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THE ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES ARISING FROM SALE CONTRACTS IN THE TEXTILE SECTOR IN THE EUROPEAN UNION

Yüksek Lisans Tezi

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Danışman: DOÇ.DR.SİBEL ÖZEL

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PREFACE

The amount of recent policy implications and the regulatory developments in textile sector, the city where my current business focused on is the centre of textile sector through Turkey was one of the reasons that I decided to deal with textile sector and specifically the arbitration aspects in my thesis. During my study and also my business life I have observed that the imports in this sector is competelly lack of technical and legal aspect such as non of the companies are dealing with techtextile and rare of them are aware of EU's legislation.

The subject contains theoretically interesting legal and economic aspects. In addition, I believe that the thesis will be useful in the period of Turkey's harmonization studies with EU *aquis communitaire*.

To broaden the scope of the thesis and to focus on the legal issues, I decided to deal with the case of ECJ, the Supreme Court Of the US, ICC, other member states' courts in general way and especially comparison of both Turkish and EU's legislation.

During my stduy, I have not accesed to any kind of information not available to the public.

TABLE OF CONTENT

ABBREVIATIONS

T/C- Textile and Clothing Sector

WTO- World Trade Organisation

MFA- Multi Fiber Arrangment

ATC- Agreement on Textile and Clothing Sector

FB-Framework Programme

SME- Small amd Medium Enterprises

HLG- High Level Group

LTA- Long Term Agreement

GATT- General Agreement On Tariffs and Trade

OPT-Outward Processing Traffic

GSP- Generalised System of Preferences

ICC- International Chamber Of Commerce

HGK- Yargıtay Hukuk Genel Kurulu

HD- Yargıtay Hukuk Dairesi

CISG- The UN Convention on Contracts For The International Sales Of Goods

ILA- International Law Association

DSI- Devlet Su İşleri

CHAPTER 1.EU TEXTILE POLICY

I.INTRODUCTION

The European textiles and clothing industry involves some 177.000 companies with a combined turnover of €200 billion in 2002. It accounts for approximately 4% of total EU manufacturing production and 7% of manufacturing employment(2.1 million people)[1]

There had not been an "official" textile policy in the Union(Community) during the last decade. The Union(Community) had developed a de facto trade policy aimed specifically at protecting its textile market from the disruption caused by the rapid rise in textile imports into Community.

1.1.OVERVIEW OF THE TEXTILE INDUSTRY AND DEFINITION OF THE SECTOR

The textile and clothing sector (hereinafter "T/C indusrty") is a devirse and heterogenous indusrty which covers a wide variety of products from hi-tech synthetic yarns to wool fabrics, cotton bed linen to industrial filters or nappies to hing fashion. This diversity of end products corresponds to multitude of industrial processes, enterprises or market structure.

1.1.1.Definition of the Sector

The textile and clothing industry comprises:

- The treatment of raw materials, i.e. the preparation or production of various textiles fibres and/or the manufacture of yarns
  - "natural" fibres include cotton, wool, silk, flax, jute etc.
  - "Man-made" fibres include cellulosic fibres (e.g.viscose), synethetic fibres (e.g. organic fibres based on petrochemicals, such as polyster, nylon/polyamide,

[1] Nanotechnologies and nanoscience available at http://ec.europa.eu/research/indusrial_technologies last visited 14.11.2005

acrylic, polypropylene etc) and fibres from inorganic materials (e.g. glass, metal, carbon or ceramic) the production of knitted and woven fabrics (i.e. knitting and weaving)

- finishing activities aimed at giving fabrics the visual, physical and aethetic properties which consumers demand such as bleaching, printing dyeing, impregnating, coasting and plasticising, etc.

- The transformation of those fabrics into products

- Garments, knitted or woven (so called “clothing” indusrty)

- Carpets and other textile floor covering

- Home textiles (such as linens, table linen, curtains etc.)

- Technical or “industrial” textiles

1.2. UNION LEGISLATION APPLICABLE IN THE TEXTILE SECTOR

I.General

From industrial point of view, the Community legislation applicable in the textile and clothing sector is covered by the chapters of acquis the deal with the free movement of goods and industrial policy. There are fourt basic Council Directive and Commission Directive concerning the textile and clothing sector.

The sector is also covered by measures of toher chapter of acquis such as: competition and trade.

1.2.1. Aproximation Of Legislation

I.General

Within the enhanced pre-accession strategy, the EU assistance to the approximation of the acquis in the textiles and clothing sector focuses on three types of actions:

- Assessment of the conformity of the legal texts that are adopted by the Candidate Countries in view of approximation with the acquis

- Training seminars for officials of the Candidate Countries, twinings

- In rare cases in textile and clothing , upon request of the candidate countries negotiation of protocols

1.2.1.1. Commission Reports and "Communications"

I.General

The Commission is working with the sector to create better position for it. The Commission is concious of the fact of sectoral either crisis or needs. The Commission takes action which might potentially affect the sector.

1.2.1.1.1. Reports and "Communications"

The Commissions' first reports on textile and clothing (T&C) are COM(88)653 in 1988, SEC(90)492 and which follows on these SEC(91)405 in 1991.[2] The latest one gives more detailed analysis of the individual subsectors of the textile industry as well as regional diffirences in the degree of the modernisation of the industry and the branches of the market. The report emphasis the the scale of the changes and resulting competition which can be expected in the next few years in the light of internal market. The Commission urged national governments and public authorities to supports those regions of the Community where the textile industry has not yet sufficiently progressed, and to encourge the development of high technology in the textile sector.

The European Commission adopted a "Communication" in October 2003 on future of the textile and clothing sector in the enlarged Union. Its first communication on 29 October 2003 stated that the role of public authorities is and will remain the establishment of favourable framework conditions in which T&C, like other sectors, can develop and enjoy the oppurtunity to compete, domestically and internationally, on the

[2] Commission Report, available at www.ec.europa.eu/research/press last visited 12.05.2006

basis of equity[3] On 13 October 2004 the Commission adopted its second communication: "Textile and Clothing After 2005 Recommendations of the High Level Group for Textile and Clothing". It is outlining the key characteristics of the global textiles and clothing market and the steps necessary to ensure a healty European textile and clothing sector, taking into account the natural process Restructuring and modernisation.In the second communication, the commission built on the work carried out by the HLG and proposed a set of concrete actions to be taken at regional, national and the EU level to enchance the competitiveness of the European textile industry in a fair.

The complition of ATC(Agrement on Textile and Clothing) in 2005, after the membership of China to WTO in 2001 and Chiese unfair acts, enlarged EU has recently aware that its current strategy is not enough to compete. In order to follow up on the ideas and suggestions contained in the communication, the EuropeanCommission set up a High Level Group (HLG) for textiles and clothing in early 2004 with a mandate to formulate recommendations on an integrated set of concrete initiatives that could be undertaken at regional, national, and EU level to facilitate the sector's adjustment to major challanges, and to suggest actions to improve its competitiveness[4]. The High Level Group brings together top EU decision-makers in the sector. The objectives of the HLG is to recommend the cautions to improve competiviness of the textile and clothing sector for long time.[5] The report named "European Technology Platform for future of Textile and Clothing- A vision for 2020." mentioned recommendations on major issues affective competitiveness of the section- including innovation, education, and training, trade policy, protection of intellectual property rights, labelling and industrial co-operation [6] The European Technology Platform for textile and clothing has set up on 17.December.2004 Turkey is also taking place in textile technology platform. The platform has set up to achieve its target in 2020, three main classes, as: Standart

[3] Market Access for Textile and Clothing and Footwear, available at www.ec.europa.eu/trade/issues/sectoral/industry/textile/legis, last visited 23.11.2006
[4] High Level Group, available at www.europa.eu.int/research/press, last visited 22.07.2006
[5] İGEME, Teknik Tekstil ve Nonwowenlar için 13.Uluslar arası Teknik Tekstil Sempozyumu, Frankfurt, 6-9.Haziran.2005, pg.2
[6] www.europa.eu.int/research/press last visited 22.07.2006

Clothing to Special Clothing, New textile Applications, Mass production to Personal Production.[7]

During the meeting of the High Level Group in June 2004, recommendations for possible priorities under both the current Sixth Framework Programme (FB6) and future Seventh Framework Programme (FB7) were presented. Specific EU support was requested for a large-scale flagship research project to achieve a technology breakthrough in garment manufacture. It is mandate covered recommendations on major issues affective competitiveness of the section-including innovation, education, training, trade policy, protection of IPR labelling and industrial cooperation.Other recommendations in the clothing and textile research arena include:

- Support for the projects on fashion creation as well as new consumer or

  industrial customer services,

- Action to develop technical textiles for innovation applications

- A call for the Commission to examine state aid rules for non-technological İnnovation

- Efforts to facilitate industry participation and particulary access by small and medium-sized enterprises (SMEs) to publicly funded research and innovation programmes.

With the abolition of textile quotas on 1 January 2005, EU textile industry in under stress. Many European producers expressed concern at the sudden increase in Chinese textiles and clothing exports to the EU. On 28.04.2005 the European Commission initiated safeguard investigation for 9 key product categories. On 14 June 2005 HLG has called on the EU and the national authorities to help address the structual changes taking places in the industry by attracting new investment, providing retraining apportunities and committing social relief to the hardest hit regions. The meeting further stessed the importance for the industry to tap on the large potential for

[7] Işıl Tarakçıoğlu, Tekstil AR-GE'si Konusundaki Gelişmelerin Türk Tekstil Sanayiine Muhtemel Etkileri, Standart, Yıl:45, Sayı:532, Nisan 2006 pg. 36

export to China and elsewhere offered by the liberalisation of textile trade. The groupexpressed its support for the recent EU-China textile accord..[8]To solve this problem, an agreement was drawn up between the Eu and China - Memorandum of Understanding-MoU In June 2005. China and the EU agreed to deal to manage the growth of Chinese imports.[9] The agreement between the EU and China – Memorandum of Understanding-MoU- provided for gradual growth in Chiese textile exports, while giving the EU-25's textile and clothing through until the end of 2008. , the EU and China have agreed to grant a 3 year adaptation period during which the growth rate of Chinese textile imports will be limited in categories of concern.[10] It reintroduced quantitive limits on the most ten sensitive categories of products with tha aim of achieving fully liberalised trade by 1st January 2008.

1.2.1.2. Basic Regulations

The basic regulation about textile products were in 1986 Regulation 4136/86.[11] It laid down the detail rules governing imports of certain textile product originating in third countries. It apporoved the adoption of MFA and established quantitive limits to imports of all products from countires whose exports are subject to quantitive restrictions under MFA and the bilateral agreements negotiated with third countries. It also set out the practical procedures which have to be followed when importing textile products into the EC. The basic regulation 4136/86 on the common rules for imports of certain textile products had been admended by many time by new regulation. The regulation 3734/91 aimed to extend Regulation 4136/86 which expired at the end of 1991, for a further period of one year pending the completion of renewal process of the bilateral textile agreements with MFA suppliers.[12]

[8] "Textiles:High Level Group Discusses Industry Challenges", available at www.ec.europa.eu/research/press last visited 14.11.2006
[9] European Business Facts and Figures, European Commission 2005, pg.99
[10] "Textiles:High Level Group Discusses Industry Challenges", available at www.ec.europa.eu/research/press last visited 14.11.2006
[11] OJ 1986 L.387
[12] OJ 1991/L.352

The basic regulation under the chapter "Products not integrated WTO" is the Council Regulation EEC.No.3030/93 [13]

On 13 July 2005, specific textile and clothing goods imported from China were blocked upon their entry into the EU and import licences were no longer granted because Chiana rose the restrainets previously agreed. The situation was resolved on 7 September 2005. A new regulation enacted.

The Commission Regulation EC No. 1478/2005 of 12.09.2005 amended the annexes 5,7 and 8 of an 1993 Council Regulation on a common rules for imports of certain textile products providing for imports levels to be modified and allowing for the immediate import of all the blocked quantitives. For this part China committed not to issue any further export licenses for those of ten product categories for which the agreed quantities for 2005 had already been exhausted.[14]

1.2.1.3. Textile Directives

I.General

The proper functing of the internal market in the textile and clothing sector is based on four specific Council Directives and one Commission directive concerning labelling.

The reasons for this legislative are twofold:

- If the provisions of the Member States with regard to names, composition and labelling of textile products were vary from one Member States to another, this would create hindrances to the proper functioning of the internal market

- Consumer interests need to be protected by correct information

[13] OJ No. L275 08.11.1993, p.1
[14] European Business Facts and Figures, European Commission pg.99

1.2.1.3.1. DIRECTIVE 96/74 of the European Parliament and of the Council of 16 December 1996 on textile names.[15]

I. General

Directive 96/74/EC[16] on textile names requires the labelling of the fibre composition of textile products. It stipulates for checks on whether the composition of textile products is in confirmity with the information supplied.

The scope of the directive is, all products containing at least 80% by weight of textile fibres, including raw, semi-worked, worked, semi-manufactured, semi-made, made-up, products are covered in Directive. The labelling indicating the fibre composition is mandatory in all stages of the industrial processing and commercial distribution of a product.

The Directive contains 19 articles and 6 annexes. Articles decsribe conditions and rules for labelling of textile and the procedures for adapted.

1.2.1.3.1.1. Commission Directive 97/37/EC of 19.06.1997

The Directive 97/37[17] is adapting to technical progress Annexes I and II to Directive 96/74/EC of European Parliament and of Council on textile names. It addes four new fibres to the list of fibre names: Cashgora, Lyocell, Polyamide, Aramid.

1.2.1.3.1.2. Commission Directive 2004/34/EC of 23.03.2004

The Directive 2004/34[18] is adapting to technicall progress, annexes I and II to Directive 96/74/EC of the European Parliament and of the Council on textile names. It adds one new fibre to the list of fibre names: Polylactide.

[15] OJ L032 OF 03.02.1997 P.0038-0055
[16] OJ L 032 of 03.02.1997 p.0038-0055
[17] OJ L.169 of 03.02.1997 p.0074-0075
[18] OJ L.89 of 26.03.2004 p.0035

1.2.1.3.1.3. Commission Directive 2006/3/EC of 09.01.2006

The Directive 2006/3[19] adds one new fibre to the list of fibre names: Elastomustiester.

1.2.1.3.1.4. Commission Directive 2007/3/EC of 02.02.2007

The Directive 2007/3[20] adds one new fibre to the list of fibre names: Elastolefin

1.2.1.3.2. Directive 96/73/EC of the European Parliment and of Council Of 16.12.1996 on Certain Methods For Quantitive Analysis Of Binary Textile Fibres

I.General

In 1972 methods for the quantitive analysis of binary textile fibre mixtures were harmonized in a Directive. The Directive admended several times and finally consolidated in the this directive. The Directive 96/73/EC [21] provides for uniform methods for sampling and analysis to be used in Member States for the purpose of determining the fibre composition binary textile fibre mixtures, in order to implement directive 96/74/EC on textile names requires the labelling of the fibre composition of the textile products

1.2.1.3.2.1. Main Provisions

The Directive gives rules for the preparation of test samples. It identifies diffirent methods for the quantitive anaylsis of binary fibre mixtures. It sets up rules in case no uniform methods exists. It specifies proceedings for the adaption to technical progress

1.2.1.3.2.2. Commission Directive 2006/2 of 06.01.2006

[19] OJ L.5 of 10.01.2006 p.0014
[20] OJ L.28 of 03.02.2007 p.0012-0013
[21] OJ L.032, 03.02.1997 p.0001-0037

The Directive 2006/2[22] is amending for purposes of its adaption to technical process, Annes I and II to Directive 96/73/EC of the European parliament and of Council on certain methods for quantitive analysis of binary textile fibres adds two new fibres Elastomultiser and polylactide to the uniform test methods of quantitive analysis.

1.2.1.3.2.3.Commission Directive 2007/4/EC of 02.02.2007

The Directive 2007/4[23] adds one new fibre (elastolefin) to the uniform test methods of qunatitive analysis.

1.2.1.3.3. Council Directive 73/44/EEC of 26.02.1973 on the Approximation of the Laws the Member States Relating To The Qunatitive Analysis Of Ternary Fibre Mixture

I. General

Directive 73/44/EEC[24] provides for uniform methods for sampling and analysis to be used in Member States for the purpose of determining the fibre composition ternary textile fibres mixtures in order to implement Directive 96/74/EC on textile names requires of labelling of the fibre composition of textile products.

1.2.1.3.3.1. Main Provision

The directive gives rules for the preparation of test samples. It identifies diffirent methods for the quantitive analysis of ternary fibre mixtures. It sets up rules in case no uniform method exists. It spesifies proceedings for the adaption to technical progress.

[22] OJ L.5 of 10.01.2006 p.0010-0013
[23] OJ L.28 03.02.2007 p.0010-0013
[24] OJ L.083, 30/03/1973 p.0001-0018

1.3. THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS (CISG)

I. General

The 1980 UN Convention on Contracts for International Sales of Goods is intended to simplfy transnational goods sales by subjecting uniform law. It is applies to nearly all such sales where each party has his business in a diffirent ratifying state or where the contract is governed by the law of a ratifying country.[25] CISG regulates the circumtances which are directly and indirectly subject to it. The convention is directly applied if the regular domicile of the contracting parties are in diffirent countries.[26] The CISG will indirectly be applied if the chosen law is the law of one of the contracting state.[27] For instance, Turkish seller and Dutch buyer choose law of Switzerland. Is it CISG or only Swiss Commercial Law? Except Italian decision of 1993 it is mostly accepted that the choosen law which will be applied to essence is the CISG because if the party want to mean Swiss Commercial Law they must definitely express their demand on spesific code. Otherwise their intention may accepted more general such as internation convention which are incorporated to that law. That international conventions are a part of that law. The practise is paralell to it. Not only courts but also arbitrators accept that CISG is taking action as long as parties express specific code.[28] In this example the contract is always subject to CISG so that arbitrator should apply CISG.

In one of the decision of the ICC, the conflict arising from a sales contract between American seller and the Dutch buyer who decided on Swiss law, American seller rejected applying CISG and claimed that they actually meant "Swiss Commercial Code". The arbitrators said that "So Swiss Law consisit of the Convention itself as of the date of its incorporation into Swiss Law"[29]

[25] Michael Row, Letters Of Credit, Euromoney Publications, 1985, pg.11.
[26] Michael R.WILL, Milletlerarası Mal Satım Hukuku ve Milletlerarası Tahkim, çev.Bilge Öztan, pg.25
[27] ibid
[28] ibid.
[29] ibid

In my point of view law of this convention is supranational and its rules for substance of international commerce. Its rules regulate the substance of international commerce because there are provisions which regulate them such as offer,acceptance,delivery,damages etc. It is supranational because if it is recognised in national laws then these national laws are consist of CISG and CISG is more specific. As a general principle of law the specific rules are firstly applied rather than general rules. Consequently it will applied, even it is not chosen by parties, the applicable law is one of the contracting states' law (of this convention) then CISG is indirectly applied no matter it is choosen by parties or not. Then the damages, forced majours, hardship clauses or etc. will be defined according to CISG. My opinion is if parties want to choose a specific law rather than CISG then they must definately express that code.

UN Convention on Contracts of Sales of Goods has not been signed by Turkey by September 2006.

1.4.MULTI-FIBER ARRANGEMENT (1974-1994)

I.General

The WTO Agreement on Textiles and Clothing which is replaced the so called Multi Fibre Agreement or Arrangement is a transitional instrument, built on the product coverge basically yarns, fabrics, a programme for the progressive integration of these textiles and clothing products, a liberalisation process to progressively integration of these pillards, a specifial safeguard mechanisim to deal with new cases of serious damage, establishment of a Textile Monitoring Body to supervise the application of the agreement and other provisions

1.4.1. Legal Aspect of the MFA

The quota system started with the Long Term Agreement Regarding International Trade in Cotton Textiles (LTA) under auspice of the GATT in 1962. In

1974 LTA was extended to cover other materials than cotton and became Multi-Fiber Agreement.[30]

The textile and clothing industry was, until recently the only major manufacturing industry that was not subject to the rules of the General Agreement on Tariffs and Trade (GATT). Since 1974, world trade in textile and clothing used to be governed by The Multi-Fiber Arrangement(MFA) provided that the basis on which industrialized Countries restricted imports from developing countries.

MFA is a voluntary export restraint arrangment between contracting parties to the GATT, including the EC(EU) the US, and the developing countries most concerned with textile exports (the Mediterranean basin countires, most Asian countries).It is not just a trade defence mechanism but promotes the expansion of international textile markets by the gradual abolition of trade restrictions, especially those applying to developing countries.[31]

The MFA was designed to be a short-term measure primarily to give industrialized countries time to adjust competition from imports from developping countires.

Up to the end of the Uruguay Round, the textile and the clothing quotas were negotiated bilaterally and governed by the rules of the Multi-Fiber Arrangement. This provided for the application of selective quantitatives restrictions when surges in import of particular products caused, or theatened to cause, serious damage to the industry of the importing country. The MFA was a major departures from the basic GATT rules and particularly the principle of non-discrimination.[32] The Agreement on Textile and Clothing (ATC) occured from MFA during these negotitions. The ATC set a timetable for phasing out of the MFA in four stage January 1995, with full phase Out in January 2005. It was agreed that countires wishing to retain quotas would commit themselves to phasing them out gradually over a 10 year old period with last quota being abolisihed

[30] "Employment Strategy Paper The End of Multi-Fibre Agreement and its implication for trade and employment",available at www.ilo.org/public/english/employment/start last visited 12.11.2006
[31] The Textile and The EEC, DRT Europe Services, European Study Service, Belgium, pg.9
[32] "Textile Monitoring Body The Agreement on Textile and Clothing" available at www.wto.org/english/tratop last visited12.11.2006

1st January 2005. There are two aspects of the process 1- The integration into World trading system 2- the progressive raising of quotas. [33]The ATC was the transitional instrument to oversee the ingration of textile and Clothing products into normal GATT rules, by means of progressively removing Quotas. By January 2005 textile and clothing products were opened to Free Trade.[34]

The end of the MFA in 2005 changed world trade significantly. T&C world became more open market subject to stronger price and quality competition. [35]

There was a general assumption that some countires will gain from the phase-Out of the MFA and other countries will lose. There would be an increase in the Movement of the clothing industry from industrialised Europe and The US to proorer[36].Bangladesh was expected to lose.Also Japan, France, Germany and even the USA had lose. Once quotas are removed Bangladesh is expected to suffer from its lack of textile industry a develop infrastucture.[37] So does Thailand, Sri Lanka, the Philippines were expected to lose because they all depend on Fabric and on marketing/buyer groups over which they have little control[38] So they did.

China was expected to be a big winner and it did with supplier factories relocating from Other countires to China. Also India is the second winner from MFA. China's low cost labour force, its own textile industry andthe financial and marketing expertise of firms from Hong Kong has already emerged as a dominant supplier in spite of high quota restricitons.[39] In 2005 Chiana increased its exports to the EU by 42% in value and by 36% in volume. For categories liberalised in 2005 there was an increase in Chinana's market share by 130% in volume and 82% in value. This suggests significant falls in unit prices. In these products China, India, the USA and Turkey were the only significant suppliers to have increased their exports in 2005. Turkey's increase in

[33] "MFA", available at www.iccr.org/issues/css/mfa_factsheets.htm last visited 12.11.2006
[34] European Business Facts and Figures, European Commission pg.99
[35] "Employment Strategy Paper The End of Multi-Fibre Agreement and its implication for trade and employment",www.ilo.org/public/english/employment/start 12.11.2006
[36] "MFA", available at www.iccr.org/issues/css/mfa_factsheets.htm last visited 12.11.2006
[37] MFA, available at www.iccr.org/issues/css/mfa last visited 12.11.2006
[38] ibid
[39] ibid

exports by value was 4%[40]Chiana's share of exports to the EU in the textile categories liberalised on 1 January 2005, has increased sharply at the expense of the tradititonal EU suppliers.

The main implication of the MFA for companies are, small companies have to compete with international suppliers and for manufacturers in developing countries, the global competition means that there will be more insecurity and increased pressure to reduce.

There will be also likely negative implication for workers rights. The increase in competition at a global and a local level will intensify the downward pressure on working conditions. With no quota restriction, labour cost even more significant factor. The main shifts being predicted are to low wage economic where workers of basic labour rights.

The abolition of textile quotas on 1st January 2005 raises considerable challenges for the EU textile and clothing industry. Chiana is becoming a key growth market for European textile, exports were up 15% in 2005 and 15% in value for the first seven months of 2006. Russia is also an important market for European textiles with exports increasing by 25.6% during the sevent months of 2006.

1.5.BILATERAL AGREEMENTS

I.General

The EU has negotiated bilateral textile agreements with a considerable number of third countries which are not yet Members of WTO . Those countries are subject to quantitive restricitons and /or a surveillance regime

By the end of 1986, The EC had concluded bilateral agreements with all of its 26 MFA supplier countires. There were 3 types of agreements: normal Agreements (Fixing quotas), agreements do not fix quatos (Bangladesh and Uruguay) and exchanges

[40] "Evolution of the EU Textile Imports From China in 2005 and the first 7 months of 2006" available at www.ec.europa.eu last visited 02.10.2006

of letter- which only contain the basic clauses of normal agreements (Haiti, Guatemala, Mexico and Collumbia).

1.5.1. Legal Aspect Of Bilateral Agreements

The regime is so called "Double Checking" system is based on the following principles:

- For a limited number of product categories the supplier country has to issue an export licence

- Upon presentation by the EU importer of a valid export licence, the competent authority of the EU Member States in question has to issue an import authorisation

- In principle those double-checking agreements do not provide for any quantitive restriction. However the EU has right to request the open consultations with a view to agreeing on an appropriate quato level, if the level of imports of the product in question exceeds a certain threshold of total extra-community imports of that product. This is called "baske-exist" mechanism.

The Community objectives were such as keeping the "basket-exit" system which allows new quantitive restrictions to be introduced during the lifetime of an agreement, retaining special provisions for outward processing arrangments, introducing greater flexibility in dealing with the quota shares allocated to indiviual Member States of the EC.

In July 1991, the EC was renewing its bilateral agreements for the same period with several third countries whose agreements run out in December 1991 to extend MFA furher 17 months. This subject is negotiated with East European Countries under "Europe Agreement"[41]

[41] European Commission, European Business Facts and Figures pg.99

1.6. AGREEMENTS WITH PREFERENTIAL COUNTRIES

I.General

Association Agreements give "preferential" countries considerable commercial advantages. The main principles governing Community arrangments with preferetial countires are: guaranteed free access to the Community markets for industrial products, the establishment of a system of double control, the distinction between direct quotas and the OPT, the consultation procedure and the possibility of transfer of quotas from year to another. In this framework, Ankara Agreement which was signed between the EC and Turkey is 1963 an Association Agreement.

1.6.1. The Ankara Agreement

Ankara Agreement envisiges economic union between Member States and Turkey, freemovement of workers, capital and services, strenghtening the social relations between parties also aims the future fullmembership and it has both economic and political character.[42] Ankara Agreement's economic dimension envisiges the complition of distinctions between economy of Member States and Turkey and for this aim it envisiges financial aids[43]

In preparatory stage of Ankara Agreement interlocutory protocol article 6 regulates the tariff quotas for some group of goods, one of these goods are textile products. Despite these quotas the import to the EC during the 1963-1969, increased only % 7,6 because the supply was not enough and there had not been elasticity of demand.[44]

The quota struggle had been started between Turkey and the EC when the Great Britain had stopped export of cotton fiber from Turkey unilaterally in 1975.[45]

[42] S.Rıdvan KARLUK, Türkiye Ekonomisi Tarihsel Gelişim Yapısal ve Sosyal Değişim, 6.Baskı, Beta Yayınları, pg.588
[43] ibid
[44] Karluk, pg.590
[45] Karluk, pg.593

In 1982 the EC had got into contract with sectoral parties to restrain the export of textile goods and in 1992 the EC and the Turkey concluded and Textile Administrative Cooperation Agreement.[46] Turkey which is the Community's leading external suppliers of textile, has been difficult as for some time the Turkish government has refused to enter into a voluntary restraint agreement with th EC.

Textile sector is being used to one of the problem industry between the EU and Turkey because the EU used to keep exports from Turkey free from custom duties since 1971.[47] With Restrain Agreement in 1982 the textile sector was negatively effected.

Voluntary Restrain Agreements are informal bilateral or multilateral arrangments though which the exporting nations voluntarily restrain certain exports, usually though exports quotas, to avoid economic dislocation in an importing country and to avert the possible imposition of mandatory import restrictions by the importing country. [48]

Turkey was expected to access new market freely with its exports but the Chienese increase blocked Turkey's exports like many other countries. Chiese increase makes the decrease in exports of other countires. However Turkey increased in export by value 4% after MFA, Turkey is not able to compete with China Today, Chiana is in a dominant position in the World.

Turkey has raw material export to Chiana but Chiana has many categories of exports to Turkey[49] So that the exports from Chiana should be disiplinised.Turkish producers are leaving Turkey to move countries such as Bulgaria, Eypt where the labour cost are too low. This is also very negative for Turkey. This textile emigration affects other sectors.

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[46] ibid
[47] Harun Gümrükçü, Türkiye ve Avrupa Birliği Unutulan Yönleri, Dünü, Bugünü, ATA-Enstitüsü, Hamburg Avrupa Dizisi-15 pg.124
[48] "Gönüllü Kısıtlama Anlaşmaları", available at www.tbmm.gov.tr/komisyon/tekstil/sonuç, last visited 31.05.2007
[49] Dış Ticaret Müsteşarlığı, available at www.dtm.gov.tr, last visited 11.12.2006

Many categories of the Chienese goods are subject to new quotas until 2008. This new quotas on Chienese goods has vital importance for Turkish textile sector. To compete with Chiana and the others, until 2008 Turkey

- should change its textile policy,
- create its own designs
- create its own trade marks
- develop researchs in technical textiles
- improve export regime for healty economic development for long term between Chiana and to compete with Chiana and the others.

1.7.TARIFFS PREFERENCES

1.7.1. The Generalised System Of Preferences (GSP)

The Generalized System Of Preferences (GSP), a program designed to promote economic growth in the developing world, provides preferential duty-free. The GSP program was instituted on January 1 1976, and authorized under the Trade Act of 1974 for a ten-year period. It has been renewed periodically since 2002 though 2006.[50]

For MFA products, GSP treatment used to be conditional upon the developing country or territory having signed a bilateral self-restraint agreement with the EC Under the aegis of the MFA.

ECJ CASE 51/87 on the Allocation of the GSP According to National Quotas in 1988 the ECJ ruled against the system of allocation GSP according to national quotas. It accepted that such quotas could be necessary for administrative, technical or economic reasons. However, the imposition of customs duties in member states which have exhausted their national quotas, while the global Community quota is not yet exhausted, was inconsistent with the fact that the GSP was a community preference

[50] "Generalized System of Preferences" available at www.ustr.gov/Trade_Develpoment/Preferences_Programs last visited 14.11.2006

scheme. The importers therefore entitled to import duty free until the total, EC-wide "tariff quotas" or duty free allowances were exhausted, regardless of how they were distributed amongst the Member States. The Court's decision particulary affected textile products because many industrial products imported under the GSP were only given an EC-wide limitation to the amounts which can benefit from the scheme whereas preferences in the sensitive textiles sector were almostalways divided up by countries as well[51]

In this context the applications of GSP should be comply with 1/95 decision and like other Member States Turkey should be informed about the all applications and changes of GSP

1.7.2.Outward Processing Traffic (OPT)

The OPT is the practice by which developed countires export textiles or clothing, in not fully processed form, for further processing in another country, folowed by reimportation into first counrty.[52] Outward Processing Trade involves temporarily exporting goods out of one country to be processed and then subsequently re-importing them for further processind or/and sale. Finished products re-imported under OPT. By GSP, standart textiles or clothing goods are processed by the countries where the labour cost are too low such as Turkey. So, when the number of employer in this sector are decreasing, the income of the sector is increasing in volume 70-75%. When the goods are reimported, they subject to appropriate tariff on the foreign value-added only. OPT is typically caried out in low-wage countires and involves labour intensive process.

Council regulation 636/82(OJ 1982 L76) laid down the conditions for the application of economic outward processing arrangment to textile products and clothing faling under the common custom tariffs. This regulation provided for the situation where textile products and clothing resulting from the said third country. It also applies whenever there are specific measure applicable to products resulting from a processing operation. Under the regulation, OPT imports were often given access where conventional imports would be impossible.

[51] Textile and the EEC, DRT, Europe services, pg.28
[52] Textile and the EEC, DRT ,Europe services, pg.30

In this context, Turkish firms should take OPT into account while they exports goods.

1.8. STRUCTURAL PROFILE OF TEXTILE, CLOTHING & LEATHER MANUFACTURING

I.General

In the EU, the T/C industry is concentrated in the 5 most populated countries accounting for about three quatres of the EU production of textiles and clothing, ie. Italy, the UK, France and Germany followed Spain. As regards the two sub-sectors, textile and clothing, southern countries such as Italy, Greece and Portugual and to a lesser extend, Spain and France contribute more to total clothing production while northern countries such as the UK, Germany, Belgium, the Netherlands, Austria and Sweden contribute relatively more to textile production.On average the T/C sector plays a more important role in the economy and employment of the new Member States and candidate countries.

Italy was by far the leading textile, clothing and leather manufacturer in the EU-25 in 2002, with 24.4.billion€ of value added, which was sightly more than one third of the EU-25 total. France, Germany, the United Kingdom and Spain all generated between 8.8 billion€ and 6.7billion€ of value added while Portugual accounted for 4.6% of the EU-25 total. The manufacture of textiles, clothing and leather was also relatively important to the economies of the candidate countries of Bulgaria, Romania, Turkey.[53]

1.8.1. Employment Character of Textile Clothing and Leather Manufacturing

There is a higher proportion of women in their workforce. This characteristic was particularly strong in the case of the manufacture of clothing, excluding knitted and

[53] European Business Facts and Figures, European Commission, pg.100

crocheted articles where 79.8% of those employed in this activity in 2004 were female.[54]

1.8.2. External Trade of Textile, Clothing and Leather Manufacturing

The Eu-25 exported textile, clothing and leather goods to non-Community Countries to the value of 45.7billion€ in 2004. Leaving aside the ten key categories of Textile and clothing products for which an agreement was reached until 2008, EU-25 imports of all other, fully liberalised textile and clothing products was valued at 17.6 billion€.

T/C external trade performance more than 20% of the EU production in value is sold on the external market despite limited access to many third countries However there remain significant impediments to trade in sector, and the EU industry could increase productrion and exports to those parts of the world when the impediments to free trade were lifted.

Consequently, textile industry is one of the important sector and problem industry in both the EU and all over the World. Textile industry is a branch of classical industry and a step of new subsectors. The trend for global commerce has increased competition, especially from the large Asian textile nations. With liberalisation in this sector developed countries like France, Italy even the USA has lost their previous position in the sector. Contrast this, Asian countries like India, strengthened their position. The sinking of the EU industry is mainly caused by the labour costs differentials between developing countries and Europe. The EU industry has responded to this challenge by substantial restruction and modernisations. The EU industry is thus concentrating on the production of high-Quality out put and especially deals with techtextile.

[54] European Business Facts and Figures, European Commission, pg.103

CHAPTER 2. INTERNATIONAL ARBITRATION OF COMMERCIAL DISPUTES IN TEXTILE INDUSTRIES

I. INTRODUCTION

The extensive period of modernisation and reform of national arbitration laws within the globalizing economy is the focus of analysis in this chapter. Although the statement is still "Internatinational Arbitration" in the doctrin, the content of it is "global" not "international" anymore.

The economic dimension of globalisation as "the growing economic interdependence of countries worldwide through the increasing volume and variety of cross-border transaction in goods and services and international capital flows" effects the "international commerce" inversly to nationalisation, makes it clear from nationalisation and the globalisation led the "denatinalisation" for the needs of the market. Thus many wellknown conventions which are basis of internation arbitration are occured.

2.1. DEFINITIONS

2.1.1. The definition of "International Commerce" and "Economic Globalisation"

The expression "International Disputes" covers not only disputes between States as such, but also other cases such as, individuals, bodies, corporate and non-state entities and "International Disputes" may arise from the subject which is the core of this thesis: "International Commerce". International Commerce means that the economic, commercial and financial relations of private bodies either legal or natural which effects more than two state are regulated by International Law rules.[55]Another defination for international commerce is, the services or goods circulation between natural or legal

[55] Serap Telli, Devletler Hukuku Açısından Uluslararası Ticaret ve Kurumsallaşması, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 1991 pg.36

bodies whose domices are in diffirent countries or nationalities are diffirent or business central is in diffirent countries.[56]

In the United States to define "commercial" relationship was Island Territory of Curacao v. Solitron Devices. In this case, Solitron objected to confirmation of an award on the gorunds that the dispute was not "commercial" because the contract obligations involved performing a govermental act. The District Court ruled against Solitron holding that the purpose of the "commercial" limitation was probably "to exclude matrimonial and other domestic relations awards, political awards and the like.[57] In this context, it is clear that in the USA, the term "commercial relationship" includes employee-employer relations, fiduciary relationships giving rise to antitrust and other public law disputes cases involving claims by foreign regulatory authorities and insurance companies.[58]

The states have right of international commerce. This right is accepted within the Territory of state.[59] Today the framework of international commerce is limited by international conventions and the international institution which are established by international agreements. The states only set up the general legal framework with these international conventions, the essence is set up by international agreements.[60] It is meant that the basic equipment for international commerce is the "agreement".

Commercial Agreements are born of a union of an offer and an acceptance although under some systems one-side contracts are possible.[61] Parties should agree on all the points of their agreement because international commerce is very sensitive. The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Such as any trade transaction for the supply or exchange of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, construction of

[56] Cemal Şanlı, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, Beta Yayınları, 2.Baskı, İstanbul 2001, pg.3
[57] R.Doak Bishop and Elain Martin, Enforcement of Foreign Awards available at wwww.kluwerlaw.com last visited 12.03.2007
[58] ibid
[59] Telli pg.37
[60] Şanlı pg.5
[61] Row, pg.3

works, consulting, engineering, investment, banking, insurance,joint ventura and other forms of industrial or business co-operation, carriage of goods or passenger by air, sea, rail or road.

An international commercial agreement should content at least: First of all the parties should conclude agreement other than letter of credit. The name of the parties, the aim of the agreement, the period of agreement, the definitons of terms stated in agreement what the parties mean from them, payment, conditions of delivery, forced major and hardship clauses and choosen law and jurisdiction. The last item can be either choosen one of the national jurisidiction or another way to settle the disputes.

The general rule is to settle the disputes in courts but there may be a good reason in some cases, why the satndart way should be modified or supplemented. Parties may agree on a law and jurisdiction either one of the parties national law or another diffirent law to apply the agreement. Beside this parties may agree on an alternative way to settle their disputes.

2.1.2.The definition of "Arbitration": The Alternative Way of Dispute Solution

It should be noticed that there two convention in the EU, aiming to uniform the procedural and essential legal rules for jurisidiction and the enforcement of the judgements in civil and commercial matters in 1968 known as Brussels Convention and there is also Rome Convention. There is also another international convention not only in the EU but also many other states are recognised is the UN Convention on Contracts for the International Sales of Goods (CISG). Which is widely used both in national jurisdciton and arbitration. The UN Commission for International Trade Law is trying to persuade countries to apply common rules for international sales deals. This will later discussed.

In this part alternative settlement way of these conventions will be explained and discussed.

For some reasons parties may want alternative way which is more practical, easier, shorter than national jurisdictions.

In general, the methods of settling disputes fall into two categories:

- Peaceful means of settlement, that is, where the parties are agreeable to find out an amicable solution

- Forceable or coercive means of settlement that is where a solution is found and imposed by force

Today the most popular way of settling international disputes is the "ARBITRATION". The needs of international commerce and the procedure of resolutions make arbitration more effective.[62] Commercial arbitration has been existed since the dawn of international commerce. The one the risks of international commerce is the law system of the country where dispute arises. The practise of international commerce shows that arbitration helps to reduce the minumum risks. Then the "Arbitration", is one of the peaceful or amicable method of settling international dispute.

Arbitration is "apparently rudimentary method of settling disputes, since it consist of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties"[63]

Arbitration, a process used to settle a dispute in a non-judicial settling, is particulary effective for international commercial disputes by which parites agree to refer their existing or future disputes to neutral third party for hearing and decision.

It is a voluntary process of dispute resolution.

The arbitration is concluded the outside of formality and publicity of court law and also litigation in a foreign court can be time-consuming, complicated, and

[62] Cemal Şanlı, Uluslararsı Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, Beta Yayınları İstanbul 1996 pg.235
[63] Alan REDFERN, and Martin HUNTER and Murray SMITH, Law and Pratice of International Commercial Arbitration, Second Edition, London, 1991, Chapter 1 pg. 10

expensive. So that it allows tha parties greater flexibility than a court proceeding. Parties can decide to have abbreviated time periods in which to repond to claims, where the arbitration will be conducted how formal the process will be.

2.2. MULTILATERAL AND REGIONAL CONVENTIONS CONCERNING INTERNATIONAL COMMERCIAL ARBITRATION

1.General

There are diffirent arbitration treaties and conventions to which party or nation may adhere. One of the most important is the Convention on the Recognition and Execution of Foreign Arbitral Awards of 1958, known as the New York Convention.[64] New York Convention follows the Geneva treaties which Geneva Protocol of 1923 is the first modern international convention on arbitration and it was followed by the Geneva Convention of 1927 which applied to the execution of foreign arbitral awards.The essence of the New York convention is that subscribing nations agree that their nationals will abide by an agreement to arbitrate and that those who agree to determine their diffirences themselves, with the aid of a person or institution of their own choise will be allowed to do so without the intervention of a state.

2.2.1. The New York and The 1961 European Convention

I.General

The New York Convention which is based on two diffirent projects, one of these projects is the project of International Chamber of Commerce's project and the other is the project of the UN called ECOSOC prepared by Economic and social commitee, is for recognition and enforcement of foreign arbitral awards. The convention regulates the phase after arbitral awards[65] And also it is able to be used in

[64] New York Convention RG 25.09.1991/22002
[65] Nomer ve Ekşi ve Gelgel, Milletlerarası Tahkim, Beta Yayınları, 2000 İstanbul pg.125

the country where it is not party of the convention.[66] It shows that convention universal character.

2.2.1.1.Main Provisions Of The Conventions

Article 1 regulates the which arbitral awards are subject to enforcement. According to article 1, sentences 1, that the awards which are arbitrated in foreign country are subject to this convention. The consept of being "foreign" should be explained. Under the New York Convention "foreign" depends on 2 criteria:

- The award should be arbitrated in an other country than country where the enforcement is requried.It is meant that arbitration and enforcement are in diffirent countires.

- The awards which are accepted as foreign awards under national law. It is meant that the awards which are arbitrated by foreign authority in the same county.

As an example, if the awards arbitrated outside the territory of Turkey, these awards are "Foreign" under article 1. If the awards arbitrated in Turkey but under foreing authority (except Turkish authority) , they are also " foreign".

Another alternative is, if the awards arbitrated under non of national authority but under international institutitons they are also "Foreign".[67] If the arbitration sued under foreign arbitral procedure for example ICC in Turkey, the award is "foreign".Even it is used in recognition or enforcement in a Turkish court and the conflicts occured between turkish parites as long as the award arbitrated in foreign country.[68]

[66] M. Tupman, Staying Enforcement Of Arbitral Awards under the New York Convention, 1987 Arbitration International, pg.215
[67] Ergin Nomer, "New York anlaşmasına İlişkin Dr.Şeref Ünal'ın Tebliği ile ilgili Yorum" Avrupa New York Sözleşmeleri ve Türk Tahkim Sempozyumu, Banka ve Ticaret Enstitüsü, Ankara 1990 pg.82
[68] Feyiz Erdoğan, Uluslar arası Huku ve Tahkim, Seçkin Yayınları, Ankara,2004, pg.107; Kazancı İçtihat Bankası

Type of arbitral award		Efficiency of arbitral award
Domestic	1.Arbitral award under HUMK 2.Arbitral award under MTK	Turkish courts approve their efficiency then it can be executed
Non domestic	1. Foreign arbitral awards 2. arbitral award of international institutions	Turkish Courts enforce them then they have efficiency and can be executed

In recoginition and enforcement case, the judge should fistly determine the award foreign or not under lex fori.[69]

In decision HGK E.126 K.109 T.77.11.1951 In this case the parties want to enforce an arbitral award which is arbitrated under Argentina's Law. The High Court decided that any award arbitrated under foreign state authority accepted as foreign award.[70] This case is known as "Argentina Decision".

The second decision of Turkish High Court about this point is the decision TD 23.12.1955, in this case the "foreign" parties agree to arbitrate and the plaintiff foreign company X wants to enforce that arbitral award under Turkish Law. The High Court repeats its principle in Argentina Decision and states that any award arbitrated under foreign state authority accepted as foreign award.[71]

In decision 11HD 19.12.1985 7375-7099, the parties agree to arbitrate their conflicts and they choose a Turkish arbitrator Mr.X and they choose Turkish Law as applicable Law. Turkish arbitrator Mr.X arbitrated that the debtor will pay its debts in four installment in Paris in ICC. The plaintiff wants to enforce this arbitral award under Turkish Law. The High Court say that here there is no need of enforcement

[69] Kazancı İçtihat Bankası
[70] ibid
[71] ibid

because there is no "foreign decision" Both under "given decision under whose authorty" and also "under the law of the place of arbitration –here French Law- this award is national because applicable law is Turkish. Only ICC is a secreteriat to control arbitrator. ICC do not use its authorty.[72]

In decision 15 HD 01.03.1976 1617-1052 which a wellknow decision called as "Keban Decision". In this case plaintiff is a foreign company called X and the respondant is the DSI (Turkish Public Entitiy) conclude an agreement and under article 34 of that contract they agree of to arbitrate their disputes. Arbitrators are Turkish, the applicable law is Turkish, the contract and the arbitration clause is signed in Turkey, the contract executed in Turkey but the arbitrator become together in Paris in ICC. In this case the problem is that arbitral award is whether Tukish of foreign. Turkish Supreme Court states that if an arbitral procedure is sued in foreign country under foreign authorty that it is regared as foreign award. In this decision high court bases on criteria of territory.[73]

According to "Dissenting Opinion " it is stated that Principle of Territory is not sufficent to analyse the term "Foreign" because this what would happen if arbitrator give their decision on a plain in airspace or on high seas So that to decide under Principle of Territory shall be wrong.[74]

In my point of view, in analysing the term "Foreign" under principle of territory is not always suffice. This principle may err the judge to determine the "foreign"

However the awards arbitrated under non of national authority but under international institutitons they are also accepted as "Foreign" explained above. In decision of 15 HD 20.06.1996 2781-3553, the plaintiff is Turkish Private entity and the respondant is Turkish Public Entity agree to arbitrate according to ICC procedure in

[72] Saim Üstündağ, ve Ydr. Doç.Dr.Abdurrahim Karslı, Yargıtay Kararları Işığında Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, Fakülteler Matbaası, İstanbul 1996 pg. 375
[73] Ahmet Cemal Ruhi Gerekçeli-Açıklamalı-Yargıtay İçtihatlı MÖHUK Seçkin yayınları, Ank 2003, pg. 422; Erdoğan pg. 109
[74] Saim Üstündağ, ve Abdurrahim Karslı, Yargıtay Kararları Işığında Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, pg. 372

Turkey. The court says that the ICC is not an International Public Entitiy. It is a private entitiy. Its rules have no public effect. So that arbitral awards give under ICC rules is not related to any national authority. That is why ICC rules can not be accpeted as foreign. The award is Turkish award it is not foreign. Therefore it is not subject to enforcement.[75]

The New York Convention deals with the phase after the tribunal arbitrated.[76] The European Convention on International Commercial Arbitration[77] regulates the phases before the recognition and enforcement. This convention is prepared by UN Economic Commission and it aims to promote commerce and international arbitration and to prevent obstacles that stops or slow downs the arbitration procedure.[78]

It regulates, plea as to arbitral jurisdiction, jurisdiction of courts of Law, applicable law, reasons for award, settling aside of the Arbitral awards.

The Scope of the convention is limited by international commercial disputes Under article 1 this convention is suitable for:

- Disputes arising or shall arise from international commercial disputes and,

- Legal or real bodies whose domiciles are in diffirent countries.

Therefore to be subject to this conevention these two conditions should be satisfied. If both parties are domiciled in the same country the convention can not be regulated.[79]

The other criterion is,"the international commercial disputes". This term should be widely interpreated such as transportation of goods from one counrty to another country, international sales, licence contacts[80]

[75] Ata Sakmar ve Nuray Ekşi ve İlhan Yılmaz, Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun Mahkeme Kararları, Beta Yayınları, Istanbul pg.365
[76] Nomer ve Ekşi ve Öztekin, Milletlerarası Tahkim, Beta Yayınları, 2003, pg.47
[77] RG 23.05.1991-21000
[78] Nomer ve Ekşi ve Gelgel s.23
[79] Nomer ve Ekşi ve Öztekin pg.46

The New York Convention is both used in ad hoc and institutional arbitration[81]. It is promoted by, UNCITRAL Rules.

2.2.2.The UNCITRAL and The Model Law

I.General

UNCITRAL is the United Nations Commission on International Trade Law.[82] It exists to make the rules of international business simpler, clearer and more comtemporary and it has been working since 1966. In 1976 the decision of General Assembly 31/98 the UNCITRAL Rules are recommeded.[83]The UN General assembly elects 60 member states to form the Commission for a term of 6 years. Their role is commercial law reform. UNCITRAL has produced arbitration rules in accordance with which parties may choose to arbitrate.These rules may be used by any public or private entitiy. Flexibility of UNCITRAL Rules are suitable for countries whose social, commercial and economic systems are extremly diffirent. So that they more more popular.

2.2.2.1. Legal Fraework Of the UNCITRAL and The Model Law

UNCITRAL does not act as an arbitral institution or administer arbitration, it creates its own procedural rules, the UNCITRAL Arbitration rules. These rules are widely used in ad hoc arbitration. Not only it compose all the advantages of the arbitration but also it turns the disadvantages of it into advantages

UNCITRAL Rules are generaly used in 2 ways: (i) All or one part of UNCITRAL Rules are used in agreement, (ii) arbitration institutions do not change their name and identity but they enacts a clause in administration chapter that says " Disputes are settled by UNCITRAL Rules". Kuala Lumbur Regional Arbitration Center

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[80] ibid
[81] Erdoğan, pg.109
[82] available at www.un.org last visited 04.06.2007
[83] available at www.unicitral.org last visited 04.06.2007

and Cairo Center for International Commercial Arbitration use the UNCITRAL Rules in their administration chapter.[84]

If parties enacts a written agreement saying that "Disputes are settled by UNCITRAL Rules" will be sufficient and also parties may add[85]:

- The name of the arbitrator
- The number of the arbitrator (1 or 3)
- The place of arbitration
- The language they choose

Sometimes arbitration institutions whose rules and procedures are exactly diffirent from UNCITRAL Rules, use UNCITRAL Rules when the parties request them.[86] This alternative is used by London Court Of International Arbitration

The aim of The UNCITRAL Rules are stated in the Preamble part of UNCITRAL.Therefore the basic purpose is to prepare the common rules of arbitration for nations whose economic, social and legal backgrounds and systems are diffirent. Another aim of the UNCITRAL rules is to make arbitration based on consent of the parties more liberal free from the review of the courts.

Under article 1 of the Preamble of UNCITRAL Rules the scope of these rules are limited by commercial disputes.[87]

Although UNCITRAL Rules are for international commercial arbitration, it can also be used in International Public Law, between states. The wellknown tribunal for this, is the case between USA-Iran.[88] The Iran-USA Claims Tribunal was created by

[84] Erdoğan pg.138
[85] Turgut Turhan ve Rıfat Erten, ve K. Sedat Sirmen, ve Gülüm Bayraktaroğlu, Ticari Tahkimi Düzenleyen Temel Metinler, Ankara 2002 pg.133
[86] ibid
[87] Kemal Dayınlarlı, UNICITRAL Kurallara Göre Uzlaşma ve Tahkim, Dayınlarlı Hukuk Yayınları, Ankara 2002 pg.41
[88] Georgios Petrochilos, Procedural Law in International Arbitration, Oxford University Press, 2004 pg, 231

international agreement between those two states as apart of wider settlement of crisis situation that resulted from the Iranian revolution in 1979. Because two states had severed the crisis between them took the form of a series of declaration by Algeria as a mediating power. It is mentioned above that the Hauge Permanent Court can use the UNCITRAL Rules. So, the International Public Law arbtiration is parallel to International Private Law arbitration in the point of use of the UNCITRAL Rules. [89]

The UNCITRAL Rules do not include clear and precise provision for applicable law. So, in case of enforcement of any UNCITRAL Rule, the related provisions of the New York Convention shall be used.[90]

The UNCITRAL Rules are enacted only for ad hoc arbitration.[91] They do not refer to any of arbitration insitution and also not checked, not controled, not administered by any entitiy.[92]

In addition UNCITRAL has issued an Model Law on International Commercial Arbitration that has influenced the national arbitration legislation.

The UNCITRAL rules should be distinguish from the UNCITRAL Model Law. Model Law is a recommended pattern or template for law-makers in national governments to consider adopting as a part of their domestic legislation on arbitration.

UNCITRAL Model law has more importance because its practical consequence is the Model law is widely adopted by states' legislation. Such as Turkish Code Of Arbitration.

The 1985 UNCITRAL Model Law owes its origins to a request made in 1977 Asian-African legal Consultative Committee for a review of the operation of the New York Convention. The Committee maintained that there was an apparent lack of uniformity in the approach of national courtsto the enforcement of awards. The Secretary-General of UNCITRAL concluded that harmonisation of the enforcement

[89] Petrochilos pg.17
[90] Erdoğan pg.140
[91] Erdoğan pg.137; available at www.lectlaw.com/files/adr14htm, last visited 05.03.2007
[92] available at www.unicitral.org /dfm/resource last visited 05.03.2007

practises of States, and the judicial control of the arbitral procedure could be achieved more effectively by promulgation of a model or uniform law rather than by any attempt to revise the New York Convention.

The Model Law is structed into eight seperate chapters entitled:

- I-General Provisions
- II- Arbitration Agreement
- III- Compaosition of Arbitral Tribunal
- IV- Jurisdiction of Arbitral Tribunal
- V- Conduct of Arbitration Proceeding
- VI- Making of Award and Termination of Proceedings
- VII- Recourse against Awards
- VIII- Recognition and Enforcement of Awards

The Model Law was prepared on the basis that it would apply to "international commercial arbitration". That's why the important provisions of it relates the scope of application of the Model Law.

The term "arbitration" is not defined in the Model Law , but it was not intended to cover non-consensual, non-binding or "free" arbitrations.[93] Thus compulsory arbitration such as the Italian "Arbitrato Irretuale" does not fall into scope of the Model Law. The Model Law provides the term "commercial" wide interpretation as to cover matters arising from all relationships of a nature, whether contractual or not.[94] It does not care whether or not the parties are commercial persons under any given national law and irrespective of whether the relationship arises on the basis of a contract.

[93] Redfern and Hunter and Smith, pg.511
[94] Marc J Goldstein and Andrea K Bjorklund, Non-Judicial Developments in the International Arbitration Community, The International Lawyer, Summer 2002 Vol.36 Num.2 pg.407

The proposed Model Law provides that a conciliation is "international" if the parties have their place of business in diffirent states, if the place of conciliation is outside the state in which both parties have place of business or if a substantive part of the obligation of the commercial relationship is to be performed outside the state where the parties have their business [95]

However there is nothing to stop national legislatures from giving it a wider application, for example by including domestic commercial arbitration, and many countries may prefer to have only one law governing commercial arbitration, whether international or domestic.

The UNCITRAL is organising a congress in July 2007 "Modern Law for Global Commerce" to provide an oppurtunity to review the working methods and achievements of UNCITRAL.[96]

The New York Convention, the UNCITRAL Rules and the Model Law represent a significant contribution to the development of the international arbitral process which is desing to produce a binding and enforceable method for the resolution of the disputes in international trade.

2.3.THE AGREEMENT TO ARBITRATE

I.General

The arbitration agreement is a specific agreement[97] The *conditio sine qua non* of arbitration is the arbitration agreement.[98] Because it serves to evidence the consent of the parties to submit to arbitration and this consent is indispensible to a process of settling disputes which depends upon the agreement of the parties for its very existence.

[95] ibid
[96] available at www.uncıtral.org last visited 22.04.2007
[97] Nuray Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, Beta Yayınları , I.Baskı, İstanbul 2004, pg.44
[98] Erol Ertekin ve İzzet Karataş, Uygulamada İhtiyari Tahkim ve Yabancı Mahkeme Kararlarının Tenfizi ve Tanınması, Seçkin Yayınları, Ankara 1997, sf.70

2.3.1. Elements Of Arbitration Agreement

The definition of arbitration agreement is stated in article 2 of the New York Convention. Therefore it is the agreement between the parties, to resolve the disputes occure whether from contract or not, current or future, all or a part of disputes by arbitration. The UNICITRAL Rules do not explains the definition of the arbitration agreement as the New York Convention.

Arbitration agreements classified into two groups according to conluding time:

- The arbitration agreements conluded at the same time with basic contract
- The arbitration agreement concluded after the dispute arised[99]

Also there are two categories of arbitration agreements:

- More common one is, an agreement to submit "future" disputes to arbitration. This type of agreement usually takes the form of an arbitration clause in the principle agreement between parties
- The second is an agreement to submit "existing" disputes to arbitration, an agreement of this kind is commonly referred to as a "submission to arbitration agreement agreement" or simply a "submission agreement"[100]

The arbitration agreement are often concluded at the same time with the basic contract and the parties often determine the arbitral details like the arbitrator, the place of arbitration after the disputes arise.[101]

The concept of arbitration agreement does not contain certain elements. It is meant that the parties may mention their arbitration consent in every way, *"arbitration in Istanbul"* is even sufficient.[102] The optimal way to draft an appropriate arbitration

[99] Nuray Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg46
[100] Redfern and Hunter and Smith pg. 253
[101] ibid
[102] Ertekin ve Karataş, sf. 73

clause that sufficiently meets their needs. The examples of model clauses recommended by institutions are:

- **Unicitral Arbitration Clause,** *"Any dispute, contraversy or claim arising out of or relating breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Unicitral Arbitration Rules as at present in force"* Parties may wish to consider adding (a)The appointing authority shall be....(name of institution or person), (b)The number of arbitrators shall be.....(one or three), (c)The place of arbitration shall be....(Town or country), (d) The languages to be used in the arbitral proceeding shall be.....

- **ICC Arbitration Rules**, *"All disputes arising in connection with the present contract shall be finally settled underthe Rules Of Arbitration at the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules"* The parties should choose the place of arbitration otherwise, the ICC will choose

In Continental Law, the arbitration agreement which is concluded after arising from disputes called "COMPROMISE", the arbitration agreement which is concluded by a clause in the basic contract is called "CLAUSE COMPROMISSOIRE".[103]

The arbitration agreement can be formed during the negotiations or after a legal disputes arises. This apporach is same in Code no 4686 article 5.[104] So, if a arbitration agreement is concluded during the jurisdiction of a national court, that national court should stop continuing the jurisdiction.

The Turkish code 4686 is differs from UNCITRAL Rule in the scope of the arbitration. According to Turkish Code conflicts may arise not only from commercial disputes from contracts but also unfair acts and unjust enrichment.

According to UNCITRAL Rules article1/1 where the parties to a contract have agreed in writing that disputeİn relation that contract shall be reffered to arbitration

[103] ibid
[104] Ertekin ve Karataş, sf.71

under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these rules subject to such modification as the parties may agree in writing.[105]It is also clear from this article that the consent of arbitration should be "written."

The UNCITRAL Model Law article 7/2 the arbitration agreement shall be "written". The arbitration agreement shall be written. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or in exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and reference is such as to make that clause part of the contract.

The European Convention is flexible about the form of the arbitration Agreement. According to European Convention arbitration agreement can be an agreement or clause under article1/2 –a but clause or agreement should be written and the written form of arbitration agreement or clause is so wide, letter signed by both parties, fax, telgram, exchange of documents etc. is accepted Turkish International Arbitration Code number 4686[106] which envisiged the ad hoc arbitration and based on UNCITRAL Rules and Swiss Private International Code,[107] the definition of arbitration agreement has vital importance because the agreements which do not comply with the definition stated in International Arbitration Code are invalid.[108] The Code n.4686 has ad-hoc character,which understtod from the arcticle 8/A.

"*The term "arbitration agreement" shall be either an arbitral clausein a contract or an arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations*

[105] available at www.unicitral.org UNICITRAL Arbitration Rules Introductory Rules Article 1/1 last visited 22.04.2007
[106] Milletlerarası Tahkim Kanunu Kanun No 4686, Kabul Tarihi 21.06.2001, RG 05.07.2001 ve 24453 sayılı RG
[107] Nuray Ekşi, Miletlerarası Tahkim Kanunu Hakkında Genel Bir Değerlendirme, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Yıl 23 Sayı 1-2/ 2003
[108] Ertekin ve Karataş, sf.70

between States whose laws do not require that arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws"

The article 2 of New York Convention regulates that the arbitration agreement should be "written" (subparagraph 1) and subparagraph 2 rules some types of written agreement as an example" because there has been a communication revolution since New York was established in 1958. So that convention did not subject the form of agreement to applicable law, it exactly regulates[109]

In decision 19.HD. 1997/7119, 2000/1342 24.02.2000 the high court said that the arbitral clause is a *"sine qua non"* of enforcement case. First of all, there must be a case which will be sued under arbitral procedure. For that, there must be an arbitration agreement between parties to settle the disputes arising or shall arise from basic contract. Then, under New York Convention this agreement must be written. As explained what the "written" means in the same article such as a letter signed by both parites, fax etc., in the case there was not signiture of respondant. So that the local court must reject the enforcement demand of the plaintiff.[110]

In decision 19.HD. 2001/9357, 2002/4209 03.06.2002, there were 3 diffirent sales contract between parties. Contract of 11.03.1998 ther is an arbitration clause and the contract of 17.04.1998 refer to the first contract but in last contract of 16.03.1998 there is no clause or reference. Under arbitration clause the ICC is charged and the case was arbitrated under ICC. In decision of 19.06.2000 of ICC it is stated that the plaintiff is creditor of respondant and ICC's decision became exact. Then the plaintiff applied to the Istanbul Commercial Court for enforcement. Istanbul Commercial Court accept the enforcement. It is reviewed by Turkish Supreme High Court. High Court stated that there wasn't any agreement or clause of arbitration in the contract of 16.03.1998. Although these three contract are chained, it is not possible to interpret that the last one is subject to arbitration because under New York Convention the written agreement or

[109] Redfern and Humter abd Smith, pg.148
[110] Kazancı Yargıtay İçtihat Bankası 2006

clause is clearly and definetly required. So that the local court shoul reject the enforcement case.[111]

In decision 9HD 08.05.1997 9616/4669, the parties argree on FOSFA Arbitration. Later the respondant could not pay by letter of credit because of "Gulf War II". It is objective impossibility. The repondant accepts to pay and there is letters between parties about the impossibility and about letter of credits. The High Court accepts these letters as an arbitration agreement under New York Convention.[112]

Laws of the most countries now recognise agreements made by modern methods of communications such as exchange of telex, fax.

Under Turkish Law the arbitration agreement should be written. The written lettes, excahnge of letters, telex,telegrams exchange by faxs, document signed by parites, electronic agreement or no objection to arbitration agreement in the petition are also accepted as arbitration agreement. [113] So that Turkish International Arbitration Code is harmonized by both New York and European Convention[114]

In French Law, Nouveau Code de Procédure Civile the arbitration agreement are regulated but French Law does not requires the form for arbitration agreement. The German Law bases on UNCITRAL Model Law, the form of arbitration Agreement should be signed by both parties such as telex,exchange of fax So does any document including arbitration consent which is accepted by the other party[115] It is meant that the oral arbitration agreements are not acceptable under German Law.

In Netherlands, however the written form is not required the arbitration agreement should be proved by a written document. Parites can agreed together for arbitration agreement orally but they shall present a written document of arbitration agreement .[116]

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[111] Kazancı İçtihat BAnkası
[112] Sakmar ve Ekşi veYılmaz, pg.365
[113] Ekşi, Milletlerarası Tahkim Kanununa Genel Bir Bakış pg.307
[114] Erdoğan, pg.204
[115] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Tahkim Anlaşmaları pg.56
[116] ibid

In Switzerlad, the written form is rquired but the signiture is not needed. The written agreement can be fax, letter, or any other way of written document used in communication.[117]

In American Law, the federal Arbitration Act requires written arbitration agreement. The British Arbitration Code is only accepts written arbitration agreements.[118]

The national court of Norway "Halogaland Court Of Appeal" does not accepts the arbitration agreement by e-mail in its deicison 16.08.1999. It says that the electronic way of arbitration agreement does not satisfies the requirement of New York Convention. This is not sufficient for to be "written" becuse it is not reliable enough[119]

The Model Law, The German Procedural Law article 1031 and the British Arbitration Law chapter 5 and 6 accepts the incorporation reference of arbitration agreement.[120] The Model Law article 7 regulates the arbitration agreement s by incorporation references. Model Law accepts the incorporation references as long as it become a part of basic contract. Beside this the New York Convention does not includes a clear provision about incorporation reference.[121] The New York Convention only counts the types of "written" form of arbitration agreement under article II/2 but this provision is not *numerous clauses* it only gives examples for written agreement.

2.3.2. The Validity Of Arbitration Agreement

According to New York Convention the validity of arbitration agreement is depends on the applicable law. The "Proper of the Law" of the arbitration agreement is the law governing its validity, meaning and scope, the validity of the notice to arbitrate, the constitution of the tribunal and the jurisdiction of the arbitrators[122]

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[117] ibid
[118] ibid
[119] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg. 159
[120] Ekşi, Milletlerarası Deniz Ticareti alanında "Incorporation Yoluyla Tahkim Anlaşmaları, pg.9
[121] Ekşi, Milletlerarası Deniz Tiareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.166
[122] Clare Ambrose and Karen Maxwell, London Maritime Arbitration, LLP 2nd. Edition, London pg.42

The intention of the parties is the basic criterion for applicable in order to determine it. In absence of any implied or express choise of law, the arbitration agreement will be governed by the system of law with which the agreement has its closest and most real connection.[123] If the parties have not expressly agreed the law which is govern their contract, recourse must be had to surrounding circumtances, which may indicate an implied choise of law or the system to which the arbitration agreement is most closely connected.[124] In this context, for instance, if London is choosen as the seat of arbitration, then it will be a strong proof that the parties intended to choose English Law.

In Star Texas case, a charterparty arbitration clause provided for "arbitration in Beijing or London in defendant's option". The Court Of Appeal rejected the submission that the arbitration clause was governed by implied choice of a "floating" proper law, holding that it was only where a single place of arbitration was selected by parties that implied choice of law could be made out. The court accepted that English law applied to the arbitration agreement because this was the system with which the contract had the closest connection.[125]

Other relevant factors to determine the closest connection are such as, the language which the agreement is made, the nationality of the parties, the currency in which any payment is to be made, the place of performance of the contract.

It was expected that the law governing the main agreement it would be same that of arbitration agreement but in absence of an enforceable arbitration agreement, it will rarely bu useful to draw a distiction between them.

In Sumitomo Heavy Industries Ltd v. Oil Natural Gas Commission, the parties chose ICC arbitration in London and they agree on Indian Law as applicable law. The

[123] ibid
[124] ibid
[125] Ambrose and Maxwell, pg.43

court found that the proper law of the arbitration agreement was properly Indian Law but the English Law is governing the procedure of arbitration.[126]

In XL Insurance Ltd v. Owens Corning the parties to an insurance contract agreed on arbitration in England under provisions of the Arbitration Act of England but the governing law is the American Law. Cpurt found that by stipulating for arbitration in London under the 1996 Act the parties has impliedly chosen English Law as the proper law of the arbitration clause.[127]

In The Atlantic Emperor case, an arbitration clause providing for London arbitration had been telexed to buyers but had not been acknowledged by the sellers. I was held that the putative proper law of the arbitration agreement was English Law. Therefore English Rules of contract concerning offer and acceptance would be used to determine whether an agreement had been concluded.[128]

Briefly, if there is no choice about law and jurisdiction, then the arbitral place of law shall be binging to determine whether or not arbitration agreement is invalid. In other words the concept that an arbitration agreement is governed by law of the place in which it is held and that is "forum" or "seat" or "locus arbitri" of the arbitration. In this contex the "seat" of arbitration must be taken into consideration.

Every arbitration must have a "seat" and the "seat" of arbitration is ordinarily the place where the parties have agreed that it should be held.

The New York Convention maintains the reference to "law" of the country where the arbitration took place" and synonymously, to "the law of the country where the award is made"If the arbitration agreeement is null under arbitral place of law so that award could not be enforced under New York Convention.[129]

The Model Law has same approach. It provides that it is applied only if the place of arbitration is in territory of the state. Arcitle 20 of Model Law states that the

[126] Ambrose and Maxwell, pg.44
[127] ibid
[128] ibid
[129] Erdoğan, pg.111

parties agree on the place of arbitration and the tribunal to meet any place it is considers appropriate. It is said that "place of arbitration" in Model Law is a legal term of art rather than a point on the map.

It was recently uphelded by Court Of Singapore, that the court was face to apply article 34 of the Model Law in the respect of arbitration agreement which the seat of it was in Jakarta. The award was stated to have been made in Jakarta, but hearings took place in Singapore as a convenient location.The Court said that an award is to be regarded as having been made at the agreed seat of arbitration whose law governed the arbitral proceeding because it was so chosen.[130]

English Law recognises that the "seat" of the arbitration means more than its geographical location, it connotes the legal place of the arbitration.[131]

The element "seat of arbitration" has significant legal consequences. The seat of arbitration determines the applicable provisions on arbitration of the place, access to courts for assitance in constituting the arbitral tribunal and the jurisdiction of the courts to rule upon applications to set aside any arbitral award. It is important to recognize that the seat of the arbitration is a legal concept and should not be confused with the place where the proceedings are conducted physically.

An arbitration agreement should be valid even if the seat of the arbitration is not expressly designated as the seat is not an essential element of the arbitration agreement.

In summary, the first argument determining the validity of arbitration agreement is determing the applicable law. In this context, the applicable law to an arbitration agreement is only concerns with the rules of procedure and that the parties may formulate these for themselves. Secondly the law of the place of arbitration will be applied.

[130] Petrochilos, pg.73
[131] Ambore and Maxwell pg.46

Another arguement in "validity of arbitration agreement" is that invalidity prohibits any case of enforcement and invalidity may occure from many diffirent ground.

Article 8/1 of UNCITRAL Model Law, the arbitration agreement is valid as long as that agreement is incapable of being performed and article 36/1-a ruled that if one of the parties is incapable under applicable law or that agreement is contrary to mandatory rules of that state then arbitration agreement is invalid. It is almost same under 5/2 and 9/1-a of European Convention. Article 5/2 regulates that *"Pleas to the jurisdciton reffered to in paragraph 1 that have not been raised during the time limits there referred to, may not be entered either during a subsequent stage of the arbitral proceeding where they are pleas left to the sole discreation of the parties under the law applicable by the arbitrator, or during subsequent court proceeding concerning the substance of the disputes or enforcement of the award. The arbitrator's decision on the delay in raising the plea, will, however, be subject to judicial control".* Article 9/1-a regulates that "*The settling aside in a contracting states of an arbitral award covered by this convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a state in which, or under the law of which the award has been made and for : a- the parties to the arbitration agreement were under the applicable law to them, under some incapacity or said agreement is not valid under the law to which parties have subjected it or failing any indicatio thereon under the law of the country where the award was made"*

The Turkish International Arbitration Code has same apporach. Under article 4/III to determine the validity of arbitraiton agreement under any kind of law system, it is subject to consent of parties. If parties choose a law to settle their disputes according to that law, then that law is binding in determining the validity of arbitration agreement.[132] If not then the validity of arbitration agreement is checked according to Turkish Law. So that parties have a chance to choose a law to apply their case and if they do not under territorial principle the arbitral place of law shall be applied to the

[132] Karataş ve Ertekin, pg.77

case.In case of applying Turkish Law as law of place of arbitration, the judge should not take care of Conflicts of Law becuse according to Code Turkish Law is directly and exactly applied to the arbitral procedure as long as the arbitration agrement is not contrary to Turkish Law.[133]

Another point for validitiy of arbitration agreement is "written form" of arbitration agreement that it explained above. If the arbitration agreement is not written then that agreement is invalid under both international conventions and Turkish International Arbitration Code.

If the arbitrator dies, does not accept to be a arbitrator or resign this time arbitration agreement shall be invalid. The arbitration agreement is diffirent from agreement on choosing the arbitrators. In Decision 11.HD 07.06.1981 2726-3508 the parties choose the Chamber Of Commerce of Paris instead of International Chamber Of Commerce as arbitration institution. Then the plaintiff claims that however Paris Chamber Of Commerce is written they meant the ICC But the Chamber Of Commerce Of Paris does not have propety of arbitration so arbitration clause is invalid because it is impossible to arbitrate. Contrary to this plaintiff claims that the consent of arbitration is clear and exact infact they wanted to mean ICC. The Turkish High Court says that this time arbitration agrement is invalid because the agreement on arbitrators is invalid. Interpretation of arbitrators can not be as wide as interpretatiton of arbitration agreement.[134]

Other types of invalidities are, fault, fraud, threat. If arbitration agreement is signed under fault, fraud or by threating the validity will be determined under applicable law.[135]

Validity of arbitration agreement of clause is parallel with severability of arbitration agreement or clause which is explained below. The question is whether arbitration agreement stays valid in case invalidity of basic contract. In other words what would happen if basic contract is signed by fault fraud or threa.t As a principle the

[133] ibid
[134] Üstündağ ve Karslı, pg.377
[135] ibid

basic contract and arbitration agreement of clause are severable but in practical difficulities it has no efficiency. However some authors claims that it would not effects arbitration agreement but according to Nuray Ekşi, the reason of invalidity of basic contract should be analised. If it is invalid such as one of parties of arbitration agreement is not a part of the basic contract, then here there is not valid arbitration agreement.[136] In other words, inspite of severability of arbitration agreement, some types of invalidities may effect the validty of arbitration agreement or clause.[137] But the claasification of types are not certain.

According to Cemal Şanlı, the arbitration clause in basic contract which is invalid because of fraud, fault both basic contract and arbitration clause is invalid. Inversely, for the other reasons the arbitration agreement and basic contract should be analylised seperately.[138] Such as; if the basic contract is subject to approval of a public body for validity and that basic contract is invalid because of deficiency of approval the arbitration agreement is still valid. The arbitration agreement here do not need any approval. So that the deficiency of approval in basic contract do not effect the validity of arbitration agreement because arbitration agreement is not subject to any approval in this example.

According to Nuray Ekşi deficiency of approval of a public body effects the validity of arbitration agreement.[139]

In my point of view, the first condition for arbitration agreement is the "consent" to do it. There is a written arbitration agreement .Arbitration agreement is autonom from the basic contract as a principle. Thus the arbitration agreement satifies all the condition of a valid arbitration agreement and it is autonom. Thus deficiency of approval in the basic contract is not related to arbitration agreement. According to my idea it does not effect the validity of arbitration agreement.

[136] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşları, pg.49
[137] ibid
[138] ibid ;Şanlı 1996, pg.120
[139] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları pg.50

What would happen if the attoyner does not have any valid proxy or the arbitration agreement is not signed by representative of the company? Pierre Mayer says that in these cases the invalidity of basic contract effects the validity of arbitration agreement.[140] Turkish Supreme Court reflects this approach in its decisions[141] Here, I am agree with this idea because the consent for arbitration shall be showned by the signiture of representative of the company.

New York Southern Court, Belship Navigation Inc. v. Sealift Inc. (USA) case it is stated that the arbitration agreement stays valid despite of the validty of charterparty[142]

In my point of view, the validity of basic contract do not effect the validity of arbitration agreement in general even as a principle unless there is no common invalidity cases such as, fraud, fault, incapability of one of the parties, or lack of approval or signiture of representative of the company because in these the consent for basic contract and consent for arbitration agreement or clause is almost similar.

Other problem is the validity of arbitration agreements by incorporation references. In practise the validity of incorporation references are subject to basic contracts or standart contracts. This is a problem of severability of arbitration agreement.

Consequently it is meant that the invalidity of arbitration agreement can occur the contrary to "written" or form of agreement or the content of arbitration agreement.

The contrary to form of arbitration agreement can be claimed during the arbitral procedure. This time arbitrators must checked the validity of arbitration agreement under arbitral procedure. The applicable law in determining the invalidity of arbitration agreement is discusting. The problem is which law will be applied to decide whether arbitration agreement is comply with the "form" of the agreement or not.

[140] Pierre Mayer, The Limits Of Severability of the Arbitration Clause, Improving the Arbitration Efficiency of Arbitration Agreements and Awards, 40 Years of Application of the New York Convention, ICCA Congress Series, N.9 Hauge pg. 264-265
[141] Kazancı İçtihat Bankası, 18HD 15.01.1995 9105/9685
[142] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorproation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.51

According to an approach in doctrin to decide the validity of the form of an arbitration agreement the international commercial relation shall be considered instead of of national laws because national law can not be easly foreseen, some of the national laws are hardly strict about the form of the arbitration agreement.[143] This validity is about the "form" of the arbitration agreement.

According to another idea in the doctrin, the validity of the form of the arbitration agreement under ICC arbitration, ICC law article 54 regulates the seperability of arbitration agreement so no matter whether parites choose applicable law or not because whatever the applicable law is can not be applied under article 54 of the ICC Rules. So it would be much better that the arbitrator shall decide under international commercial relations[144]

Another approach in the doctrin states that the New York Convention article 2 is binding for all contracting states.[145] Another idea states that the arbitrators shall apply the law of the place of arbitration[146]

Mostly, the concept of arbitration agreement is it procedural agreement or basic agreement is trying to be determined before deciding the applicable rule or law to validity of the form af the arbitration agreement. I do not agree with this approach because in arbitration there are more than one national law. The aim of the parties in arbitration is to be free from national laws and to be more flexible. In this respect, firstly the arbitrators should define validity of form of arbitration agreement widely so it would better to apply the international commercial relations secondly international conventions because the contracting states are agree on these conventions. It is meant that they accep them and they are common amoung these contracting states. If there is chosen law for basic contract my idea is to apply this chosen law to validity of arbitration agreement. However both two agreements are seperate, the chosen law means parties are agreen on

[143] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.73
[144] ibid
[145] ibid
[146] ibid

it so applying that law would not contrary to consent of parties even it is more suitable, lastly the law of the place of arbitration.

The invalidity of arbitration agreement can be claimed during the annullment of arbitral award or appeal of the arbitral award.[147]

The parties may appeal to the national court despite the arbitration agreement. This time parties may claim the invalidity of arbitration agreement in the courts. The plaintiff may think that the arbitration agreement is invalid and the plaintiff may demand to sue his case and reject the validity of arbitration agreement in the court. This time the judge shall decide whether the arbitration agreement "the form of it" valid or not according to lex fori.

Another problem is if it is possible to claim the invalidity of arbitration agreement during the enforcement case. According to Ekşi, the invalidity of arbitration agreement is claimed before the enforcement phase it is exact to claim it again.[148] Here the problem is the use of "goodwill". If invalidity is not claimed before the enforcement could it be contrary to goodwill? My idea is, if the party who claimed the invalidity during the enforcement did not have a chance to claim before than it may be claimed. It is not contrary to use of goodfaith.

The New York Convention allows the parites to claim invalidity of arbitration agreement during the enforcement of arbitral awards.[149] Although the name of the New York Convention is the "Recognition and Enfrocement of arbitral awards the article 1 of its effectiveness convention states that this convention regulates the prepatory phase of the arbitration agreement.[150]

If the invalidity of the form of the arbitration agreement is claimed during the enforcement case and it would not contrary to use of goodfaith how would judges decides; according to lex fori or any other rule?

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[147] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmları, pg.66
[148] ibid
[149] Ziya Akıncı, Milletlerarası Tahkim, Beta Yayınları, Ankara 2003, pg. 82-83
[150] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg. 77

According to UNCITRAL Model Law and other national laws which are based on UNCITRAL Model Law , the law of the place of arbitration shall be applied if place of arbitration and place of jurisdiction are in same country. For example if place of arbitration is in Istanbul and the enforcement case is in Istanbul Courts then applicable law to validity of the form of the arbitration agreement is Turkish Law.

The problem occurs when the place of arbitration and enforcement case are in diffirent countries. How will German Court decide validity of arbitration agreement in France in enforcement case in Germany? According to an approach in the doctrin, the law of the state where the enforcement case is sued might be more flexible in determining validity of the form of the arbitration agreement and it would be more strict if the validity would have been checked under New York Convention. [151]

The courts of Netherlands decide validity of form of the arbitration agreement according to New York Convention if the place of arbitration is in contracting state, if not Dutch judges decides according to lex fori[152]

According to Nuray Ekşi, the formal validity of the arbitration agreement is subject to lex fori. The arbitration agreement is procedural agreement under Turkish Law because its results are occur in procedural law. If there is a valid arbitration agreement then it prevails the authority of naitonal court. Then procedural results of arbitration agreement should be subject to lex fori[153]

I do not agree with this approach because, here the concept of arbitration agreement is determined according to Turkish Law but the arbitration in here is for international disputes. The arbitration agreement is procedural agreement in Turkish Law. Beside this it might be regarded as main agreement in other national laws. My idea is, if the disputes arising from international commercial relations, if the parties are from diffirent states, diffirent laws then we should be more flexible to all arbitral details to make possible the valid arbitration agreement because the consent of parites is to

[151] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.79
[152] ibid
[153] ibid

settle their disputes in arbitration. In this respect I agree with the practise of the courts of Netherland. It is more fair to decide the validty if the parites are from contracting states of New York Convention. If the place of arbitration is in contracting state then New York Convention is applicable if the lex fori is not applicable.

In addition in determining validity of form of the arbitration agreements by arbitrators and by national courts distinguishs. In my point of view -stated above- the arbitrators are more flexible in applying rules, the national courts are more strict than arbitrator. To make arbitration agreement valid the national courts should interpret widely.

Another question is validity of form of the arbitration agreements by incorporation reference. How will the arbitration agreements by incorporation references are decided whether their form is valid or not? The written document is important to prove the consent of arbitration and the arbitration agreements by incorporation references can not be occur without any written document. I think in this subject it is easier to decide it valid or not. In every case arbitration agreement by incorporation agreement is valid under New York Convention because it is written.

Consequently, I understood from validity is:

- Formal Validity: That an arbitration agreement is valid when it is made in writing as such as, by telegram, telex, fax, exchange of letters or any other means of communication which enables it to be evidence even an issue which is incorporated by reference into an agreement

- Substantive Validity: An arbitration agreement is valid provided that it complies with either the chosen law or with the law governing the subject matter of the dispute. In this contex, the starting point is determining the “consent”. There must be a real consent. It must not be effected by fraud, fault or threat.

Lastly the scope of arbitration agreement must be valid. It is meant that the dispute should be available to be settle in arbitration. In other words the disputes must be arbitrable.

The arbitrability will be explained later.

2.3.3. Severability Of Arbitration Agreement

Validity of arbitration agreement is not related to validity of basic agreement. These both agreements are difffirent from each other. The invaliditiy of one do not effects the validity of the others.[154]

If arbitration agreement or clause would be invalid because of invalidity of basic contract, the disputes would not have been settled because arbitration would not have any affect. The arbitration agreement or clause are severable from the basic contract.[155]

It is meant that term "validity" of basic contract will be sued by arbitration procedure. The arbitrators will decide whether is valid or not. If arbitrators decide that the basic contract is invalid it would not have changed the validity of arbitral decision.

In many counrties the arbitration agreement or clause is regared as another agreeement from the basic contract. It is called "autonomy of arbitration agreement" in German and Fench Law and "Severablity or seperability" in Anglo-Saxon Law.[156] An independent or autonomous arbitration clause gives an arbitral tribunal a basis to decide on its own jusidcition, even if it is alleged that the main contract has been terminated by performance or by some intervening event.[157]

The autonomy of the arbitration means, that an allegation that the main contract is invalid does not jeopardize the validity of the arbitration agreement relating to the contract , even if it is incorporated in it, and that the arbitrator hearing the case by virtue of the agreement must make a rulling on the issue, i.e. make a decision on the validity of the main contract.[158]

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[154] Karataş ve Ertekin, pg.78
[155] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg. 48
[156] Karataş ve Ertekin, pg. 79
[157] Redfern and Hunter and Smith, pg. 160
[158] Ulf K. Nordenson, ICC, 60 Years of ICC Arbitration, A Look of the Future, ICC Court Of Arbitration, 60th Anniversary, 1984, Paris, pg.301

Autonomy of arbitration clause was disgussed during the preparation of Model Law and it was considered that its main purpose was to give the arbitral tribunal a basis to decide on its own jurisdiction*: "The main practical advantage of this principle is that it constitutes a serious bar for a party who desires delay or wishes to repudiated his arbitration agreement, to subvert the arbitration clause by questioning in court the existence or validity of the arbitration agreement."* (by quesitoning the validty of the main contract)[159]

There is a direct connection between autonomy of the arbitration clause and the power of an arbitral tribunal to decide upon its own jurisdiction.This is known as "Doctrine of Competence/ Competence".[160]

UNCITRAL Rules article 21(2) staes that a decision by an arbitral tribunal that the contract is null and void "shall not entail" ipso jure the validity of the arbitration clause. So does Model Law. Both UNCITRAL Rules and the Model Law (art. 16-1) provides: *The arbitral tribunal may rule on its own jurisidiction including nay objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause"*

Some commentators suggest that the arbitration clause will survive even if the main contract which contains it provides to be null and void[161] The annullment of basic contract shall be distinguish why the basic contract is invalid because in some cases the invalidity reasons of basic contract shall effect the validity of arbitration agreement. It must be considered the reasons for which the contract is found null and void, for instance that one of parties claims that he was not party to the main contract.

[159] ibid
[160] Refern and Hunter and Smith, pg.177
[161] ibid

Thus in Pyramide Case, the Egyptian Government's claim that it was not a party to the contract was upheld by the court at the place of arbitration[162]

Principle of the severability of arbitration agreement is stated under article 4 of Turkish International Arbitration Code. This article also allows to draft arbitration agreement for future dispute. But for drafting arbitration agreement for future disputes, there must an existing legal relation. However it is possible to draft arbitration agreement for future disputes in practise, it is accepted only for present disputes.[163] Because in definition of arbitration agreement in Turkish International Arbitration code it is stated that "disputes arising or shall arise from an existing legal relation"[164]

In decision 18.HD 15.01.1995 9108/9685 the Turkish Company and Bulgarian buyer concluded two sale contract. The dispute arises from the arbitration agreement. The Plaintiff claims that there is a another valid arbitration agreement diffirent from sale contract. The respondant claims that there is not valid arbitration agreement because the representative of the Turkish company does not sign the agreement. The signiture is fake. There is not any rule about the conditions of capability to conclude arbitration agreement both under the New York Convention and Turkish International Procedural Code but under Code number 2674 article 8 states that the capability of rights and actions of a person is subject to person's national law and under Bulgarian Law the representation of a company is subject the law of the place of the centre of company. Therefore, the capacity to enter into arbitration agreement shall be decided under Turkish Law because the center of the company is in Ankara.

According to Turkish Law, the two agreements are seperate from each other. The sale contract is a main contract and the arbitration agreement is a procedural agreement. So that they are seperate. There is a valid sales contract because the buyer made its payment and the seller deliveried the goods but the validity of sales contract does not effect the validity of arbitration agreement. Therefore, the validity of arbitration agreement should be analysised.

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[162] ibid
[163] Ekşi,Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.49
[164] Karataş ve Ertekin, pg.75

The respondant Turkish Company claims that the signiture is not belong to their representative. The local court determined the fake signiture. It is meant that the arbitration agreement is not valid because it not signed truely under Turkish Law.

Finally, the invalid arbitration agreement prevails the acceptance of enforcement submission.[165]

2.3.4. Arbitration Agreement Under The Light Of Principles Pacta Sund Sevanda and Rebus Sic Stantibus

The international commercial contract are performed same as national contracts. Wars, revolutions, natural disasters and economic upheavals may stop a sale. If performance of contract becomes impossible, the law will take action to terminate or suspend the contract. This is called "Frustration" in common law and "forced majeure" in civil law.[166] In some countries, West Germany or Egypt for instance, the judge can modify the terms of a contract that has run into difficulties, and produce a result that is fair for both parties.[167]

All legal systems agree on one point: only in exeptional circumtances will parties be relieved of their obligation.

The principle "Pacta Sund Sevanda" states that the parties of contract are binding with the provisions of contract.[168] Sometimes the performence could be impossible sometimes because of wars, revolutions, natural disasters, economic upheavals this time parties may leave the principle pacta sund servanta and the principle and the principle "Rebus Sics Stantibus" takes action. "Rebus Sics Stantibus" means that in these cases the parties may be relieved of their obligation from the contract or may revise the contract according to new conditions.[169]

The contract is concluded under conditions of concluding date. That conditions may change during the time, particulary economic changes are usual. For instance,

[165] Üstündağ ve Karslı, pg.383
[166] ROW, pg.11
[167] ibid
[168] Şanlı, 2001, pg.3
[169] ibid

change of economic conditions in Turkey is very often because Turkey does not have stable economy. These changes sometimes can effect conditions: against honesty, justice, goodwill.

These two principle is the most widely recognised principle in international law. [170] In such circumtances the arbitrators will find that parties will not be legally binding with contract. As stated above as seen below, these exeptional circumtances are almost common in every law system. In Sapphire v. National Iranian Oil Company, the court applied the Pacta Sund Servanda Principle. It stated that this principle is common for both parties and it is one of the most accepted principle in international law so it could be applied whole agreement.[171] In Liamco v. Libya and Tabco Decision the court stated that the agreement which is occured freely as a consent of parties could be binding.[172]

The principle Rebuc Sic Stantibus is also applied in Iran v. USA tribunal.In Quetesch Decision arbitrators decided that the Iranian Islamic Revolution is a ground for Rebus Sic Stantibus becuase tthe difficulites of performance of contract becasue of radical changes in Iran. It would be dishonest to demand the performance.[173]

In my opinion international agreements should be legally binding with under "Pacta Sund Servanda" principle because the conditions are precise and clear to accept the impossibility.

The second principle "Rebus Sic Stantibus" is compliting the first principle. It is the result of Pacta Sund Servanda. Pacta Sund Servanta makes the agreement annul and the Rebus Sic Stantibus make agreement alive again. In my opinion, the Rebus Sic Stantibus should be accpeted too but the problem occurs which law will be binding and practically can it be revised?

[170] Yusuf Çalışkan, Milletlerarası Tahkimde Ahde Vefa ve Sözleşmenin Değişen Şartlara Uyarlanması Prensiplerinin Uygulanması, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni Yıl 24 1-2/2001 pg.365
[171] ibid
[172] ibid
[173] ibid

I do not think that the Rebus Sic Stantibus can be applied in a case, however theoratically it can. Also the aim of arbitrator is to resolve the conflicts. In some circumtances in Turkish Law besides the resolutions of conflicts the judge has authority to change the conditions of contract. By the it should be notice that this authorty is very exeptional. I do not think that arbitrators can do it because the authorty of arbitrators is not equal with authorty to judges. Arbitrators acts as judges but their authorty is not as wide as judges'.

If an international commercial agreement which is subject to international arbitration needs to be revised under these two principles, which law the arbitrators will apply? Chosen Law is for basic contract. In this case basic contract is not valid nowon. So that the its provisions about chosen law is invalid too. The other alternative is the law of the place of arbitration. If the revision of the contract under principle Rebus Sic Stantibus by the law of the place of arbitration, the unwanted law, even non of the parties states' law will be applied. Then can it be said fair for both parties? In my opinion, to revise the contract under the law of the place of arbitration is not fair neither seller nor buyer. The law which will take action is very irrelevant with the intention of parties however the basic item for contracts is the intentions of parties.

As mentioned just above the principle Pacta Sund Servanta stops the agreement which is against the goodwill. In one of the decision of ICC, the arbitrators did not accept the changes in prices as a parameter of Pacta Sund Servanda. [174] I agree with this decision because my idea the parameters of Pacta Sund Servanda should be very exeptional circumtances that to one one can resist to want the performance of agreement. If so, this demand will be dishonest behaviour. My idea is to revise the agreement under Rebus Sic stantibus can be difficult. In revising an agreement it is needed to be reconcluded or changed. How it will be done is problem. Which law the arbitrators will apply is discussing. The practical resolution is to concluded Hard ship or Forced Major clauses in basic contract and regulates them in details especially long-term agreement should exactly contain detailed clauses to cope with such events.

[174] Şanlı, 2001, pg. 39

2.4. ARBITRABILITY IN TEXTILE SECTOR

I. General

Arbitrability is a prerequisite to the validity of an arbitration agreement. Parties may conclude arbitration agreement only about the subject which they personally and freely arrange[175] The consept of arbitrability relates to public policy limitations upon arbitration as a method of dispute settling. Each state may decide, in accordance with its own economic, social policy, which matters may be settled by arbitration and which may not. Arbitrability, then, is concerned with the question of whether a dispute is capable of settlement by arbitration under applicable law, in other words is this kind of dispute which relevant law allows arbitrators to resolve or does it fall within the reserved domain of courts?

2.4.1. Concept of Arbitrability

The consept of arbitrability, sometimes referred to as "Objective Arbitrability" relates to whether or not the subject matter of the dispute may be validly submitted to arbitration.[176] "Subjective Arbitrability" encompasses capacity and broadly refers to whether or not a specific entitiy or person may be party to an arbitration .[177]

It becomes necesary to consider the types of disputes which states might consider not capable of settlement by arbitration. Relevant subject-matters for consideration include competition laws and antitrust matters, matrimonial status, bankruptacy, and certain intellectual property rights.[178] Some matters of public law nature, such as criminal law, do not admit of settlement by private parties.[179]

There is a two-step process to determine if a dispute shall be subject to arbitration:

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[175] Süha Tanrıver, Yabancı Hakem Kararlarının Türkiye'de Tenfizi Bağlamında Kamu Düzeninin Etkisi, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Yıl 17-18/ Sayı 1-2 1997-1998 pg.469
[176] Zina Abdullah, The Arbitration Agreement, International Arbitration In Switzerland, A Handbook for Practititoners, The Netherlands, 2004 pg. 21
[177] ibid
[178] Redfern and Hunter and Smith, pg.143
[179] ibid

- The parties should specify in an arbitration agreement or in an arbitration clause of a contract whether disputes will be subject to arbitration

- The parties should consider that the law of the country in which the arbitration takes place may prohobit arbitration for certain types of disputes. The types of disputes that are considered arbitrable varies amoung countries. ***Arbitration in commercial matters are normally encourged. In this framework the disputes in textile sector are arbitrable.***.

2.4.2. Arbitrability and Antitrust &Competition Issues

The concept of arbitrability has been substantially considered within the evalution of competition-law rules, as their high importance for the operation of an economic, social and political system chosen by the law-maker and mainly their direct interventionist role, have triggered many courts to consider whether antitrust claims are admissibly and legitimately arbitrable.

The US Supreme Court has described the "public order" nature of antitrust laws:

" Antirust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill Of Rights is to the protection of our fundemental personal freedoms."[180]

Within the same spirit, the ECJ has declared that:

"...according to Article3(g) of the EC Treaty(now after admendment Article 3(1)(g), Article 85 of the Treaty (now after admendment Article 81) constitutes a ***fundemental provision*** *which is essential for the accomplish of the tasks entrusted to the Community and, in particular for the functioning of the internal marketand the alter*

[180] United States v. Topco Associates, Inc. 405.U.S.596,610 available at www.jus.uio.no/lm/eu last visited 25.07.2007

that ... the provision of Article 85 of the Treaty may be regarded as a matter of ***public policy****.*[181]

Within the EU, a number of courts have recognised Article 81 as a matter of public policy within the meaning of the New York Convention In a case, the Swiss Federal Tribunal held that an arbitral award, which disregard the application of EU competition law, was not contrary to public policy insofar as the parties had not alleged that the agreement at stake was incompatible with EC competition rules.[182]

In Mitsubishi Motors Corp v. Soler Chryler-Plymouth Inc. case whilst the US Courts emphasised its strong presumption of favoring and upholding international arbitration agreements, the Court reserved the right to review any award that violate US antitrust law. The Court held that the antitrust claims were non-arbitrable even though it had agreed to arbitrate them and reasoned that " *the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make...antitrust claims... inappropriate for arbitration*." [183]

The various non-arbitrable subject matters differs from country to country. In spite of this divergence, it is remerkable that the question of a non-arbitrable subject matter has been raised in relatively few cases under the Convention. The Italian Court has decided that the question of the validty of a trade marks that were being used in Italy was non-arbitrable, requiring the public prosecutor's intervention. The Belgian Court refused to enforce an award under the Convention on the ground of non-arbitrable subject matter in view of the need for protection of the weaker party.[184]

Under Turkish law beside, the New York Convention article V/2a and also Turkish Code number 2675 article 45/c states that arbitrability depends on national rules as long as they allow this kind of arbitration. In this respect, for example under Turkish Law, arbitration agreement can not be concluded disputes arising from;

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[181] C-126/97 Eco Swiss China Time Ltd. V. Benetton International NV, ECR[1999] I-030055, para.36 and 39
[182] Abdullah, pg. 23
[183] R.Doak Bishop and Elaine Martin, Enforcement of Foreign Arbitral Awards, available at www.kslaw.com/library/pdf/bishop.6pdf pg.30 last visited 12.02.2007
[184] ibid

- Immovables
- Matrimonial relationships
- Bankruptacy
- Criminal jurisdition
- Administrative jurisdiction
- Law of persons
- Not contentinous cases

The subjects which are not arranged by the parties freely and personally are essentialy related to term "public policy" of that state. In other words the grounds of limitation of arbitrability is the idea of "protecting public policy".[185]

2.4.2.1. Evaluation Of Arbitrability Of Competition Law Disputes.

The antitrust and competition issues provides a good exmaple of arbitrability. The evaluation of the arbitrability of a competition law disputes is mainly influenced by (a) the states policy for or against arbitration itself as a settlement mechanism, (b) the application of public order rules in arbitration proceedings.

The issue of the arbitrability of antitrust claims has been heavily influenced by the evolution of the state attitute towards arbitration in general. It is like historical development.

The "public order" concept is inevitably linked to national core values reflecting public law choices of a constitutional character, amoung which competition issues serve as an illuminating example.

It has for some time been clear, both in the USA and the EU that antitrust cases are arbitrable. In the famous Mitsubishi Case the Court of Appeal in the USA in an

[185] Tanrıver, pg.470

enforcement case decisided that antitrust issues arising from an international contract were arbitrable contrary to Federal Arbitration Act. The Court rejected the old-fashioned mistrust and hostility towards the arbitrability of antitrust claims and confirmed a policy favouring the arbitral settlement of disputes arising from federal statutes of a public order.[186] The Court proceeded with two important qualifications: firstly, it recognise that the public order nature of the US antitrust laws had to be respected by the arbitrators even though the parties had chosen the Swiss law as applicable, for it was the breach of the US antitrust laws that "created" the relevant claim, and secondly it also recognised the possiblity for a state control carried out at the recognition of the award phase in which a court may be asked to review whether the antitrust laws had been properly applied and fully respected.The Court states that " *We conclude that concerns of international commity respect for the capacities of foreing and transnational tribunals, and sensivity to the need of the international commercial system for predicability in the resolution of disputes require that we enforce the parties' agreement even assuming that a contrary result would be forthcoming in an domestic context* .[187]

In the EU as well, "competition and antitrust claims are arbitrable. The ECJ implicity acknowledged arbitrability in Nordsee Case where the ECJ confirmed that EC competition law, as public order rules should be respected and applied by any arbitral tribunal, in any case that a private commercial transaction involves a restriction of competition that significantly affects trade between member states and irrespectively of the choice of law the parties involved have opted for.[188]

"... Community law must be observed in its entirety thoughout the territory of all the meber states, parties to a contract are not, therfore,free to create exceptions to it.. "[189]

[186] Mitsubishi Motors Corporation v. Soler Chrysler Plymouth, 473 U.S 614
[187] Abdullah, pg.21
[188] Case 102/81 Nordsee deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefisherei etc., ECR[1982] 1095, para.14
[189] ibid

The fundemental character of the EC competition law provisions has also been confirmed in the Eco Swiss case[190], where the ECJ was confronted with the question as to whether the arbitrators were obliged to apply EC competition law *ex officio* namely to apply EC competition law even though neither party had raised such an issue during the arbitration proceedings. This was a case reffered to it under Article 177 of the Treaty by a national court before which the losing party took the position that there had been a violation of public policy. The ECJ reflect,ing second qualification in Mutsubishi Motors Case, recognised in essence the public order nature of thet EC Competition Law and most importantly, the duty of member state courts when reviewing arbitral awards, to order annulment in case there is a breach of community competition law provisions:

" It follows that where the domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the provision laid down in Article 85(1) of the Treaty."[191]

Each state may have its own policy on antitrust and competition issues but the position of Member States are diffirent because the EU's anti-competition laws have a public policy nature. Competition is a basic mechanism of the market economy and encourages companies to provide consumers products that consumers want. It encourages innovation, and pushes down prices. In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others.

The antitrust area covers two prohibition rules set out in the EC Treaty:

- First, agreements between two or more firms which restrict competition are prohibited Article 81 of the EC Treaty, subject to some limited exceptions. It prohibits practices which restrict or disort competition.This provision covers a wide

[190] See supra, note 211
[191] ibid

variety of behaviours. The most obvious example of illegal conduct infringing Article 81 is a cartel between competitors (which may involve price-fixing or market sharing);

- Second, firms in a dominant position may not ause that position in Article 82 of the ECTreaty. This is for example the case for predatory pricing aiming at eliminatingcompetitors from the market.

The Commission is empowered by the Treaty to apply these prohibition rules and enjoys a number of investigative powers to that end (e.g. inspection in business and non business premises, written requests for information, etc). It may also impose fines on undertakings who violate EU antitrust rules.

Since 1 May 2004, all national competition authorities are also empowered to apply fully the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions so as to protect the individual rights conferred to citizens by the Treaty.[192]

To avoid EU competition law being circumvented by arbitral awards, the European Commission by Regulation 17/62[193] used to require that parties to an exemption notify it of all arbitral awards relating to the agreement. Under Regulation 17/62, the EU has sole jurisdiction to declare exemptions under the Article 81(3) of the EEC Treaty. While this regulation was in effect, arbitrators could not hear petitions for Article 81/3 exemptions. If the arbitral award had effect of extending an exemption beyond permissible limits, the exemption may be withdrawn. This was a public policy measure designed to ensure that exemptions which were an exception from normal rule prohibiting restrictive trade practise.

[192] available at www.europa.eu.int/comm/overwiev/antitrust last visited 22.04.2007
[193] OJ 13, 21.02.1962

2.4.2.2. Modernisation of The EU's Competition Law and Its Implications In Arbitration Proceedings

On 1, May 2003, Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of rules on competiton laid down in article 81 and 82 of the Treaty[194] became effective, replacing its legendary predecesor Regulation 17/62 which esteblished a centralised monitoring system under which agreements liable to restrict and affect trade between Member States in order to qualify for an exemption, be notified to the Commission. The Key changes in the new regulation are as follows:

- The system of prior notification and authorization is abandoned, which means that private undertakings no longer need to notify their respective agreements to the Commission in order to avoid null and void or to avoid pay fines but to have assess their commercial agreements themselves

- It abandons their prior centralised notification and authorization system regarding the application of Article 81/3. Under the new regime, Article 81(3) can be directly invoked by parties before a national court or competition authority which can decide whether its conditions are fullfilled and grant an exemption from the application of the Article 81(3).

- Finally, Regulation 1/2003 provides a mechanism of close cooperation between the Commission and national courts and competition authorities in order to ensure the uniform application of the EU Competition Laws in an enlarged EU.

To sum up, under new Regulation which became directly applicable in all member states as of May 1, 2004 the EU no longer has exclusive power to make Article 81.3 exemption decision. That power is now also expressed shared with the national courts of member states. The cooperation between national court and the Commission in the application of the Article 81 of the Treaty omitted any reference to arbitral tribunals. Accordingly, it is reasonable to conclude from this ommission mat arbitrators have no power to rule on Article 81.3 petitions.

[194] OJ L1, 16.12.2002

The Commission begun in 2005 a reflection on the policy underlying Article 82 and the way in which it should enforce that policy. This review aims to set out in a clear and consistent manner theories of harm underlying the application of Article 82 based on sound economic assessment and to develop practical and workable rules, which take into account the reality on the market. At the same time the Commission remains committed to firmly enforce all aspects of Community competition law to help strengthen the European economy to the benefit of all EU citizens.In 2005 the Commission published a Staff Discussion Paper[195] for discussion with the public. The paper describes a general framework for analysing abusive exclusionary conduct by a dominant company. Where a dominant company is present on a market, competition on that market is already weak. The concern of the competition rules is therefore to prevent conduct by that dominant company which risks weakening competition still further, and harming consumers, whether that harm is likely to occur in the short, medium or long term.

In Summary, competition and antitrust rules have public policy nature because of the especially in the view of the need for protection of the the weaker party.Thus, if any disputes arises out of any said agreement that is contrary to arbitrators should declare themselves to be out of jurisdiction or at least apply EU Law just as national courts of Member States. How they would apply is another problem. In my point of view, the decision related to a matter where the applicable law is a law of a Member State, then it inecessarily incorporates EU Law. In other words, If the chosen law or the law of the place of arbitration is one of the member States law then the arbitrator shall apply the EU law.

The ground for limitation of arbitrability, the state's approach to arbitrability depends on the state's social and economic character and especially to public policy. International public policy may also limit the scope of what is arbitrable.

In the meaning of the context of this thesis, it is arbitrable and has a public policy character not only in a specific manner in the textile sector but also in general all the sale contracts in textile sector are subject to EU competition law which is

[195] available at www.europa.eu.int/comm/overview/antitrust last visited 22.04.2007

recently recognised as a matter of public policy both in theory and practise in Member States' court.

2.5. *"ORDRE PUBLIC"* AS A BENCMARK OF THE ARBITRABILITY

I.General

The term "public policy" – or to borrow from French *"ordre public"*-can be defined as; the complition of rules which protects the political,social, economic, moral and legal order and basic interests of that society in a certain period of time[196]

The definition of public policy is relevant and the consept of it is also releated to time, place and subject of state.[197]

2.5.1. Evalution Of Public Policy

As time has changed the term "public policy" has changed. It is directly related to period of time. After the entrance of Turkish Civil Code no 4157 the age of marriage has been changed as, the age diffirence between man and women in a marrige has changed under the principle of equality of the sexes. While the prior civil code was in effect, the women could marry at the age of 15 when men could marry at the age of 17. This divergence has been changed and the requisite age became 17 for both sexes under the reason of the needs of time.

Public Policy term is also related to place where it is accpeted. The states' public policies are diffirent from each other. Every state has diffirent public policy.It is meant that the term public policy has "national" character.[198] When, German Law allows marriages between relatives in Turkish Law, marriages between uncle or aunt and nephew or niece are null.[199]

The position of gained rights according to foreing law systems are allowed under Turkish Law as long as they are not contrary to Turkish Public Policy. For

[196] Tanrıver pg.476
[197] A. Gündüz Ökçün, Devletler Hususi Hukukunun Kaynakları ve Kamu Düzeni, Sermaye Piyasası Kurulu,2.Baskı, Yayın no 108 Ankara 1997 pg. 111
[198] ibid
[199] ibid

example, if parties get married in the UK and one of them is incapable this marriage might be valid according to British Law but it is invalid to Turkish Law. So it is accepted as invalid under Turkish Law.

Lastly public policy is releated to subject such as plural marriages are invalid in Turkey but valid in Iran.

Another discusting point, is the definiton, reason of "public policy" in national law and international law same? According to Süha Tanrıver, Public Policy in national alw and in internation law are distinguish in content and function of public policy[200] In international law the " public policy" is more restrained than in national law. In national laws the public policy functioned to limit the freedom of intentions.In contracts, in international law the public policy is functining to prohibit applying foreign law, enforcing foreign arbitral awards or excuting that foreign arbitral award.[201]

In my opinion, the public policy should narrowly defined both in national law and international law. Particulary in international law, to restrain any thing for the public policy there must be sufficiently clear and precise proofs to apply public policy.

In decision of Turkish Court of Appeal 15.HD. 22.09.1989, the plaintiff is M.A.N German Company wants to enforce the arbitral award and the defendant Turkish Company claims its conversy to Turkish Public Policy. This decision is before the New York Convention get in effect in Turkey so the enfrocement part will be discussed later. In this case Turkish Defendant claims the conversy to Turkish Public Policy in,

- Interference of secreteriat of ICC
- Abjuration from arbitral appeals
- Infrigment of right to defence

[200] Tanrıver, pg.477
[201] ibid

a-Interference of ICC: As long as ICC is an international institution, its interference on form of given arbitral award is not conversy to public policy becasue ICC is not the only secreteriat.

b- Abjuration from arbitral appeals : Despite Turkish Law, according to ICC rules, the article 24 it is accepted that parties may abondon of arbitral appeals. In some parts of international commerce is directly subject to national. In Turkish Law it is refused to abondon to appeal. If the arbitral award would be given under Turkish authorty, it would have been contrary to Turkish Public Policy.

c-Infrigment of right of defence: In the case the notification is comply with ICC rules,

proofs are analised by arbitrators, then it is impossible to talk about infrigment of defence. Under New York convention for an infrigment of defence, there should be invalid hearing or invalid representation of a defendant.

Consequently, the Turkish High Court refused the appeal of enforcement case.[202] The conditions and requirements of enforcerment will be discussed next chapter.

Another decision of Turkish High Court is the decision HGK.20.06.1973, E.1972/1-147, K.529. The case is about a sale contract. The sale is a FOB. The parties are agree on arbitration but the buyer party is Romania. In 1970's Romania used to be a socialist state and all commercial relations are sought by state. So that there was a clause that foresees an appeal to Socialist Commercial Chamber before to appeal arbitration. The turkish defendant claims that this clause means infrigment to arbitration and it is contrary to Turkish Public Policy but the high court refuse its claims and states that this clause is compulsory because of system buyer party and Turkish seller knows it

[202] Günseli ÖZTEKİN, Yargıtay 15HD 22.09.1989 tarihli Kararın Eleştirisi, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Yıl 13, Sayı 1-2 1993, pg.40 vd.

before concluding arbitration agreement so that it can not claim that it not comply with turkish public policy.[203]

Its efficency is so wide that not only private bodies but also other foreign states can not interfere.The inteferance is called "Mandotory Rules."[204] Mandatory Rules reflects the state's political, economic, social policies on private bodies[205]. However ther is no common definition of Mandatory Rules, the concept of mandatory rulesin international law are wider that the mandatory rules in national law. In national laws all mandatory rules do not direct applicablity but in internation al law mandatory rules have direct applicability.The exeption to direct applicability ,final and binding character of arbitral decisions is contraversy of arbitral awards is mandatory rules of enforcement place.[206]

2.5.2. Mandatory Rules

I.General

The public policy concept has gained currency under the label of the so-called "mandatory rules" which formulate public law provisions allowing for no derogation. The concept of Mandatory Rules are related to term "Public Policy" of that state. So does Public Policy, the mandatory rules have diffirent meaning in national law and international law. All mandatory rules in national law can not be regarded as mandatory rules in international law.[207] If a "foreing" legal relation is relating to a national rule which is about that state's political, social or economic order, then that rule should be directly applied that foreing legal relation.

2.5.2.1. Legal Aspect Of The Mandatory Rules

Mandatroy Rules of Law are defined as imperative provisions of law which must be applied to an international relationship irrespective provisions of law that

[203] Üstündağ ve Karslı, pg.373
[204] Ekşi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.31
[205] ibid
[206] Erdoğan, pg.125
[207] Ekşi, Milletlerarası Deniz Tşcareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, pg.33

governs that relationship, they are a matter of public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant conflicts-of-law rule.[208]

According to an approach in doctrin, the rules which are about that state's political, social, economic order are not mandatory rules because mandatory rules are aiming to protect a group of people who are not in a strong position as consumers. It is said that *"if we aim to protect state's any policies, then we do not mean to protect weaker part."* [209]

For example in Turkish Code number 2675 does not include the mandatory rules. In other words there is not clear provision about which rules are mandatory, in he code. The judge should decide whether it is mandatory or not. To do it judges should consider the aim of the provision, which interest are taken into care, why it isneeded etc. In my opinion it would better to define the aim of mandotory rules and the concept of it rather than define it . As in public policy these terms should be narrowly defined because they are so abstract and it gives judges wide authority of creation of law. It is more suitable to enact legal arrangments instead of expecting judges to make reasonable practise.

Under article 5/2-b of New York Convention, if a arbitral award is contrary to public policy of the state where that arbitral award is required to enforced, that national law may prohibit the enforcement. Therefore, the New York Convention is allows the national laws to interfere recognition and enforcement of the arbitral awards. In this framework, judges should automatically checked if the arbitral awards comply with public policy.

Judges have wide authority to interfere the international arbitral awards. However the essence of the New York Convention is to widespread the recognition and enforcement in diffirent countries, judges' wide authority hinders this principle. Finally

[208] Gordon Blanke, The Role Of EC Competition Law In International Arbitration: A Plaidoyer, EC Competition Law in International Arbitration, ELBR, 2005, pg.172; D.Hochstrasser, Choice Of Law and "Foreign" Mandatory Rules in International Arbitration, Int Arbit. Vol.18(5), pg.97
[209] ibid

it is said to be that judges should be equal to public policy and international arbitral awards.

When the UNCITRAL Rules are contrary to national mandatory rules, that mandatory rules shall be used on behalf of UNCITRAL Rules. Under article 2/1 of UNCITRAL Rules *shall govern the arbitration except that where any of these Rules is İn conflict with a provision of the law applicable to the arbitration which the parties can not derogate, that provision shall prevail.*[210]

In Turkish Code number 4686 International Arbitration Code, "Contrary to Public Policy" is regulated as a ground for refusal of annulment case. According to code number 4686, the binding and final arbitral awards can only be subject to an annulment case if there is a valid ground which is counted by code under article 15. Also Turkish Code 2675 article 45 regulates the contrary to public policy is a ground for refusal of enforcement.

In decision 15.HD. 1996/2707 1996/2585 13.05.1996, the high court said that the parties may choose arbitral procedures as long as it is not contrary to Public Policy. Otherwise this arbitration is invalid.[211]

In decision 13HD.25.04.1991, the high court refuses the enforcement case because in the case, one of party forced the other party to conclude an arbitration agreement. Concluding an arbitration agreement by forcing the other party with its economic influence, changing the equality in the contract in favor of its interests causes the invalidity of that arbitration agreement and also the arbitral awards which are arbitrated in this position is accepted as "contrary to public policy". [212]

In decision HGK 09.06.1999, 19/467, 489, the article of an aribtration agreement which allows choosing arbitrators preferencly is valid.[213]

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[210] available at www.unıcıtral.org UNCITRAL Rules Introductory Rules Article1/2 last visited 22.04.2007
[211] Kazancı İçtihat Bankası
[212] Nomer, pg.423
[213] ibid

In these two decision of Turkish Court Of Appeal, it is defined that the equality of parties in arbitration agreement is accepted as a matter relating to public policy. So does Frech Cour De Cassation. French Cour de Cassation in decision "Dutco" case, in which an ICC award was set aside on grounds of public policy because the requirement that multiple defendant nominate a single arbitrator while a sole claimant also nomianated a single arbitrator violated the principle of equality of parties.[214]

In decision 15HD.2383/3667 10.07.1991 the case is about foreign exchanges. The parties agree on ICC arbitration. In enforcement case the pliantiff claims that this kind of arbitration agreement is contrary to public policy because arbitrators are not independant and demands to determine the invalidity of arbitration agreement.The local court refuses the case saying that it isn't contrary to public policy because the parties are freely choose arbitration and ICC arbitration is acceptable in Turkey. The arbitral procedure is comply with the ICC Rules so that it is not possible to claim that arbitrators are not independant.[215]

In my opinion if arbitrators would have been forced to arbitrate and would not been independant it would be contrary to public policy of Turkish Law because independance of judges are regulated under Turkish Constitution and this provision serves to satisfies the guaratee of fair justice. This would be contrary to public policy, and Turkish Constitution article 166 would be mandatory rule here.

In decision 9HD 1996/8273 1997/265 23.11.1997, the high court refuses enforcing a case where the right of defense is infriged. The parties choose aribtration and choose Moscow International Arbitration Court but the Russian Party did not call the other party in arbitral procedure. The case arbitrated and the Russian party submit their enforcement demanda nd during the enforcement case the respondent party claimed that they did not call to the aribtration and it infringes their right to defense. Turkish high court says that, however the arbitration agreement is valid but the pliantiff party did not give chance to listen to the respondent. The respondant party might have had valid reasons to not to fufill their burdens. Also under Turkish Constitution article

[214] Goldstein, pg.399
[215] Sakmar ve Ekşi ve Yılmaz pg.351

36 everyone has right to defense. So that infrigment of right to defense is accepted as contrary to public policy.[216]

To accept a contradiction of Turkish Public Policy, that foreign arbitral award must definately infridges the essential principle of Turkish Law, or any mandatory rule or equity and justice.[217] Then contraversy to public policy must exactly clear and precise.

The International Commercial Arbitration Committee of the International Law Association states that International public policy which is applied by State Courts to foreign awards rather than domestic awards.[218] "International public policy is understood to be narrower than domestic public policy: not rule of law which belongs to the *ordre public intene* is necessarily part of the *ordre public extene* or *international"*[219]

ILA noted that the International Public Policy of any State includes:

- Fundemantal principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned

- Rules designed to serve the essential political, social or economic interests of the State, these being known as "public policy rules" or "lois de police"

- The duty of the State to respect its obligations towards other states or international organisations[220]

International Public Policy also includes both substantive and proceduralprinciples.Substantive public policy goes to the enforcement and recognition of rights and obligations by a tribunal or enforcement court in connection with the

[216] Sakmar ve Ekşi ve Yılmaz pg.366
[217] Tanrıve,r pg.479
[218] Audley Sheppard, "Public Policy and The Enforcement of Arbitral Awards: Should there be a Global Standart", available at www.ıto.publicpolicyantritrust last visited 22.04.2007
[219] ibid; Hochstrasser
[220] ibid; Blanke

subject matter of the award, as opposed to procedural public policy , which goes to the process by which the dispute was adjudicated. [221]

An example to substantive public policy is the principle of goodfaith or prohibition of abuse of rights, an example of a procedural principle is the requirement that the tribunal are impartial.

Another problem which should be taken into consederation is the time period which the public policy is concerned because as mentioned above the consept of public policy changes by time. It is not stable. Then to determine conversty to public policy, the public policy at the time of enforcement should be taken, not the time of arbitral award.[222]

Lastly, ordre public is also recognised and protected stricly in Turkish Law. Some examples to refusal of enforcement in the meaning of contraversy to public Policy under Turkish Law;

- Arbitral award stem from a contract which is prohibited by Turkish Law such as piracy, terrorism, genocide, smuggling, drug trafficing[223]

- It is impossible to enforce two arbitral awards about a same event which are contrary to each other [224]

- Infrigment of equality of parties, unfair behavioaurs of arbitrators to parties.

While determining the judges' unfair and injustice behaviours it should be very careful, these circumtances must be sufficiently clear and precise.

- Infrigment of indepencancy and impartiality of arbitrators

[221] ibid
[222] Tanrıver pg.480
[223] ibid
[224] ibid

2.6. ENFORCEMENT OF ARBITRAL AWARD

I.General

The purpose of the arbitration is to achieve a binding determination of disputes. Once an arbitral tribunal has made its award, it has fulfilled its function and its existence comes to end. A party who succeds in an international commercial arbitration expects the award to be performed without delay. If the award is not carried out voluntarily, it may be forced by legal proceedings because the losing party has more room for manoeuvre. The losing party may carry out the award disagreeable thoguh it may be to do so, secondly he may use the award as a basis for negotiating a settlement or finally, he may resist any attempt by winning party to obtain recognition.

Majority of awards are performed voluntarily. When losing party fails to perform the award, the winning party will need to submit enforcement to the court of losing party.

Important international treatieas and conventions relate to the recognition and enforcement. The most significant and widely used one is the New York Convention. It sets out the procedure to be followed for recognition and enforcement of foreing arbitral awards with limited grounds on which recognition and enforcement of such awards may be refused. (These conventions are instrument of international law but their applications with respect to any particular award will be matter of national law.) However the New York Convention does not prevails the application of other agreements between these states. Article VII of the convention provides that the New York Convention shall not affect the application of the other bi- or multilateral treaties entered into by the contracting states concerning the recognition and enforcement of arbitral awards.

2.6.1. Court Enforcement Of Arbitral Awards

The effectiveness of arbitration in providing final and binding resolution of international commercial disputes depends upon the ability to obtain court recognition and enforcement if a party refuses to satisfy an award. The New York Convention

provides that each contry must “recognise” arbitral awards as binding and enforce them in accordance with rules of procedure of territory where award is relied on. This means the party only needs to supply the local court with an authenticated original or duly certified copy of the award. The New York Convention obligates each country that is a party to enforce arbitral awards subject to a limited number of defence. Article V of the Convention on Recognition and Enforcement of

Foreign Awards states:

1- Recognition and enforcement may be refused at the request of the party against whom it is invoked , only if that party furnishes to the compenent authority where the recognition and enforcement is sought

a- The parties to the agreement referred to in article II were, under law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the law of the country where the award was made or,

b- The party against whom the award is invoked was not given proper notice of appointment of arbitrator or of the arbitration prooceedings or was otherwise unable to present his case or,

c- The award deals with a diffirence not contemplate by or not failing within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration, provided that , if the decision on matters submitted to arbitration can be seperated from those not so submitted that party of the award which contains decision on matters submitted to arbitration may be recognised and enforced

d- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement was not accordance with the law of the country where the arbitration took place or,

e- The award has not yet become binding on the parties, or, has been set asideor suspended by a competent authority of the country in which or under the law of which that award was made

2- Recognition and enforcement of an arbitral award may also be refused if the compenent authority in the country where recognition and enforcement is sought finds that:

a- The subject matter of the diffirences is not capable of settlement by arbitration under the law of that country or,

b- The recognition or enforcement of the award would be contrary to the public policy of that country.

The Turkish Courts' enforcements should be analysied into two phases:

- Before the New York Convention (Pre-1991)
- After recognition of New York Convention (After 25.09.1991 OG.1991/22002)

Before incorporation of the New York Convention into Turkish Legislation during enforcement cases judges should determine whether there is mutual agreement between two states under principle of reciprocity.

In decision 15.HD.22.09.1989 decision the German plaintiff wanted to enforce ICC award in Turkey. The Turkish defendant claimed that there was not any legal recipirocty between Germany and Turkey. Under Turkish Code nm.2675 there must be legal, contractual or practical reciprocity between the states where the plaintiff who wants enforcement is citizen of that state.[225] In decision of Turkish High Court 19.12.1985 if one of these three circumtances are obtain then that award could be enforced.[226] If award which is given according to third law rather than plaintiffor defedant law, can it effect enforcement? My opinion is about reciprocity is between

[225] Öztekin, Yargıtay 15HD 22.09.1989 tarihli kararının eleştirisi, pg.37
[226] ibid

state of plaintiff who wants enforcement and Turkey. Award could be given according to ICC rules but plaintiff could be German as in the case discussed above, the character of award do not effect reciprocity only nationality of plaintiff is taken into consideration.

2.6.1.1. Grounds For Refusal To Enforce Arbitral Awards

I.General

Court must comply with a request to enforce an arbitration award. The grounds upon which a court can refuse to enforce an award are very narrowly defined. There are seven grounds for refusal to enforce which fall into two categories[227]:

1- Problems with the conduct of the arbitration itself. The party against whom enforcement is sought must furnish proof that award is flawed due to:

- Incapacity of a party

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[227] . *Article V of the Convention on Recognition and Enforcement of Foreign Awards states*:
1- Recognition and enforcement may be refused at the request of the party against whom it is invoked , only if that party furnishes to the compenent authority where the recognition and enforcement is sought

a- The parties to the agreement referred to in article II were, under law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the law of the country where the award was made or,

b- The party against whom the award is invoked was not given proper notice of appointment of arbitrator or of the arbitration prooceedings or was otherwise unable to present his case or,

c- The award deals with a diffirencenot contemplate by or not failing within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration, provided that , if the decision onmatterssubmitted to arbitration can be seperated from those not so submitted that party of the award which contains decision on matters submitted to arbitration may be recognised and enforced

d- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement was not accordance withthe law of the country where the arbitration took place or,

e- The award has not yet become binding on the parties, or, has been set asideor suspended by a competent authority of the country in which or under the law of which that award was made

2- Recognition and enforcement of an arbitral award may also be refused if the compenent authority in the country where recognition and enforcement is sought finds that:

a- The subject matter of the diffirences is not capable of settlement by arbitration under the law of that country or,

b- The recognition or enforcement of the award would be contrary to the public policy of that country.

- Failure to give proper notice to a party, or the inability of a party to present his/her case

- The award fell outside the scope of arbitration agreement

- The selection of arbitrators violated the agreement, or if the agreement did not address selection, the selection process violated the law or

- The award was set aside or annulled

2- State Sovereignty Issues

- The law of the country in which enforcement is sought prohibits arbitration on the subject of matter of the issue in dispute or,

- The recognition or enforcement of the award would be contrary to the public policy of that country

From a procedural perspective, the main diffirence between two groups of refusal grounds states in article V of the New York Convention is that the court will examine *"ex officio"* the issues of arbitrability Article V(2)(a) and public policy Article V(2)(b) whereas the grounds for refusal set forth in Articel V(1) are only taken into consederation upon requests of deptor.[228] Some commendators say that these grounds are exhaustive.[229] And some say especially Article V(1)(a) gives discreationary standart.[230]

The discussion is whether these grounds are exclusive on which court may vacate such an award. In United States Court of Appeals for the Second Circuit held in Algbanim case that "manifest disregard law" and other "implied" grounds for setting aside a domestic award are permissible grounds to vacate an intenational arbitration award.[231] The court stated that *"we read article V of the convention to allow a court in*

[228] Gabriella Kaufmann-Kohler and Blaise Stucke, International Arbitration in Switzerland, A Handbook for Practitioners, Kluwer&Schluthess, The Hauge, 2004 pg.175
[229] ibid
[230] Petrochilos, pg,300
[231] Goldstein, pg.190

the country under whose law the arbitration was conducted to apply domestic arbitral law.''[232]

The US court declared that "manifest disregard of law" provided the only avenue for judicial scrutiny of an arbitrator's legal mistake and then declared that this was not adequate to permit protection of public interests.[233]

In Westerbeke v. Daihatsu Motor Co case, the Supreme Court established two-step process to determine the "manifes disregard of law" :

- Objective element required inquiry into whether the relevant law is "well defined, explicit, and clearly applicable"

- A subjective component of the test involved examination of the whether the arbitrator intentionally ignored the law[234]

In another decision of the USA Court Of in Industrial Risk Insurance v. M.A.N case states that the grounds for refusing recognition and enforcement of an international arbitral award stated in article V of the convention are also exclusive grounds on which a court at the place of arbitration to vacate an award pursuant the arbitral procedural law of the forum.[235]

According to US Courts the refusal grounds are exclusive but judge-made ground "manifest disregard of law" is also taken into consideration. The refusal grounds stated in the New York Convention are:

a) Article V(1)(a): incapacity of one party/invalidity of arbitration agreement

Under this provision, recognition and enforcement are denied if the respondant party shows that it is lacked of capacity to enter into the agreement to arbitrate under the law applicable to party's personal status. This provision also includes the incapacity to

[232] ibid
[233] William W Park, and Andrea K Bjorklund, and Jack J Coe, International Commercial Dispute Resolution, The International Lawyer, Vol.23, Number 2, 2003 pg. 445
[234] Park and Bjorklund and Coe pg.447
[235] ibid

be a party and , incapacity to act both for natural and legal bodies, lack of power for representation. [236]

The rules governing the capacity of a person to enter into contract are by no means of uniform[237] In examining incapacity the court will apply its conflict of law rules to determine which law will be applied to the question of capacity.[238]

For a natural person, capacity may depend on his nationality or on his place of usual residence, for a corporation, it may depend on the place of incorporation or place of business. The New York Convention specifies that capacity should be decided "under the law applicable",The Model Law ,by contrast does not specifies which law is to be determine "incapacity" of a party.[239]

For example; 17-year-old resident X(where the age of majority is 18) traveled to Y (where the age of majority is 16) and there they entered into arbitration agreement he (X) would not claim that he had been lack of capacity to enter into contract under the law of X. In case of legal person for instance a corporate entity, an act which is ultra vires the corporation remains so wherever it travels by its directors or agents. The law of the country Y does not have extraterritorial reach to ultra vires acts of the legal person created in X.

Consequently, the court of forum in which recognition and enforcement are sought will consider its conflicts of law rules to determine which law applies to the question of incapacity.

Another point is there might be special restrictions. Special restrictions on the capacity to arbitrate may be imposed by national systems of law. In many states there is no restriction on the capacity of the state or its agency to enter into arbitration agreement but there are some states in which states and its agencies are prohibited from entering into arbitration agreements; In the USA, the Federal Goverment itself may not

[236] Kaufmann and Stucki, pg. 176
[237] Redfern and Hunter and Smith, Chapter 2, pg.200
[238] Kaufmann and Stucki, pg.176
[239] Redfern and Hunter and Stucki, pg.201

enter into an arbitration agreement, in France legal persons of public law may not enter an arbitration agreement unless the restriction is waived by decree.[240]

In Austria and Italy, a legal person of public law may not enter into arbitration agreement unless specifically authorised.[241] In Greece the state or a state agency must obtain the approval of the relevant authorities in order to enter into a domestic arbitration agreement.[242] There is no uniformity in practise of states and their agencies in entering into arbitration agreement but The European Convention provides that persons considered by the law applicable to them to be " legal persons of public law" should have right to conclude valid arbitration agreements under article II.1 and 2

In the USA Buques Centroamericanos S.A v. Refinadora Costarricence de Petroleos SA case, the respondent claimed that the arbitration agreement is invalid because it was not approved by the legislature of Costa Rico who owned the company at the time of entering the agreement. The court noted that this argument was rejected when raised during the arbitration, agreed with the arbitrators' findings, and the confirmed award.[243]

The New York Convention and the Model Law both emphasise the necessity for a valid arbitration agreement as a precursor to a valid arbitration and enforceable award. The articles 34(2)(a) and 36(1)(a)(i) of the Model law have the same effect.

b)Article V (1)(b) : breach of due process

Pursuant to this provision, recognition and enforcement of a foreing arbitral award may be refused if the party against whom the award is to be enforced was not given proper notice of appoinment of the arbitrator, or arbitral proceedings or was otherwise unable to present its case. These grounds are an expression of general principle of due process or the right to be heard and represent minimum standarts which

[240] ibid
[241] ibid
[242] ibid
[243] R. Doak Bishop& Elaine Martin, Enforcement of Foreing Awards, LLP available at www.kslaw.com/library/pdf/bishop.6.pfd last visited 23.04.2007

all arbitral proceedings must comply with[244]. This defense is essentially sanctions the application of the forum state's standart of due process as one court has noted.

In the leading case of "Parsons& Whittemore Overseas Co. v. Societe Generale de l' Industrie du Papier, the US court Of Appeal held that the arbitral tribunal did not violate US' constitutional standarts of due process by refusing to reschedule a hearing because one withness had a prior speaking engagement. The withness provided the arbitrators with an affidavit containing most of his proposed testimony and therefore Overseas could not claim that it was unable to present evidence. The Court stated that by agreeing to submit disputes to arbitration, the party relinguish his courtroom rights, including that to subponea withness, in favor of arbitration with all of its well known advantages and drawbacks.[245]

In Cableries de Lens v. Southwire Co. case the US Cpurt of Appeal held that arbitrators are charged with the duty of determining what the evidence is relevant and what is irrelevant and the absent a clear showing of abuse of discreation, the court will not vacate an award based on improper evidence of the lack of proper evidence.[246]

In International Standard Electrics Co v. Bridas Sciedad Anomania case, the ISEC assert that it was unable to present that case in the meaning of the New York Convention, because it was not informed of the identity of the panel's independent expert or given an opportunity to rebut that expert's opinion. It further argued that it contravened tha public policy. The US Court Of Apeeal held that ISEC informed in advance of the panel's procedure for appointing its independent expert.[247]

In Italy, a decision of the Milan Court of Appeal enforcing an award was reversed based on a finding that Article V(1)(b) had been violated because the reasons given by the lower court for its decision were insufficient and illogical.[248]

[244] Kaufmann and Stucki, pg.177
[245] Bishop and Martin, pg.15
[246] ibid
[247] ibid
[248] ibid

In Spain, recognition of an award was refused because the respondent had died before being notified of the request for the arbitration, and proceedings were not conducted against his heirs.[249]

c) Article V (1) (c) : relief granted on matters beyond the scope of the arbitration agreement

Under this provision recognition and enforcement is denied if it determines matters that do not fall into scope of arbitration. For example parties may agree to arbitrate disputes arising from sales contract but then the disputes arising from other contract is arbitrated. Here arbitral award can not be enforced under this provision. This provision is the only defence in which possible,reflecting the pro-enforcement policy of the convention.

Parties may expand the competence of arbitral tribunal by mutual agreement. This time, that award should be enforced despite the narrower scope of arbitration.

In Fiat SPA v. Ministery of Finanse case the court found that the tribunal exceed its authority when it claimed that it is not true that it bind a non-signatory not expressly covered by the arbitration agreement when the issue was submitted to arbitration. The court vacated part of an award against one party, while confirming the remainder against a second party.[250] This case is also rare example of a court dividing an award into permisible and impermissible section.

d) Article V (1)(d) : constitution of arbitral tribunal and aribtral procedure

Enforcement of an award may be denied if the arbitral tribunal is not properly constituted or if the choosen arbitral procedure is not followed. Here party must prove that the arbitral tribunal violated the procedure. It could be the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place.[251]

[249] ibid
[250] Bishop and Martin, pg.21
[251] Bishop and Martin, pg.21

This defense has fruently been used to argue that the arbitrators were biased in violation of the parties' agreement. The principle of independence and impartuality of arbitrators might be argued under this provision. It is definately accepted that arbitrators should be independant and impartual as judges. The responsibility of arbitrators is discussed according to main classification:

- Absolute Responsibility of arbitrators
- Intention on Purpose and Liability [252]

In any case, the party relying on this provision must have objected to the breach of procedural rules at the time it occures, failing which party may not invoke such breach in subsequent enforcement proceedings.[253]

e) Article V (1)(e) : award not yet binding

If the award enforced is not yet binding between parties or has been set aside or suspended by a compenent court, recognition or enforcement will be refused.

This subsection essentially provides two grounds of refusal of recognition:

1. when the award has not yet become binding and,
2. when it has been set aside or suspended

Under the convention, "binding" means that no further arbitral appeals are available. The exhaution of all court appeals in the country in which an arbitral award was rendered is not required for enforcement of the award in an another Convention company. Binding, in short, is today universaly recognised to mean that the award, in the rendering action to set aside.[254] It is meant that the reversal of burden of proof, therefore, it makes extremly difficult for losing parties to oppose enforcement with evidence that the award is not binding in the rendering country.

[252] Ergun Özsunay, Uluslararası Ticari Tahkimde Hakem Kararları, İTO Yayınları, Yayın No.2004-16, pg.144
[253] Redfern, Hunter, Stucki pg.
[254] Hanks Harnik, Recognition and Enforcement of Foreing Arbitral Award, Company Lawyer, 1983, Amsterdam, pg.703

The Courts in the USA and elsewhere have held that the language of the convention provides that the application to set aside or suspend an award can only be made in the country where the arbitral procedural, rather than substantive, law is applied.[255]

Although arbitration does not have the powers or the prerogatives of a court of law, an arbitral tribunal is entrusted by the parties with the right and duty of reaching a decision which will be binding upon them. It distinguishes arbitration as a method of resolving disputes from other methods such as mediation.

In Clair v. Berardi case, the Paris Court found that award which will be enforced is Swiss award because the Swiss procedural rules applied and the award's having been set aside by the Geneva Court precluded its enforcement in France. The Cour de Cassation states that the court's finding on nationality was unnecessary but it may have been buttressits ruling on preclusive effect on award. It applied article VII to give effect in France[256] Article VII makes domestic law prevail over the Convention if that law contains a more favourable enforcement regime. The French judges do not use their discreationary power they interpret narrowly and they apply other articles of convention in order to interpret the Article V.

Article VII is so widely draft that it would seemingly cover both scenarious outlined above for the enforcement of an annull award. [257] It is said that the convention has dual regime in enforcement[258]

In Norsolor case, an ICC award made in Australia awarded Turkish Company to compensate against its French principal Norsolar. The tribunal stated that it had based its award on lex mercatoria. The Turkish Company submit enforcement in France.Meanwhile French Arbitration Code has been admended. According to new code awards made abroad may be refused on four grounds more or less identical to those of the New York Convention.Thus French Court is concerned to enforce an

[255] Judgement of 1 February 1980, Austrian Supreme Court , Bishop pg.11
[256] Petrochilos, Chapter 7 pg.309
[257] Petrochilos, pg.321
[258] Goldstein, pg.393

annulled award.[259] However Article V(1)(e) of the New Yorl convention obliges French judges to refuse the enforcement the new Frech code give chance to enforce annulled award.[260]

In Chromalloy Case, award given under UNCITRAL Rules in Cairo, dispute between US Company Chromalloy and Eygptian State. The arbitration clause provided for the application of "Eygpt Laws" and Cairo as the place of arbitration.

After then US Company sought directly enforcement in the USA insipre of confirmation to Eygptian court. The Eygptian party annulled the award in Eygpt court and it claims this in the US Courts. The US District Court states that it is not null award because confirmation to Eygptian court could not have an effect to change substance it is only procedural not substantive and also Article V (1)(e) gives discreationary standart to determine its annullity. So that this award could be enforced. Under New York Convention, Federal Arbitration Act and judge-made ground "manifest disregard of the law" [261]

In any case of enforcement, the USA courts consider both New York Convention and Federal Arbitration Act and judge-made ground "manifest disregard of law" stated in Albgahim Case. In International Standart Electric Corp. Case the US Court held that the country whose substantive law is applied does not, because of that fact alone, have authority to vacate an arbitral awards. The court held that the languahe of Article V(1)(e) *"refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law which the arbitration was conducted, and not the substantive law of the contract which was applied in the case"* [262]

[259] ibid
[260] ibid
[261] Petrochilos, pg.319
[262] Bishop and Martin, pg.11

In Calzaturifico case the Italian Court held that conflict of authority as to whether such an award fell within the Convention, and adjourned the enforcement proceeding under Article VI of the Convention[263]

The second leg of Articel V(1)(e), providing for refusal of recognition when the award has been set aside or suspended by a court in the country of origin. In order for the suspension of the award to be a gorund for refusal of enforcement, the respondent must prove that the suspension was ordered by a court.

f) Article V (2) (a) : lack of arbitrability

Pursuant to this provision the court seize with the application for recognition and or enforcement must determine "ex officio" and according to the laws of the country in which the award is to enforced, whether the award deals with a subject matter that is capable of being settled by arbitration

If the grounds of a dispute can not be settled by arbitration under the domestic law of the enforcing nation, a court may refuse to enforce an award granted though a foreign arbitration panel. To claim this defence, a party must prove that the enforcing nation attaches a special national interest to the dispute that make it incapable of being settled by arbitration.

g) Article V (2)(b) : violation of public policy

A foreing arbitral award can not be recognised and enforced in the country if it would violate public policy. Public Policy is often regarded as a vague concept which is almost impossible to define, which varies from State to State. This leads uncertainity and unpredictablity, which encourges the unsuccessful party in the arbitration to resist enforcement of the award on grounds of public policy.In this contex, the concept of public policy is not the domestic public policy. It is agreed by authors that it is international public policy.[264]

[263] Bishop and Martin, pg.26
[264] Kaufmann-Kohler and Stucki pg. 178

However the discussed arbitration and the basic conventions aiding international arbitration are instrument of international law, their applications occurs in national law. In this contex for instance, the US Courts applies a restrictive concept of public policy.

In Parson v. Whittemore case the court held that enforcement of a foreign arbitral award may be denied on public policy grounds "only where enforcement would violate the forum states'most basic notions of morality and justice"[265] It states that the public policy did not equate with "national policy". The Court would not refuse to enforce an award in favour of the Eygptian party simply because of tension at that time between the USA and Eygpt.

In Schrek v. Alberto Co. Court recognised the diffirence between international and domestic public policy. It enforced an agreement to arbitrate a claim arising in international trade, although arbitration of a similar claim would have been barred had it arisen from a domestic transaction.[266]

In National Oil Crp. v. Libyan Sun Oil Co., the court rejected a challenge to an award at the enforcement stage on the ground that it was in favour of Libya- "a state known to sponsor international terrorism"[267]

English Court have not yet applied "international pulic policy" in enforcement or recognition cases but they have affirmed the importance of finality of awards in enfrocement cases on grounds of illegality and have endorsed a restrictive concept of public policy.[268]

In Renusagar v. General Electric case, The Indian Supreme Court held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of India. It held the term "public policy" in the field of private international law and stated that enforcement of a foreign award would be

[265] Shapperd
[266] ibid
[267] ibid
[268] ibid

contrary to public policy if it was contrary to a)fundamental policy of Indian Law, b) the interests of India c) Justice and immorality[269]

2.6.1.2.The Other Defences To Enforcement Of Awards

2.6.1.2.1.Lack of Reciprocity

I.General

Article I(3) of the New York Convention provides that contracting states may declare that they "will apply the Convention on the basis of reciprocity to the recognition and enforcement of only those awards made in the territory of another contracting state"[270] In this contex for instance Turkish Law used to provide application of New York Convention on the basis of reciprocity before its incorporation ito Turkish Legislation. Today, the New York Convention is ratified by many countries with no reservation except some countries such as the US. The US' reservation which means that the place when the award is made will decide its enforceability.

2.7.CONFIDENTIALITY AND PRIVIACY OF INTERNATIONAL COMMERCIAL ARBITRATION

I.General

Unlike judgements the arbitral awards are commonly held that they are private and confidential. The hearings in tribunal are close to public, arbitral jurispudence is prohibited to nonparties, arbitrators and any stuff in tribunal are liable to keep secrets.These are some practises for satifiying confidentiality and priviacy of arbitral tribunal. My opinion on why the confidentiality and priviacy needed is, it might be for "trade secrets". Today, "trade secrets" are protected by TRIPS Agreement under article

[269] ibid

[270] NY Convention art.I(3) "*when signing, ratiiying or accedingto this Convention or notifying extension under the article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in territory of another Contracting State. It may also declare that it will apply the Convention only to diffirences arising out of legal relationships, whether contractualor not, which are considered as commercial under the national law of the Statemaking such declarations"*

39.[271] The parties may prefer arbitral tribunal to protect their trade secrets. Arbitration is a consencual procedure and a private means of dispute resolution. When it is private then it should be confidential as well. If the parties agree on to keep the trade secrets to nonparties, it shall be more reliable.

Confidentiality and priviacy of arbitration is not an absolute principle[272] but they are especially provided in Common Law. In Great Britain the view is that the arbitrators are private and confidential. Whilst there is no statutory provision in the arbitration Act of 1996 of England which deal with such issues, arbitration is generally considered private and confidential. [273]

Naturally there are limitiations of confidentiality. In Ali Shipping Corp. v. Shipyard Trogir[274] In this case the court stated that arbitration proceedings and materials produced were treated as confidential to the parties and the arbitrator, subject to certain exception and find out following exceptions recognised under the English Law,

- Disclosure made with the express or implied consent of the party originally produced the material

- Where there is an order of the Court

- Disclosure when and to extent reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis a third parties

- Disclosure requried in the public interest.

In Glidepath BV and others v.John Thopmson and others[275] case the third party applied for copies of certain documents under English Procedural Law . The agreement in dispute between parties contained an arbitration clause. The third party acessed to

[271] TRIPS Art.39 "*In the course of ensuring effective protection against unfaşr competition as provided in Article 10bis of the Paris Convention, Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or govermental agencies in acoordance with paragraph3"*
[272] Ergun Özsunay, Thakim Yargılamasının Mahremiyeti, İTO Yayınları, Yayın no.2004-16, pg. 120
[273] Sharon Gerbi, "Confidentiality In Arbitration Under The UK Law", available at www.kluwerlaw.com. last visited 16.07.2007
[274] ibid
[275] ibid

these documents on the Court file, on the basis that they were necessary to assist in establishing a seperate claim.

Briefly, in my point of view the confidentiality of arbitration should be accepted because it is a private means of dispute resolution. As long as it is private thus it should be confidential. These principles are to serve reliability of arbitration. Beside this, the limits of confidentiality should be stated because there is unique balance between confidentiality of parties and the others.

2.7.1. Fair Trial In Arbitration In The Light Of The European Convention On Human Rights Art.6

Fair Trial is a human right so that it should be satisfied in either court trials or arbitral tribunals. Infrigment of fair trial in arbitration might be treated as a refusal ground in enforcement case. In specisific manner infrigment of fair trial is included by subparagraphs of article V of the New York Convention.

There are not much examples of decisions holding infrigment of fair trial in arbitration. Major Case is the Lila Marlanne Nordstömjanzon . In this case there were 3 arbitrators in the tribunal and they arbitrated the tribunal. After award had been given, the plaintiff Lila Marlanne learnt that one of the arbitrators used work for defendant company. After compliting national appeals, Lila Marianne appealed to European Court Of Human Rights.[276] The Court excludes fair trial in arbitration and held that the parties are willing to abjourn the courts jurisidictiobn which gives maximum legal protection to the parties in the manner of fair trial. They conses on rejecting jurisdiction hoewever jurisidiction gives maximum legal protection. Therefore it is impossible to claim it now.

[276] ECHR 8101/95, 27.10.1996 ; Murat Özsunay, Tahkim Yargılamasının Temel İlkeleri ve "Adil Yargılanma" ilkesi bakımından AİHS.md.6 İncelenmesi, İTO Yayınları, Yayın no.2004-16, pg. 79

CONCLUSION

Consequently, the textile and clothing industry is one of the most important sector and problem industry in not only the EU but also all over the World. The textile and clothing industry is a very global industry, with a constantly increasing trade folows all over the World. Textile industry is is a branch of classical industry and a step of new subsectors. The trend of global commerce and liberalisation has increased the competition in textile and clothing industry from a large number of low-labour cost countries especially form Asian Textile Countries for which the sector constitutes onet of the most important sources of income and employment. With liberalisation in this sector, developed countries has lost their position. Beside this, Asian Countries strengthened their position. The sinking of the EU industry is mainly caused by the labour costs diffirences between developing countries and Europe.

The EU industry has responded to this challenge by substantial restruction, modernisations and technological progress. The sector in Europe has been subject to a series of radical transformations over the last years, due to a combination of technological changes, evolution of the diffirent products. The research and innovations in textile sectors, especially the innovations in Technical Textile, the production of some new textile fibres such as tolarable to high degrees or water or non-wovens, geotextile, hygiene products for medical sector or products for automotive industry creates new competitive advantages of the Euroepan industry. The other competitive advantages of the textile and clothing sector in EU are now found in a focus on quality and desing. The EU industry concentrating on the production of High Quality of out puts. The European producers are world leaders in markets for technical/industrial textiles and as well as quality garment in high quality design.

Furthermore appropriate framework conditions need to be ensured with particular focus on technical textile in order to enable the sector to fully exploit its competitive potential. The recommendations has vital importance in this sense. The recommendations are generaly envisiges targets in the sector to be achieved such as standart clothing to special clothing, new textile applications, and trade policy, education, training and innovation in the sector as well.

Second chapter deals with the the alternative way of dispute solution in global commerce of textile and clothing. It has been widely acknowledged that arbitration within today's global economy constitutes one of the most effective means of private law enforcement. Parties in commercial transactions, especially those with a purely international character, have increasingly indulged into referring their disputes to arbitral tribunals instead of court.

The sector itself is one of the most problem industry. I would like to evaluate how the resolutions might be in private law, whether the character of sectors effects the difficulties in resolutions, if it would have made more difficult. I determine that the problems of the sector is directly reflects to private disputes solution even in arbitration. The antitrust and competition issues serve as an illuminating example of public order concept in the arbitration of dispute solutions of sectors.

Lastly I would like to deal with comparative study with Turkey in the light of acquis communataire.