually depends on its legitimacy in the eyes of the public. According to Wayne D. Brazil;[114] "The public's trust and confidence in the courts is their most precious and essential asset". The legitimacy of judicial decision-making, and the public's perceptions of such legitimacy, depends on the system's performance. The explanation by appellate judges of the rules for reversing or upholding of lower court decisions enhances credit because it enables the public to find out which court decisions are legitimate and expected to be binding. Precedent both empowers judges to improve the law and controls the abuse of judicial power. The potential lack of effective appellate review makes arbitration risky relative to litigation.[115] Consequently, the establishment of an appellate arbitral tribunal will minimize the risk and add prestige to arbitration. Private substantive review would not compromise the flexibility of standards in arbitral decision-making unless the arbitrator was required by the parties to apply the law precisely in a court's interpretation[116].

William M. Landes & Richard A. Posner[117] argue that: "Private production of rules or precedents involves two problems. First, because of the difficulty of establishing property rights in a precedent, private judges may have little incentive to produce precedents. … The second problem with a free market

Security Services, 105 F.3d 1465, 1487 (D.C. Cir. 1997)(dictum). *Halligan v Piper Jaffray, Inc.,*148 F.3d 197 (2nd Cir. 1998).

113 *Dickerson v United States*, 530 U.S. 428, 443 (2000) (Rehnquist, C. J.) ("The doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification' "); *Arizona v Rumsey*, 467 U.S. 203, 212 (1984) ("Any departure from the doctrine of stare decisis demands special justification."). Antonin Scalia, "The Rule of Law as a Law of Rules," 56 *U. Chi. L. Rev.* 1175 (1989) (advocating that judges rely, to the extent possible, on general rules, rather than on totality of the circumstances analyses).

114 Wayne D. Brazil, "Court ADR 25 Years After Pound: Have We Found a Better Way?" 18 *Ohio St. J. On Disp. Resol.* 93, 97 (2002).

115 Theodore Eisenberg and Geoffrey P. Miller, "The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts," 2006, www.ssrn.com.

116 "Bowles Fin. Group, Inc. v Stifel, Nicolaus & Co.," 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system ….. One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law.")

117 William M. Landes & Richard A. Posner, "Adjudication as a Private Good," 8 *J. Legal Stud.* 235, 238–39 (1979).

in precedent production is that of inconsistent precedents which could destroy the value of a precedent system in guiding behaviour". By contrast, this author argues that inconsistent precedents will mean that there is a need for a different philosophical approach by legal theory regarding the specific topic that has caused the production of inconsistent precedents. Furthermore, inconsistent precedents might highlight the need for the intervention of legislature to amend the statute that has caused the issue of inconsistent precedents. It is characteristic that Christopher J. Bruce[118] indicates that "evidence … overwhelmingly supports the contention that a private arbitration system is able to produce consistent, precedential rulings". Additionally, Thomas E. Carbonneau[119] indicates that arbitration awards brought substantial judicial opinions on employment law as well.

Arbitration is a private hearing, and so principles of *res judicata* and collateral estoppel do not always apply[120]. Consequently, if an issue is resolved once in arbitration, it would have to be resolved again if that same issue arose in a later proceeding. Classically, by submitting a claim to arbitration, parties are precluded from pursuing the same claim in court[121]. Moreover, arbitration is a dispute resolution process that is adversarial and adjudicatory in nature – analogous in this respect to trial, apart from the fact that the formal rules of law and procedure are not automatically applied absent the agreement of the parties, and the awards of the arbitrators are generally final and binding[122]. The finality of the awards is questionable, since there is always a prospect of courts' review. According to Richard C. Reuben[123] "the displacement of finality with substantive judicial review, if codified, will greatly undermine the arbitration process, its attractiveness as an alternative to public adjudication or negotiated settlement, and its utility as an aid to the judiciary as a forum for the expeditious resolution of disputes". Furthermore, Richard C. Reuben[124] criticizes Professors Stempel, Cole,

118 Christopher J. Bruce, "The Adjudication of Labor Disputes as a Private Good," 8 *Int'l Rev. L. & Econ.* 3, 9 (1988).

119 Thomas E. Carbonneau, "Arbitral Law-Making," 25 *Mich. J. Int'l L.* 1183, 1205 (2004) ("A perusal of recent employment arbitration awards revealed that the vast majority of awards are purely factual determinations …. About seven percent of awards are the equivalent of substantial judicial opinions on employment law.").

120 *Keating v Superior Court of Alameda County*, 645 P.2d 1192, 1207 (Cal. 1982) ("Because the principles of *res judicata* and collateral estoppel do not apply in arbitration proceedings, any issue resolved against a party … in one arbitration proceeding would have to be decided anew in a subsequent arbitration …").

121 9 U.S.C. § 3 (2000).

122 Robert N. Covington, "Employment Arbitration after Gilmer: Have Labor Courts Come to the United States?," 15 *Hofstra Lab. & Emp. L.J.* 345, 406–08 (1998) (willing to accept the increased role of arbitration because it is a "finality-enhancing doctrine").

123 Richard C. Reuben, "Process Purity and Innovation in Dispute Resolution: A Response to Professors Stempel, Cole, and Drahozal," Legal Studies Research Paper Series, Research Paper No. 2007–14 at 1–2.

124 David S. Schwartz, "If You Love Arbitration, Set it Free: How "Mandatory"Undermines "Arbitration"," Legal Studies Research Paper Series Paper No. 1052, August 2007.

and Drahozal's thoughts regarding the fact that the FAA should be amended to allow a greater role for the courts in arbitration.

The arbitration process itself needs to operate effectively, efficiently, and legitimately in the sense that it is consistent with principles of procedural justice and democratic values[125]. Arbitration is a means of the law to protect itself from itself and not to give expression to some other law. There is no basis to deem arbitration faulty relative to the formal process[126]. Arbitration is simply an alternative method of law enforcement. According to H. Krause[127] "litigants could compromise on process, but that the arbitrator still had to apply the law". Arbitration decision-making is based upon the flexibility of worldly judgment, equipped by substantive expertise, rather than on the more mechanical application of legal standards, which is the duty of courts[128]. It is argued that there is a finality to arbitration awards because of their limited substantive review. According to this author, this brings forward the problem of dependence of arbitration upon courts' legalization–arbitration does not give a final award, in solving a dispute since there is always the possibility to take the award before a court. Thus, not only do we not have a final award, but there is an intervention of courts in the arbitration which minimizes the role of arbitration as a supposed substitute of litigation and an independent mechanism. S. Brekoulakis[129] argues that arbitration and courts "designated in jurisdiction agreements should be understood as equal alternative *fora* to the default jurisdiction", but in practice litigation controls arbitration with its intervention and rulings over the entire arbitration process and so arbitration's superiority and advantages over litigation are erased. Arbitration as an autonomous and independent mechanism should compete equally and independently with courts in any field of civil law dispute for better justice.

125 State B. of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No 1989–116, § B (1989), *available at* http://www.calbar.ca.gov/calbar/html_unclassified/ca89-116.html ("Arbitration is a recognized and favored means by which parties expeditiously and efficiently settle disputes which might otherwise take years to resolve.").

126 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985).

127 Hermann Krause, Die Geschichtliche Entwicklung Des Schiedstrichtswesens In Deutschland 89 (1930).

128 *United Steelworkers of Am. v Enter. Wheel & Car Corp*., 363 U.S. 593, 597 (1960) (discussing the need for flexibility on the part of arbitrators).

129 Stavros Brekoulakis, "The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?" 2007 *Journal of International Arbitration* 341 at 363–4 "International arbitration and national courts designated in jurisdiction agreements should be understood as equal alternative *fora* to the default jurisdiction …. In the context of the shipping industry, arbitral tribunals and English courts have been competing "players" for many decades. Thus, instead of promoting arbitral tribunals at the expense of national courts indiscriminately, it would be better to allow arbitral tribunals and national courts to compete in the same international arena, and, of course, give the parties the unfettered discretion to opt for the one that best serves their commercial needs …. An expanding pro-arbitration policy to the detriment of litigation constitutes a misapplication of the overriding principle of party autonomy and will in the long-term undermine international arbitration itself."

Since the parties made an agreement to arbitrate[130], they "should be held to it". The choice of arbitration as a jurisdictional issue rather than purely a procedural one might not be accepted if, as is repeatedly claimed, arbitration is not viable without judicial enforcement of arbitration agreements and rulings, and/or arbitration is merely a compromising process and not a source of legal interpretation and precedent. To that extent Wooldridge[131] argued that "commercial arbitration makes 'the courts secondary recourse in many areas and completely superfluous in others"'. Taking into consideration Wooldridge's view, it could be said that courts and arbitration can stand as totally independent dispute mechanisms or even that for some kind of disputes arbitration can be superior to courts dispute mechanism. Besides, presently the defendant can always refuse to engage in arbitration or to accept an arbitration ruling. Subsequently, the plaintiff must be willing and able to seek judicial enforcement through state courts in order to have a credible threat to ensure acceptance. This means that the approach that arbitration often involves a choice between legal systems may be at least somewhat undermined. The need for arbitration agreements and awards to be enforced by the judicial system means potential costs and therefore loss of the advantages of choosing arbitration instead of litigation. Thus, the existence of large arbitration costs could preclude a litigant from successfully vindicating her/his federal statutory rights in the arbitral forum[132].

It is argued that only very limited appellate review is offered for arbitration awards and so courts vacate awards on narrow procedural grounds or for manifest disregard of the law[133]. Consequently, in arbitration there is far less opportunity to

130 Sarah Rudolph Cole, "Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees," 64 *UMKC L. Rev.* 449, 454 (1996) (arguing that courts should not enforce executory employment arbitration agreements). Reginald Alleyne, "Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum," 13 *Hofstra Lab. L.J.* 381, 383–84 (1996) (arguing that arbitration in the employment context is "procedurally defective"). Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis," 24 *J. Legal Stud.* 1, 8 (1995) (arguing that arbitration agreement enforcement increases social welfare) (discussing the growth of the ADR movement and noting that "the group of lawyers, arbitrators, academics, and jurists fostering ADR [which] has taken on some of the aspects of a social movement"). Eric Yamamoto, "Efficiency's Threat to the Value of Accessible Courts for Minorities," 25 *Harv. C.R. C.L. L. Rev.* 341, 360 (1990) (arguing that "[f]or those on society's margins … ADR raises problems of considerable importance without ensuring fairness"). Maureen A. Weston, "Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration," *88 Minn. L. Rev.*449, 449–50 (2004) (discussing explosive growth of arbitration cases administered by such arbitration groups as AAA, National Arbitration Forum, and Judicial Arbitration and Mediation Services, Inc.).

131 Wooldridge, William C, "Uncle Sam, The Monopoly Man," New Rochelle, New York, Arlington House. (1970) p. 101.

132 *Green Tree Fin. Corp. v Bazzle*, 123 S. Ct. 2402 (2003); *Green Tree Fin. Corp. v Randolph*, 531 U.S. 79 (2000); *Harris v Green Tree Fin. Corp*., 183 F.3d 173 (3rd Cir. 1999); *Munoz v Green Tree Fin. Corp*., 542 S.E.2d 360 (S.C. 2001).

133 *Wilko v Swan*, 346 U.S. 427, 436–37 (1953) ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

stay away from any errors resulting from biases through appellate review than there is in court, but it is not taken into consideration that arbitration cannot be a replica of litigation and so a different approach giving a different result in the interpretation of the merits of a case to the one given by courts does not mean that one is worse than the other, but obviously that they are alternative dispute resolution mechanisms competing for a fair result. Chief Justice Burger championed arbitration in his speeches as a way to advance competence[134]. According to Stephen J. Ware: [135] "Arbitration is adjudication in a private, non-government, forum". On the other hand, the arbitration process might not have been exactly voluntary, because it was imposed by statute[136]. In *Scherk v. Alberto-Culver Co*[137]. the court held that it is a "parochial concept that all disputes must be resolved under our laws and in our courts", equating dispute resolution in courts with dispute resolution in arbitral tribunals. Justice O'Connor, in *Southland Corp. v Keating*[138] stated that: "Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far". Furthermore, the need for a reliance upon norms contributing to a desired rational decision[139] is stressed. Accurate adjudication results comprise a positive litigation value resulting in a "good result efficacy"[140] which does not mean that arbitration has to mimic and follow the litigation road because accurate results can be achieved by arbitrators' interpretation of facts via written law or customary law.

Courts still prevent parties from entirely realizing the benefits of arbitration by issuing ill-reasoned rulings on the subject of *res judicata* in the framework of arbitration. The courts compel a judicial resolution route that the parties did not bargain for and this increased and needless judicial intervention in effect denies parties their freedom to contract, as well as the benefits of arbitration to which they are entitled[141].

134 Warren E. Burger, "Isn't There a Better Way?, Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association," 68 *A.B.A. J.* 274, 277 (1982) (proposing to relieve overburdened courts with a system of arbitration).

135 Stephen J. Ware, *Alternative Dispute Resolution* §§ 2.1, 2.2, 2.55 & 4.32 (2001) at §1.6(c).

136 *Hardware Dealers' Mut. Fire Ins. Co. v Glidden Co*., 284 U.S. 151 (1931).

137 *Scherk v Alberto-Culver Co.,* 417 U.S. 506 (1974) at 519. *Bremen v Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

138 465 U.S. 1 (1984) at 36.

139 Lon L. Fuller, "Collective Bargaining and the Arbitrator," 1963 *Wisc. L. Rev.* 3,29 (asserting that the "procedural limitations that surround the adjudicative function are designed to unsure as rational a decision as possible") Ronald Dworkin, *A Matter of Principle* 72–74 (1985).

140 Robert Summers, "Evaluating and Improving Legal Processe – A Plea for "Process Values," 60 *Cornell L. Rev. 1*, 1–3 (1974). Geoffrey Hazard, "Rising Above Principle," 135 *U. Pa. L. Rev.* 153, 167–171 (1986). William W. Park, "The 2002 Freshfields Lecture—Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion," 19 *Arb. Int'l* 279, 293 (2003).

141 *Prod. & Maintenance Employees' Local 504 v Roadmaster Corp*., 916 F.2d 1161, 1163 (7th Cir. 1990) (en banc) ("Arbitration clauses are agreements to move cases out of court, to simplify dispute resolution, making it quick and cheap …. Arbitration will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and a suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once. Reluctance

From the eighteenth century to the 1950s, the sovereign state sought to restrain many aspects of arbitration through its national laws and judicial intervention[142]. States established rigid controls over arbitration in both domestic and international matters, controlling activity that occurred within its jurisdiction and particularly the dispute resolution mechanisms of the international commercial community of the specific country. The basis for the courts' control over arbitration was that every activity that took place within a jurisdiction should be within the purview of the state law and court. Judges take the view that they have been created by the state, all the way through its constitutional means, for the explicit rationale of determining disputes of parties within the jurisdiction and in accordance with the law of the court. An alternative mechanism is considered to corrode the authority of and respect for the national courts' jurisdiction. There is animosity against the alternative mechanism which resolves disputes in a more competent and effective manner[143]. The established pattern of judiciaries having to struggle with the tension of sovereign control and party autonomy over dispute resolution remains nowadays[144].

Courts' judgments are treated as final and authoritative and courts do not sit to render "advisory opinions[145]". The doctrine of *res judicata* serves to guarantee finality in judicial proceedings and to advance the efficient administration of justice[146]. Those two qualities also have to be adopted by arbitration[147], while

to see the benefits of arbitration smothered by the costs and delay of litigation explains the tendency of courts to order a party feebly opposing arbitration (or its outcome) to pay the winner's legal fees. Anything less makes a mockery of arbitration's promise to expedite and cut the costs of resolving disputes." *Migra v Warren City Sch. Dist. Bd. of Educ*., 465 U.S. 75, 77 n.1 (1984) (explaining that *res judicata*"consist[s] of two preclusion concepts: 'issue preclusion' and 'claim preclusion"' James Wm. Moore *et al.*, Moore's Federal Practice § 131.10[1][a] (3rd edn. 2000) ("*Claim preclusion* prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action."). § 131.10[1][a] ("*Issue preclusion* prevents relitigation of issues actually litigated and necessary for the outcome of the prior suit, even if the current action involves different claims.").

142 The EAA 1698, the French arbitration law in the Code of Civil Procedure of 1806 and the German Code of Civil Procedure of 1879.

143 In *Scott v Avery* (1856) 5 HL Cas. 811, Lord Gampbell stated that the doctrine of hostility to arbitration 'probably originated in the contests of the different courts in ancient times for extent of jurisdiction all of them being opposed to anything that would deprive one of them of jurisdiction'.

144 *Parsons and Whittmore v Societe Generale de I'Industrie du Papier (RAKTA)*508 F. 2d 969 (2nd. Cir. 1974), the court expressed a hands off approach, as evidenced by the statement: '[a] court has no general power of review or to enter into the arbitral chambers'.

145 David L. Shapiro, "Civil Procedure: Preclusion in Civil Actions" 14 (2001). Jackson Williams, "What the Growing Use of Pre-Dispute Binding Arbitration Means for the Judiciary," 85 Judicature 266, 267 (2002) (suggesting that courts will become "less a force for the rule of law in general, and more of a forum for resolving individual disputes among the privileged."

146 *Parklane Hosiery Co. v Shore*, 439 U.S. 322, 326 n.5 (1979).

147 *Miller Brewing Co. v Fort Worth Distrib. Co. Inc*., 781 F.2d 494, 497 n.3 (5th Cir. 1986) ("[A]rbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of *res judicata* … [has] probably done more to prevent useless and wasteful litigation than arbitration ever could.").

keeping its own characteristics[148]. The Second Restatement of Judgments[149] provides that "a valid and final award by arbitration has the same effects under the rules *of res judicata*, subject to the same exceptions and qualifications, as a judgment of a court." Thus, arbitration cannot be a fully effective alternative to litigation if parties who have arbitrated a dispute are allowed to litigate matters determined in a prior arbitration.

Arbitral awards are subjected to far less judicial scrutiny than a civil court judgment or an administrative determination, regardless of the greater degree of procedural protections in those forms of dispute resolution[150]. Established dispute resolution theory teaches that disputes can be plotted along a spectrum–arbitration and administrative adjudication lie on the same spectrum although they are merely different "forms" of dispute resolution[151] – but the arbitration award carries with it a high degree of judicial enforceability, which shows that the fundamental basis for acceptability of a forum is the judicial enforceability–indicating a superiority of courts[152] and not equality as alternative dispute mechanisms co-existing in a legal system. The FAA does not strip federal courts of jurisdiction entirely but it simply defers their consideration of the dispute, limiting the extent of their review. If federal district courts are stripped of their power to review[153] arbitral awards,

148 *Dial 800 v Fesbinder*, 12 Cal. Rptr. 3d 711, 724 (Cal. Ct. App. 2004) ("As a general matter, an arbitration award is the equivalent of a final judgment which renders all factual and legal matters in the award *res judicata*." [citation omitted]); *Apparel Art Int'l, Inc. v Amertex Enters*., 48 F.3d 576, 585 (1st Cir. 1995) ("An arbitration award generally has *res judicata* effect as to all claims heard by the arbitrators." [citations omitted]); *Simpson v Westchester*, 773 N.Y.S.2d 881, 882 (N.Y. App. Div. 2004) (noting that "the doctrine of *res judicata* applies to arbitration awards").

149 Restatement (Second) Of Judgments § 84(1) (1982) *N.Y. Lumber & Wood-Working v Schnieder*, 119 N.Y. 475 (1890); *Brazill v Isham*, 12 N.Y. 9 (1854)).

150 Born & Rutledge, *International Civil Litigation* 1126–27 (4th edn. 2006).

151 Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353 (1978) at 354–56, 389. Rebecca Hanner White, "Arbitration and the Administrative State," 38 *Wake Forest L. Rev.* 1283 (2003).

152 Owen Fiss, "Against Settlement," 93 *Yale L.J.* 1073 (1984); Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353 (1978). Weisburst, "Judicial Review of Settlements and Consent Decrees: An Economic Analysis," 28 *J. Legal Stud.* 55 (1999) (describing the differing degrees of judicial deference to party-initiated settlement). Rutledge, "On the Importance of Institutions – Review of Arbitral Awards for Legal Errors," 19 *J. Int'l Arb.* 81 (2002). *Printz v United States* 512 U.S. 898 (1997). *U.S. Bancorp Mortgage Co. v Bonner Mall P'ship*, 513 U.S. 18 (1994). *Nebraska v Nebraska Ass'n of Public Employees*, 477 N.W.2d 577 (Neb. 1991) (holding that state authorizing binding arbitration violated "open courts" provision of Nebraska Constitution). Amar, "A Neo-Federalist View of Article III; Separating Two Tiers of Federal Jurisdiction," 65 *B.U. L. Rev.* 205 (1985).

153 *Johnson v Robinson,* 415 U.S. 361 (1974) (precluding judicial review of certain Veteran's Administration determinations), *Morris v Gressette,* 432 U.S. 491, (1997) (finding that Attorney General's failure to make timely objection under the Voting Rights Act of 1965 is not subject to judicial review), *Block v Community Nutrition Institute*, 467 U.S. 340 (1984) (consumers of dairy products could not obtain judicial review of milk market orders), *Webster v Doe*, 486 U.S. 592 (1988) (holding CIA director's decision to discharge employee was not subject to judicial review). *Crowell v Benson*, 285 U.S. 22 (1932). *United States v Raddatz*, 447 U.S. 667 (1980), *Commodity Futures Trading Commission v Schor*, 478 U.S. 833 (1986).

will a constitutional infirmity arise? It is argued that constitutionality of arbitration is based on the chance for federal courts to conduct *de novo* review of questions of law[154]. On the other hand, arbitration is a voluntary process. Moreover, federal courts are precluded from conducting *de novo* review of the arbitrator's legal errors[155]. Arbitration, as a constitutionally guaranteed adjudication method, is subject to the primary rules of fair hearing/due process, neutrality and impartiality of arbitrators, which apply to state courts[156]. The capacity of parties to choose their judge brings arbitration as a coercion dispute system into line with the constitution of any state[157]. It is worth mentioning that in *Henderson v Beaton*[158] the constitutionality of a Texas statute enacted in 1879 upheld the provision of a board of referees or arbitrators to dispose of civil actions by the consent of parties.

Can arbitration be transformed into "a civil court of general jurisdiction"? David S. Schwartz[159] thinks that: ""Broad form" pre-dispute arbitration agreements – those requiring arbitration of "all disputes" between the parties – essentially transform the system of private arbitration into "a civil court of general jurisdiction". Arbitration can be developed into an independent and co-equal to courts alternative dispute system able to deal with any type of dispute; keeping its advantages over

154 Fallon, "Of Legislative Courts, Administrative Agencies and Article III," 101 *Harv. L. Rev.* 915, 918–26 (1988) *United States v Meade*, 533 U.S. 218 (2001) (discussing degrees of judicial deference to agency statutory interpretations). D. Schwartz, "The Federal Arbitration Act and the power of Congress over state courts," 2004 *Ore L Rev* 541. "FAA preemption is unconstitutional"; Jean R. Stemlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concems," 72 *Tul. L. Rev.* 1, 1 (1997) (arguing that the current pro-arbitration policy neglects the contractual principle of consent and often leads to the violation of constitutional rights); J. Douglas Uloth & J. Hamilton Rial, III, "Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?," 21 *Rev. Litig.* 593, 632 (2002) ("Since 1999, courts have arguably reached too far to find an agreement to arbitrate.").

155 Norman Posner, "Judicial Review of Arbitral Awards: Manifest Disregard of the Law" 64 *Brook. L. Rev.* 471, 506 (1998) ("Consequently, although most circuit courts have adopted "manifest disregard of the law" as a non-statutory ground for vacating or modifying an award, until recently there have been few cases in which a court has set aside an arbitral award on this ground."), Noah Rubins, "Manifest Disregard of the Law and Vacatur of Arbitral Awards in the United States," 12 *Am. Rev. Int'l Arb.* 363 (2001).

156 T. Carbonneau, "Arbitral Justice: The Demise of Due Process in American law," 70 *Tulane L Rev* 1945 (1996); F. Kessedjian, "Principe de la contradiction et arbitrage," *Rev Arb* 381 (1995). *AT & T and Another v Saudi Cable Company*, [2000] 2 Lloyd's Rep 127 (CA).

157 The Greek Constitution is an illustration of modern standards where the constitutional text makes positive reference to the rights of persons to waive or oust the jurisdiction of national courts. Article 8 Greek Constitution (1975/1986/2001) provides: "No person shall be deprived of the judge assigned to him by law against his will" Article 20(1) provides: "Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law".

158 52 Tex. 29 (Tex. 1879).

159 David S. Schwartz, "If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration"," Legal Studies Research Paper Series Paper No 1052 August 2007 at 4.

litigation and not merely mimicing litigation. Moreover, Andrew M. Siegel[160] mentions that Congress' intention was for arbitration to be placed on an equal footing with litigation as a prospective mechanism for resolving commercial disputes, but regardless of the acceptance that arbitration is a substantively sufficient and procedurally preferable alternative to the sacrifice of litigation, as analysed in theory and practice earlier arbitration has not developed into the second equal pole in a single legal system and it remains under the guardianship and control of courts.

It is argued that the privatization of dispute resolution is devious because the explanation of law achieved in courts is indispensable to protect and improve individual rights[161]. According to Jean R. Sternlight[162] "Certainly, the private and informal resolution of disputes does not allow for the formal explication of rules envisioned by Lon Fuller and other rule of law advocates". On the other hand, an independent arbitration with concise written awards can enhance the rule of law by informal explication of rules[163]. The right operation and interpretation

160 Andrew M. Siegel, "The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence," 2006 *Texas Law Review* 1097, at 1141 "what started out as an honest effort to enforce Congress's intention to put arbitration on an even footing with litigation as potential mechanisms for resolving commercial disputes has morphed over the last two decades into a policy-driven assault on the wisdom and propriety of litigation as a mechanism for resolving such disputes", at 1141 "the conviction – shared, in the telling, by the statute's drafters and the majority of the modern Court – that arbitration is, in most instances, a substantively adequate and procedurally preferable alternative to the mire and expense of litigation".

161 Judith Resnik, "Procedure's Projects," 23 *Civ. Just. Q.* 273, 276 (2004) (stating that while adjudication is far from perfect due to lack of access, it is relatively attractive as compared to ADR "because it is self-limited, self-conscious, and relatively transparent, whereas the alternative forms of process attend too little to their own power as well as to the effects of disputants' power and position on strategic interaction, opportunities, knowledge, and the legitimacy of outcomes"). Richard Delgado *et al.,* "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution," 1985 *Wis. L. Rev.* 1359, 1375–91 (explaining that traditional adjudicatory settings with defined rules and a formal structure provide rational control, whereas informal settings encourage prejudicial behavior because majority group members are allowed a wider scope for emotional and behavioral idiosyncrasies); Richard Delgado, "Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina" Grillo, 81 *Minn. L. Rev.* 1391, 1398 (1997) (reiterating concerns that without a formal court proceeding to remind participants of the American values of equality and fairness, majority group members are less hesitant to express and act upon their prejudices).

162 Jean R. Sternlight, "Is Alternative Dispute Resolution Consistent With The Rule Of Law? Lessons from Abroad," 2007 *Depaul Law Review*[Vol. 56:569, At 571. Lon L. Fuller, *The Morality Of Law* 38–39 (1964) (explaining that compliance with the rule of law demands that laws must actually be established, that such laws must be adequately publicized, that rules should apply only prospectively, that rules must be understandable, that rules shall not be contradictory, that it must be possible to conform to the rules, and that the rules must be administered in the intended manner in which they are announced). Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns," 72 *Tul. L. Rev.* 1 (1997) (critiquing arbitration case-law for increasingly favouring arbitral forums without regard for basic fairness or rule of law norms).

163 Robert C. Bordone *et al.,* "The Next Thirty Years: Directions and Challenges in Dispute Resolution," in *The Handbook Of Dispute Resolution* 507, 510 (Michael L. Moffitt & Robert

of legal rules and doctrines and the fluctuation between wide judicial discretion and strict imprisonment of the magistrate by minute is the cause of dissatisfaction with the law[164]. Law provides justice but justice is a concept with a broader and deeper meaning than law, and law can be one of the instruments that can be used in order to achieve justice. An independent arbitration can be used to achieve justice in a deeper and more socially acceptable way than formal law[165]. Besides Jean Sternlight[166] argues that it is unsuitable for a society to establish completely private dispute resolution processes.

Informality[167] can make the created norms, soft or formal law more accessible and applicable to disputes[168]. Formal law strictly interpreted can destabilize norms

C. Bordone eds., 2005) (suggesting that while concerns about ADR may be valid, critics often overstate their arguments and depict an oversimplified understanding of dispute resolution); Menkel-Meadow, "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)," 83 *Geo. L.J.* 2663 (1995). At 2669–70 (responding to criticisms voiced by Professor Owen Fiss and others, and urging that settlement promotes such values as "consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice"). At 2695 (recognizing that certain settlements, such as mass tort actions, have such a significant impact on our justice system that "public exposure of such cases may be a necessary part of our democratic process" (internal quotation marks omitted)).

164 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 *Am. L. Rev.* 729, 731 (1906) ("The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules …. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand."). At 732–33 ("Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society.").

165 Jean R. Sternlight, "ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice," 3 *Nev. L.J.*289 (2002–2003) (urging that a proper system of justice should resolve societal as well as individual interests, seek societal harmony, and that both litigation and ADR can serve such goals); Jean R. Sternlight, In "Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis," 78 *Tul. L. Rev.* 1401 (2004) (examining tensions between using formal and informal systems to resolve employment discrimination complaints in the US, Great Britain, and Australia).

166 Jean Sternlight, "Creeping Mandatory Arbitration: Is it Just?, "*Stanford Law Review*, Vol. 57, p. 1631, 2005.

167 Carrie Menkel-Meadow, "Exporting and Importing ADR: 'I've Looked at Life from Both Sides Now," *Disp. Resol. Mag*., Spring 2006, at 5. (explaining that ADR's legitimacy can be established by values other than the rule of law, such as treaties, consent, and economic and trade values).

168 Frank K. Upham, "Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China," 114 *Yale L.J.* 1675, 1714 (2005) (reviewing Zhu Suli, "Sending Law To The Countryside: Research On China's Basic-Level Judicial System" (2000), describing justice in rural China and urging that "[t]he solution [to the tension], therefore, may be to institutionalize the dialectic that Zhu describes between formal and informal, modern and customary, center and periphery in a manner designed to make the norms created more accessible to the public while also being

that are already operating effectively and successfully[169]. Arbitration allows parties to use their own selected norms, which may be different from formal rules applicable by a court. The arbitral tribunal can also have a better interpretation of formal rules[170]. The "rule of law" means a more authoritarian approach, but fixed legal norms obstruct the right application of the rule of law in accordance with social norms which have merely been formalised by the rule of law[171]. The view of Professor Marc Galanter[172] that an apparently fair litigation system can be proved unproductive in eliminating economic and social unfairness is worth mentioning.

While formal rule-based systems such as courts/litigation can offer more certainty and transparency leading to justice and satisfaction, an informal approach such as arbitration can lead to justice and satisfaction of a different degree, which in many might be higher than in a formal system instances, taking into account other factors such as costs, speed and publicity. There is no need for identical degrees of justice and satisfaction among the two systems, but the parties can choose which one they require. For instance, equity has offered justice and satisfaction when it is applicable, instead of the common law approach[173]. Courts have proved themselves

respectful of local practices"). Lan Cao, "Introduction to Symposium, The 'Rule of Law' in China," 11 *Wm. & Mary Bill Rts. J.* 539, 542 (2003) (noting that the Chinese may have a very different attitude toward the rule of law than Americans do, and that "rule of law" translates into Chinese as "rule *by* law," which implies a more authoritarian approach); Pat K. Chew, "The Rule of Law: China's Skepticism and the Rule of People," 20 *Ohio St. J. On Disp. Resol.* 43, 48–54 (2005) (discussing China's ongoing tension between the Western rule of law approach and the traditional Chinese preference for the rule of people).

169 Richard H. Pildes, "The Destruction of Social Capital Through Law," 144 *U. Pa. L. Rev.* 2055, 2057 (1996). Haini Guo & Bradley Klein, "Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs," 20 *Ohio St. J. On Disp. Resol.* 825, 885–86 (2005) (stating that in China, formal law is "muddy" and more unpredictable than social norms).

170 Lisa Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," 21 *J. Legal Stud.* 115, 135–43 (1992) (discussing the shortcomings of the American legal system as it relates to the diamond industry and how the industry has adapted to enforce extralegal agreements).

171 Rosa Ehrenreich Brooks, "The New Imperialism: Violence, Norms, and the "Rule of Law," 101 *Mich. L. Rev.* 2275, 2283–89 (2003).

172 Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Soc'y Rev.*95, 119–22 (1974). Simon Roberts, *Order And Dispute: An Introduction To Legal Anthropology* 26–27 (1979) ("[E]ven where judicial institutions are found they do not always enjoy the unchallenged pre-eminence in the business of dispute settlement which our courts claim and manage to exercise. Fighting and other forms of self-help, resort to supernatural agencies, the use of shaming and ridicule, or the unilateral withdrawal of essential forms of cooperation may all constitute equally approved and effective means of handling conflict."). Robert M. Ackerman, "Disputing Together: Conflict Resolution and the Search for Community," 18 *Ohio St. J. On Disp. Resol.* 27, 91 (2002) ("The ultimate promise for dispute resolution is that it can harness and nurture the *will* to play together so that society is more than the sum total of disparate notes, but rather a cohesive—albeit sometimes discordant—tune.").

173 Thomas O. Main, "ADR: The New Equity," 74 *U. Cin. L. Rev.* 329, 329–30 (2005) (urging that just as the British system of equity sought to relieve problems and tensions created by the strict common-law approach, ADR today is a release for pressures created by our formal litigation system).

to be no panacea in to achieving justice. The qualities of the rule of law such as transparency, fairness, and equality, fostering individual rights and protecting the individual from the state can be achieved by other systems of dispute resolution such as an independent and co-equal to courts arbitration.

2 Arbitration co-equal to courts

Can we have two parallel dispute systems within a sovereignty without a problem? Can a fully-fledged arbitration system as a second pole not be an effective mechanism for guaranteeing legality within the state's jurisdiction? Is there a need for superintending a dispute system such as arbitration, which is supposed to be introduced as an alternative dispute system? Has this conflict driven arbitration in an effort to copy litigation procedure in order to be closer to litigation and so achieve legality and integrity? At present, under national arbitration Acts and Courts' precedent, national courts play a role in securing the integrity of arbitrations conducted within their jurisdiction. It is argued that judicial intervention in arbitration is not inconsistent with the parties' interests, as courts provide useful assistance that guarantees both the effectiveness and efficiency of the arbitral process. In other words, judicial intervention has been seen as a means of both providing assistance to the arbitral process and securing the fairness and legitimacy of the system[174]. Does the absence of any court's involvement means that the arbitral process will not be fair and legitimate? The problem is how to strike a balance between the wishes of the parties to use a private system of dispute resolution and the interests of the State in superintending the process. The state cannot demand one dispute system such as courts to supervise another one such as arbitration, since these two dispute systems are supposed to be alternative to each other and so totally independent.

While arbitration will never replace litigation, it does provide a cost-effective, time-effective adjudication method, and so the judicialization of arbitration will cause the loss of arbitration's advantages as a dispute mechanism negating the reason for its emergence as an alternative dispute mechanism. Properly run, commercial arbitration can provide parties with similar or better legal decision-making than the court system without the hangover resulting from tight court budgets and the resulting reduced legal services. Lord Wilberforce[175] said that "I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration … regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive laws". Moreover, according to Eric D. Dunlap[176]: "The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit

174 DAC, "Report on the Arbitration Bill," 1997 *Arbitration International* 3.

175 Hansard HL (Series 5) Vol. 568 Col 778 18 January 1996.

176 Eric D. Dunlap, "Setting aside arbitration awards and the manifest disregard of the law standard," 2006 *Florida Bar Journal* July/August 51, p. 52.

parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less". Thus, there is support for arbitration being a totally independent dispute mechanism and not merely auxiliary to courts. Moreover, arbitration has to be a free-standing system co-equal to courts and has to develop its own substantive laws.

It is worth mentioning here that according to Hegel[177] "The parties have a right to go through these lengthy [legal] formalities, which are *their* right. But since these may also be turned into an evil and even into an instrument of injustice, the parties must be obliged by law to submit themselves to a simple court (a court of arbitration or CFI) in an attempt to settle their differences before they proceed any further. This is necessary in order to protect them – and right itself, as the substantial matter at issue – against the process of law and its misuse". Thus, Hegel considered arbitration non-binding and the litigants could opt to carry on the litigation as the aim of the arbitration was the means for reaching a settlement. In other words, Hegel's position is that arbitration is justified as a deviation from public law only to the extent that it corrects those internal trends in law which destabilize it as public and accessible. To Hegel's mind, arbitration was to be a state-sponsored alternative to public law to assist weaker private parties against more powerful commercial interests better able to navigate and control intricate legal procedures. The model of arbitration according to Hegel's view is not an independent and co-equal to courts dispute system.

Arbitration is a private dispute mechanism that cannot be a replica of courts under the custody of courts. A co-equal arbitration as an alternative to courts is the creation of contract and so parties cannot be forced to arbitrate a dispute if there is not an arbitration agreement. Our analysis has shown a tendency to arbitrate more and more types of disputes. Arbitration as a co-equal to courts dispute mechanism should be able to deal with all types of disputes, taking into account that there will be a parties' arbitration agreement. All kind of disputes should be considered as arbitrable in general. The only thing that it has to be inspected is if there is a parties' arbitration agreement regarding the specific dispute. Any dispute arising out of a written or electronic arbitration agreement will also be solved by arbitration. The arbitral tribunal will decide on its jurisdiction, validity of the arbitration agreement and the applicable law. The parties can define by their agreement the applicable law, the jurisdiction of the arbitral tribunal and the procedure to be followed.

The current mistrust towards arbitration procedures rests on an archaic understanding of the arbitration process, which is subject to intense oversight by courts. Presently, the arbitral tribunal cannot deal with interim measures until it has been established and national courts may be expected to deal with such urgent matters. So, throughout the course of all arbitration, it may be necessary for a national court

177 G.W.F. Hegel, "Elements Of The Philosophy Of Right" § 223 (H.B. Nisbet trans., Allen Wood ed., 1991) (1821).

to issue orders intended to preserve evidence, to protect assets and to maintain the *status quo* pending the outcome of the arbitration proceedings themselves. Moreover, the assistance of a national court may be vital because the tribunal's powers are limited to the parties involved in the arbitration itself and so there is a need to allow third parties affected by the arbitrable dispute to get involved in the arbitration process in order for arbitration to be transformed into a co-equal to courts dispute mechanism. Furthermore, throughout the course of all arbitration processes, the arbitrator should have all the powers of an actual judge and be able to act as a judge in matters of evidence, discovery, punitive damages, and interim and provisional measures. In other words, arbitrators should act as judges and have the same duties, rights and status of court judges in every arbitration case. Additionally, whatsoever aid is available in litigation should normally also be offered in arbitration[178]. On the other hand, arbitrators must diminish any dilatory approach to the process, keeping the parties and their lawyers under control. Regarding arbitrators' role, David A. Wright[179] says that: "Canadian law's willingness to allow arbitrators to determine issues up to and including constitutional claims has stemmed from the view that they are public decision-makers, part of the general legal system". Hence, arbitrators should be granted the equal legal status of judges as being public-policy makers and the second equal pole of the legal system.

The current analysis has shown that arbitration presently has many disadvantages and lack of power in many instances, which makes the court's assistance necessary. This means that courts' assistance and intervention must be replaced by new duties and powers of arbitrators which will enable the arbitral tribunal to deal by itself with all the previously mentioned problems and misgivings that occur throughout the course of the arbitration process, in order for arbitration to be transformed into a truly alternative and co-equal to courts as a dispute mechanism. How will the fact that people plea reference to arbitration before a court be circumvented? Can courts not be involved in any stage of arbitration from the commencement to the enforcement of the award? Who will decide the type of the arbitration, whether *ad hoc* or institutional, that is contained in the parties' arbitration agreement? An institution dealing with the administration of arbitration should be introduced in order to direct the whole process of *ad hoc* arbitrations prior to the establishment of the arbitral tribunal. An administrator is necessary prior to the application/invitation for arbitration is filed, and before the panel is chosen and the arbitral tribunal is established. This institution/administrator will not be vested with any responsibility for deciding any issue that could have a real effect on a case. Moreover, during the arbitration process, this institution/administrator will

178 Constantine N. Katsoris, "A Roadmap to Securities ADR," 11 *Fordham J. Corp. & Fin. L.* 413, 479 (2006) (noting that "whatever relief is available in court should generally also be available in arbitration").

179 David A. Wright, "Foreign To The Competence Of Courts" Versus "One Law For All": Labor Arbitrators' Powers And Judicial Review In The United States And Canada," 2002 *Comp. Labor Law & Pol'y Journal* 967 at 1005.

support the arbitrators during the procedure and in accordance with the arbitrators' demand for aid.

The establishment of an authority dealing with the administration of private arbitration having a public authority stemming from the prerogative of a state and power analogous that of the courts is necessary in order to have dual co-equal dispute mechanisms (arbitration, courts). To that extent, the establishment and introduction of a national authority management arbitration (NAMA)–a state institution that is part of the state justice structure–for ad hoc and institutional arbitrations is the first step towards the establishment of arbitration as an independent, co-existent alternative dispute mechanism. The NAMA will deal with pre-dispute management of ad hoc and institutional arbitrations until the establishment of the arbitral tribunal. Its main duty would be to take all provisional measures needed to secure the implementation of the parties' agreement. Thus, the NAMA has to be empowered with the authority and the duty to deal with the commencement of ad hoc arbitrations in case of non-compliance of any of the parties, by simply administering the process until the establishment of the tribunal. Moreover, the NAMA will have not only the power to administrate private arbitration by referring disputes to arbitration, but also taking private measures and appointing arbitrators if parties ask for it, and enforcing national and foreign awards. Arbitration under the supervision of NAMA will constitute a state action, as in litigation. In other words, arbitration should amalgamate the prerogative of the state in the same way as the courts.

Having a party's application in hand, the NAMA will refer the case to arbitration by giving notice to both parties. Consequently, the case will be referred to arbitration by the NAMA and if there is no compliance of a party, NAMA will take provisional measures against it. The NAMA will not play the role of an institution of arbitration but it will be merely the state authority which will have the entire management of ad hoc arbitrations and the management of institutional arbitration from the admission of a case to the NAMA after a court's transfer or a party's application until the reassignment of the case to the relevant institution. Of course, the NAMA will not deal with institutional arbitration but it will merely refer a case to the relevant institution if it comes out that in accordance with their agreement, parties' wanted an institutional arbitration and not an ad hoc arbitration. If parties go to courts then courts will simply have to reject the lawsuit for lack of jurisdiction if there is an arbitration clause and so courts will refer the case to the NAMA for further administration of the case. It is worth recalling the view expressed by the subcommittee[180] discussing the introduction of the FAA that "court's only role should be to ensure that parties have agreed to arbitrate, thereby waiving any right to trial by jury and ending the court's substantive involvement in arbitration process." There is a need for the introduction of a rule in the national CCP distinguishing that if there is an arbitration clause in a contract, courts will reject the lawsuit for

180 "To Make Valid and Enforceable Certain Agreements for Arbitration," S. REP. NO. 68–536, at 17–18 (1st Sess. 1924).

no jurisdiction[181], will transfer all arbitration cases to the NAMA, and they will not intervene in any stage of arbitration including, the enforcement of awards.

Interim and provisional measures prior to the establishment of the arbitral tribunal in both ad hoc and institutional arbitration will be taken and will be enforced by the NAMA since it will be the only state authority dealing with arbitration. During the arbitration process the NAMA will authorize the enforcement of any measures issued by institutional or ad hoc arbitral tribunals. The parties will appoint their own arbitrators and the umpire. The NAMA will appoint arbitrators in case parties fail to appoint arbitrators or disagree on the appointment of an umpire within ten days from the commencement of arbitration and if there is a party's application to intervene, strictly administering the appointment of arbitrators and umpire. The NAMA will hold a list of arbitrators and umpires qualified for the first instance arbitral tribunal. Parties can replace or revoke an arbitrator who fails to act or lacks the needed qualifications prior to the establishment of the tribunal. Consequently, the NAMA will revoke and replace arbitrators on all occasions in which at present courts revoke and replace arbitrators after a tribunal's establishment but only after a party's application. Arbitrators will have entirely the same powers as judges. Thus, arbitrators would deal with discovery like judges in the states' sovereignty and jurisdiction for the specific case to which they are appointed. Moreover, arbitrators should be able to demand service out of the jurisdiction or an application for service out of the jurisdiction may be made by the NAMA. Punitive measures will be imposed by arbitrators and will be enforced by the NAMA. During the arbitration process, from commencement of arbitration until the issue of the award, parties will not have any means of recourse against the whole process. The award will have the force of a judgment issued from it and signed by the umpires as this measure is already applied in Austrian law[182]. The award will be registered in a registry of the NAMA which will authorize the award and which will be enforced by the same mechanism used for the enforcement of courts' judgments.

181 See, for instance, in China, disputes arising under an arbitration agreement will only be dealt with through arbitration. In accordance with Article 257 of the Civil Procedure Law and Article 5 of the Arbitration Law, parties who agree to bring their disputes to arbitration cannot file a lawsuit. The courts will refuse to hear cases that have had prior arbitration agreements made. Moreover, the Chinese solution could be seen at face value to be more liberal, since Article 257 of the Civil Procedure Law of 1991 and Article 65 of the Arbitration Law of 1995 (in force since September 1, 1995) repeal the jurisdiction of domestic courts in favor of arbitration when the controversy concerns "economic, commercial, transport and maritime matters." Law of Civil Procedure of the People's Republic of China, Article 257 (1991), available at http://www.qis.net/chinalaw/prclaw34.htm. Arbitration Law of the People's Republic of China, Article 65 (1995), *available at* http://www.qis.net/chinalaw/prclaw47.htm.

182 2006 Austrian CCP (ZPO) Effects of the Award Article 607 (The award has between the parties the effect of a final and binding court judgement). Article 594 Austrian (1983) Code of Civil Procedure, 4th Chapter "The chairman of the tribunal, or if he is unable to act, any other arbitrator, shall at the request of a party confirm in writing on a copy of the award the final and binding nature and the enforceability of the award."

Arbitration should commence and then finish, with the issue of an award, without the involvement of courts in any stage of the process. The award of the arbitral tribunal in both ad hoc and institutional arbitration can be appealed and referred to a second degree of arbitral tribunal formed with the parties' arbitrators involved in the first degree arbitration process, or the parties can appoint new arbitrators and a new umpire appointed by the parties in the first place exclusively from the list of umpires held by the NAMA, and in case of disagreement the NAMA will appoint the umpire. The umpires for the second degree arbitral tribunals who will be appointed by the NAMA or the parties will be retired judges firstly and secondly experienced lawyers or knowledgeable scholars included in a list held by the NAMA. In the list of umpires will be included all people having the typical qualifications needed for someone to act as umpire in an arbitral tribunal of appeals. Thus, an appeal against an award issued by an institutional arbitration and registered in the NAMA's registry can be submitted by the parties to the NAMA. When an appeal against an institutional award has been filed, arbitrators and an umpire from the NAMA's list of umpires will be appointed either by the parties or in case of conflict by the NAMA as well.

Presently, the award possesses the power of *res judicata* by the notification to the parties, but it has to go through a whole process in order to be enforced and so there is a need for simplification of the process. The award authorized and submitted to the NAMA will be enforced if the time (probably ten days) for an appeal against the award of the first instance arbitral tribunal has passed without an appeal having been filed against the award. If there is an appeal, then an appellate arbitral tribunal will be established and will deal with the review of the award. The appeal against the first instance arbitral award will be submitted to the NAMA in order to give notice to the parties for the establishment of the arbitral tribunal of appeals. In other words, the NAMA will merely have the management of arbitration in this stage as well as providing authorisation for the enforcement of any interim and provisional measures issued by the appellate arbitral tribunals. During the appeal process, parties will not have any means of recourse against the process.

The second degree of arbitral tribunal will examine and review the award only for compliance with public policy, arbitrability, validity of arbitration agreement, manifest disregard of law, partiality of arbitrators and a fair hearing. If the second degree tribunal (arbitral tribunal of appeals) discovers the existence of non-fair hearing (lack of due process) then the parties will present their arguments again before the arbitral tribunal of appeal. Thus, in the case of annulment of the award of the first instance arbitral tribunal, the arbitral tribunal of appeals will issue the final award. The appellate arbitral tribunal will simply examine the legality of the first instance award, replacing or not the legal part of the award and issuing the appellate award. Hence, the arbitral tribunal of appeal will examine the reasons for setting aside the award and will again decide the case, based on the same evidence or, in the case of an unfair hearing, examine the new evidence presented by the parties–and so it will issue the appellate award that will be directly enforced by the NAMA. The tribunal will void and replace the first instance award by the issue of an appellate award within 30 days from the establishment of the appellate arbitral tribunal enforceable by the NAMA.

The review of an award by an appellate arbitral tribunal will be a safeguard of legitimacy. The voluntary review of an award by an appellate arbitral tribunal with the parties' agreement, as currently exists and as analyzed above in the investigated legal systems is a basis for the proposed development. It could be argued that an appeal process might increase the cost of arbitration, but it is up to the parties to take the initiative to appeal. On the other hand, the existence of an appellate arbitral tribunal will give parties the assurance of legitimacy equal to that of the courts, regardless of the fact that the procedure will be more informal, following the path of an arbitration process.

As discussed earlier, the custom of judges to be appointed as arbitrators is an example of the non-co-equality of courts versus arbitration in the analyzed systems, otherwise it could be argued that arbitrators should also be appointed as judges. In our proposed system, the arbitrators constituting the first instance arbitral tribunal or new ones with a new umpire appointed either by the NAMA or by the parties will constitute the appellate arbitral tribunal in every case. The appointment of the arbitrators of the first instance arbitral tribunal plus a new umpire is recommended because firstly they know the case and will mainly discuss its legal basis with the new umpire. Only in a rare case of unfair hearing there be a new hearing before the appellate arbitral tribunal, which means time and cost effectiveness. Secondly the appellate arbitral tribunal will reexamine above all the legal foundation of the award. As mentioned above, retired judges will be appointed as umpires but not before their retirement[183] because otherwise they will transfer their court tradition and tactics to arbitration and so there is a probability that they will act more as judges than as arbitrators, which will mean alteration of the character of arbitration. There is a danger of judges (even after their retirement) acting more as judges than as arbitrators, but in this case parties will appoint as umpires experienced lawyers or other scholars from the NAMA's list of umpires rather than judges. As discussed earlier, lawyers or other knowledgeable scholars with 20 years professional experience will be included in the umpires list held by the NAMA and they will also be appointed as umpires. The enforcement of a final award after the appeal will be undertaken by the NAMA as a state authority using the states' enforcement authority. Thus, the enforcement of the award authorized by arbitrators and the NAMA will be made through the mechanism currently used for the enforcement of judgments.

Taking as an example the Netherlands code[184], it is essential that any third party affected by an arbitrated dispute can get involved in arbitration. Third parties

183 Austrian Code of Civil Procedure, 4th Chapter Article 578 "Judicial officers may not accept appointment as arbitrators during their tenure of judicial office." See, C. Koller and N. Tunkel, "An Outline of the New Austrian Arbitration Act based on the UNCITRAL Model Law," 2006 *The Vindobona Journal of International Commercial Law and Arbitration* 27 at 33 "Austrian law does not permit judges to act as an arbitrator."

184 Netherlands Code of Civil Procedure Article 1045 – Third Parties 1. At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.

having an interest in the arbitrated dispute will also have the right to appeal against a first instance arbitral award in order to be reviewed by an arbitral tribunal of appeals, as happens currently in Italian law[185]. In other words third parties, having an interest in the arbitrated dispute affecting directly the third parties' rights, will be able to intervene either directly to the first arbitral tribunal during the first instance arbitral process by submitting a notice and taking part by the allowance of the arbitral tribunal or to appeal against a first instance award. Thus, arbitrators should be empowered to deal with actions involving third parties as in litigation and the enforcement will be made through the NAMA by the same mechanism used by the courts.

Since only the NAMA will have the sole authority to deal with the management of arbitration in a state, then foreign awards will be submitted to the NAMA for a typical recognition and enforcement as well. Moreover, an appellate arbitral tribunal will be established in order to review foreign awards and NYC awards and this appellate arbitral tribunal will order their enforcement by the NAMA through the mechanism used currently to enforce foreign awards. Three arbitrators appointed by the NAMA will form this appellate arbitral tribunal responsible for the review of the international arbitral awards and NYC awards. Moreover, a global acceptance and establishment of arbitration and courts as two co-equal dispute methods issuing directly enforceable awards and judgments will mean that the NYC, on recognition and enforcement of foreign awards, should be substituted and awards and judgments will be enforced equally by the introduction of a modern international convention concerning the enforcement of foreign judgments and awards, permitting a worldwide enforcement.

A summary of the award and factually neutral insight into the legal issues which do not disclose any sensitive or confidential information should be published by the NAMA and, therefore, create not only an arbitration precedent but also contribute to the formation of substantive law and in general to the law-making process. It is worth mentioning here that Dora Marta Gruner[186] proposed the establishment of an official international regulatory body to require and supervise award publication apart from in those cases involving exclusively "issues of a private, consensual nature".

185 The award may only be subject to recourse for nullity; for revocation; or third party opposition (Article 827) and the recourse may be filed regardless of the filing of the award. The request for revocation and third-party opposition shall be filed with the court of appeal of the district in which the arbitration has its seat (Article 831). A recourse for nullity is filed with the court of appeal of the district in which the arbitration has its seat, within 90 days of notification of the award (Article 828).

186 Dora Marta Gruner, "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform," 41 *Colum. J. Transnat'l L.*923, 960–63 (2003). Llewellyn Joseph Gibbons, "Private Law, Public 'Justice': Another Look at Privacy, Arbitration, and Global E-Commerce," *15 Ohio St. J. On Disp. Resol.* 769, 771 (2000) at 787 (arguing that publication of arbitral awards will promote the appearance of fairness and develop public confidence in arbitral system).

The establishment of the NAMA and an appellate arbitral tribunal for review of awards without any intervention from courts in ad hoc commercial/maritime and institutional arbitrations will create a fully independent, alternative and co-equal to courts dispute mechanism and consequently two parallel civil law dispute systems will exist, keeping their own advantages. Arbitration will keep its informality, cost effectiveness, confidentiality and quickness as a private contractual alternative dispute mechanism under the formal management of the state, co-existing with litigation which is a more formal public dispute mechanism. Both co-equal dispute systems will contribute to the development of the legal system and the understanding of the substantive law, since both systems will apply the same principles of law. In particular, the notion of public policy will be applied and formed by the precedent of both systems.

In an ad hoc arbitration there can be at the beginning a notice of the parties to the NAMA for the arbitration, and afterwards parties might need the assistance of the NAMA only for the enforcement of their award if they do not have any disagreement during the arbitral procedure or there is no need for an appeal. In institutional arbitration, the NAMA will provide the management for the transfer of the case to the relevant institution according to the parties' demand, enforcement of the first instance award and administration of the appeal process in case of an appeal, and enforcement of the appellate award. In institutional arbitration the NAMA will be involved and administer in case of inability of the institution to solve a conflict among the parties concerning matters of the arbitration. Interim and provisional measures will be issued either by the NAMA itself prior to the establishment of an arbitral tribunal or by arbitrators after the tribunal's establishment, in both ad hoc and institutional arbitration, and authorised and enforced by the NAMA through the same mechanism currently used for the enforcement of judgments.

An advisory committee comprised of judges from the Supreme Court and the Court of Appeal, professors and very experienced professionals of all fields will be established in order to advise the NAMA concerning any legal issues. The NAMA will solve any legal issues addressed by any arbitral tribunal. Moreover, arbitrators will be able to address legal questions via the NAMA to the ECJ. EU law principles and ECJ judgments will be applied *ex officio* by arbitrators and awards compliant with national substantive law, EU law and international law will be reviewed by the appellate arbitral tribunal. The review of the appellate arbitral tribunal will avoid any blatant disregard of law and will not entirely follow interpretations of law imposed by the Supreme Court or impose very strict legal, reasoning or legal argumentation identical to that occurring in judgments. The arbitral tribunals will try to give the best interpretation of the law and norms chosen by the parties as long as their choice is not illegal. The prevailing view established by courts' case law on various legal matters will be the basis and a starting point for further developments in the contribution to precedent and *stare decisis* by arbitration as a co-equal to the court mechanism and the second pole in the jurisdictional sovereignty of a state/country. Of course, arbitrators will be free to utilize courts' judgments on legal issues not decided previously

by arbitration or to use law interpretation formed by courts' judgments. In other words, arbitrators are expected to utilize courts' precedent on various matters and judges can utilize arbitrators' interpretation on matters in which arbitrators have the expertise that judges lack: for instance, maritime and intellectual property (IP) matters (biotechnology-nanotechnology). Furthermore, it will be abnormal for arbitrators to give an interpretation of the law in contradiction to the one given by the courts–were this the case then people would abandon arbitration as a dispute mechanism for the patent lack of justice. The appellate arbitral tribunals are expected to mould the law's essence according to society's needs, which will be close to the ones given by the courts–forcing many courts to have a more social approach, rather than promoting dogma.

It is important to remember that for the success of arbitration as a form of dispute settlement, the avoidance of delay and expense is fundamental. Increasing costs in arbitration is a serious concern and cost-effectiveness is the desirable aim. The most obvious cost factors in arbitration are the cost of proceedings and in institutional arbitration, the costs of the institution[187]. The cost of counsel often exceeds the costs of the proceedings. Therefore, the cost of administering arbitration is eliminated by the NAMA's involvement as a state authority. Administration fees should be similar to the ones charged by courts and additionally arbitrator's fees should be fixed by the NAMA, keeping a low cost for arbitration. If allowance is made for restrictive arbitral appeal proceedings on the limited grounds presented in this chapter, the cost of arbitration proceedings can compare favorably with those incurred before the courts–achieving at the same time informality, quickness and a legal certainty and scrutiny compared to that achieved by courts.

In conclusion, there is a need for the introduction of new legislation establishing an arbitration that is independent and co-equal to courts.

3 A draft national law establishing a co-equal arbitration mechanism

The following proposal could be seen as a draft of the main articles of an Arbitration Act establishing an independent and co-equal to courts arbitration:

1 The NAMA, a state's authority, will handle the management of ad hoc and institutional arbitrations. The NAMA imposes and enforces provisional

187 According to the terms of the CEPANI Rules, arbitration costs consist of the fees and expenses of the arbitrators as well as the administrative expenses of the secretariat. The advance required to cover the arbitral costs must be paid to CEPANI prior to the appointment or the approval of the nomination of the arbitral tribunal. Provided that the advance has been entirely paid, the secretariat will transfer the file to the arbitral tribunal. Guy Kexjtgen, "CEPANI Reviews its Rules," 2005 *Journal of International Arbitration* 22(3): 255–260. Owing to the low cost of the court proceedings in Belgium, arbitration tends to be more expensive but it is often a worthwhile alternative if the parties to a dispute are from different countries whose laws do not allow them to enter into litigation in Belgium.

and interim measures prior to the establishment of the arbitral tribunal (first instance and appellate tribunal) necessary for the case.

2 The party who intends to bring a dispute before an arbitral tribunal shall give notice to the NAMA that it will undertake the management for notice of the parties.

3 The NAMA will solve any legal issues addressed by the arbitral tribunal. In case of institutional arbitration the NAMA will enforce measures imposed by the arbitrators and by the parties' application the NAMA will administer a conflict on the occasion of the inability of the institution to give a solution.

4 Any civil law dispute may be the subject of an arbitration agreement.

5 An arbitration agreement shall be constituted by an instrument in conventional writing or electronically signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration.

6 The judge dealing with a dispute that is the subject of an arbitration agreement shall, at the request of either party, declare that he/she has no jurisdiction, and will transfer the case to the NAMA.

7 An arbitrator may be any person who has the capacity to contract. The arbitral tribunal shall be composed of an uneven number of arbitrators. If the parties have not appointed the arbitrators then the NAMA will appoint three arbitrators. Prior to the establishment of an arbitral tribunal, parties can replace arbitrators who refuse or cannot perform and in the case of disagreement replacement will be made by the NAMA. The NAMA will revoke and replace arbitrators during the arbitration procedure.

8 Arbitrators will have the same authority as court judges during the arbitration and will impose and enforce provisional and interim measures or punitive damages via the NAMA.

9 Any third party can intervene in arbitration during the arbitration process or appeal against a first instance award.

10 The parties may decide on the rules of the arbitral procedure, applicable law and on the place of arbitration. The president of the arbitral tribunal shall regulate the hearings and conduct the proceedings. The arbitral tribunal shall give each party an opportunity to substantiate his/her claims and to present his/her case.

11 The arbitral tribunal may rule in respect of its own jurisdiction and for this purpose, may examine the validity of the arbitration agreement. The arbitral tribunal will issue an award in case of an invalid arbitration agreement due to the arbitration clause itself or the nullity of the main contract.

12 An award shall be made after a deliberation in which all the arbitrators shall take part. An award will be issued within 30 days from commencement of the arbitration. An award shall be set down in writing containing a basic reasoning and will be signed by the arbitrators.

13 The president of the arbitral tribunal shall sign and deposit the original of the award with the registry of the NAMA and give notice to each party of the award. Institutional awards will also be deposited with the registry of the NAMA.

14 The parties or any third party having any interest can appeal against awards issued by ad hoc arbitration or institutional arbitration within ten days from the deposit and notice of the award.
15 If an appeal is not submitted before the NAMA within ten days the deposited award is final in producing *res judicata* and will be enforced by parties with the assistance of the NAMA through the state's mechanism employed for court's judgments.
16 The following are the reasons for appeal: dispute could not be settled by arbitration (lack of arbitrability); no valid arbitration agreement; unfounded reasoning; contrary to public order; the arbitral tribunal has exceeded its jurisdiction or its powers; manifest disregard of law; and unfair hearing.
17 The appellate arbitral tribunal will be constituted in ten days by the parties' arbitrators of the first arbitral tribunal or new ones appointed by the parties or by the NAMA in their failure and an umpire appointed by the parties or by the NAMA in their failure from its list of arbitrators. As the umpires appointed are retired judges, lawyers of great experience and other knowledgeable scholars, they will be included in the list of the NAMA.
18 The appellate arbitral tribunal examines the legal reasons for appeal and in the case of unfair hearing, examines new evidence. In 30 days from the date of its establishment, the appellate arbitral tribunal will issue the new and final award signed by the umpire, deposited to the NAMA's registry and enforced by the NAMA.
19 The NAMA will charge administration fees comparable to courts and the arbitrators' fees will be fixed by the NAMA and paid by the parties.
20 A summary of the awards containing the basic legal reasoning will be published by the NAMA.

Of course, further elaboration on this draft covering any unforeseen gaps might be needed. The NAMA as a state's authority will be established by public law, having its own internal regulation governing various matters concerning its operation.

4 Conclusions

Arbitration arising out of contract is supposed to be an entrepreneurial, private-sector innovation producing what disputing parties want: quick, inexpensive, commonsense adjudication of disputes. Economic barriers avert many, if not most, parties in the US from achieving meaningful access to courts–justifying the employment of ADR[188]. Procedural party autonomy endows the parties with the power to choose in advance the forum that suits them best, instead of having

188 Robert Rubinson, "A Theory of Access to Justice," 29 *J. Legal Prof.* 89, 100–02 (2005) (specifying that, for the most part, the only persons or groups able to obtain access to the US litigation system are commercial organizations, affluent individuals, and persons engaged in "values conflicts" of significant interest to attract pro bono or reduced-fee representation).

their disputes resolved by the default forum, which in many cases is hard to predict. Litigation in the public-sector court system is slow and archaic, full of legalistic technicalities and formalities that produce a lot more work for lawyers without producing a corresponding enhancement in justice for the disputing parties who have to pay the lawyers.

Courts today find themselves entangled in a large number of dispute resolution processes that take them far away from traditional adjudication, obscuring the line between public and private dispute resolution and triggering the presumption of public access to judicial proceedings[189]. Court opinions, statutes, regulations, and commentary maintain control of legal prediction. Court system predictability promotes private sector economic planning and, eventually, increases productivity[190]. Moreover, the identity of the judge and the quality of legal representation will almost certainly prove to be the most powerful predictors of who wins in court[191]. Furthermore, in the US researchers have documented huge differences from city to city in the way that the laws are applied[192]. On the other hand, globalisation

189 Judith Resnik, "Procedure as Contract," 80 *Notre Dame L. Rev.* 593, 597 (2005) (noting that arbitration and mediation "have been brought inside the courts, thereby changing that which is 'judicial"'); at 624 (suggesting that ADR "is often chosen because it has the advantage of private decision-making, made in the 'shadow' rather than in the light"); at 624 (noting that public benefits of ADR "are presumed to flow from the reduction of conflict … predicated on the parties' preferences"). Jean R. Sternlight, "Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia," 80 *Notre Dame L. Rev.* 681, 690 (2005) (commenting upon the "real-world blending" of litigation and other dispute resolution approaches).

190 Catharine Pierce Wells, "Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method," 18 S. *Ill. U. L.J.* 329, 335–42 (1994). A recent experiment in predicting Supreme Court decisions illustrates the point. The regression analysis accurately predicted the Court's decision in 75 percent of those cases. Theodore Ruger, *et al.,* "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking," 104 *Colum. L. Rev.* 1150 (2004). Frederick Schauer, "Prediction and Particularity," 78 *B.U. L. Rev.* 773, 783–84 (1998). Peter Boettke & J. Robert Subrick, "Rule of Law, Development, and Human Capabilities," 10 *S. Ct. Econ. Rev.* 109, 111 (2002) ("[T]he rule of law provides us with the stability and predictability in economic affairs required for agents to engage in entrepreneurial action – both in terms of exploiting existing opportunities for profit through arbitrage and the discovery of new profit opportunities through innovation."); Edward A. Morse, "Reflections on the Rule of Law and 'Clear Reflection of Income': What Constrains Discretion?," 8 *Cornell J.L. & Pub. Pol'y* 445, 456 n.52 (1999) ("Predictability may also increase productivity to the extent that economic commitments can be made in reliance upon a stable legal structure.").

191 Paul Elias & Rinat Fried, "A Failure to Execute, The Recorder," Dec. 15, 1999 (finding huge variations from judge to judge in the length and disposition of death penalty cases).

192 Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, "The Persistence of Local Legal Culture: Twenty Years of Experience From the Federal Bankruptcy Courts," 17 *Harv. J. L. & Pub. Pol'y* 801 (1994) (sharp geographical differences in exercise of the choice between Chapter 7 and Chapter 13 cases); Lynn M. LoPucki, "Legal Culture, Legal Strategy, and the Law in Lawyers' Heads," 90 *Nw. U. L. Rev.* 1498, 1504–08 (1996) (sharp geographical differences in subordination of insider debt in Chapter 11 cases). *Erie R.R. v Tomkins*, 304 U.S. 64 (1938) (holding that a federal court sitting in diversity must apply the substantive law of the relevant state). Michael C. Dorf, "Prediction and the Rule of Law," 42 *UCLA L. Rev.* 651, 690–95 (1995)

and the development of technology have at once integrated national economies and facilitated the evasion of economic regulation. Modern trade, influenced by globalisation and electronic technology, characterized by a great deal of mobility and its requirements seems to be better served by a flexible dispute system such as arbitration which is more informal than the strictly formalised litigation based on doctrines, dogma and the status quo of legal perception. Modern trade serves the needs of the society and commercial society's creativity formulates commercial customs and norms that serve the needs of the society prior to creating a formal scheme and their conversion into written law. Arbitration as a flexible and informal system serves modern trade in the globalisation era. It is the second pole, contributing to a better justice system in a single legal jurisdiction and sovereignty, contributing to economic development, which will bring better social justice, motivating courts to restrain from over-expansion of formalities – which do not add to justice – but rather to mounting bureaucracy.

Flexibility is one of the driving forces behind globalisation, and so a flexible approach towards the interpretation and essence of national law, encompassing internationally harmonised customs and norms embedded in commercial practice is the right approach for a modern state/country. An independent and autonomous arbitration is the mechanism that can absorb advances and developments functioning successfully in the globalisation era; viz. the second pole balancing the inflexibility, formality and strictness of litigation. Thus, "living law" leading to a legal realism/pragmatism serves globalisation and international commercial and maritime transactions. An autonomous arbitration and e-arbitration with its informal and realistic approach, (but not illegal, rather a very formalistic litigation missing the substance/core on behalf of the formal status quo in order to understand various modern trade realities and new forms of transactions such as electronic and IP matters in the cyberspace era) is the mechanism more suitable to serve the interests of a state.

The benefits of court system transparency generally accrue to the public, while the detriments from loss of privacy accrue to the parties[193]. On the other hand, arbitration proceedings are transparent for the parties achieving due process. As a

(discussing obligation of single US Supreme Court justice to predict whether four justices would vote to grant certiorari).

193 Edward Brunet, "Arbitration and Constitutional Rights," 71 *N.C. L. Rev.* 81, 84–85 (1992). Jean R. Sternlight, "Creeping Mandatory Arbitration: Is It Just?" 57 *Stan. L. Rev.* 1631, 1658 (2005) ("Unfortunately, researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons. First, to a large extent, researchers cannot obtain access to the data they need to perform good studies …. One of the fundamental traits of arbitration is that it is typically private."); "Towards A Science of International Arbitration: Collected Empirical Research" 81 (Christopher R. Drahozol & Richard W. Naimark eds., 2005) ("Arbitration proceedings themselves are private and thus difficult to study. The nature of the process adds to that difficulty. Much of what happens (such as with respect to discovery) may not be documented in any central case file."). Stephanie Brenowitz, Note, "Deadly Secrecy: The Erosion of Public Information under Private Justice," 19 *Ohio St. J. On Disp. Resol.* 679, 693 (2004) (attributing increase in ADR as ironic consequence of attempts to ban confidential settlements), at 693 (positing that "parties that are concerned about

result, the incentives for parties to choose private arbitration are excessive because civil law disputes solved via transparent proceedings for the involved parties serves the public in a transparent way[194].

It is observed that in the recent amendments of national arbitration laws such as in Austria, Italy and Denmark, the courts' role in arbitration is guaranteed, regardless of an effort to show that arbitration is treated favourably. Courts forward many issues to the level of public policy in order to annul awards–showing a hidden hostility against the more flexible approach taken by many arbitral tribunals concerning commercial matters that must be approached by a creative method suitable for the inventive commercial society.

Arbitration agreements are generally enforceable under current law[195]. Moreover, international and national arbitration laws call for enforcement of valid agreements to arbitrate, but do not stipulate formation standards for these agreements or process rules for arbitration proceedings. Arbitration was a method of dispute resolution that the courts viewed with skepticism[196]. Courts have dismantled the legal constraints that stood in the way of the recognition of agreements to arbitrate, the enforcement of such agreements, and the enforcement of the resulting arbitral awards[197]. They have expanded the availability of arbitration far beyond the law merchant and collective bargaining–encompassing,

publicity may be more inclined to proceed to arbitration and mediation, which limit the access of the press and public even more [than litigation]").

194 The ability to resolve a dispute in private with minimal public exposure induces parties to choose ADR over litigation and has undeniably fuelled its growing popularity. Dianne LaRocca, "The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims," 80 *Chi. Kent L. Rev.* 933, 936 (2005) (characterizing arbitration as "significantly more private and focused" than public courtrooms); Edward F. Sherman, "Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience," 38 *S. Tex. L. Rev.* 541, 561 (1997) (stating that ADR is "often touted as a means of resolving disputes in private to avoid public exposure"). Patrick E. Higginbotham, "So Why Do We Call Them Trial Courts?," 55 *Smu L. Rev.* 1405, 1409, 1412 (2002) (describing "increasing diversion" and "flight" to private dispute resolution); Richard A. Bales, "The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration," 52 *U. Kan. L. Rev.* 583, 619 (2004) (criticizing laissez-faire approach that permits parties to stipulate to whatever arbitration procedure they wish); Sarah Rudolph Cole, "Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution," 51 *Hastings L. J.*1199, 1200 (2000) (identifying party consent as the "nearly exclusive guiding principle for process design").

195 *United Steelworkers of Am. v Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960)., *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 515 U.S. 528 (1995*). Mastrobuono v Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995). *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Southland Corp. v Keating*, 465 U.S. 1 (1984). *Green Tree Fin. Corp. v Randolph*, 531 U.S. 79 (2000). *Circuit City Stores v Adams*, 121 S. Ct. 1302 (2001). *Allied-Bruce Terminix Cos., Inc. v Dobson*, 513 U.S. 265 (1995). *Volt Info. Scis., Inc. v Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468 (1989). *Am. Bankers Ins. Co. v Crawford*, 757 So. 2d 1125 (Ala. 2000). *Lloyd v MBNA Am., N.A.*, 2001 WL 194300 (D. Del. Feb. 22, 2001). *Harris v Green Tree Fin. Corp*., 183 F.3d 173 (3rd Cir. 1999).

196 Diane P. Wood, "The Brave New World of Arbitration," 2003 *Capital University Law Review* 383 at 383.

197 *Circuit City Stores, Inc. v Adams*, 532 U.S. 105 (2001).

in addition to traditional subjects, virtually all statutory claims, constitutional claims, consumer claims, and employee claims. Voluntary consent to arbitration exists even if the contract was presented on a take-it-or-leave it basis. According to Diane P. Wood[198] "some recalibration of the system is necessary and desirable if we are to reach a socially acceptable balance between dispute resolution in the public institutions known as courts and private dispute resolution that should be entitled to public enforcement".

The level of judicial intervention in arbitration matters is, to a large extent, dependent upon the attitude of the judge towards arbitration and, of course, the finality of arbitration agreements is thereby undermined, since certain judges might not have confidence in the arbitral process and thus be more inclined to intervene. The possibility of judicial review alters the self-regulatory core of private arbitration. Presently arbitration is not an alternative dispute system but rather an inferior to courts dispute system. In other words arbitration is not the second pole as an autonomous, independent and co-equal to courts dispute method in a legal system.

Arbitration has been described as a confidential, quick and cost-efficient method for resolving disputes creating an internationally enforceable award but those virtues have eroded with the increase in the number of parties using arbitration, the more and more adjudicative nature of the process and the shift in the group serving as arbitrators, which has grown beyond the "grand old men" to a younger generation of arbitration technocrats[199]. Today in major international maritime law centres such as London and New York, arbitration has become almost as costly and time-consuming as litigation[200]. Moreover, during the

198 Diane P. Wood, "The Brave New World Of Arbitration," 2003 *Capital University Law Review* 383 at 384.

199 *Morrison v Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003), where the Sixth Circuit concluded: "Minimal research will reveal that the potential costs of arbitrating the dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court." Christian Bühring-Uhle, "Arbitration And Mediation In International Business" 140–48 (1996) (noting the mixed evidence as to the decreased cost and efficiency of international arbitration and suggesting that generally arbitration is not less expensive but it may be quicker). At 148 (describing international arbitration's "metamorphosis from a 'gentlemen's game', where commercial disputes were resolved informally among peers, to a highly sophisticated judicial procedure with amounts at stake that are 10 to 100 times larger than they used to be 30 years ago").

200 Constituting an arbitral tribunal in London and in the Chambre Arbitrale Maritime de Paris, the cost of the former is five to ten times higher than in France. *UK Capital more Costly than Paris* Lloyd's List, June 26, 1996. The legal expenses in Germany are on average three times lower than those incurred in London. E. Riehmer, "Maritime Arbitration: Why London?," 55 *Arbitration* 61 (No 1, 1989). London is certainly more expensive than other arbitration centres. This is due to the length of some arbitrations but has mainly to do with the nature of the English procedural system. The parties have to engage two lawyers, i.e., a solicitor and barrister, creating a duplication of costs. Sarah Walker, "Counting the cost of Arbitration, International Dispute Resolution Newsletter. February 2006 – Issue 13 www.twobirds.com. Fairplay of 11th May 2007: London still ahead for arbitration/London 11 May 2007 – "London remains the world's pre-eminent centre for maritime dispute resolution despite the claims of up to 15 rivals, claims

last few years there have been increasing complaints about the high cost of dispute resolution and cost constitutes the foremost case against London maritime arbitration. In addition, criticism of New York maritime arbitration has focused predominantly on delays in rendering awards and the high cost of arbitration[201]. The issuing awards are detailed and time-consuming, rather than simply starting the outcome[202].

Arbitration only exists in the area granted to it by courts and consequently too much court intervention suffocates arbitration. By choosing arbitration, parties expect to exclude courts from both the conduct of the proceedings and the adjudication of the case. A court can block an arbitration altogether by enjoining a party from participating therein, interfering with the composition of the arbitral tribunal, hearing challenges against procedural orders of the arbitrators, taking any other measure directed to control the course of the arbitral proceedings and finally, courts can reverse the final award on appeal or deprive it of most of its legal force by setting it aside. On the other hand, the trust shown in arbitration is based on the fact that arbitrators are not just influenced or guided by local or national precepts, but will have much wider perspectives for the benefit of the parties. The success of national commercial/maritime arbitration is as a result an expression of skepticism about national courts and of aversion to the heavily criticised "proceduralisation" of national proceedings.

Furthermore, arbitration presently is an alternative dispute resolution mechanism permitting parties to settle disputes before a neutral panel in a pseudo-judicial setting rather than a courtroom[203]. In other words, the process of arbitration is a mechanism to avoid national court systems. Arbitration developed as an alternative to the national court systems and has evolved into a central method of dispute resolution for contractual issues[204]. Nevertheless the judiciary is not excluded from the dispute entirely because enforcement of an arbitral award requires confirmation by a domestic court and so this confirmation alone could successfully overthrow the speed advantage. To that extent, an arbitral award could become the first step in lengthy national litigation for a party and so evoke the entire national legal system at the enforcement stage[205]. Hence, enforcement may hinder the finality of the dispute and damagingly influence the alleged cost-cutting advantage of arbitration

Ben Horn, a lawyer with London-based Faegre & Benson. Cost can be higher in London than elsewhere".

201 H. Wodehouse, "New York Arbitration as Seen by a Londoner," 1 *Lloyd's Maritime & Commercial L. Q.* 43, 45 (1986).

202 R. Jarvis, "Problems with and Solutions for New York Maritime Arbitration," 4 *Lloyd's Maritime & Commercial L.* Q. 535 (1986).

203 4 AM. JUR. 2D § 70 Alternative Dispute Resolution (1995).

204 Thomas E. Carbonneau, "The Ballad of Transborder Arbitration," 56 *U. Miami L. Rev.* 773, 773–75 (2002).

205 William H. Knull and Noah D. Rubins, "Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?," 11 *Am. Rev. Int'l Arb.* 531, 547–550 (2000) at 547 (noting that in numerous jurisdictions an arbitral decision may only initiate the process of national court litigation because addressing appeals regarding the arbitral award itself are still unavoidable).

and consequently in the enforcement stage the court may increase its role in the arbitration process as it deems suitable, and in other words controlling arbitration at the enforcement stage.

Arbitral awards finalize the results of adjudication and represent one of the last steps in the process of the coercive imposition of legal liability. Judicial *laissez-faire* as to arbitration is especially characteristic of courts in developed Western nations. Judicial review of arbitral awards constitutes a form of risk management.

Arbitration proceeds in the shadow of government power at several stages. The validity of an arbitration clause may first be questioned in a motion to compel arbitration or to stay judicial proceedings. During the arbitration itself, litigants sometimes request interim measures such as enforcement of subpoenas or pre-award attachment of assets. Judicial review attempts to resolve tensions between the rival goals of award finality (necessary to make arbitration reliable) and procedural fairness (without which aberrant decisions would sap community confidence in the process).

National courts play a larger role in the arbitration process, usurping power from both the panel and the parties. In certain circumstances, courts have determined the general applicability of the arbitration clause to the dispute or specified elements such as location and panel members, and so judicial actions destruct control by the parties and judicialize the process. Moreover, control is instructed through the discovery process, the majority of which is voluntary.

The problem with arbitration is that, as in the court system, arbitral panels make mistakes, and so without appellate review mistakes are not addressed and speed and finality become advantages only for the "winners" of arbitration. By contrast, an appellate review by an arbitral tribunal will contribute to a more efficient arbitration.

Privacy is arguably a fallacy because it may not protect the interested parties. Confidentiality could be protected if it is established that parties can demand that the reasoning of the award can be published but not the names of the parties and so the facts of the case and the result can be used as an arbitration precedent, keeping the advantage of arbitration as a dispute mechanism. The arbitrator compiles and declares as '*lex mercatoria*' those legal notions and principles which he needs in order to justify the outcome of the arbitration proceedings. The parties, and failing them the arbitrators, will be the masters shaping the procedural rules according to their particular needs, without having to apply any rules pertaining to any local CCP.

The role of national courts is purposely minimized in the international arbitration context to insulate decision-making processes from national bias or interference, and legislatures' support for international arbitration has conventionally taken the form of policies of non-interference. Courts reviewing final arbitral awards, in the meantime, have a deliberately minimal role to play and are predominantly ill-suited to provide substantive oversight of arbitrators. The standards for national court review of arbitral awards were designed with a strong pro-enforcement bias, which limits the grounds for refusal to enforce. Moreover, courts in the enforcement jurisdiction can refuse to enforce arbitral awards based on

barely defined procedural grounds or additional provisions that safeguard the national interests of the enforcement jurisdiction, such as when the issue in dispute cannot be settled by arbitration or offends the public policy. These grounds are by design limited to what might be considered the "most basic notions of morality and justice". As a result there is a need to avoid shifting decision-making power back to national courts under the excuse of award review[206].

It is argued that honouring party consent may require courts, in reviewing awards, to engage in a more careful analysis of the conduct and how it fits within the agreed-upon arbitral process, which means that the endorsement of rigorous review of every action of arbitrators will cause the abolishment of arbitration as a mechanism of dispute resolution. Arbitrators' immunity involves analogies to their judicial counterparts, who enjoy judicial immunity[207], contributing to the development of co-equal dispute mechanisms.

The justice of the final award is measured by the extent to which it is warranted by reasons that derive from rules (written, customs and norms) and so entire deviations to satisfy parties' collective interests are unjustified[208].

Arbitration has to be a more inexpensive alternative to litigation[209]. Moreover, arbitration should be considered a "self-help deregulation" for business[210] as it reduces the business defendant's process costs – the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal. If all arbitration's benefits to the business defendant come from lower process costs – then arbitration benefits both parties to the contract.

Decision-making in a legal regime should be allocated to the decision-maker most competent to make that decision[211]. Courts are generally seen as having a high degree of competence to decide questions of law[212]. This author argues

206 William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," 63 *Tul. L. Rev.* 647, 649 (1989).

207 Susan D. Franck, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity," 20 *N.Y.L. Sch. J. Int'l & Comp.* L 1, 18–19 (2000).

208 Detlev Vagts & W. Michael Reisman, "International Chamber of Commerce Arbitration," 80 *Am. J. Int'l L.* 268 (1986) (suggesting that ad hoc arbitration has declined in popularity because parties have traded off the "maximum suppleness" offered by ad hoc arbitration for the predictability of institutionalized arbitration).

209 *Alston & Cole-Alston v UBS Fin. Serv., Inc*., No. 04-01798, 2006 U.S. Dist. LEXIS 656, at *4 n.2 (D.D.C. Jan. 2, 2006) (stating that the purpose of arbitration is to provide a less complicated alternative to litigation).

210 Stephen J. Ware, "Consumer Arbitration as Exceptional Consumer Law," 29 *McGeorge L. Rev.*195, 212 n. 95 (1998). Stephen J. Ware, "The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration," 16 *Ohio St. J. on Disp. Resol.* 735, 747–51 (2001).

211 William N. Eskridge Jr. & Philip P. Frickey, "The Making of the Legal Process," 107 *Harv. L. Rev.* 2031, 2032 (1994) (describing institutional competence as one of the "great legal process concept[s]").

212 Henry M. Hart, Jr. & Albert M. Sacks, "The Legal Process: Basic Problems in the Making and Application of Law" 163–64 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

that experienced arbitrators having the expertise on the disputed subject have an even higher degree of competence to decide questions of law rather than an inexperienced judge on the subject matter, such as for instance, maritime or patent arbitration. Both courts and arbitration can offer justice and satisfaction according to the expectations of the parties following their own traditions[213] and so both dispute mechanisms can be employed as two different, independent and co-equal dispute mechanisms.

It is supposed that the role of the judiciary is mainly one of support and assistance to arbitration before, during and after the arbitral process, while the supervision and control of arbitration is exceptional and very limited. The application for annulment or an action for setting aside is the principal and often the only means of recourse against the arbitral award in civil law countries. Our analysis has shown a great deal of courts' involvement in arbitration–showing that currently arbitration in the analysed systems is merely an appendage to courts and not a truly alternative, co-equal and independent dispute system which works in parallel to courts in a national legal sovereignty. Arbitration is rather a supplementary to courts mechanism in the sense that courts reduce the amount of cases piled in their courtrooms. Moreover, in the vast majority of cases there is a major involvement of courts in the arbitration procedure that makes arbitration a less attractive dispute method.

Finally, arbitration is more and more judicialized and dependent on courts' rulings, losing its advantages and becoming more and more costly. Its validity is therefore questionable and it might be more productive to establish more courts and employ more judges rather than struggling with an arbitration as currently functions, where parties are thrown from the arbitrators' field into the courts' field of rising costs, time and ineffectiveness–against the principle of parties' autonomy to resolve their dispute exclusively by arbitration. It is up to a credible and autonomous arbitration to show a legitimate face and get the community's approval for fairness and justice, establishing itself as the second pole in a legal system.

With the establishment of the NAMA as the management state authority of ad hoc arbitrations and partly of institutional arbitration (with the absence of courts' jurisdiction to deal with arbitration cases) the proposed changes will lead to the development of arbitration as a co-equal dispute mechanism in a single legal system. Arbitration will be enveloped with the same state authority and sovereignty as to courts and it will work as the second, co-equal, independent and parallel civil dispute system in a single legal system. The arbitral tribunal of appeal which will re-examine the award constituted by retired judges and experienced lawyers or

213 Edward A. Dauer, "Justice Irrelevant: Speculation on the Causes of ADR," 74 S.C. L. REV. 83, 98 (2000) ("The trade-off between efficiency and justice is not in itself necessarily a bad thing …. The far bigger problem comes … from the difference between justice and satisfaction …. What seems fair depends upon what one expects.").

scholars guarantees legality and efficiency because the very experienced people who can act as arbitrators in the arbitral tribunal of appeal will review and correct any legal mistakes or due process of the first instance arbitral tribunal. Finally, the issue of a reasoned award and its publication will contribute to the emergence of arbitration precedent and the development of substantive law, therefore creating its own *stare decisis*.

List of cases

ABB AG v. Hochtief Airport GMBH and Athens International Airport SA [2006] EWHC
Aiglon Ltd v. Gan Shan Ltd [1993] 1 LR 164
Alexander v. Gardner Co 39 Led2d 147
Allied –Bruce Terminx Co v. Dobson 130 Led 2d 753
Altco Ltd v. Sutherland [1971] 2 LR 292
Alvenue Shipping v. Delta Petroleum (U.S.A.), Ltd., 876 F. Supp 482
Alvey Incorporated v. Teamsters Local Union 132 F3d 1209
Am. Sugar Ref. Co. v. Anaconda, 138 F.2d 765, 766–67
Amec Civil Engineering Limited v. The Secretary Of State For Transport [2004] EWHC 2339
Arab Business v. Banque Franco_Tunisienne [1997] 1 LR 531
Arakawa v. Japan Network Group, 56 F.Supp. 2d 349
Arakawa v. Japan Network Group, 56 F.Supp. 2d 349
Arenson v. Casson [1975] 3 AllER 901
Arios Pagos 899/1995 1985 NV 1399
Arnold v. Nat West Bank Plc [1993] 1 EG 94
Asplundh Tree Expert v. Bates 71 F3d 592
AstraZeneca Insurance v. CGU International Insurance [2006] All ER (D) 176
Bank Mellat v. Helliniki Techniki [1984] QB 291
Bernhardit v. Polygraphic Co of America 122 Fsupp 733
Bernhardit v. Polygraphic Co of America 350 US 198
Bernhardt v. Polygraphic Co 100 Led 199
BMBF (No.12) Ltd v. Harland and Wolff Heavy Industry [2001] 2 Lloyd's Rep. 227
BNP Paribas & Ors v. Deloitte & Touche LLP, 2003 *EWHC* 2874
Broemmer v. Abortions Servs. of Phoenix, Ltd., 840 P.2d 1013
Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569
Buckeye Check Cashing v. Cardegna, 126 S.Ct. 1204
Bulfracht (Cyprus) Ltd. v. Boneset Shipping Co. Ltd. [2002] EWHC 2292
Burke Country v. Shaver Partnership 279 SE2d 816
Carolina Power & Light Co. v. Uranex, 451 F. Supp 1044 (N.D. Cal.1977)
Cathiship SA v. Allanasons Ltd [1998] 3 All ER 714
Chromalloy Aeroservices Inc v. Arab Republic of Egupt 939 Fsup 907
Circuit City Stores v. Adams, 121 S. Ct. 1302
Circuit City Stores, Inc. v. Najd, 294 F.3d 1104
Coady v. Ashcraft 996 Fsup 15

Index