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INTERNATIONAL COMMERCIAL ARBITRATION

PROCEDURAL MATTERS

"AUTONOMY PRINCIPLE"

Yüksek Lisans Tezi

GÖZDE ERKAYA

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ABSTRACT

This study regarding the "*Procedural Matters Autonomy Principle*" aims to give the reader a crsytal clear message that the intention of the parties, party autonomy, is the main source of arbitration and its procedure. On the other hand, however, irrespective of the parties' nationality and the diverse charaterictics of arbitration procedure every arbitration subject to legal and regulatory supervision.

Generally, the national law of the place of arbitration has such supervisory control over arbitration. Furthermore, usually the parties agree on certain rules arising from international arbitration laws, conventions and rules in order to apply the same to their arbitration process. At this point, it is likely to face certain problems in case there is a conflict between the rules of the underlying national law and arbitration rules determined by the parties. We can in a way define the problem as of hierarchy of norms between party autonomy, the rules arising from respective international laws, conventions, international arbitration practice and the rules arising from national law.

In light of the foregoing analysis and the analogy, the consensus of the parties comes first and accordingly prevail the chosen arbitration rules. In the existence of such determination, it prevails the international arbitration practice. Accordingly, in case there is no determination made by the parties as to the applicable rules then the applicable law comes to the stage in order to govern the arbitration. However, party autonomy still has dominance over such governing law.

It has to be emphasized that this hierarchy of norms subject to limitations arising from mandatory rules. In today's arbitration practice, we can say that most of the national legal systems respect party autonomy principle and its prevailing effect over the others. The rationale of this approach can be summarized as should arbitration arises from solely the intention of the parties then such parties should have the right to determine the applicable rules according to their wishes. Therefore, the major constraints arising from mandatory rules that limit party autonomy can be classified as the nature of the conflict to be arbitrated, arbitrability issue, and fair trial and equal treatment right of every real and/or legal person.

ÖZET

"Usul Meseleleri Özerklik Prensibi" konulu bu çalışma dahilinde okuyucuya verilmek istenen açık mesaj taraf iradesinin tahkim ve tahkim usulünün ana kaynağını teşkil etmekte olduğudur. Öte yandan, tarafların milliyeti ve tahkim usulünü teşkil eden hususların çeşitliliğinden bağımsız olarak her tahkim hukuksal denetime tabidir.

Genellikle tahkim yeri hukuku söz konusu hukuksal denetimi sağlamaktadır. Bununla birlikte, taraflar sıklıkla uluslararası ticari tahkimi düzenleyen kanunlar, kurallar ve konvansiyonlardan doğan ve/veya bunlardan bağımsız olarak kendi iradeleri ile belirledikleri çeşitli kuralların aralarındaki tahkim sürecine uygulanması konusunda anlaşmaktadırlar. Bu noktada, yerel hukuk kuralları ile tarafların aralarında kararlaştırmış oldukları kuralların çelişmesi halinde problem yaşanması olasıdır. Bu problemi taraf iradesi, tarafların aralarında kararlaştırmış oldukları kurallar, uluslararası tahkim kanunları, konvansiyonları ve uygulaması ile yerel hukuk kuralları arasındaki normlar hiyerarşisi olarak nitelendirebiliriz.

Yukarıdaki analiz ve benzetme ışığında, taraf iradesi öncelikli olup kararlaştırılmış olan tahkim kurallarının üstünde yer almaktadır. Bu tarz kararlaştırılmış tahkim kurallarının olması halinde ise söz konusu kurallar uluslararası tahkim uygulamasının üstünde yer alır. Bu doğrultuda, taraflar uygulanacak kurallara ilişkin herhangi bir kararlaştırmada bulunmamış iseler uygulanacak hukuk devreye girer. Ancak yine de, bu durumda da taraf iradesi uygulanacak hukuk üzerinde yer almaktadır.

Bu normlar hiyerarşisinin emredici kurallardan doğan kısıtlamalara tabi olduğu önemle belirtilmelidir. Günümüz tahkim uygulaması dahilinde taraf iradesinin üstünlüğü prensibinin birçok yerel hukuk sisteminde benimsenmiş olduğunu söyleyebiliriz. Bu yaklaşımın altında yatan husus şu şekilde özetlenebilir; eğer ki tahkim taraf iradesine dayanmakta ise söz konusu taraflar uygulanacak olan kuralları istekleri doğrultusunda belirleme hakkına da sahip olmalıdırlar. Bu nedenle, taraf iradesini sınırlandıran emredici kurallar tahkime sunulacak uyuşmazlığın türü, tahkime elverişlilik, ve her gerçek ve/veya tüzel kişiliğin adil yargılanma ile eşit davranılma ilkeleri olarak sınıflandırılabilir.

INTRODUCTION

The past two decades both national and international arbitration, one of the most popular alternative dispute resolution mechanism, has significant growth and worldwide expansion. It has been accepted for a certain time that international commercial arbitration has substantial autonomy and in a way insulated from the application of national laws and accordingly court control. Therefore, the autonomy and the procedural flexibility that is believed to be provided by arbitration constitute a significant advantage.

In light of the extensive use of international commercial arbitration and the significance of autonomy principle, the question has been arisen whether an autonomous set of international procedural rules has emerged and to what extent international rules or national laws restrict the autonomy with respect to international procedural rules.

Eventhough certain general principles and practices have emerged, it is not possible to talk about an autonomous set of international procedural rules or a consistent international arbitration practice. Furthermore, due to the variety of the disputes submitted to arbitration and in turn the diversity of the parties and the arbitrator(s), there is no common practice and/or procedure in international commercial arbitration. On the other hand, the separability and the competence-competence principles constitute the corner stones of international arbitration process.

The separability doctrine has a significant importance since without it, it would be so easy to delay the arbitration proceedings by challenging the validity of the main contract but not the consensus of the parties to arbitrate. Competence-competence principle has at least the same importance since such principle grants the arbitrators an exclusive authority to rule on challenges regarding their jurisdiction in the first instance but subject to judicial review. Both the separability and the competence-competence doctrines aim is to secure the parties' implied or express intent to arbitrate.

The respect to the intention of the parties in arbitration arises procedural matters issue. In general the parties of the dispute have the oppurtunity and flexibility to also determine the arbitral procedure to be applied to the dispute in concern. This means that there is no typical set of established procedural rules to be applied during the arbitration process. On the other hand, such freedom of the parties to determine the applicable arbitral procedure and the discretion of the arbitrators in case the parties cannot agree on the procedural issues may sometimes arise uncertainty and unfairness. Therefore, eventhough most of the arbitration laws recognize the discretion of the parties to decide the organization and conduct way of arbitration, there are and should be few mandatory requirements which prevail such freedom of the parties. At this point, court assistance is of fundamental nature in order to maintain proper functioning of the arbitration process.

With this brief background, in the first part of this study we will begin by analysing the meaning and elements of international commercial arbitration. Then proceed with examining the requirements of an arbitration agreement which is essential for the conduct of arbitration process.

In order to clearly understand the rationale behind the guardian principles (i.e. eparability and competence-competence) of arbitration, effects of an arbitration agreement is important which will be identified in the third part of this study. The meaning, importance and practice of the guardian principles of arbitration come to the picture then. In the last stage, we will conclude by analysis on the reflection of autonomy principle to that of arbitration procedure and examine the boundries of such principle.

I. INTERNATIONAL COMMERCIAL ARBITRATION

A. The Definition of International Commercial Arbitration

International commercial arbitration is a phrase which has been adopted by the European Convention on International Commercial Arbitration[1] dated April 21, 1961 (the "European Convention") and the Model Law of the United Nations Commission on International Trade Law[2] (the "Model Law") dated June 21, 1985. International arbitration is a well recognised and quite established way of settling international commercial disputes without recourse to the national courts[3].

The international commercial arbitration has been emerged following the second world war[4]. The collapse of the Soviet Union and the end of the cold war, in a way the fall of the Berlin Wall in 1989, constitute the second pillar in this respect[5]. When we came to the 1990's, most of the national arbitration laws came into effect[6] such as Latin American countries, most of the today's EU countries, former Soviet States etc[7].

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[1] European Convention on International Commercial Arbitration, April 21, 1961, United Nations Treaty Series, Vol. 484, p. 364, No: 7041, Julian D M Lew QC, Loukas Mistelis, Queen Mary University of London, Primary Materials Arbitration Laws, Conventions, Rules and Other Materials, 2004-2005, p. 262

[2] UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, http://www.jus.uio.no/lm/un.arbitration.model.law.1985, 12.06.2006

[3] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, Law and Practice of International Commercial Arbitration, London Sweet & Maxwell 2004, p. 1

[4] Thomas E. Carbonneau, Cases and Materials on International Litigation and Arbitration, American Case Book Series, Thomson West, USA 2005, p. 360

[5] ibid, p. 360

[6] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, Comparative International Commercial Arbitration, Kluwer Law Internatinal, the Netherlands 2003, p.18

[7] Thomas E. Carbonneau, p. 360

In order to clearly understand the meaning of international commercial arbitration, the definition of all the words have to be analysed:

1. The Meaning of International

In certain of the legal systems there are different rules regarding the national and international arbitration. Until the courts of certain countries involved in arbitration process and accordingly the enforcement of the arbitral awards[8], there was no distinction as national and international arbitration[9]. The rationale behind this approach is to keep the supervisory control of the national courts over the purely national arbitrations[10]. On the other hand, however, in countries like the USA, England and France there are combined rules both for national and international arbitration[11].

In analysing the relevant criteria in order to assess the internationality of the arbitration, the important thing is not to make any confusion with the internationality of the arbitral award since they are subject to different enforcement regimes.

An arbitration having foreign elements is defined as "international arbitration". In order to determine whether there exists any foreign elements in the arbitration, there are certain connecting factors such as:

- the nationality and domicile of the arbitrator(s),
- the nationality of the parties,

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[8] Every arbitral tribunal has to resolve the dispute in concern and render its decision accordingly.
[9] Andrew Tweeddale/Keren Tweeddale, Arbitration of Commercial Disputes, Oxford University Press, New York 2005, p. 45
[10] ibid, p. 45
[11] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p.57

- the domicile, residence or company headquarters of the parties,
- other connecting factors (i.e. the execution place of the contract, the performing platform of the contract, the place where the loss has been incured and etc.),
- the place of the arbitral institution,
- the seat of the arbitration,
- the governing law of the arbitration proceedings and the merits of the dispute in concern.

The foregoing connecting factors are essential in order to determine the nationality of the arbitration. Should all of the connecting factors point out a specific country, it is obvious that the arbitration will be defined as national arbitration[12] and accordingly the relevant local legislation shall be applied to the dispute in concern. On the other hand, should one or more of the foreign elements can be applicable then the international characteristic of the arbitration will be recognized.

Accordingly, there are certain methods in order to more clearly analyse the connecting factors of the international character of commercial arbitration:

a. Objective Criterion

According to the objective criterion, the nature of the dispute between the parties and characteristics (i.e. whether national or international) of such dispute become important in order to determine the internationality of arbitration[13].

[12] In most of the countries there are certain rules regarding the application of national arbitration. Furthermore, in some countries there are also specific arbitration rules for the settlement of the disputes arising from labour law, maritime law and etc.

[13] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p.58

The objective criterion can be clearly seen under the practise of International Chamber of Commerce (the "ICC") according to which;

"*... the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities.*

By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State."[14]

The meaning of international characteristics of an arbitration was also provided under French Law. Accordingly, Article 1492 of the French Code of Civil Procedure[15] (the French Code") provides that "*an arbitration is international if it implicates international commercial interests*".

Furthermore, French case law is also another parity for assessing the objective criterion. At this point, in ***Murgue Seigle vs. Coflexip***[16] case, the Paris Court of Appeal held that "*the international nature of an arbitration must be determined according to the economic reality of the process during which it arises. In this respect, all that is required is that the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contractor, the arbitration and the place of arbitration are irrelevant.*"

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[14] The International Solution to International Business Disputes/ICC Arbitration, ICC Publication No:301, 1997, p.19

[15] French Code of Civil Procedure-Book IV-Arbitration in Force May 14, 1981, www.jus.uio.no/lm/france.arbitration.**code**.of.**civil**.**procedure**.1981/ 30.09.2006

[16] Murgue Seigle vs. Coflexip, Cour d'appel de Paris Rev Arb. 355, March 14, 1989

b. Subjective Criterion:

In subjective criterion, other than the nature of the dispute in concern the nationality, place of business and/or the domicile of the parties are taken into consideration in determining the internationality of the arbitration.

This alternative approach is provided under Article I. 1 (a) of the European Convention since it has been explicitly provided that; "*this Convention shall apply to arbitration concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluded the agreement, their habitual place of residence or their seat in different Contracting States.*"

Switzerland system also constitutes a crystal clear example for the application of the subjective criterion. The reflection of the subjective criterion can be seen in the language of the Swiss Private International Law Statute[17] (the "Swiss Statute"). Accordingly, Article 176 (1) of the Swiss Statute provides that "*the provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.*"

In English law, before[18] enactment of the English Arbitration Act of 1996[19], there was a distinction between national and international arbitrations[20]. According to such distinction, should the arbitration be in England and parties of such arbitration be neither a foreign resident nor corporation then it would be considered as national arbitration.

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[17] Swiss Private International Law Statute (1990), Julian D M Lew QC/Loukas Mistelis, p. 242
[18] English Arbitration Acts of 1975 and 1979
[19] The English Arbitration Act, 1996, http://www.opsi.gov.uk/ACTS/acts1996/, 12.12.2006
[20] Blackaby/Constantine Partasides, p. 15

Eventhough there was a contemplated likewise definition in the English Arbitration Act of 1996, it did not come into effect[21].

c. Combined Criterion:

As it can be understood from its name, the combined criterion is the combination of the objective and the subjective criteria. The nature and the meaning of this criterion can be analysed under Article 1 (3) of the Model Law, which provides that:

"*An arbitration is international if:*

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

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

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

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

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

The definition of the Model Law regarding the phrase 'international' has been interpretated quite broadly in general[22]. Since the Model Law is applicable to the international commercial arbitration, providing a clear definition of the term "commercial" was critical in this respect[23].

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[21] ibid, p. 15
[22] Andrew Tweeddale/Keren Tweeddale, p. 50
[23] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 16

2. The Meaning of Commercial

The characteristics of the dispute in concern determine the commercial aspect of such dispute. In case the dispute is stemming from economical conflicts between the parties, we can conclude that the nature of the arbitration is commercial.

In certain countries arbitration is possible should the nature of the contract in concern is commercial. For instance, under Article 1 of the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters[24] (the "Geneva Protocol") the distinction between the commercial and non-commercial issues has been provided as "*each contracting state may limits its obligation to the contracts that are considered as commercial under its national law*".

Furthermore, this '*commercial reservation*[25]' principle has also been provided under the Convention on the Recognition and Enforcement of Arbitral Awards[26] (the "New York Convention").

In this respect, it has been provided that "*when signing, ratifying, or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.*

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[24] Geneva Protocol on Arbitration Clauses in Commercial Matters, June 17, 1925, http://www.state.gov/t/ac/trt/4784.htm, 31.12.2006

[25] Andrew Tweeddale/Keren Tweeddale, p. 18

[26] The Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, New York, http://www.wipo.int/amc/en/arbitration/ny-convention/index.html, 31.12.2006

It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration[27]."

Eventhough the international commercial arbitration phrase has been adopted by the Model Law, it does not provide a specific definition for the commercial concept. According to the interpretation of the Model Law; all kinds of trade transactions and the contracts for such purposes (i.e. distribution agreements, financing, licensing, leasing, banking and etc.) provides commerciality to the arbitrations[28].

Furthermore, the Model Law states that:

"*the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions:*

"any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road[29]."

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[27] Article I (3) of the New York Convention

[28] Fouchard/Gaillard/Goldman, International Commercial Arbitration, Kluwer Law International, The Netherlands 1999, p. 36

[29] Footnote of Article I (1) of the Model Law

3. The Meaning of Arbitration

Arbitration is the most preferred alternative dispute resolution ("ADR") method in order to solve the commercial disputes between the parties. The parties of the dispute mutually agree to serve such dispute to a certain private individual whose decision is binding on the parties.

At this point it is essential to anayse the main differences between arbitration, conciliation and mediation all of which are the common ways of ADR. The role of arbitrator differs from the conciliator and the mediator in certain aspects. Most importantly, the arbitrator has the ability to render binding solutions on the parties whereas the conciliator and the mediator lack of such power. On the other hand, there are close relationship between arbitration and conciliation since the arbitrator acts also as a conciliator while trying to accommodate the parties of the dispute[30].

There are 2 main reasons for the parties of a dispute to recourse arbitration. The neutrality of the tribunal and the internationally enforcability of the arbitral decision constitute main reasons for the parties such preference[31]. The flexibility of the arbitration process and the confidentiality also provide additional benefits for the parties.

There are 2 types of arbitration namely; ad hoc arbitration and permanent arbitral institutions:

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[30] Fouchard/Gaillard/Goldman, p. 14

[31] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 22

a. Ad-Hoc Arbitration

Ad-Hoc arbitration is conducted in accordance with the principles laid down by the parties or by the arbitral tribunal[32]. In ad hoc arbitration, it is the parties' duty to decide on the arbitrator(s), the applicable procedure and law, the language, the seat of the arbitration and all the other essential instruments of the arbitration. With respect to the procedure, it is also possible for the arbitrator(s) to decide on the procedure following their appoinment.

The main reason for the parties to select ad hoc arbitration is because it is more cheaper, flexible and faster when compared with an institutionalized arbitration[33]. Accordingly, the Rules of the Commission on International Trade Law[34] (the "UNCITRAL Rules") provides the most significant reason for the choice of ad hoc arbitration since before the enactment of such Rules either the parties of the dispute or the arbitrator(s) had to determine and in turn draft the rules of the arbitration[35].

On the other hand, in order to execute a proper ad hoc arbitration, the cooperation and in turn the consensus of the parties are obligatory. In other words, should one of the parties fails to agree on the elements of the arbitration then it will not be possible to execute the arbitration process.

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[32] ibid, p. 47

[33] Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, International Commercial Arbitration A Transnational Perspective, Second Edition, American Casebook Series, Thomson West, USA 2003, p. 28

[34] UNCITRAL Arbitration Rules, Adopted by the General Assembly on December 15, 1976, http://www.jus.uio.no/lm/un.arbitration.rules.1976/ 10.01.2007

[35] Gerald Aksen, Ad Hoc versus Institutional Arbitration, ICC International Court of Arbitration Bulletin, Vol. 2/No. 1CISSN 1017-284X, 1991, www.icc.books.com, 07.01.2007

b. Institutionalized Arbitration

In institutionalized arbitration the parties determine an arbitration institution in their agreement in order to execute the arbitration in case of any dispute. Unlike the ad-hoc arbitration, an institutionalized arbitration has been administered[36] in accordance with the own rules of a specialist arbitral institution[37].

There are certain advantages of settling the disputes via an established arbitration institute. The existence of the established rules is the main advantage at this point. On the other hand, an institutionalized arbitration is very costy when compared with ad hoc arbitration.

Usually, the contract that has been executed between the parties of the dispute has an arbitration clause which determines a specific institution. There are significant number of arbitration institutions all over the world. Approximately out of the 1,200[38] arbitration institutions, the well-known ones are defined below:

1) The International Chamber of Commerce ("ICC")
2) The International Center for Settlement of Investment Dispute ("ICSID")
3) The American Arbitration Association ("AAA")
4) The Inter-American Commercial Arbitration Commission ("IACAC")
5) The Arbitration Institute of the Stockholm Chamber of Commerce
6) The London Court of International Arbitration

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[36] An administered arbitration can either be in the form of 'totally administered' or 'partially administered'. International Center for Settlement of Investment Disputes ("ICSID") arbitration is a good example of totally arbitration since it provides a whole service to the arbitral tribunal. On the other hand, in some arbitrations for instance conducted according to the Rules of the Chartered Institute of Arbitrators, the Institute executes the initial work and then the arbitral tribunal deals with the rest of the proceedings such as arrangement of the meetings, communication with the parties and etc. thus this type of an arbitration can be named as a partially administrated one.

[37] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 47

[38] www.lectlaw.com/ files/adr14.htm, 07.02.2007

B. The Regulatory Framework of International Commercial Arbitration

In this part, we can clearly and briefly analyse cornerstones with respect to the regulatory framework of international commercial arbitration in the historical order:

- In 1899 and 1907, the Hague Conventions[39] have created the Permanent Court of Arbitration.

- In 1919, the ICC has been established by the business community of the globe and accordingly the Court of International Arbitration has been establihed by the ICC in 1923.

- In 1923 the Geneva Protocol on Arbitration Clauses and in 1927 Geneva Convention on the Execution of Foreign Awards[40] have been adopted by direct involvement of the ICC.

- In 1958, the New York Convention have replaced the foregoing Geneva Conventions.

- In 1961, the European Convention has been concluded.

- In 1970's, the Commission on International Trade Law (the "UNCITRAL") has prepared rules for ad hoc arbitration.

[39] The Hague Convention for the Pacific Settlement of International Disputes, adopted July 29, 1899.
[40] The New York Convention has been superseded these conventions.

- In 1985, the Model Law has been come into force in order to harmonise common principles of international arbitration.

C. The Nature of International Commercial Arbitration

The nature of the international commercial arbitration can be in a way defined as the "freedom of contract" principle[41].

The application and meaning of this principle can be analysed in ***Volt Information Sciences, Inc. vs. Board of Trustees of Leland Stanford Junior University***[42]case, in which the court held that:

"*The FAA does not require parties to arbitrate when they have not agreed to do so ... nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement ... It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms ... Arbitration under the Act is a matter of consent, not coercion and parties are generally free to structure their arbitration agreements as they see fit ...*"

The freedom of contract principle grants the parties the right to eliminate certain legal rules mainly the ones related to the trial tecniques and accordingly determine their own arbitral rules namely; the rules for arbitral process in order to have more fair, functional and to the point arbitration process[43].

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[41] Thomas E. Carbonneau, p. 369
[42] Volt Information Sciences, Inc. vs. Board of Trustees of Leland Stanford Junior University, U.S. Supreme Court, 489 U.S., S. Ct. 1248, 103 L. Ed. 2d 488, 1989
[43] Thomas E. Carbonneau, p. 369

II. FORMATION OF THE ARBITRATION AGREEMENT

A. The Definition

In order for the parties of the dispute to submit their case to arbitration, the arbitration agreement is essential (*conditio sine qua non*[44]). In other words, arbitration is stemming from a contract[45]. An international commercial arbitration agreement has 2 or more parties who agree to refer their disputes arising from a commercial issue to arbitration[46]. Accordingly, the authority of the arbitral tribunal stems from an agreement concluded between the parties of the dispute in concern[47]. Such arbitration agreement has to be valid and enforceable for a proper functioning arbitration process[48].

The arbitration agreement can be seen as either in the form of an arbitration clause or a submission[49] agreement[50]. Rarely the arbitral proceedings are being initiated via a "*standing offer*" exceptionally in case of bilateral investment treaties[51].

The arbitration clause has been drafted for the disputes that can arise in the future. By an arbitration clause the parties agree and undertake to submit the dispute arising from the main agreement to arbitration.

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[44] Ziya Akıncı, Milletlerarası Tahkim, Seçkin Yayıncılık, Ankara 2003, p. 70
[45] Andrew Tweeddale/Keren Tweeddale, p. 34; Ergin Nomer, Devletler Hususi Hukuku, Beta/İstanbul 1999, s. 408
[46] ibid, p. 97; Yavuz Kaplan, Milletlerarası Tahkimde Usule Aykırılık, Seçkin Yayıncılık, Ankara 2002, p. 23; International Arbitration, www.osec.doc.gov/ogc/occic, 21.07.2006
[47] Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p. 84
[48] Article IV of the New York Convention provides that the original agreement or a duly certified copy of the same has to be submitted for the recognition and enforcement of the arbitral award.
[49] According to Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, in certain countries submission agreements were the only type of arbitration agreements that can be enforceable.
[50] Andrew Tweeddale/Keren Tweeddale, p. 34
[51] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 6

On the other hand, the submission agreement has been drafted for the settlement of the disputes that has already been arisen between the parties of the agreement[52]. The parties of the dispute have concluded a submission agreement when the arbitral tribunal has been constituted[53].

In light of the foregoing information, we can briefly define the meaning of the arbitration agreement as the agreement by which the parties submit the legal disputes that have been already arisen (i.e. "compromis") or that may arise in the future (i.e. "clause compromissoire") to a third party (i.e. the arbitral tribunal)[54].

In ***Dalico***[55] case, the substantive rules approach has also been followed by the French courts in order to determine the existence, validity and the scope of the arbitration agreement. The distinction between these two types of arbitration agreement mainly seen in their form. That means, the submission agreement has been drafted as a seperate document which is mostly composed of many pages. This is because, the dispute in concern has already been arisen and the parties are well aware of the dispute and its key issues. The submission agreements contain quite detailed provisions such as the constitution of the arbitral tribunal, the applicable procedure, the substantive law and etc[56].

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[52] United Nations Conference on Trade and Development/Dispute Settlement (2005), United Nations, New York and Geneva
[53] Thomas E. Carbonneau, p. 355
[54] Ergin Nomer, p. 409
[55] Khoms El Mergeb vs. Dalico Contractors, French Cour de Cassation, 121 J.D.I. 432 (1993)
[56] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 7

The execution of an arbitration agreement has certain consequences. The arbitration agreement is of evidentiary nature since it is proving the intention and consent[57] of the parties to submit the dispute to arbitration. Furthermore, it is the arbitration agreement which grants the competence and the authority of the arbitral tribunal. Most importantly, in case of any dispute, the arbitration agreement provides the arbitration liability of the parties[58].

B. Arbitrability

Arbitrability determines the types of the disputes that can be resoved by means of arbitration. Accordingly, arbitrability constitute certain obstacles to the freedom of contract principle since this principle limits the parties' right to refer the disputes to arbitration[59].

Inarbitrability occurs should the dispute in concern cannot be solved via arbitration due to the involvement of the public interests[60]. In such cases, the national courts have the sole authority, relying on their public mandate, to resolve the conflicts arising from public interest. The limitations on arbitrability arising from the subject matter of the dispute in concern called "objective arbitrability"[61] (*ratione materiae*[62]). Criminal law matters constitute a clear example of objective arbitrability.

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[57] Consent of the parties is essential in forming a valid arbitration agreement. Once the parties give their consents thereon, they become liable to arbitrate since such liability is a part from the main contract.
[58] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 100
[59] Thomas E. Carbonneau, p. 371
[60] ibid, p. 371
[61] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 188
[62] Nevhis Deren Yıldırım, UNCITRAL Model Kanunu ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları, Alkım Yayınevi, 2004, p. 27; Fouchard/Gaillard/Goldman, p. 313

Besides the objective arbitrability, "subjective arbitrability" (*ratione personae*) takes place should the restrictions arise from the parties of the dispute[63]. For instance, in certain national law systems states cannot be a party to arbitration.

C. The Validity and Interpretation

1. Validity of the Arbitration Agreement

In order for an arbitration agreement to be effective on the parties of the dispute and in turn grant jurisdiction to the arbitral tribunal, it must be valid and binding on the parties. There exist certain conditions that should be fullfilled for the validity of the arbitration agreement. In international commercial arbitration, such conditions should be considered in light of the international treaties, comparitive law and arbitral case law (i.e. substantive approach)[64]. There are specific cases[65] that the national courts recognize their jurisdiction over the dispute in concern since they have considered the arbitration agreement as invalid.

An arbitration agreement will be considered as invalid should there be constraint on one or both of the parties before executing such agreement[66].

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[63] ibid, p. 187; Fouchard/Gaillard/Goldman, p. 313
[64] Fouchard/Gaillard/Goldman, p. 241.
[65] Robobar Ltd. vs. Finncold, French Court de Cassation, October 28, 1995
[66] Georgios Petrochilos, Procedural Law in International Arbitration, Oxford University Press, January 2004, p. 115

a. Formal Validity

With regards to the formal requirements of the arbitration case, it is quite certain that the arbitration agreement must be in the written form. However, in few national laws an oral arbitration agreement is also accepted. On the other hand, in most of the laws and international conventions it has been required to conclude the arbitration agreement in writing or at least evidenced in writing.

In Article 7 (2) of the Model Law it has been clearly provided that "*the arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*" When we look at the International Arbitration Law of Turkey[67], it has been clearly seen that the requirement with respect to the form of an arbitration agreement reflects the language of the Model Law.

Also, Article II (2) of the New York Convention provides that "*the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.*" The Model Law and the New York Convention further require the arbitration agreement to be signed by the parties.

[67] Milletlerarası Tahkim Kanunu, published in the Official Gazette dated July 5, 2001 and numbered 24453.

Besides these international rules, the formation requirements are also provided under the relevant articles of certain national rules, the significant of which are examined below:

In Article 1031 (1) of the German Code of Civil Procedure ("German Arbitration Law")[68] the form of an arbitration agreement is defined as "*the arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of communication which provide a record of the agreement*".

Furthermore, the Netherlands Arbitration Act[69] requires the arbitration agreement in writing as well. Article 1021 of the Netherlands Arbitration Act provides that "*the arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standart conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.*"

b. Legal Capacity of the Parties

As in all types of agreements, the parties have to bear the legal capacity in order for them to enter into an arbitration agreement. Otherwise, the invalidity of the arbitration agreement will be occured. Therefore, existence of the legal capacity of the parties is a major requirement for the validity of the arbitration agreements.

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[68] Tenth Book of the German Code of Civil Procedure (Zivilprozessordnung;ZPO), January 1, 1998, Julian D M Lew QC/Loukas Mistelis, p. 112

[69] The Netherlands Arbitration Act, December 1, 1986, Code of Civil Procedure, Book Four: Arbitration, Julian D M Lew QC/Loukas Mistelis, p. 190

In order to determine whether the parties have the legal capacity or not to conclude an arbitration agreement, the applicable law to the parties will be taken into consideration[70].

This principle is also provided under Article V.I.a[71] of the New York Convention. Likewise, Article VI (2) of the European Convention provides that "*in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions. ...*" On the other hand, however, the Model Law does not provide such a connecting factor.

In considering the implication of such principle under the relevant rules of certain national legislation; the Belgian Judicial Code[72] (the "Belgian Code") and Spanish Arbitration Law[73] can be concrete examples. Article 1676 (2) of the Belgian Code states that "*whoever has capacity or power to contract may conclude an arbitration agreement.*" Likewise, Article 60 of the Spanish Arbitration Law states that "*the capacity of the parties to enter into an arbitration agreement shall be the same as the one required by their own personal law to dispose of in the controverted subject matter.*"

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[70] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 140; Ergin Nomer, p. 409; Fouchard/Gaillard/Goldman, p. 242

[71] Such article provides the basis for the denial of recognition and enforcement of an arbitral award should "*the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*".

[72] The Belgian Judicial Code, adopted July 4, 1972 and amended both on March 27, 1985 and May 19, 1998, Julian D M Lew QC/Loukas Mistelis, p. 17

[73] Spanish Arbitration Law, December 23, 2003, Julian D M Lew QC/Loukas Mistelis, p. 226

2. Interpretation

The main requirement for the validity of an arbitration agreement is the mutual consent of the parties[74]. Therefore, in case of any ambiguity regarding the validity, existence or the scope of the arbitration agreement the parties' intention has to be determined and interpreated either by the court or the arbitral tribunal. The common principle is to interpreat such ambiguties in favour of arbitration ("*the principle of interpretation in good faith*")[75].

In **Mutsibishi vs. Soler**[76] case the Supreme Court held that:

"*questions of arbitrability must be addressed with a healty regard for the federal policy favouring arbitration. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration* ...".

It is worth to mention that in order to make such a favourable interpretation, there must be certainty that the parties mutually agree to submit the dispute to arbitration[77]. Also, it is not so common for the parties to allege that the arbitration agreement in concern is ineffective due to duress, misrepresentation or mistake that ruins the consent of the parties for arbitration[78].

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[74] Article II.1 of the New York Convention provides that the parties must undertake to submit their disputes to arbitration.
[75] Fouchard/Gaillard/Goldman, p. 257
[76] Mitsubishi Motors Corp. vs. Soler Chrysler Plymouth Inc., 473 U.S. 614, 1985, http://www.adrinstitute.org/library/supreme_new.htm#10, 12.01.2007
[77] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 151
[78] Fouchard/Gaillard/Goldman, p. 307

D. Drafting Process

1. Arbitration Clause and its Content

In light of the foregoing information, it is very clear that the arbitration agreement is the main factor in order for the parties to arbitrate. At this point, it is very important and crucial to state the intention of the parties very clearly. That's why there exists typical languages regarding the arbitrability of the dispute. For instance, the most common language of this type is ICC clause[79].

The arbitration clause must be definite, clear and shall not let any ambiquities at all. Before drafting the arbitration agreement, the type of the arbitration must be determined; namely ad hoc or institutionalized arbitration. Ad hoc type of arbitration seems more appropriate when the dispute has already been arisen. Should the parties' aim is to select institutionalized arbitration then it is more easy to draft the arbitration clause since most of the instutions have typical clauses[80]. On the other hand, in ad hoc type of arbitration, should the language of the arbitration clause be not clear then the law of the arbitration seat will be applied[81].

In drafting the arbitration agreement before any dispute has been arisen, it is important to determine the key issues and then well incorporate such into the language of the arbitration agreement.

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[79] "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

[80] An extensive list of model clauses can be found at htpp://www.internationaladr.com

[81] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 167

The parties should explicitly state the matters that they want the arbitration agreement to cover. It should be clearly seen that the parties have chosen to go to arbitration instead of other dispute resolution mechanisms. In other words, the agreement has to provide a mandatory undertaking to arbitrate.

The scope of the arbitration agreement is another important issue that should be taken into consideration while drafting the arbitration agreement. In order to specify the corelation between the dispute in concern and the contract, usually the phrases like "arising from", "arising out of" or "in connection with" have been preferred. Even if future disputes are concerned, the important thing is to specify the contractual relationship that the disputes arising from or in connection with. Otherwise, the agreement may be considered as void or uncertain[82].

2. The Seat of the Arbitration

It is important for the parties to an international arbitration to specify the seat or place of the arbitration in the arbitration agreement. Should the parties can not agree on the place of arbitration then either the institution[83] or the tribunal will decide on. Article 16 of the UNCITRAL Rules states that "*unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.*"

[82] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 170

[83] Article 14(1) of the ICC Rules states that "*the place of arbitration shall be fixed by the Court unless agreed upon by the parties*".

Eventhough they are two seperate concepts, in principle the seat of arbitration mostly considered as the applicable procedural law[84]. Therefore, determining the place of arbitration has significant importance. So that, the parties should also well analyse the procedural law principles and the court system of the place in determining the seat of the arbitration.

3. The Applicable Procedural Law

As it has been also emphasized in the foregoing paragraph, the seat of the arbitration and the procedural law are two different issues that the parties of the dispute have to determine in the context of the arbitration agreement.

We can clearly observe the implementation of this principle in the language of the European Convention. Article IV 1 (b) (iii) of the European Convention states that "*the parties to an arbitration agreement shall be free to lay down the procedure to be followed by the arbitrators.*" Furthermore, according to Article IV 4 (d) of the European Convention the arbitrators also have the right to determine such procedural rules.

4. Choice of the Arbitrators

In the arbitration agreement, it is better for the parties to determine both the number of the arbitrators and their qualifications (i.e. technical knowledge, professional qualifications, language skills and etc.). Regarding the number of the arbitrators, the tribunals usually composed of three (3) arbitrators.

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[84] Article 1(2) of the Model Law states that "*the provisions of this Law, except for articles 8,9,35 and 36, apply only if the place of arbitration is in the territory of this State*". Also, the provisions of the International Arbitration Law of Turkey shall only be applied should the seat of arbitration is Turkey.

On the other hand, by mutual consent the parties can agree otherwise. The cost, speed and expertise are the main factors for the parties in deciding the number of the arbitrators[85]. Should the parties do not determine the number of the arbitrators, they will be determined by the applicable arbitration rules or law[86].

5. Language of the Arbitration

When the parties of the arbitration agreement are from different nationalities, determination of the arbitration language can constitute a major issue. The parties are free to determine the language through which the arbitration will be conducted. As also in the other elements of the arbitration agreement, in case of no choice made by the parties regarding the language then the arbitral tribunal[87] will decide on the applicable language.

6. Applicable Substantitive Rules

One of the most significant questions to be decided by the parties when drafting the arbitration agreement is the scope of the powers conferred upon arbitrators concerning the settlement of the conflict[88].

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[85] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 173

[86] Article 5 of the UNCITRAL Rules states that "*if the parties have not previously agreed on the number of the arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.*"

[87] Article 16 of the ICC Rules provides that "*in the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.*" Furthermore, according to Article 17 of the Model Law "*many rules and laws on arbitral procedure enpower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.*"

[88] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 120

The parties are free to decide on the law applicable to the dispute. In case the parties do not opine on the law; the arbitrator shall apply the conflict of law system of the institution in order to determine the applicable law should there be an institutionalized arbitration or the arbitrator determines the law according to the law most closely connected to the merits of the dispute should there be ad hoc arbitration[89].

[89] Fouchard/Gaillard/Goldman, p. 55

III. EFFECTS OF THE ARBITRATION AGREEMENT

By executing an arbitration agreement, the parties undertake to submit the dispute, if any, to arbitration rather than initiating a court case before the national courts. Therefore, the parties surrender their rights to initiate a case before a national court (i.e. negative effect) and give the jurisdictional authority to a third neutral party, the arbitrator(s) and/or the arbitral tribunal (i.e. positive effect)[90].

A. Negative Effects

In case of an arbitration agreement between the parties, in principle the courts do not have any jurisdiction on the dispute in concern. On the other hand, however, should one of the parties initiate a court case then the other party has to challenge the jurisdiction of the court on the grounds of the existence of the arbitration agreement. Thus, the court does not recognize its lack of jurisdiction automatically (i.e. ex officio)[91]. Therefore, the defendant of the court case must raise his/her objection not later than submitting the response writ to the court. In other words, the courts are lack of jurisdiction should there be an arbitration agreement between the parties unless the parties provide their consent on the jurisdiction of the national courts (i.e. waive of the rights arising from the arbitration agreement).

[90] ibid, p. 382
[91] ibid, p. 405

This so called negative competence-competence principle has been arising from French Law[92]. Accordingly, Article 1458 of the French Code provides that "*if a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State Court, it shall declare itself incompetent. If the dispute is not yet before an arbitral tribunal, the State Court shall also declare itself incompetent unless the arbitration agreement is manifestly null and void. In neither case may the State Court declare itself incompetent at its own motion*".

Both in national and international law, the general aim of the negative competence-competence principle is to avoid delay of the arbitration proceedings due to certain attempts of the parties (i.e. application to national courts, allegations regarding the validity of the arbitration agreement and etc.)[93].

B. Positive Effects

As it has been also emphasized in the foregoing paragraph, the arbitration agreement provides jurisdiction to the arbitrator(s) and/or the arbitral tribunal. The obligation of the parties to submit the dispute to arbitration arises from a general principle of contracts law; the parties have to fulfill their obligations under the contract (i.e. pacta sund servanda)[94].

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[92] John J. Barcelo III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", Vanderbilt Journal of Transnational Law, Vol. 36:1115, p. 1124
[93] ibid, p. 1125
[94] Fouchard/Gaillard/Goldman, p. 382

There are also certain provisions with respect to binding nature of arbitration in international conventions. For instance, Article 1 of the Geneva Protocol provides that "*each of the contracting states recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject*".

C. Effects of the Arbitration Agreement In Light of the Model Law and the New York Convention

The effects of the arbitration agreement have been also recognized under the relevant articles of the Model Law and the New York Convention.

In Article 7 (1) of the Model Law the arbitration agreement defined as "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*"

Furthermore, according to Article 8 (1) of the Model Law; "*a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*"

Article II.1 of the New York Convention provides that; "*each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*"

When we examine the foregoing relevant articles, it has been clearly seen that the language of the Model Law (i.e. Article 8(1)) is similar with the text of Article II.1 of the New York Convention. Both of these articles are as of mandatory nature. Furthermore, Article 5 of the International Arbitration Law of Turkey has been drafted in line with the language of Article 8 of the Model Law[95].

In light of the foregoing, it is obvious that the courts do not determine the existence and/or the validity of an arbitration agreement ex officio. The rationale of this principle is the arbitration agreement stems from solely the consensus of the parties. Therefore, such parties can any time agree otherwise and decide to submit the dispute in concern to the jurisdiction of the courts.

[95] Ziya Akıncı, p.84

IV. SEPARABILITY OR AUTONOMY OF THE ARBITRATION AGREEMENT

In International Arbitration Conference which was held in Paris in 1961, the major issues have been raised regarding the improvement and sake of international arbitration namely; general acceptance of the autonomy principle or separability of the arbitration agreement from the main contract and the power of the arbitral tribunal to rule on its own jurisdiciton (i.e. 'competence-competence principle')[96].

The main characteristic of arbitration as an alternative dispute settlement method stems from the autonomy and/or separability of the arbitration agreement from the main contract and the national laws.

In principle, the 'doctrine of seperability' means that the arbitration clause is separate from the main contract and therefore independent and distinct from the main contract. In other words, allegations of the parties such as the invalidity of the contract should not affect the validity of the arbitration clause[97].

Under the separability doctrine, the arbitral clause can be deemed as another entity bearing its own legal rules[98]. This principle is very important in order to ensure the parties' mutual consent for submitting the dispute to arbitration.

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[96] Andrew Tweeddale/Keren Tweeddale, p. 216

[97] Joseph E. Neuhaus, the Autonomy of the Arbitration Agreement: Some Thoughts on the U.S. Experience, www.iccamontreal2006.org/english/pdf/program/presentations (19.09.2006); Andrew Tweeddale/Keren Tweeddale, p. 35; Gary L. Benton, "The Arbitration of International Technology Disputes Under the English Arbitration Act 1996", p. 8, http://library.findlaw.com, 09.19.2006

[98] Thomas E. Carbonneau, p. 370; Robert H. Smit, "Seperability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?, American Bar Association Section of International Law and Practice Spring Meeting, May 7, 2003, Washington D.C., p. 1

A. The Sources of the Separability Doctrine

1. The United States Federal Arbitration Act and the Case Law:

There is no provision in the U.S. Federal Arbitration Act[99] (the "FAA") regarding the separability doctrine. The "separability doctrine" was first articulated by the United States Supreme Court in ***Prima Paint Corporation vs. Flood & Conklin Manufacturing Co***[100] case. The plaintiff of the case has initiated an action on the grounds that the contract had been unfairly concluded. On the other hand, the defendant has claimed that such a claim (i.e. the invalidity of the contract) should be evaluated and determined by the arbitrator but not the court due to the existence of the arbitration clause. At this point, the Supreme Court has decided in favour of the defendant on the grounds that the plaintiff has challenged the main contract but not the validity of the arbitration clause. The significance of this case stems from the Supreme Court's distinction between the validity of the contract and the validity of the arbitration agreement[101].

It is worth to mention that the separability doctrine can not be applied in cases in which the parties allegation is there is no mutual consent of the parties in order to submit any kind of dispute to arbitration.

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[99] The Federal Arbitration Act, Title 9, U.S. Code, Section 1-14, February 12, 1925, www.chamber.se/**arbitration**/shared_files/laws/arbitr**act_us**_cont.html, 10.07.2006

[100] Prima Paint Corp. vs. Flood & Conklin Mfg Co, US Supreme Court, 388 U.S. 395, 1967

[101] Ashby Leigh Kent, the Separability Doctrine, www.library.find law.com, 18.09.2006

The Supreme Court has based its ruling on Article 4 of the FAA which provides that "... *the court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or failure to comply therewith it is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ... If the making of the arbitration agreement or this failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.*"

On the other hand, however, in ***Chastain v. Robinson-Humphrey Co.***[102] case since the plaintiff has never signed the main contract it was not possible for her to rely on the arbitration clause contined in such contract. On the other hand, the Eleventh Circuit has adopted the "separability doctrine" since it has held that "*under normal circumstances, an arbitration provision within a contract admittedly signed by contractual parties is sufficient to require the district court to send any controversies to arbitration. Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general.*"

Another significant case law regarding the implementation of the "separability doctrine" is ***John B. Goodman Limited Partnership v. THF Construction, Inc***[103]. case. The dispute in this case was related with the license of a contractor and invalidity of the contract.

The Court, has considered the arbitration agreement as valid and in turn decided that the arbitrator has to determine whether the license of the contractor has any effect on the validity of the construction contracts.

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[102] Chastain v. Robinson-Humphrey Co., The Eleventh Circuit of Court of Appeals, 957 F. 2d 851, 1992 Supreme Court of Florida, www.floridasupremecourt.org/decisions/2005/sc02-2161.pdf, 20.09.2006

[103] John B. Goodman LP v. THF Construction Inc., 321 F.3d 1094 (11th Cir. 2003), www. findarticles.com/p/articles 20.09.2006

In order to clearly analyse the effect of invalidity of the main contract on the validity of the arbitration agreement/clause, a very recent case can give us a guidance at this point. In its decision regarding ***Buckeye Check Cashing vs. Cardegna***[104] case, the United States Supreme Court has rejected the distinction between the void (i.e. obvious invalidity) and voidable (i.e. valid until annullity) contracts. The Supreme Court has reversed the Florida Courts' decision in which it has refrained from applying the separability doctrine on the grounds of the distinction between the void and voidable contracts. Thus, the Supreme Court has reached a conclusion that the allegations regarding the validity and/or invalidity of the contract but not the arbitration clause must be determined by the arbitrator. The effect of the autonomy of the arbitration agreement can be clearly identified in this specific case[105].

Georgia state courts have adopted a view of the separability doctrine that is consistent with that held by the Eleventh Circuit. In ***Stewart vs. Favors***[106], the Court held that where a party raises a clear and specific challenge to the enforceability of the arbitration provision in addition to challenging the underlying contract generally, the issue is properly decided by the Court. Alabama courts, however, have expressly limited the application of the separability doctrine to "voidable" contracts only (*e.g.*, a contract where a party is induced through fraud or a contract where a party is an infant).

For instance, Alabama courts have held that contracts which are void *ab initio* are "challenges to the very existence of the contract" as opposed to "attempts to avoid or to rescind a contract" which are otherwise subject to arbitration[107].

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[104] Buckeye Check Cashing, Inc. vs. John Cardegna, The United States Supreme Court, February 21, 2006, No. 04-1264, www.adr.org, 20.09.2006
[105] Joseph E. Neuhaus, p. 2
[106] Stewart v. Favors, 590 S.E.2d 186 (Ga. App. 2003)
[107] Camaro Trading Co. vs. Nissei Sangyo America, Ltd., 577 So.2d 1274 (Ala. 1991)

While this position is consistent with well-settled Alabama law which disfavors pre-dispute agreements that submit disputes to binding arbitration[108], this is in direct contrast to recent holdings in the Eleventh Circuit finding that "void *ab initio*" arguments should be decided by arbitrators rather than courts.

In *Goodman*, the Court found that because Plaintiff's challenges went to "the method of performance" rather than the "existence" of the underlying contracts, an arbitrator should decide whether Plaintiff's construction contracts were void under state law.

Similarly, in ***Bess v. Check Express***[109], the Plaintiff claimed that certain contracts were void *ab initio* because the transactions on which they were based were illegal under Alabama law. Finding that these claims challenged "the *content* of the contracts" rather than their "existence," the Court found that an arbitrator should decide such contract's validity.

The Alabama state law policies favoring judicial determination of "arbitrability" clearly conflict with the Eleventh Circuit's policy preferences favoring arbitration and its emphasis on the parties' presumptive assent.

This conflict may be of particular interest in the construction context, in light of the numerous lawsuits brought under Alabama's harsh qualification statutes. Under state law, a general contractor's non-licensure or a foreign corporation's non-qualification may "void" an underlying contract along with the arbitration provisions contained therein.

However, upon finding "presumptive intent," a district court may "separate" the arbitration clause by finding that these claims challenge the "contents" or "performance" rather than the "existence" of the contract.

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[108] Articles 8-1-41 (3) of 1975Alabama Code 1975

[109] Check Express, 294 F.3d 1298 (11th Cir. 2002)

Parties should be aware that a state law voiding a contract may not prevent an arbitrator from ruling on the contract's validity in cases where the parties signed the agreement and have therefore "presumptively agreed to arbitrate." This state/federal disparity could encourage forum-shopping and/or otherwise affect both the business and litigation strategy of parties performing work in Alabama or entering into contracts with Alabama contractors.

Furthermore, the Cour de Cassation has been rendered in its **Gosset**[110] decision that "*in international arbitration, the arbitration agreement, whether concluded separately or included in the contract to which it relates, shall, save in exceptional circumstances ..., have full legal autonomy and shall not be affected by the fact that the aforementioned contract may be invalid.*"

In ***Sojuznefteexport vs. Joc Oil***[111] case, the Bermuda Court of Appeal has been pointed out 2 qualifications regarding the limitation of the separability doctrine. A Bermudian company, Joc Oil, and a Soviet foreign trade organisation, Sojuznefteexport, have concluded a contract for the sales and purchase of oil. In accordance with the arbitration agreement, Sojuznefteexport has initiated arbitration process in the Soviet Union for its receivables from Joc Oil. The arbitral tribunal has been ordered Joc Oil to pay 200,000,000 $.

The main defence point of the defendant during both the arbitration and the enforcement proceedings in Bermuda was that the arbitration agreement was not valid since the main purchase and supply agreement was invalid since according to the Soviet law an agreement concluded for the purposes of foreign sale of oil can only be valid by the signature of 2 authorised officials but the one in concern has only one signature of authorised official.

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[110] Cass. Le civ., Raymond Gosset vs. Carapelli, May 7,1963.
[111] Sojuznefteexport vs. Joc Oil Ltd., Bermuda Court of Appeal July 7, 1989

The arbitral tribunal has accepted the arguments of Joc Oil regarding the invalidity of the contract but did not accept its arguments regarding non-existence of the contract. Therefore, the arbitral tribunal has made a clear distinction between the nullity of a contract and non-existence of a contract, namely:

i. "*... the case where the existence of the contract itself is contested. If the question arises whether the parties have indeed concluded a contract containing an arbitration clause, the jurisdiction of the arbitrator is put in question. If there is no contract at all, the legal basis of the arbitrator's powers which reside in the arbitration clause found in the contract is also missing*".

ii. "*... when the attack is not upon the principal agreement but upon the validity of the arbitration clause itself – whether, for instance, it conformed to the requirements for conclusion of a valid arbitration agreement under the proper law of the agreement or whether it is, for example, itself vitiated by fraud. Here, while the arbitral tribunal is competent to pass upon that question, it is, as a rule not competent to pass upon it with definite effect.*"

In light of the foregoing information, it can be concluded that should the main contract be never exists then it will not be possible to mention a valid arbitration agreement[112].

[112] Robert H. Smit, p. 13

2. International Arbitration Laws

The doctrine of separability also identified in certain of the international arbitration rules. Article 16 (1) of the Model Law provides that "*the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*".

The French approach with respect to the dilemma arising from the question whether the courts should resolve the issue , i.e. validity and/or existence of the arbitration agreement, or refer the same to the arbitrator(s) to decide is of significant importance[113]. Accordingly, Article 1458 of the French Code provides that:

"*Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction.*

If the arbitral tribunal has not yet been seised of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null.

In neither case, may the court determine its lack of jurisdiction on its own motion."

Article 178 (3) of the Swiss Statute constitutes another source of the separability doctrine. According to such Article, the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid or that the arbitration agreement concerns disputes which have not yet arisen.

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[113] Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p. 87

In English Arbitration Act the separability of the arbitration agreement has been clearly provided under the heading of separability of arbitration agreement. Pursuant to Article 7;

"*unless otherwise agreed by the parties, an arbitration agreement which forms or was intented to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement.*"

Furthermore, Article 1040 (1) of the German Arbitration Law provides that "*the arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*"

Also, Article 1697 of the Belgian Code provides that;

"*1. The arbitral tribunal may rule in respect of its own jurisdiction and for this purpose may examine the validity of the arbitration agreement.*

2. A ruling that the contract is invalid shall not entail ipso jure the nullity of the arbitration agreement contained in it."

Likewise, under Article 1053 of the Netherlands Arbitration Act it has been stated that;

"*An arbitration agreement shall be considered and decided upon as a seperate agreement. The arbitral tribunal shall have the power to decide on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related*".

Besides the foregoing international arbitration laws, the separability doctrine has also been provided under Article 4 of the International Arbitration Law of Turkey.

3. International Arbitration Rules

Besides the foregoing relevant international arbitration laws, there are also certain articles provided in international arbitration rules. Article 6 (4) of the Arbitration Rules of the ICC[114] (the "ICC Rules") provides that "*unless otherwise agreed, the Arbitral Tribunal shall not cease to have any jurisdiction by reason of any claim that the contract is null and void or allegation that is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.*"

It is quite clear under the ICC Rules that the autonomy of the arbitration agreement from the main contract has been recognised. Thus, should the main contract be void or non-existent then the arbitrator(s) have to rule accordingly but without prejudice to their jurisdiction arising from the arbitration agreement. On the other hand, however, the arbitrator(s) should decline their jurisdictional rights should the arbitration agreement in concern be void and/or non-existent[115].

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[114] Arbitration Rules of the International Chamber of Commerce, January 1, 1998, http://www.iccwbo.org/court/english/arbitration/rules.asp, 08.10.2006

[115] Fouchard/Gaillard/Goldman, p. 200

Article 21 (2) of the UNCITRAL Rules provides that "*the arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part.*

For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

In analysing the language of the UNCITRAL Rules, should the voidness of the main contract also affects the validness of the arbitration clause then both of them should be considered as void by the arbitrators[116].

Regarding the separability doctrine, Article 15 (2) of the American Arbitration Association International Arbitration Rules[117] (the "AAA Rules") has to be emphasized, too. It has been provided that the tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

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[116] ibid, p. 201

[117] The American Arbitration Association International Arbitration Rules, April 1, 1997, http://www.law.berkeley.edu/faculty/ddcaron/Documents/, 03.08.2006

4. The New York Convention

Article II (3) of the New York Convention provides that "*the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*"

The recognition of the autonomy principle can obviously seen in the respective arbitral awards regarding the Libyan oil concession disputes. In ***BP vs. Libya***[118] case, the plaintiff has argued that the concession agrement was not terminated due to the nationalization law and subsequent legislation. The sole arbitrator has rendered his opinion in a way that;

"*the BP Nationalisation Law was effective to terminate the BP concession, except in the sense that the BP concession forms the basis of the jurisdiction of the Tribunal and of the rights of the Claimant to claim damages from the Respondent before the Tribunal.*"

Similarly in ***LIAMCO vs. Libya***[119] case, the sole arbitrator has stated that "*it is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination.*"

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[118] BP Exploration Co. (Libya) Ltd. vs. Government of the Libyan Arap Republic; Fouchard/Gaillard/Goldman, p. 207

[119] Libyan American Oil Co. (LIAMCO) vs. Government of the Libyan Arab Republic; Fouchard/Gaillard/Goldman, p. 207

Another similar and significant recognition derives from the case law of the European Court of Human Rights. Accordingly, in ***Stran Greek vs. Greece***[120] case the Court held that;

"the unilateral termination of a contract does not take effect in relation to certain essential clauses of the contract, such as the arbitration clause. To alter the machinery set up by enacting an authoritative amendment to such a clause would make it possible for one of the parties to evade jurisdiction in a dispute in respect of which specific provision was made for arbitration."

In light of the foregoing case law and the respective provisions of the international rules and laws, it has been concluded that in principle the invalidity of the main contract does not make the arbitration agreement invalid and vice versa. In other words, invalidity of the arbitration agreement does not affect the validity of the main contract. In more practical terms, the seperability doctrine is essential in order to avoid the delay of the arbitral proceedings by challenging the main contract in which the arbitration clause has been found.

B. Determination of Arbitral Tribunal's Jurisdiction

As it has been analysed in Section III (B), the arbitration agreement has a positive effect since the parties agree to submit any disputes covered in the arbitration agreement to the jurisdiction of the arbitral tribunal. Hence, the decision making authority of the arbitrators arises from such jurisdiction of the arbitral tribunal. The arbitral awards that have been rendered by unauthorized arbitrators are lack of legitimacy.

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[120] Stran Greek Refineries and Stratis Andreadis vs. Greece, The European Court of Human Rights, December 9, 1994, Fouchard/Gaillard/Goldman, p. 209

Therefore, in case the jurisdiction of the arbitrators become an issue, it should be settled in the very early phases of the judgment[121]. It is a generally recognised principle that the arbitral tribunal has the right to determine its own jurisdiction[122].

1. Determination by Arbitral Tribunal ("Competence-Competence")

The principle of competence-competence is another key stone of international arbitration[123]. Both the separability and the competence-competence principles can be considered as the guardian of the mutual consent and intention of the parties to submit the dispute to arbitration. This is because, mostly the parties use jurisdiction challenges as a strong mechanism in order to delay the arbitration proceedings. At this point, separability and the competence-competence principles' intention is to secure the arbitral process from such maneuvers[124].

The competence-competence doctrine means that in case of any challenge regarding the jurisdiction of the arbitrators, they have the authority in order to determine whether they have such jurisdiction or not ("*the positive effect of the competence-competence principle*").[125]

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[121] Robert H. Smit, p. 2
[122] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 251
[123] The competence-competence principle is recognized by the major international conventions on arbitration, by the most of the arbitration statutes and by the institutional arbitration rules.
[124] Thomas E. Carbonneau, p. 372; X.L. Jason Ju, A Brief Introduction to the "Kompetenz-Kompetenz" Principle in International Commercial Arbitration, www.duanduan.com, 5.12.2006; Fouchard/Gaillard/Goldman, p. 401; Gary L. Benton, p. 8
[125] Fouchard/Gaillard/Goldman, p. 213; John J. Barcelo III, p. 1118

Obviously, the meaning and the aim of the principle is not that the arbitrators are the only mechanism to judge their jurisdiction but to grant them the authority in order to decide on their jurisdiction before court involvement ("*the negative effect of the competence-competence principle*")[126]. It is worth to emphasize that, the arbitrators do not have to investigate their jurisdiction should both of the parties give their consent regarding the appoinment of the tribunal and accordingly there is no conflict with respect to the jurisdiction of the arbitrators[127]. On the other hand, however, a detailed investigation and evaluation of the tribunal is needed should there be an explicit challenge regarding the jurisdiction of the arbitral tribunal. Likewise, it is not possible for the courts to *ex officio* decline their jurisdiction due to the existence of an arbitration agreement. The rationale behind this approach is the parties of the dispute always have the right to waive from their obligation to submit such dispue to arbitration[128].

Since the parties agree to submit their dispute in concern to arbitration and in turn accept the determination made by the arbitrators then it should be highly accepted that the control of the arbitral procedure should be made by the arbitrators and the parties rather than the courts. Accordingly, the validity of the contract and the jurisdiction of the arbitrators should be priorly determined by the arbitrators themselves[129].

The competence-competence principle has been clearly provided under Article V (3) of the European Convention, which explicitly states that;

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[126] ibid, p. 400
[127] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 330

[128] Fouchard/Gaillard/Goldman, p. 405
[129] Roy Goode, The Role of Lex Loci Arbitri in International Commercial Arbitration, 17 (1) Arb. Int. 19-39 (2001), p. 1

"*subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part*".

Furthermore, Article 16 (2) of the Model Law provides that;

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

The same principle has been also provided under Article 30 (1) of the English Arbitration Act. It has been clearly stated that;

"*unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction, that is, as to:*

a) *whether there is a valid arbitration agreement,*
b) *whether the tribunal is properly constituted, and*
c) *what matters have been submitted to arbitration in accordance with the arbitration agreement.*"

Furthermore, according to Article 31 (1) of the English Arbitration Act;

"*an objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to consent the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appoinment of an arbitrator*".

Also in German Arbitration Law we can see the same approach under Article 1040 (2); "*a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed or participated in the appoinment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay*".

The Netherlands Arbitration Act is another source in which the competence-competence principle has been explicitly provided under Article 1052 (1) which states that "*the arbitral tribunal shall have the power to decide on its own jurisdiction.*" On the other hand, in contrary to the foregoing respective articles, under the Netherlands Arbitration Act it is not possible for a party to challenge the jurisdiction of the arbitral tribunal should such a party has participated in the constitution of the arbitral tribunal[130].

[130] Article 1052 (3) of the Netherlands Arbitration Act

Besides the foregoing provisions, the leading international arbitration rules have also be taken into consideration in order to more clearly analyse the implementation of the competence-competence principle.

Article 21 (1) of the UNCITRAL Rules provides that "*the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement*."

Furthermore, Article 6 (2) of the ICC Rules regulates the principle in a different aspect since the role of the courts is also provided in the relevant provision which is "*if the respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.*"

Thus, under the ICC Rules, the arbitral tribunal follows 2 paths in case of a challenge regarding the jurisdiction of the arbitral tribunal. In the initial path, the ICC Court considers *prima facie* existence of an arbitration agreement should the existence, validity or scope of such agreement be in question. In the second path then, the arbitration process proceeds should the ICC Court recognizes the existence of the agreement in concern.

As seen the positive effect of the competence-competence doctrine is highly accepted by the most of the international arbitration laws and rules. On the other hand, likewise the arbitration agreement, the competence-competence principle also has a negative effect since due to such principle the arbitrators are the first authority to determine their jurisdiction but not the only. More clearly, the courts still have the authority to review the jurisdiction of the tribunal[131]. For instance, in Article 67 of the English Arbitration Act it has been clearly stated that "*a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:*

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction ..."

The ***Shin-Etsu Chemical Co. Ltd. vs. Aksh Optifibre Ltd.***[132] case is a good example in order to understand the implementation of such negative effect. The arbitrators' authority to priorly determine their jurisdiction in case of any conflict thereon is explicitly recognized by the Indian Supreme Court. The Court has reached a conclusion that the authority of the arbitrators to decide on their jurisdiction is counterbalanced by the courts' authority to review the existence and validity of the arbitration agreement[133].

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[131] Fouchard/Gaillard/Goldman, p. 401

[132] Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., 2005 (7) SCC. 234, High Court of Delhi, www.delhidistrictcourts.nic.in/Nov06/, 14.01.2007

[133] Emmanue Gaillard, International Arbitration Law, New York Law Journal, Volume 225 No. 105, December 1, 2005

Another significant tool with respect to the recognition of the competence-competence doctrine is Article 15 (1) of the AAA Rules. Such Article provides that "*the tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement*".

Like the separability doctrine there is no specific provision regarding the competence-competence principle in the FAA. However, the **First Options of Chicago Inc. vs. Kaplan**[134] case is an important cornerstone since it has been held by the court that "*the arbitrators have the primary power to decide arbitrability should the parties have specifically agreed to confer such power upon them*".

2. Determination by National Courts

It is a highly accepted rule in most of the national laws that the courts must submit the dispute to arbitration should the parties have concluded an arbitration agreement. On the other hand, such a referral of the courts has not been invoked ex officio.

Article VI (1) of the European Convention provides in this respect that "*a plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.*"

[134] First Options of Chicago Inc. vs. Manuel Kaplan et ux and MK Investment Inc., 115 Sct 1920 (1995)

The exception of this general rule has been provided under the New York Convention and certain of the arbitration laws. Accordingly, Article 7 (b) of the Swiss Statute provides that "*if the parties have concluded an arbitration agreement covering an arbitrable dispute, a Swiss court seized of it shall decline jurisdiction unless the court finds that the arbitral agreement is null and void, inoperative or incabaple of being performed ...*".

Furthermore, Article 1032 (1) of the German Arbitration Law provides that "*a court before which an action or application is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. ...*"

Another important source with respect to court review is Article 9 (4) of the English Arbitration Act. According to such; "*On application under this Section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.*"

In light of the foregoing, it is quite clear that should the court decides that the arbitration agreement is null and void, inoperative or incapable of being performed the national courts refrain from referring the parties to arbitrate.

3. The Relationship Between Separability and Competence-Competence Doctrines

The separability and competence-competence principles are generally considered as the complemantary of each other[135]. On the other hand, however, these 2 concepts do not bear the same meaning. The competence-competence principle provides the arbitrators such an authority in order to determine their jurisdiction in case of any conflict thereon. Whereas in separability doctrine, the issue is related with the validity of the main contract and its affects on the arbitration clause and/or agreement. More clearly, due to the separability principle, the invalidity of the contract does not automatically affect the validity of the arbitration agreement.

The autonomy principle should be considered as the first pillar that gives the right to the arbitrator(s) to rule on their jurisdiction. On the other hand, however, without application of the competence-competence principle it would not be possible for the arbitrator(s) to decide on their jurisdiction just via relying on the autonomy of the arbitration clause from the main contract[136]. Therefore, we can in a way conclude that both the autonomy principle and the competence-competence principle have a common aim to prevent the early intervention of the courts to the arbitral proceedings[137].

C. Court Review

It is quite clear and obvious that the arbitral tribunal can decide[138] its own jurisdiction. On the other hand, however, such decision is subject to the review of the national courts.

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[135] Fouchard/Gaillard/Goldman, p. 399; Philippe Leboulanger, "The Arbitration Agreement: Still Autonomous?", International Arbitration 2006: Back to Basics?, ICCA Montreal, p. 5

[136] Fouchard/Gaillard/Goldman, p. 214

[137] John J. Barcelo III, p. 1116

[138] In case of a challenge regarding its jurisdiction, the decision of the arbitral tribunal can be either lack of jurisdiction or rendering an interim award or tackle the jurisdiction issue with that of the merits of the case.

More clearly, the decision of the arbitral tribunal regarding the effectiveness and/or the meaning of the arbitration agreement is not of a final nature[139]. Court review upon one and/or both of the parties' recourse can take place in one of the three stages namely; in the beginning of the arbitration process, during the process or in rendering the arbitral award[140].

The challenges regarding the jurisdiction of the tribunal during the process are usually tackled by the arbitral tribunal via issuing an interim award thereon[141]. In some of the jurisdictions like England, such interim award can also be challenged immediately before the national courts as well[142].

The involvement of the national courts, regarding the arbitral tribunal's jurisdiction, before the tribunal renders its final award is called "concurrent control"[143]. Eventhough concurrent control can lead to certain disadvantages namely; interfrence of the national courts to the arbitral tribunal and constituting a delay mechanism for the parties who are acting without good faith, it has been adopted in the Model Law[144].

The competence-competence principle has also been recognized under Article 7 (H) of the International Arbitration Law of Turkey. On the other hand, unlike the Model Law, the decisions of the arbitrator(s)' regarding their competence on jurisdiction will be subject to nullity action but not court review[145] according to Article 15 (1)/d of the International Arbitration Law of Turkey .

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[139] Fouchard/Gaillard/Goldman, p. 254
[140] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 256
[141] ibid, p. 256
[142] Article 32 of the English Arbitration Act
[143] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 256
[144] Article 16 of the Model Law
[145] Ziya Akıncı, p. 117

V. APPLICATION OF THE AUTONOMY PRINCIPLE IN ARBITRATION PROCEDURE

Arbitration is one of the most preferred method of international dispute resolution mechanism[146]. Obviously this is due to the certain significant advantages of arbitration. At this point, one of the main benefit that international commercial arbitration provides to the parties of a dispute is the flexibility and speedness of the procedure when compared with the court systems[147]. Eventhough arbitration is a judicial process, there are no established procedural rules[148]. The party autonomy can be considered as the governing principle of the arbitral procedure[149]. According to the principle of party autonomy, the parties can choose the law and/or the laws to be applied to the merits of the arbitration and the procedural issues. On the other hand, the autonomy of the arbitration agreement from the underlying contract arises certain problems. The main problem is the law governing the underlying contract will not necessarily be the law governing the agreement nor the law governing the procedure. Furthermore, should the underlying contract is *void ab initio* the arbitration agreement will not automatically void.

In general the parties of the dispute have the oppurtunity and flexibility to also determine the arbitral procedure to be applied to the dispute in concern. This means that there is no typical set of established procedural rules to be applied during the arbitration process[150].

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[146] Andrew Tweeddale/Keren Tweeddale, p. 39
[147] ibid, p. 39; Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p. 411
[148] Andrew Tweeddale/Keren Tweeddale, p. 37
[149] Yavuz Kaplan, p. 25
[150] Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p.411; Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 264

Oftenly, the choice of the parties have been made via determination of priorly established norms of arbitral institutions or the rules established independently in case of ad-hoc arbitration[151].

A. The Procedure in International Arbitration

The procedural rules have a technical nature since they are related with the conduct of the arbitral proceedings. On the other hand, the substantive matters are directly deal with merits of the dispute and in turn influence the result of the case[152]. Also, the law to be applied both to the substance of the dispute and the procedure can be different from each other. There are no established set of procedural rules applicable to the international arbitration. The general procedural rules for arbitration provides the general principles whereas the specifics of such rules can be determined by the parties of the dispute and/or by the arbitral tribunal[153]. The parties of the arbitration have to obey with the procedural rules during the arbitration process[154]. The arbitrators also have to act in accordance with the rules agreed by the parties to the extent such rules are not in contrary with the general public policy rules, criminal law etc[155]. A procedural mistake will occur should the arbitral tribunal fails to apply the procedural rules that has to be applied[156].

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[151] ibid, p. 411
[152] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 522
[153] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 264
[154] Yavuz Kaplan, p. 35
[155] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 170
[156] Yavuz Kaplan, p. 35

The language of Article 34 (2) of the English Arbitration Act defines the procedural issues as;

(a) when and where any part of the proceedings is to be held,

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied,

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended,

(d) whether any and if so which documents and classes of documents should be disclosed between and produced by the parties and at what stage,

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done,

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) shought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented,

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

Before defining the types of procedural issues, Article 34 (1) of the English Arbitration Act clearly recognizes the parties' right to agree on procedural matters since such Article provides that "*it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter*".

Generally, the parties of the dispute present their case as they described the matters under the terms of reference and via the witnesses[157]. At this point, the duties and the behaviour of the parties play an important role for the sake of the arbitration process. Accordingly, their main duty is to act and arbitrate in good faith[158]. Failing to act in accordance with the arbitral tribunal's requests and try to avoid the proper functioning of the process via certain delay tactics[159] can be considered as the basis for the breach of the 'acting in good faith' obligation.

B. Determination of the Arbitration Procedure

It is curicial both for the parties of the dispute and the arbitral tribunal to determine the procedural rules (i.e. evidence of witnesses, the time limits, disclosure of documents and etc.) in order for them to follow[160]. In case there is silence regarding the governing law and the seat of the arbitration, such issue has to be determined either by the arbitral institution or by the arbitral tribunal itself[161].

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[157] Thomas E. Carbonneau, p. 357
[158] ibid, p. 357
[159] Such as; presenting too many lay or expert witnesses, pursuing the counter party's witnesses, refusing to compy with the tribunal's document submission requests and so on.
[160] ibid, p. 83
[161] Andrew Tweeddale/Keren Tweeddale, p. 216

The choice of neither the place of arbitration nor the institution constitutes major effect in determination of the arbitral proceedings[162].

1. Determination by the Parties

As it has been mentioned before, irrespective of the law governing the merits of the dispute, the parties have the right to determine the procedure to be applied for the arbitration proceedings. Party autonomy is the major principle in determining the procedural issues to be applied in international commercial arbitration[163]. The reflection of this principle can be analysed not only in national laws but under respective provisions of certain international conventions, rules and laws[164].

Article 19 (1) of the Model Law provides in this respect that; "*subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*"

Also Article V 1 (d) of the New York Convention provides that the recognition of an arbitral award can be rejected should "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*".

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[162] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 534
[163] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 264
[164] Article 1494 (1) of the French Code of Civil Procedure explicity provides that "*an arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide for the method of their appoinment*".

Furthermore, Article 2 of the Geneva Protocol provides that "*the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties*".

Likewise, Article 1693 (1) of the Belgium Judicial Code provides that "*without prejudice to the provisions of Article 1694*[165]*, the parties may agree on the rules of the arbitral procedure and on the place of arbitration. ...*"

Furthermore, Article IX 1 (d) of the European Convention states that should "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention*" there will be a ground for the refusal of recognition or enforcement in another Contracting State.

Also, the right of the parties to determine the applicable arbitral procedure has been provided under the respective Turkish law as well[166].

The form of the parties such agreement on the procedure of the arbitral proceedings can be either in the form of an agreement or a reference made to the procedural of certain international institutions[167].

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[165] Article 1694 of the Belgian Judicial Code aims to guarantee to give each party an opportunity of substantiating his claims and of presenting his case.
[166] Article 8 of the International Arbitration Law of Turkey.
[167] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 524

In generally speaking, the parties of the dispute agree on the applicable arbitration procedure and accordingly the format and the schedule before the commencement of the arbitration (i.e. the 'terms of reference')[168]. The parties and the arbitral tribunal sign the terms of reference document[169]. More clearly, the description made by the parties regarding the conflict in concern constitutes such terms of reference[170]. Also, by the arbitral tribunal's authorization the parties have the right to amend such terms of reference at any time but obviously before the completion of the proceedings[171]. On the other hand, however, it is not possible to grant retroactive effect to the procedural rules unless the parties agree otherwise[172]. The terms of reference concept has been arising from the language of the ICC Rules[173]. The terms of reference has significant importance in ICC practise and this importance stems from the principle that the arbitral tribunal cannot decide on the issues which are not stated in the terms of reference to the extent the parties agree otherwise[174]. On the other hand, the arbitral tribunal will decide on such procedural issues (i.e. the format and the schedule) should the parties fail to do so. Under the terms of reference the following issues have to be stated:

i. the names/titles of the parties,
ii. the addresses of such parties for notification purposes,
iii. the claims of the parties,
iv. names and addresses of the arbitrators,
v. the place of the arbitration,
vi. the applicable procedural rules

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[168] ibid, p. 527
[169] Andrew Tweeddale/Keren Tweeddale, p. 99
[170] Thomas E. Carbonneau, p. 355; Hans Smit, "Managing An International Arbitration: An Arbitrator's View", Worldwide Forum on the Arbitration of Intellectual Property Disputes, March 3-4, 1994, Geneva, http://arbiter.wipo.int/events/conferences/1994, 05.12.2006, p. 3
[171] Article 19 of the ICC Rules; Georgios Petrochilos, p. 173
[172] Yavuz Kaplan, p. 44; Ziya Akıncı, p. 112
[173] Article 18 of the ICC Rules
[174] Thomas E. Carbonneau, p. 355

For instance, Article 19 (2) of the Model Law states that "*failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine admissibility, relevance, materiality and weight of any evidence.*"

Also, Article 1693 (1) of the Belgium Judicial Code states that "*... failing such agreement within the time limit fixed by the tribunal, the decision shall be a matter for the arbitrators.*" Furthermore, other respective provisions are also avaliable under certain other international arbitration laws and conventions[175].

Should the intention of the parties to proceed according to the institutional rules, such rules provide the outline for the arbitral process, namely[176]:

- formation of the arbitral tribunal,
- determination of the tribunal's terms of reference,
- determination of the procedural rules with respect to the proceedings,
- conduct of the proceedings,
- completion of the proceedings,
- rendering the final award

[175] Article 1494 of the French Code, Article 182 (2) of the Swiss Statute, Article 15 (1) of the UNCITRAL Rules and etc.
[176] Thomas E. Carbonneau, p.355

2. Determination by the Arbitrator(s)

As well as the parties of the dispute, the arbitrator(s) also have the right to determine the arbitral procedure should the parties do not agree on the same[177].

In such a case, the very important thing is the fairness of the procedure fixed by the arbitrator(s). Therefore, eventhough the procedure has been determined by the tribunal itself, the consent of the parties should be sought thereon. The reflection of this principle can also be seen under Article 15 of the ICC Rules. Accordingly, Article 15 provides that:

"1. The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal may settle, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

2. In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable oppurtunity to present its case."

Regarding the main duties of an arbitral tribunal and the possible effects of such duties during the enforcement process, ***Firm P vs. Firm F***[178] case is of a to the point example. The firm F, German, and the firm P, U.S., have submitted their dispute in concern to arbitration which has been conducted according to the AAA Rules. The sole arbitrator has examined the case on document basis but no oral hearings have been permitted.

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[177] For instance, Article 1494 (2) of the French Code states that *"if the arbitration agreement is silent, the arbitrator shall determine the procedure in as much as necessary, either directly or indirectly or by reference to a law or to arbitration laws"*; Fouchard/Gaillard/Goldman, p. 649

[178] Firm P (USA) vs. Firm F (F.R.G.), Court of Appeal of Hamburg, April 3, 1975, Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p. 427

Both of the parties have submitted certain letters etc. which contradicted each other as well. Furthermore, the parties did not aware of the documents that the counter party has submitted. Both the Oregon District Court, USA, and German First Instance Court have enforced the arbitral award. On the other hand, at appeal stage the Court of Appeal of Germany has refused to enforce such award on the grounds that:

"... in the case of a foreign award, not every infringement of the mandatory provisions of German law constitutes a violation of German public policy. Only in extreme cases where a party had not been able to present his case in an arbitration abroad, would the basic principles of the German legal order be violated."

The Court of Appeal has considered this case also as an extreme one since the fair trial principle has been violated. At this point, the question regarding the boundaries of the autonomy principle on the arbitration procedure has been arises. In other words, the autonomy of both the parties and the arbitrator(s) may face with certain limitations arising from the mandatory nature of law where the arbitration takes place and the arbitral award is subject to review of national courts[179].

[179] Ziya Akıncı, p. 112; Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 525; Fouchard/Gaillard/Goldman, p. 644

C. The Effect of Lex Arbitri on Arbitration Procedure

In terms of a general meaning, lex arbitri is the law of the country where the arbitration takes place[180]. In order to conduct the arbitration, the parties mostly choose a place which is different than their place of business and/or residence but a neutral place in fact[181]. In case lack of such determination by the parties, then such a choice has to be made either by the arbitral tribunal and/or a designated arbitral institution[182].

The law of the seat of arbitration constitutes significant importance in arbitration process. The law governing the arbitration (i.e. *lex arbitri*) comes into the stage should there is no determined procedural rules to apply to the arbitration judgment in concern. In such a case, the parties of the dispute and/or the arbitrators appointed by such parties take into consideration lex arbitri in order to determine the arbitration procedure[183]. On the other hand, however, under Article V 1(d) of the New York Convention, when compared with the procedural rules of lex arbitri superior effect has been granted to the procedural rules agreed by the parties[184].

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[180] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 78; Tatsuya Nakamura, The Place of Arbitration in International Arbitration – Its Fictitious Nature and Lex Arbitri, Mealey Publications, Inc., October 2000, Vol. 15 No:10, p. 16

[181] Andrew Tweeddale/Keren Tweeddale, p. 39

[182] For instance, Article 16 (1) of the UNCITRAL Rules provides that "*unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration*". Likewise, Article 14 (1) of the ICC Rules provides in this respect that "*the place of arbitration shall be fixed by the Court unless agreed upon by the parties*".

[183] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 35

[184] Yavuz Kaplan, p. 44

Accordingly, Article V 1(d) of the New York Convention provides that:

"*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ...*

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

Under Article 2 of the Geneva Protocol it has been stated that "*the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place*".

The major issues that lex arbitri has possible effect on can be summarized below[185]:

- the arbitrability of the dispute,
- the definition and the form of the arbitration agreement,
- the constitution of the arbitral tribunal,
- determination of the competence-competence principle,
- fair trial,
- flexibility of the arbitration procedure,
- interim measures,
- hearings,
- the form and validity of the arbitration agreement.

[185] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 81

The importance of lex arbitri can be more clearly analysed in ***Union of India vs. McDonnel Douglas Corporation***[186] case. Under a written contract dated July 30, 1987 the plantiffs, the Union of India, has been undertaken to provide services to the defendants, McDonnell Douglas Corporation, in order to launch a space satellite. According to its relevant provisions the contract was subject to Indian law and furthermore has an arbitration clause which as follows:

"In the event of a dispute or difference arising out of or in connection with this Agreement, which can not be resolved by amicable settlement, the same shall be referred to an Arbitration Tribunal consisting of three members. Either party shall give notice to the other regarding its decision to refer the matter to arbitration.

Within 30 days of such notice, one Arbitrator shall be nominated by each Party and the third Arbitrator shall be nominated by the agreement between the Parties to this Agreement. If no such agreement is reached within 60 days of the mentioned notice, the President of the International Chamber of Commerce shall be requested to nominate the third Arbitrator.

The third Arbitrator shall not be a citizen of the country of either Party to this Agreement. The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof. The arbitration shall be conducted in the English language. The award of the Arbitrators shall be made by the majority decision and shall be final and binding on the Parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom. Each Party shall bear its own costs preparing and presenting cases. The cost of arbitration including the fees payable to Arbitrators, shall be shared equally by the Parties to this Agreement. ..."

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[186] Union of India vs. McDonnel Douglas Corporation, Queen's Bench Division (Commercial Court), December 22, 1992, Lloyd's Law Report 48.

When the dispute has been arisen between the parties of this foregoing mentioned contract, such dispute has been referred to arbitration according to the relevant provision of the contract. The hearings have been started in London. On the other hand, before dealing with the merits of the case in concern the question has been arisen regarding the governing law of the arbitration proceedings. The plaintiffs have stated that the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940 whereas the defendants argued that English law has to govern the arbitration proceedings since London has been decided as the '*seat*' of any arbitration proceedings.

The defendants has further emphasized the fact that "*the parties have expressly selected London as the 'seat' and not just the place of the arbitration. The word 'seat' is a legal term of art which means the legal place of the arbitration proceedings. By choosing the legal place of the arbitration proceedings the parties ipso facto choose the laws of that place to govern their arbitration proceedings ....*". Then the plaintiffs have stated that "*in the absence of an agreement to the contrary, the choice of a 'seat' would carry with it the choice of law of that place as the law governing the arbitration proceedings. However, in this case the parties by stipulating that the arbitration should be conducted in accordance with the procedure provided in the Indian Arbitration Act is an express choice of Indian law to govern the arbitration proceedings. Therefore, this choice must, on ordinary principles, prevail over anything inconsistent that might otherwise be implied.*"

Considering the foregoing mentioned arguments of both the plaintiffs and the defendants it has been decided as follows:

"In my judgment, there is a way of reconciling the phrase relied upon by the plaintiffs with the choice of London as the seat of the arbitration, namely by reading that phrase as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts. The word used in the phrase relied upon by the plaintiffs is 'conducted' which I agree with the defendants is more apt to describe the way in which the parties and the tribunal are to carry on their proceedings than the supervision of those proceedings by the Indian courts, for example through the Special Case provisions of the Indian Act.

It is true, as the plaintiffs pointed out, that this would mean that not only s.3 and Schedule 1 of the Indian Act would be applicable (though many of the other provisions are still to be found in the English statutes and so would be applicable in the English Courts) but the construction not only have the unsatisfactory and possibly absurd results to which I have referred, but would also necessarily give the word 'seat' a meaning which excluded any choice of London as the legal place for the arbitration. In my view, such a change from the ordinary meaning (i.e. the ordinary meaning being that submitted by the defendants) to be given to that word in an international arbitration agreement can not be accepted, unless the other provisions of the agreement show clearly that this is what the parties intended. I am not persuaded that that is the case here. On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law.

The question posed in the amended summons before me is whether upon the proper construction of Article 8 of the Launch Agreement the pending arbitration between the parties and any award made by the arbitral tribunal is subject to the supervisory jurisdiction of the Indian Courts or the English Courts. For the reasons given, my answer to this question is that it is the latter."

The lex arbitri concept has been more clearly defined in ***Paul Smith Ltd. vs. H ér S International Holding Inc.*** case[187], such as: *"... a body of rules which sets a standard external to the arbitration agreement and the wishes of the parties for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation and storage of goods), the rules enpowering the exercise by the Court of supportive measures to assist an arbitration which has run into diffuculties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct)*".

In light of the foregoing analysis on the interpretation of the lex arbitri term, it can be in a way concluded that lex arbitri should be taken into consideration separately than the procedural law. More clearly, "*lex arbitri is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration*"[188].

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[187] Paul Smith Ltd. vs. H ér S International Holding Inc., 2 Lloyd's Rep. 127, 1991
[188] Andrew Tweeddale/Keren Tweeddale, p. 233

The critical issue is the procedural law to be applied to the international arbitration can be different than the laws of the *lex loci arbitri* and another set of procedural rules determined by the parties of the dispute or by the arbitrators can be applied[189].

However, it has to be always keep in mind that an international arbitration is governed both by the rules determined by the parties and/or the arbitral tribunal and by the lex arbitri as well, this theory is called as "*dualism*"[190].

D. The Limits of the Autonomy Principle in Arbitral Proceedings

1. Mandatory Rules

The party autonomy principle is 'a key principle of current arbitration law'[191] and 'the cornerstone of modern arbitration'[192]. On the other hand, however, it has to be clearly emphasized that there is still a conflict in the doctrine whether the party autonomy principle is of absolute nature or includes the mandatory rules of lex arbitri in concern[193].

The effect of lex arbitri's mandatory rules over the party autonomy principle has been provided in the respective Turkish legislation as well. Accordingly, Article 8 of the International Arbitration Law of Turkey grants the flexibility to determine the arbitral procedural rules to the extent such rules do not violate the mandatory rules of the law in concern.

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[189] Stephen Toope, Mixed International Arbitration, Grotius 1990, p.41
[190] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 83
[191] Bay Hotel & Resort Ltd. vs. Cavalier Construction Co Ltd [2001] UKPC 34, July 16, 2001.
[192] Diagnostica Inc. vs. Centerchem Inc., Supreme Court New South Wales, 44 New South Wales Law Review 312-42; March 26, 1998
[193] Yavuz Kaplan, p. 46

In the drafting process of such Law, likewise English practise, listing every mandatory rule has been discussed but not accepted at the end of the day[194]. Therefore, the mandatory nature of each rules has to be determined case specific.

Under Turkish law, all of the provisions representing public order are of mandatory nature, however, all of the mandatory rules are not of public order nature[195]. At this point, it is also worth to mention that the right of the parties to determine the procedural rules is limited to the rules to be applied by the arbitrator(s). More clearly, the parties cannot agree on the issues regarding the appeal process of the arbitral awards[196].

In principle, the parties have dominance on the applicable procedural rules and accordingly they can change such rules at any time. The main exception of this general principle is the mandatory rules arising from mainly the public order[197]. More clearly, only the mandatory rules that may have effect on the public order can constitute such an exception to the party autonomy principle but not all types of mandatory procedural rules[198].

Accordingly, in ***Diagnostica Inc. vs. Centerchem Inc.*** case the court stated that: "*In principle, party autonomy does not mean a complete freedom to exclude a system of law or particular elements of a system law from the relationship between the parties.*

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[194] Aykut Aydoğan, Milletlerarası Tahkim Kanunu kapsamında Cereyan Eden Tahkim Usulü, Beta Yayınları, İstanbul 2003, p. 64
[195] Nomer, p. 143
[196] Aykut Aydoğan, p. 65
[197] Yavuz Kaplan, p. 38; Fouchard/Gaillard/Goldman, p. 648
[198] ibid, p. 59

Confining attention to statutory law, if the statute on its proper construction and with regard to the legislative power of the legislature applies to the parties and their conduct of the arbitration and expressly or by necessarily implication cannot be excluded by agreement, the agreement of the parties to exclude it will count for nothing."

The procedural rules that cannot be agreed otherwise are as of mandatory nature[199]. The importance of the difference between mandatory and non-mandatory rules stems from the effects of mandatory rules during the recognition and enforcement process[200]. As well as conducting the arbitration in accordance with the party autonomy principle, at the end of the day one of the other main duty of the arbitral tribunal is to render an enforceable arbitral award[201].

Under both the New York Convention[202] and the European Convention[203], the grounds for the refusal of the arbitral award have been provided explicitly and on limited basis (i.e. incapacity of the parties, invalidness of the arbitration agreement, improper notice, inarbitrability, breach of party autonomy principle).

In ***Abati Legnami vs. Fritz Haupl***[204] Case, the Italian Supreme Court has reversed the decision of the Court of Appeal of Milan, the lower court, on the grounds Abati's right to properly defend itself might have been affected. The reasoning of the decision was, Abati was summoned on August 11, 1981 in order for it to be present before the arbitral tribunal of Vienna.

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[199] Yavuz Kaplan, p. 42
[200] Thomas E. Carbonneau, p. 373; Yavuz Kaplan, p. 43; Noah Rubins, The Arbitral Seat is No Fiction, Mealey's International Arbitration Report, January 2001, Vol. 16 No:1
[201] Ziya Akıncı, p. 113; Yavuz Kaplan, p.
[202] Article V of the New York Convention
[203] Article IX of the European Convention
[204] Abati Legnami vs. Fritz Haupl, Italian Supreme Court, April 3, 1987, Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren, p. 426

The Court of Appeal of Milan has decided in a way that such notice period was sufficient enough and in turn the commercial activities between the States should not be affected due to vacations in August.

Eventhough the Supreme Court has accepted such reasoning, relying on Italian legal notice period (i.e. 90 days) and before the Italian courts all of the time limits with respect to proceedings are suspended between August 1 and September 15 it has to be determined whether Abati's right to properly defend itself has been affected or not.

The mandatory rules stemming from the law of the place of arbitration changes according to the countries in concern[205]. On the other hand however, under the relevant practice of recent international arbitration laws, the restrictions arising from the mandatory nature of certain laws have a common basic principle underneath namely; "*due process*[206]". The parties have the flexibility to determine all kinds of procedural rules other than the ones related with due process principle[207].

2. Equality

The right of the parties to determine the arbitral procedure must be in full compliance with the fundamental mandatory rules and the public policy requirements arising from the seat of the arbitration.

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[205] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 525
[206] The parties must have the oppurtunity to present their case before the arbitral tribunal.
[207] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 526

The rationale behind the mandatory effect of certain national law provisions on the arbitration proceedings is to ensure the fairness of the judgment; more clearly is to provide equal oppurtunities in order for both of the parties to present their case before the arbitral tribunal[208]. More clearly, should we consider the party autonomy as the basic principle of the arbitral procedure, equal treatment of the parties before the tribunal constitutes the latter important principle.

The right to notification and equal treatment are the basic principles that have been enforced quite strictly in the arbitral proceedings[209]. All kinds of communications must be directly made to the arbitral tribunals and/or institutions but direct or indirect communications between the parties and the arbitral tribunal and/or the institutions (i.e. "*ex parte communications*") is not possible[210].

Most of the related provisions of certain national arbitration laws have blessed such rationale. The explicit recognition of this principle is provided under Article V. I (b) of the New York Convention since "*recognition and enforcement of the award may be refused, ... should the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*".

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[208] Fouchard/Gaillard/Goldman, p. 632; Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 526

[209] Thomas E. Carbonneau, p. 357;

[210] ibid, p. 357; Firm P (USA) vs. Firm F (F.R.G.), Court of Appeal of Hamburg, April 3, 1975, Tibor Varady/John J. Barcelo III/Arthur T. Von Mehren [... *there should be no unilateral communication. Whatever submitted by the parties or by the arbitrators, must reach both parties and all arbitrators.*]; Hans Smit, p. 3

Also, under Article 18 of the Model Law, it has been stated that "*the parties shall be treated with equality and each party shall be given a full oppurtunity of presenting his case*".

Furthermore, Article 182 (3) of the Swiss Statute states that "*whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure*".

Likewise, Article 33 (1) of the English Arbitration Act provides that;

"*the tribunal shall:*

a. *act fairly and impartially as between the parties, giving each party a reasonable oppurtunity of putting his case and dealing with that of his oppenent, and*

b. *adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*"

Similarly, under French Law breach of due process has been considered as a ground for setting a side a recognition or enforcement of an arbitral award[211]. The due process principle is also defined under respective provisions of certain other international laws.

[211] Article 1502 (4) of the French Code of Civil Procedure states that "*appeal of a court decision granting recognition or enforcement is only avaliable if due process has not been respected*".

Furthermore, Belgian Law provides that "*the tribunal shall give each party an opportunity of substantiating his claims and of presenting his case*"[212].

This so called '*principle of contradiction*' means parties of the dispute should have the opportunity to reply all kinds of allegations brought against the counter-party[213]. Since whatever the procedural rules apply to the arbitration the principle of equal treatment supersedes[214], the right of the parties to be treated equally constitutes a basic restriction on the party autonomy principle.

3. Third Parties

The parties cannot agree to grant certain powers to the arbitral tribunal that can directly effect third parties who are not involved in the arbitration process[215]. This principle is valid for both the merits of the case and the procedural matters. The involvement of such third parties to the arbitration process can mostly be possible via a national court[216].

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[212] Article 1694 (1) of the Belgian Judicial Code
[213] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 527
[214] Ziya Akıncı, p. 114
[215] Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, p. 268
[216] ibid, p. 268

4. Obligations Arising From International Law

There are also certain restrictions on party autonomy arising from the international law. At this point, the Council of Europe, European Convention on Human Rights[217] ("ECHR") comes first.

On the other hand, however, in addition to the principles provided under the ECHR, there are certain other important instruments in this respect. The common principle in all of these instruments is to secure the protection of human rights. Thus, the rules established by the international rules, conventions, treaties and other types of international instruments for the human rights protection in a way constitute international public policy[218].

In light of the foregoing background, it is worth to analyse certain of the related provisions:

Article I of the ECHR provides that "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*"

Moreover, Article 6 of the ECHR further states that *"... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

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[217] Council of Europe European Convention on Human Rights, November 4, 1950, Rome
[218] Georgios Petrochilos, p. 110

Likewise, Article 14 (1) of the International Covenant on Civil and Political Rights[219], United Nations, provides that "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...*".

Also, it is provided under Article 8 (1) of the American Convention on Human Rights[220] that "*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature*".

In light of the foregoing, we can conclude that in principle every State has to act as a guardian of access to a court and fair trial principles. Accordingly, it is quite obvious that it is not possible for the parties to waive from their such rights.

The ***Deweer vs. Belgium***[221] case needs attention since the sensitive boundary between the rights arising from human rights law and the recourse to arbitration can be well anaysed in such case. Accordingly, the Court has stated that:

"*In the Contracting States' domestic legal systems a waiver ... is frequently encountered ... in civil matters, notably in the shape of arbitration clauses in contracts... The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.*"[222]

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[219] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

[220] American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969

[221] Deweer vs. Belgium, European Court of Human Rights, February 27, 1980, Series A, No:35,

[222] Natalya Shelkoplysos, The Application of EC Law in Arbitration Proceedings, European Law Publishing, Amsterdam 2003, p. 5

On the other hand, however, it is not appropriate to accept the direct effect of human rights law to arbitration. This is mainly because, generally the human rights law is addressed to the states whereas the arbitration process is of private and confidential nature[223].

[223] Julian DM Lew/ Loukas A Mistelis/ Stefan M Kröll, p. 96

VI. CONCLUSION

By the beginning of the 20th century, arbitration has become a significant tool for the settlement of the disputes arising from international trade. The parties of the dispute mutually agree to serve such dispute to a certain private individual whose decision is binding on the parties. Neutrality, speed, cost, confidentiality, expertise and the flexibility of arbitral procedure are still the main reasons of the choice made by the businessmen.

The basic principle lies beneath arbitration is freedom of contract. Therefore, existence of an arbitration agreement, either in the form of a separate agreement or an arbitration clause, is essential in order for the parties to recourse arbitration. It is quite certain that without a valid arbitration agreement, the arbitral process fails.

The principle of separability or autonomy of the arbitration agreement from the main agreement is being recognized by most of the jurisdictions. The 'doctrine of separability' means that the arbitration clause is separate from the main contract and in turn independent and distinct from the same. Therefore, the validity of the arbitration clause will not be affected by the allegations of the parties with respect to the invalidity of the main contract. The separability doctrine is essential in order to avoid the delay of the arbitral proceedings by challenging the main contract in which the arbitration clause has been found. Should the arbitration agreement was not separate from the main agreement then the liability of the parties to arbitrate would come to an end.

Another universally recognized principle of international commercial arbitration is competence-competence. Under such principle, the arbitral tribunal has the right to determine and in turn rule on its own jurisdiction. Now, it is higly accepted by most of the legal systems, laws, conventions and rules that arbitrators have the power to determine their jurisdiction. It is also accepted that such determination of the arbitrators subject to court review.

Eventhough, the separability and the competence-competence principles are generally considered as bearing the same meaning and complementary of each other, they are not identical. The main linkage between these 2 principles is the common nature of their aim which is to secure the intention of the parties to arbitrate and accordingly prevent the early intervention of the courts to the arbitral proceedings.

The separability principle plays a significant role also in the arbitration procedure. The parties of the dispute and the arbitrator(s) have the right to determine the arbitral procedure. On the other hand, the freedom granted to the parties in order for them to agree on procedure and the discretion of the arbitrators to determine the procedure in the lack of parties' agreement subject to certain limitations.

Determination of procedural rules and equal treatment of parties are considered as the *Magna Carta* of arbitral procedure. Accordingly, the parties are free to determine the arbitral procedure subject to mandatory provisions. More clearly, only the mandatory rules that may have effect on the public order can constitute such an exception to the party autonomy principle but not all types of mandatory procedural rules. Public policy can appear in different forms and context.

However, the basic and the common public policy can be summarized as every State should guarantee its citizens access to a court and their right for a fair trial.

Due process, equal treatment right of the parties during the arbitral proceedings, is the common basic principle arising from the mandatory nature of certain laws. The parties have the flexibility to determine all kinds of procedural rules other than the ones related with due process principle. Due process strengthen parties equal treatment right during the arbitral proceedings. It is also uncontested that both parties must have equal opportunity to appear before the tribunal at the hearings.

In light of this study and the foregoing summary thereon, the primary thing that we have to bear in mind that arbitration is such a unique process that is build up of party consent. The separability and the competence-competence principles are the primary tools that have been created to secure such mutual consent of the parties. Accordingly, the parties should have exclusive authority on the applicable procedural rules. At this point, acting in good-faith is the main obligation of the parties. However, in order to guarantee the fairness and the proper functioning of the arbitration there is a need for a control mechanism. Otherwise, unlimited party and procedural autonomy may result with the injury of the legal sensitivity. Therefore, non-waiveable rights of individuals and/or legal entities constitute the concrete boundaries of party autonomy and the related principles (i.e. separability and competence-competence). In my opinion, the fairest thing is to make a clear analysis regarding the mandatory nature of provisions. More clearly, every mandatory provision should not directly effect parties' autonomy but only the ones related to the fairness of the arbitral process should have such an effect.

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