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MARMARA UNIVERSITY

EUROPEAN COMMUNITY INSTITUTE

DEPARTMENT OF EUROPEAN UNION LAW

INTERNATIONAL COMMERCIAL ARBITRATION and EU LAW

LL.M. THESIS

TOLGA CEYLANTEPE

SUPERVISOR: ASSOC. PROF. DR. SİBEL ÖZEL

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ABSTRACT

International commercial arbitration is one of the most frequently selected ways to settle cross boarder disputes arising between the parties in the international transactions. By means of entering into an arbitration agreement, the parties withdraw the disputes arising between them out of the jurisdiction of national courts and refer them to arbitration for consideration.

For the time being, there is no harmonization of international commercial arbitration rules at the EU level, in contrary, these rules are codified in the acts which take place under the national legal frameworks of the Member States. Although arbitration is not regulated at EU level, the EU law therefore relevant to arbitration proceedings. Moreover, the significance of European integration and the relevance of EU law are evidenced in all areas of law including arbitration. In this context, some questions arise which relate to the application of EU law in arbitration proceedings, they also relate to the position of arbitration tribunals in the structure of European Courts.

The thesis, which is organized in three parts, examines the interaction between the international commercial arbitration and the EU law. The first part of the thesis looks at international commercial arbitration in general; essential characteristics, types, advantages and also international regulation of arbitration. The second part deals with the relation between the EU law and international commercial arbitration closely and examines the impact of EU law on international commercial arbitration. The third and last part looks at the significant features of national arbitration acts of the EU Member States.

ÖZET

Uluslararası ticari tahkim, taraflar arasında ortaya çıkan sınır ötesi uyuşmazlıkların çözümünde en sık tercih edilen yöntemlerden biridir. Taraflar, bir tahkim anlaşması akdederek aralarındaki anlaşmazlıkları milli mahkemelerin yargılama yetkisi dışına taşımakta ve tetkik için uluslararası ticari tahkime havale etmektedirler.

Bugün itibariyle, Avrupa Birliği'nde uluslararası ticari tahkim kurallarının uyumlaştırılmasından bahsetmek mümkün değildir, aksine bu kurallar tüm üye ülkelerde kendi milli mevzuatlarının parçası olarak düzenlenmiştir. Avrupa Birliği Hukuku, üye ülke mevzuatlarındaki uluslararası tahkim düzenlemeleri nedeniyle, tahkim prosedürü ile ilişki içerisindedir. Buna ek olarak, Avrupa bütünleşme süreci ve Avrupa Birliği Hukukunun kaydettiği aşama, diğer alanlarda olduğu gibi tahkim konusunda da etkiler doğurmaktadır. Bu kapsamda, tahkim prosedüründe Avrupa Birliği Hukukunun uygulanması ve hakem mahkemelerinin Avrupa mahkemeleri karşısındaki konumlarına ilişkin olarak da çeşitli sorunlar gündeme gelmektedir.

Hazırlanan tez, uluslararası ticari tahkim ile Avrupa Birliği Hukuku arasındaki etkileşimi incelemekte olup üç bölümden oluşmaktadır. Tezin ilk bölümünde; uluslararası ticari tahkim genel olarak ele alınmakta, mahiyeti, çeşitleri, avantajları ve tahkimle ilgili uluslararası düzenlemeler üzerinde durulmaktadır. Tezin ikinci bölümünde; Avrupa Birliği Hukuku ve uluslararası ticari tahkim arasındaki ilişki ve Avrupa Birliği Hukukunun tahkime olan etkileri incelenmektedir. Üçüncü ve son bölümde ise; Avrupa Birliği üyesi ülkelerin tahkim mevzuatlarının belli başlı özellikleri üzerinde durulmaktadır.

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AP Act	The Act of Czech Republic on Arbitral Proceedings and Enforcement of Arbitral Awards
BJC	Belgian Judicial Code
CCP	Estonian Code of Civil Procedure
EC	European Community
ECJL	Electronic Journal of Comparative Law
EEC	European Economic Community
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
ECSC	European Coal and Steel Community
EU	European Union
EURATOM	European Atomic Energy Community
GCCP	Greek Code of Civil Procedure
GLIA	The Greek Law of International Arbitration
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
NCAs	National Competition Authorities
NCCP	Netherlands Code of Civil Procedure
NCPC	French Code of Civil Procedure
OAS	Organization of American States
OJ	Official Journal of the European Communities
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization
ZPO	German Code of Civil Procedure

INTRODUCTION

International commercial arbitration is one of several forms of dispute resolution for international commercial transactions. It is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or arbitrators) to present their dispute for a legally binding ruling. Arbitration is often selected for the reasons of confidentiality, speed, enforceability of arbitral awards, and to eliminate the uncertainties of national court litigation.

Even though the widespread use of arbitration in Europe, for the time being, there is no harmonization of international commercial arbitration rules at the EU level, in contrary, these rules are codified in the acts which take place under the national framework of the Member States. Although arbitration is not regulated by EU measures, EU law is therefore relevant to arbitration proceedings. In addition, the significance of European integration and the relevance of EU law are evidenced in all areas of law including arbitration. In this context, some questions arise which relate to the application of EU law in arbitration proceedings, they also relate to the position of arbitration tribunals in the structure of European Courts. The European Court of Justice has on several occasions been asked to clarify certain aspects of the relationship between arbitration and various aspects of European law.

This study deals with the interaction between the EU law and international commercial arbitration. It also examines the significant features of national arbitration acts of the EU Member States. The scope of the study is limited with the voluntary, international commercial arbitration. In this context, the study does not examine domestic (national) arbitration. Moreover, mandatory arbitration in which the parties have no other choose than enter into arbitration is also excluded from the scope of the study.

CHAPTER I
INTERNATIONAL COMMERCIAL ARBITRATION

1.1 Resolution of the Transnational Business Disputes and Arbitration

With the increase of international trade, to meet the challenges of cross border transactions, several forms of dispute resolution mechanisms have been developed. Mainly four potential uncertainties underlie cross border disputes, which are:

- Where and by whom the dispute will be resolved;
- Which law will govern the dispute;
- The procedure that will be applied in reaching its ultimate resolution;
- The enforceability of any judgment that may be rendered.

In general, the question of where any dispute will be resolved typically is dealt with in the context of a choice of forum clause specifying an agreed upon forum. Similarly, choice of law clauses frequently designates the governing law for international business transactions. Of course, to determine the desired content of those clauses, the parties must have some understanding of why one forum is more desirable than another, keeping in mind that, often neither party will want to be in the other party's local forum and the question is one of designating a third neutral forum. The different procedural rules that may apply to the proceeding in a particular forum also may have significant bearing on the forum choice.

Furthermore, an understanding of any applicable treaties or conventions regarding the enforcement of judgments or the rules governing the recognition of foreign judgments in the absence of a treaty or convention has to be understood.

Under this scope, international commercial arbitration[1] is a frequently selected dispute resolution choice for many cross border transactions. Arbitration provides much needed certainty with regard to who will be deciding the dispute with some party control over that selection. Furthermore, several important international conventions provide clear rules on recognition and enforcement of arbitral awards.

On the other hand litigation and alternative dispute resolution mechanisms (ADR) mechanisms still considerable alternatives to the arbitration. In this Chapter, I will analyze these alternatives shortly and after examine significant features, types, essential elements and international regulation of the International Commercial Arbitration.

1.1.1 Arbitration

Arbitration is a dispute resolution process in which the disputing parties submit their case to an independent and neutral third party (the arbitrator or arbitrators) who resolves the dispute making a determination called an award. The arbitrator's award is binding on the parties and can be enforced through the national courts like a court order.

Generally, arbitration is used when the contract between the parties includes an arbitration clause specifying the submission of a dispute to arbitration. In some cases parties may decide to sign a separate arbitration agreement, instead of to set this clause to the contract.[2] A dispute can also be referred to arbitration after the arising of the dispute where the disputant parties mutually agree.

The principles of "Natural Justice" apply to arbitration: An arbitrator must act in good faith, without bias and must provide fair chance to parties to present their cases. If the arbitrators have an interest in the dispute, they must disclose it before the arbitration commences.

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[1] In several sources the term "Transnational Commercial Arbitration" is used, in this study "International Commercial Arbitration" is preferred, not for the term "Transnational" is considered wrong or disregarded but to be compatible with the tendency of ICC and general literature.

[2] C. Şanlı, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, 2. bası, İstanbul, Beta Basım Yayım, 2002, p.212.

The arbitrator appointed by the parties must determine a dispute according to the facts based on the evidence presented by the parties. A notable feature of arbitration is confidentiality, unlike court proceedings; it is confidential.

Each party is required to present its arguments, evidence and conclusions to the arbitrator. The arbitrator reaches a decision, after considering the competing evidence and arguments in relation to the issues to be decided, based on the application of relevant legal principles or, where the disputant's so request, the principles of equity and fairness.

The presentations are made to prove one side right, the other wrong. Thus the parties assume they are working against each other, not cooperatively. As in court-based adjudication, arbitration outcomes are typically win-lose, not win-win such as alternative dispute resolution mechanisms. Thus, the arbitrator usually decides that one side was right and the other wrong.

Nevertheless, during the arbitration process, parties have always an opportunity to see their deficiencies and to compromise in a reasonable point.

1.1.2 Dispute Resolution through National Court Systems

Litigation is generally considered as a problematic way to settle the disputes in context of international law. This is particularly so in the context of international business transactions between private parties, since no international court exists for the resolution of private disputes. Parties who wish to resolve disputes by litigation are, therefore, obliged to go through national court systems. This alternative always entails both logistical complications and significant risk.[3]

[3] John R. Lacey (ed.), The Law & Policy of International Business: selected issues: a festschrift for William Sprague Barnes, University Press of America, 1991, p.88., also see. Şanlı, op. cit., p.82-83.

First, obtaining jurisdiction over a defendant in a foreign forum might be quite difficult. Although choice of law and choice of forum clauses provide some degree of certainty with respect to where and under what substantive legal provisions a dispute will be resolved, such clauses are always subject to interpretation by the court, which accepts jurisdiction. The court exercising jurisdiction over a dispute is not always the same one provided for in the contract. This sometimes occurs as a result of the application of conflict of laws principles. Even if choice of law and choice of forum clauses are incorporated into a transnational contract, the risk of adverse unpredictable results exists.[4] Actually we should accept that if the parties do not take some fundamental decisions during the contract stage, risk of unpredictability might be exist for the arbitration as well.[5]

Moreover, the parties should consider enforcement problems of court judgments and also publicity of the proceedings, which is a fundamental notion of the court proceedings.[6]

1.1.3 Alternative Dispute Resolution Mechanisms

When we are talking about alternative dispute resolution, it basicly refers to any means of settling disputes outside of the law courts as part of the system of justice established and administered by the State.[7] However today, arbitration is generally considered out of ADR mechanisms as a different category.[8] Because in ADR mechanisms where generally a third party is involved to assist the parties in a

[4] Lacey (ed.), op cit., p.89.
[5] See. J. Uff QC, "Predictability in International Arbitration", in A. Berkeley, J. Mimms (ed.), International Commercial Arbitration: Practical perspectives, London, the Centre of Construction Law & Management, 2001, p.151-166.
[6] K. Berger, "Understanding Arbitration", in K. Berger, et. al., Understanding Transnational Commercial Arbitration, Quadis LLC, 2000, p.7.
[7] M. Özbek, Alternatif Uyuşmazlık Çözümü, Ankara, Yaklaşım Yayınları, 2004, p.83.
[8] See. E. A. Marshall, Gill: The Law of Arbitration, 4th edition, London, Sweet & Maxwell, 2001, p.6. and A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration-Student Edition, London, Sweet & Maxwell, 2003, p.31., for contrary opinion see. Özbek, op. cit., p.100.

settlement of their dispute, has no power to impose a final and binding decision on the parties.[9] Accordingly, in contrary to arbitration, there is no winner or loser in ADR.[10]

ADR mechanisms include negotiation, mediation, conciliation, and early neutral evaluation. On the other hand, there are many other types of ADR.

1.1.3.1 Negotiation

Negotiation between the parties is the most flexible, informal way of alternative dispute resolution. However it is not possible to say that this logic and cheap alternative is the easiest way to resolve complex international disputes.

1.1.3.2 Mediation

Mediation is a process where a mediator works with the parties to resolve their dispute by agreement. There is no imposed solution in mediation. Mediation is a non-binding procedure controlled by the parties.

Mediator listens to an outline of the dispute and then meets each party separately[11] and tries to persuade the parties to moderate their respective positions. The task of the mediator is to attempt to persuade each party to focus on its real interest, rather than on what it conceives to be its contractual or legal entitlement.[12] The mediator is not a decision maker; the mediator's role is, rather, to assist the parties in reaching a settlement of the dispute.

Mediation is an interest based procedure, in court litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. In mediation, as the other ADR mechanism, the parties can also be guided by their business

[9] Marshall, op. cit., p.6.
[10] Şanlı, op. cit., p.371.
[11] These separate meetings are called as “caucuses”.
[12] Redfern, Hunter, (student edition), op. cit., p.33.

interests. As such, the parties are free to choose an outcome that is oriented as much to the future of their business relationship as to their past conduct.[13]

1.1.3.3 Conciliation

The terms mediation and conciliation are generally used as if they are interchangeable and there is no general agreement as to how they should be defined.[14]

Even though historically, in private dispute resolution a conciliator was seen as someone who went a step further the mediator, in practice the two terms seem to have merged, although common lawyers tend to speak of mediation, whilst civil lawyers speak of conciliation.[15]

Mediation sometimes refers to a method where a mediator has a more proactive role (evaluative mediation) and conciliation sometimes refers to a method where a conciliator has a more facilitating mediator role (facilitative mediation).[16]

1.1.3.4 Early Neutral Evaluation

In this type of ADR, in the early stages of a dispute, the parties bring their cases to a neutral evaluator. The evaluator confidentially assesses the arguments and submissions. The assessment is not binding on the parties and the aim of the assessment is to demonstrate to each party the strengths and weaknesses of its case.[17]

[13] World Intellectual Property Organization official web site, http://www.wipo.org, (June 24, 2005).
[14] Redfern, Hunter, (student edition), op. cit., p.33.
[15] Redfern, Hunter, (student edition), op. cit., p.33.
[16] J. D. M. Lew, et. al., Comparative International Commercial Arbitration, The Hague, Kluwer Law International, 2003, p.14.
[17] Lew, et. al., op. cit., p.15.

1.1.4 Advantages of Arbitration

There are several advantages and disadvantages for the parties to refer a dispute to arbitration rather than to begin action in the courts or prefer ADR mechanisms.[18] In the below lines, I will try to explain some of the principal advantages:

- Flexible Procedure: International commercial arbitration gives the parties substantial liberty to design their own dispute resolution mechanism, largely free of the constraints of national law.[19] The procedure can be determined by the parties and arbitrators to meet the characteristics of the case.[20] Procedures can be adapted to fit the dispute, rather than the dispute being made to fit the available procedures, it means that different disputes call for different approaches.[21]
- Expertise: Each party has an opportunity to participate in the selection of the arbitral tribunal. One or more arbitrators may be chosen for their special skill and expertise in any discipline. There is no requirement to be a lawyer if the parties do not agree otherwise. For instance, when the dispute concerns a technical matter, persons chosen to arbitrate usually possess the appropriate special qualifications.
- Neutrality: A reference to arbitration means that the arbitral tribunal is independent of direct national influence. The dispute is likely to be fought on neutral territory with which neither party has any connection. Arbitrators can also be selected from different countries and with different nationalities.[22]
- Confidentiality: In person I believe that, this is one of the most important advantages of arbitration. Due to the private nature of arbitration process, confidentiality is an important for the parties so unwanted publicity can be

[18] Z. Akıncı, Milletlerarası Tahkim, Ankara, Seçkin Yayıncılık, 2003, p.26-28; Şanlı, op. cit., p.207-210.
[19] P. Fouchard, et. al., on International Commercial Arbitration, E. Gaillard, J. Savage (ed.), The Hague, Kluwer Law International, 1999, p.1.
[20] Akıncı, (Milletlerarası Tahkim), op. cit., p.28.; Lew et. al., op. cit., p.6.
[21] Redfern, Hunter (student edition), op. cit., p.23.
[22] Lew et. al., op. cit., p.7.

avoided.[23] Unlike proceedings in a court of law, an international arbitration is essentially a private proceeding. This means that the existence of the arbitration, the subject matter, the evidence, the documents and awards cannot be disclosed to third parties.[24]

- Final and Binding Decision*:* If no settlement between the parties is reached during the course of the arbitration, the arbitral tribunal will come to a decision on the dispute in the form of an award. The end result of the arbitral process, if carried through to its conclusion, will be a decision and not a recommendation which the parties are free to accept or reject as the please. The award will be final and binding upon the parties. It will not, as is the case with some court judgments, the first step on a ladder of appeals. Once the award has been made, it will be directly enforceable by court action, both nationally and internationally. In this respect, an award differs from an agreement reached by mediation or some other types of ADR, which is only binding contractually.[25]
- Recognition and Enforcement: In its international enforceability, an award has more advantage than a judgment of a court, because the treaties that govern the enforcement of an arbitral award have much greater acceptance internationally than treaties for the reciprocal enforcement of judgments.[26] Even though the existence of some attempts to provide enforceability of foreign judgments internationally[27]; currently, for example, the United States that is a party to various international and regional conventions on the recognition and enforcement of arbitral awards "is not a party to a single treaty providing for enforcement of foreign judgments."[28]
- Speed and Cost: The arbitral process can be speedier than a court case and there can be a saving in costs. In person, I do not believe that arbitration is a

[23] For a detailed analyze of confidentiality in arbitration process, see. E. Özsunay, "Tahkim Yargılamasında Mahremiyet", İstanbul Barosu Dergisi, cilt:78., sayı:2004/2, 2004, p.541-560.
[24] Lew et. al., op. cit., p.7.
[25] Redfern, Hunter, (student edition), op. cit., p.24.
[26] Z. Akıncı, Milletlerarası Ticari Hakem Kararları ve Tenfizi, Ankara, D.E.Ü. Hukuk Fakültesi Yayınları, 1994, p.40-41.
[27] See. The Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.
[28] Redfern, Hunter, (student edition), p.24. Also see. G. B. Born, "Planning for International Dispute Resolution", Journal of International Arbitration, 17(3), 2000, p.71.

cheaper procedure than litigation[29] but in some cases saving in cost can be possible.[30] On the other hand, ADR mechanisms have cost and time advantages compared to arbitration and litigation.

1.2 Essential Characteristics of International Commercial Arbitration

1.2.1 Definition of International Commercial Arbitration

As mentioned in the introduction, the scope of the study is limited to voluntary, "International Commercial Arbitration". So what is international and commercial? Is there any universal definition to set these characteristics? The following part deals with these notions.

1.2.1.1 Meaning of International

Even though there is no consensus on the definition of the notion "International", there are some criteria to characterize arbitration as international or domestic (national).

Mainly two criteria are used in defining the notion "international" in the context of an international commercial arbitration. The first involves analyzing the nature of dispute; according to this approach arbitration is treated as international, if it involves the interests of international trade. The second involves focusing attention on the parties and if their nationality, habitual place of residence or if the party is a legal entity the seat of its central management has foreign element then the arbitration is considered as international.[31]

[29] See. M. O'Reilly, E. Ryan, "Costs in international commercial arbitration", in A. Berkeley, J. Mimms (ed.), International Commercial Arbitration: Practical perspectives, London, the Centre of Construction Law & Management, 2001, p.121-136.
[30] Akıncı (Milletlerarası Tahkim), op. cit., p.28.
[31] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, 2nd ed., London, Sweet & Maxwell, 1991, p.15.

In the arbitration laws of different countries generally one of these criteria are chosen. However some countries and UNCITRAL Model Law mixes these two criteria.

The definition of UNCITRAL Model Law is as follows:
Article 1(3)

"An arbitration is international if:

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

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

> *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;*
>
> *(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*

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

Practically, categorization of an award as international or domestic is important because in many national laws there are different laws, at least different provisions for international and domestic arbitration, especially on procedural and enforcement matters. The current trend in international arbitration is to reduce the degree of intervention.

1.2.1.2 Meaning of Commercial

Such as the notion "international", for the notion "commercial" there is no universally accepted definition.

National laws of the countries define the scope of the notion commercial. Despite the fact that UNCITRAL Model Law on International Commercial Arbitration consists the word in its name does not give a clear definition, however it envisages a wide interpretation of the notion commercial.[32]

Categorization of an award as commercial is important in practice. For instance, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[33] gives an opportunity to contracting states to apply the Convention only to differences arising out of the legal relationships, which are considered as commercial under the national law of the State making such declaration.[34] A party may face a problem when wants to enforce an award in a signatory state made such declaration.

1.3 *Ad Hoc* and Institutional Arbitration

1.3.1 Generally

Essentially there are two kinds of arbitration, *ad hoc* and institutional.[35] The institutional arbitration is one that is entrusted to one of the arbitration institutions to handle, while the *ad hoc* is conducted according to the rules determined by the parties, without such an organization.

The principal benefits and deficiencies of these two types are summarized in the following part.

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[32] P. Fouchard, et. al., Traité de l'arbitrage commercial international, Paris, Litec, 1996, p. 39.
[33] United Nations, Treaty Series, Vol.330., No.4739., p.38.
[34] New York Convention, 1958, Article 1(3). For instance as a contracting state this declaration was made by Turkey.
[35] Şanlı, op. cit., p.241.

1.3.2 *Ad Hoc* Arbitration

Ad hoc arbitration is an arbitration that agreed to and arranged by the parties themselves without recourse to an institution. The proceedings are conducted by the arbitrators as per the agreement between the parties or with assent of the parties.

In *ad hoc* arbitration, no institution assists the parties. Therefore, they have to determine what are the rules governing the procedure, how arbitrators are to be appointed, where the arbitration will be held, how long it will last, etc. But to make it easy, the parties may choose to use the rules of an arbitration institute without receive the assistance of the institution and in this way they can get rid of to draft the whole framework of the procedure themselves.[36]

Moreover, the United Nations Commission on International Trade Law (UNCITRAL) developed in 1976, a special set of arbitration rules aiming to create a universally acceptable method for resolving international commercial disputes.[37] These rules especially designed for *ad hoc* arbitration[38] and have been widely used by the parties.[39]

In the past, the UNCITRAL Arbitration Rules played an important role especially for the settlement of international investment disputes between the states, which prefer *ad hoc* arbitration.[40]

[36] J.Paulsson, et. al., The Freshfields Guide to Arbitration and ADR, 2nd ed., The Hague, Kluwer Law International, 1999, p.50.
[37] These rules are known as the UNCITRAL Arbitration Rules 1976 and should not be confused with UNCITRAL Model Law 1985.
[38] E. Nomer, et. al., Milletlerarası Tahkim, İstanbul, Beta Basım Yayım, 2000, p.43.
[39] Akıncı (Milletlerarası Tahkim), op. cit., p.24.
[40] İ. Yılmaz, Uluslararası Yatırım Uyuşmazlıklarının Tahkim Yoluyla Çözümü ve ICSID, İstanbul, Beta Basım Yayım, 2004, p.29.

UNCITRAL Model *ad hoc* arbitration clause

The UNCITRAL model *ad hoc* arbitration clause is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

According to the Article 1 of the UNCITRAL Arbitration Rules, where the parties to a contract have agreed in writing that dispute in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such dispute shall be settled in accordance with these rules subject to such modification as the parties may agree in writing. Thus, the parties to an agreement can adopt the UNCITRAL Arbitration Rules for the resolution of their international disputes. However, UNCITRAL does not offer any assistance in the conduct of arbitrations.

As I mentioned above, the UNCITRAL rules, or any of the other rules such as the rules of an institution can be integrated in their entirety into the *ad hoc* agreement. Those rules supply ready made provisions that regulate all stages of the arbitral process and most significantly, resolve the major problem which has always accompanied the *ad hoc* approach prior to the availability of the UNCITRAL rules. What happens when a party refuses or fails to appoint a sole arbitrator, or party appointed arbitrators are unable to agree upon a third neutral arbitrator. The parties facing this issue now can turn to the UNCITRAL rules for resolution of the problem.

Ad hoc arbitration provides flexibility and the ability to determine the arbitral procedures to fit the precise needs of the parties. Another advantage of *ad hoc* arbitration is the lower cost compared to the institutional arbitration.

The principal disadvantage of an *ad hoc* arbitration is that its effectiveness depends in practice upon the voluntary cooperation of the parties to agree procedures at a time when they are already in dispute. If a party fails to cooperate, a number of time-consuming and expensive challenges may need to be made to the appointment or

arbitrators or the resolution of questions of jurisdiction. This is a matter, which is likely to be dealt with more rapidly and effectively through an institutional structure.[41]

1.3.3 Institutional Arbitration

Institutional arbitration is an arbitration that is administered by one of the arbitral institutions under its own rules.

The parties benefit from the ability of the institutional arbitral provider to get the arbitration up and running in a shorter period of time. Many of the functions, which may have to be exercised, are shifted to the arbitral institution, which is empowered by rule to deal with them. The institutional rules generally address the most essential questions and often empower the arbitrator to decide all issues not covered by rule.

The most significant advantage of the arbitral institution is the supervision it provides of the arbitral process and the administrative support afforded. On the other hand, the institutional arbitration may be very costly. The amount of that cost can vary considerably between institutions.[42]

As I mentioned above, there are different advantages and disadvantages of *ad hoc* and institutional arbitration. Accordingly, the decision as to whether to proceed *ad hoc* or with the assistance of an arbitral institution must be made on a case-by-case basis.

1.3.4 Leading Arbitral Institutions

There are many arbitral institutions across the world and these institutions typically offer somewhat different products. Some of these institutions are regional; some of them are specialized in a particular topic such as WIPO, which provides arbitration services on intellectual property disputes. Moreover, there are some arbitral institutions, which provide arbitration services for the disputes arising from any kind of dispute, and are fully international.

[41] Paulsson et. al., op. cit., p. 51.
[42] O'Reilly, Ryan, op. cit, p.133.

Some of the leading international arbitral institutions, which provide arbitration services for wide range disputes, are the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA) and the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute).

Each of these organizations is described briefly below. These (and other) arbitral institutions provide sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules.

1.3.4.1 International Chamber of Commerce (ICC)

Based in Paris, and founded in 1919, the International Chamber of Commerce (ICC) is a broad based, non-governmental institution active in international issues affecting business. ICC has expanded to become a world business organization with thousands of member companies and associations in approximately 130 countries.[43]

The ICC's International Court of Arbitration was historically regarded as the world's leading international arbitral institution. The ICC Court is truly international. Composed of members from 80 countries and every continent, the ICC Court is the world's most widely representative dispute resolution institution.[44] So far the ICC has administered over 12,000 international arbitration cases involving parties and arbitrators from more than 170 countries and territories.[45]

The ICC's International Court of Arbitration established in 1923 is not in fact a court, and it does not itself decide disputes or act as an arbitrator. Rather, the Court is an administrative committee that acts in a supervisory and appointing capacity under the ICC Rules. The ICC International Court of arbitration's has several functions under the

[43] "History of the International Chamber of Commerce", 2004, http://www.iccwbo.org, (July 17, 2005).
[44] "Introduction to arbitration", 2004, http://www.iccwbo.org, (July 17, 2005).
[45] "Introducing ICC Dispute Resolution Services", 2004, http://www.iccwbo.org, (July 17, 2005).

Rules such as:

- To appoint arbitrators when the parties are not able to agree on the identity of an arbitrator;[46]
- To resolve challenges to an arbitrator;[47]
- To replace arbitrators;[48]
- To fix the arbitrators' remuneration;[49]
- To review and to approve the awards of arbitrators and in case of necessity to make modifications on the form of it;[50]

Facts and figures on ICC arbitration in 2004[51]

- 561 Requests for Arbitration were filed with the ICC Court; those Requests concerned 1,682 parties from 116 different countries and independent territories;
- In 11,6% of cases at least one of the parties was a state, parastatal or public entity;
- The place of arbitration was located in 49 different countries throughout the world;
- Arbitrators of 61 different nationalities were appointed or confirmed under the ICC Rules; the amount in dispute exceeded one million US dollars in 58,8% of new cases;
- 345 awards were rendered.

ICC revised its arbitration rules last time in 1998 to improve their universal character and to provide better service to its clients from all over the world.[52]

[46] ICC Rules of Arbitration, Article 8(2).
[47] ICC Rules of Arbitration, Article 11(3).
[48] ICC Rules of Arbitration, Article 12.
[49] ICC Rules of Arbitration, Article 30-31.
[50] ICC Rules of Arbitration, Article 27.
[51] "Facts and figures on ICC Arbitration", 2004, http://www.iccwbo.org, (July 17, 2005).
[52] Y.Derains, E. A. Schwartz, A Guide To The New ICC Rules Of Arbitration, The Hague, Kluwer Law International, 1998, p.4.

1.3.4.2 American Arbitration Association (AAA)

Founded in 1926, the American Arbitration Association offers a wide range of services, including education and training, publications and the resolution of a wide range of disputes through mediation, arbitration and other out of court settlement techniques. The AAA, with 34 offices in the United States and Europe and 59 cooperative agreements with arbitral institutions in 41 countries, provides a forum for the hearing of disputes, case administration, rules, procedures, and experts to hear and resolve disputes.[53]

Compared to the ICC, there are some differences in the arbitration rules of AAA. For instance, in ICC arbitration, parties must have "Terms of Reference"[54], a procedure that has been compared to a pre hearing conference and described as an opportunity for the arbitrators to get to know each other and counsel, and to become familiar with the case. Under this rule, before proceeding with the preparation of the case, the arbitrator will draw up, on the basis of the documents or in the presence of the parties and in light of their most recent submissions, a document defining his terms of reference, which will then be reviewed by the ICC. The AAA rules do not bind the arbitral proceedings in this way and are more flexible in this point than the ICC Rules.[55] Moreover, contrary to the ICC Rules[56], The AAA rules do not envisage a detailed review of the arbitrators' award by the institution before it is released to the parties.

[53] William K. Slate II-President and Chief Executive Officer of American Arbitration Association, http://www.adr.org, (August 12, 2005).
[54] ICC Rules of Arbitration, Article 18.
[55] C. Wölper, "Parallels and Differences between the Arbitration Rules of Major Arbitration Institutions: ICC and AAA", Comparative Seminar on National and International Arbitration, Institute of East European Law University of Kiel, on January 21 2002, p.5, http://www.uni-kiel.de, (August 12, 2005).

1.3.4.3 London Court of International Arbitration (LCIA)

The LCIA is another long established international institution for commercial dispute resolution. On 5 April 1883, the court of Common Council of the City of London set up a committee to draw up proposals for the establishment of a tribunal for the arbitration of domestic and transnational disputes arising in London.[57]

London Court of International Arbitration was officially inaugurated in 1892 and at the end of a long process in 1981 the name of the Court was changed to "The London Court of International Arbitration", to reflect the nature of its work, which was, by that time, predominantly international.[58]

Contrary to the ICC, the LCIA does not itself supervise the arbitral procedure once it is entrusted to the arbitrators; likewise, no terms of reference are required and there is no review of the award by the institution.[59]

1.3.4.4 The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute)

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute) was established in 1917 and it is a separate entity within the Stockholm Chamber of Commerce.[60] The SCC Institute recognized as a neutral centre for dispute resolution in the field of East-West trade disputes during 70's and considered as one of the leading arbitration institutions in the world.

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[56] ICC Rules of Arbitration, Article 27.
[57] A. Winstanley, "The LCIA-history, constitution and rules", in A. Berkeley, J. Mimms (ed.), International Commercial Arbitration: Practical perspectives, London, the Centre of Construction Law & Management, 2001, p.21.
[58] "History of the LCIA", LCIA web page, http://www.lcia-arbitration.com, (August 5, 2005).
[59] M. Blessing, Introduction to Arbitration: Swiss and International Perspectives, Basle, Helbing & Lichtenhahn, 1999, p.75.

1.4 International Regulation of Arbitration and the UNCITRAL Model Law

1.4.1 Generally

The codification of arbitration at the international level has first focused to set rules for foreign arbitral awards in terms of recognition and enforcement. In this scope, many conventions signed by the states to eliminate the obstacles to international arbitration.

Another important step taken in the international level was the UNCITRAL Model Law, which is designed to harmonize and improve the national arbitration laws. The Model Law covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award. The following part deals with these international developments.

1.4.2 International Conventions

The majority of international conventions on arbitration deal with the international recognition of agreements to arbitrate and the recognition and enforcement of foreign arbitral awards.

1.4.2.1 The Geneva Conventions 1923 and 1927

The first significant international convention was the Geneva Protocol of 1923[61] prepared under the League of Nations.

The protocol had two objectives. Its first and main objective was to ensure that arbitration clauses were enforceable in international level and its second and subsidiary objective was to ensure that arbitration awards made pursuant to such

[60] The SCC Institute web page, http://www.sccinstitute.com, (August 6, 2005).
[61] League of Nations, Treaty Series, Vol.XXVII, No.678., p.157.

arbitration agreements would be enforced in the territory of the states in which they were made.[62]

In 1927, the Convention[63] on the execution of foreign arbitral awards was drawn up in Geneva. The purpose of the Convention was to widen the scope of the Geneva Protocol by providing for the recognition and enforcement of Protocol awards within the territory of contracting states, not merely the state in which the award was made.[64]

1.4.2.2 The New York Convention of 1958

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has introduced a procedure to make simpler the recognition and enforcement of arbitral awards throughout the world. Even though the existence of several regional arrangements, there is no global counterpart to the New York Convention for foreign judgments.[65]

The New York Convention requires contracting states to enforce valid arbitration agreements. The Convention succeeded the 1923 Geneva Protocol and 1927 Geneva Convention and reversed the burden of the Geneva Protocol and Convention by placing the principal burden on the party resisting recognition or enforcement of an award to establish the reasons why the award should no be recognized or enforced.

According to Article 1 of the Convention, an award is considered as foreign, if it is made in the territory of a State other than the State where the recognition and enforcement of such awards are sought or not considered as domestic in the State

[62] Redfern, Hunter, op. cit., p.61.
[63] League of Nations, Treaty Series, Vol. XCII, No.2096., p.301.
[64] Redfern, Hunter, op. cit., p.62.
[65] Born, op. cit., p.71.

where their recognition and enforcement are sought.[66] Accordingly, the scope of the Convention is considered quite wide.[67]

However when joining the Convention, States have an opportunity to make two reservations[68]:

- A State can choose to apply the Convention to the recognition and enforcement of awards made only in the territory of a Contracting State, and
- A State can choose to apply the Convention only to differences arising out of legal relationships that are considered commercial under its national law, as provided in Article 1(2) of the Geneva Protocol as well. [69]

The significance of the New York Convention cannot be over emphasized. When we look at the practice, only in 10% of the reported cases involving the New York Convention, national courts have refused the enforcement of foreign awards.[70]

Now I will look at some of the important articles of the Convention.

Article 3 of the Convention sets out the basic obligation undertaken by contracting states, being to recognize and enforce foreign arbitral awards:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[66] T. Tansay, "Yabancı Hakem Kararlarının Tanınması ve Tenfizine İlişkin New York Antlaşması ve Yeni Türk Devletler Özel Hukuku Kanunu", Yabancı Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi, Bildiriler-Tartışmalar, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1983, p.128.
[67] Akıncı, (Milletlerarası Ticari Hakem Kararları ve Tenfizi), op. cit., p.17.
[68] New York Convention, 1958, Article 1(3).
[69] Fouchard, et. al., (Traité de l'arbitrage commercial international), op. cit., p.141.
[70] A. Berg, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few", in F. Gelinas (ed.), Arbitration in the Next Decade, Paris, ICC Publishing S.A., May 1999, p. 75. Also see. Q. Tannock, "Judging the Effectiveness of Arbitration through the Assessment of Compliance with Enforcement of International Arbitration Awards", Arbitration International, Vol.21., No:1., 2005.

Article 5 of the Convention sets out the limited grounds upon which contracting states may refuse to recognize and enforce foreign arbitral awards:

"1. 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:

a) 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; or
b) 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; or
c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

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

As it is seen in the Article above, Article 5 consists of two parts. The first paragraph of the Article lists the grounds for refusal of enforcement of an award, which are have to be proven by the respondent. The second paragraph of Article 5, which concerns violation of public policy under the law of the forum, lists the grounds on which a court may refuse enforcement on its motion. Under Article, the three main features of the grounds for refusal of enforcement are may be summarized as follows[71]:

- The grounds for refusal of enforcement are exhaustive;
- A court may not reexamine the merits of the arbitral award;
- The burden of proof rests on the respondent.

The New York Convention has been ratified by 136 countries[72] around the world, thus providing the most extensive network presently in existence for the enforcement of decisions resolving disputes.

[71] Berg, op. cit., p.76.
[72] For the countries, which have participated in the New York Convention, see. http://www.uncitral.org, (September 21, 2005).

1.4.3 Regional Multilateral Conventions

There are some important regional multilateral conventions. In here, I will mention just three of them.

The Panama or Inter-American Convention of 1975[73] has sometimes been considered as a replica of the New York Convention. However, despite basic similarities between the goals of these two Conventions, there are some important differences. First of all, contrary to the New York Convention, Panama Convention deals with the issue on a regional basis. Moreover, while the New York Convention concerns itself mainly with the arbitration agreement and award and not with the conduct of the proceedings, except as that conduct may impair the award, in contrast, Panama Convention Article 3 requires that "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."[74]

The States from the Middle East have also been willing to cooperate between them in the field of arbitration and the most developed stage of their cooperation was the execution of the Arab Convention on Commercial Arbitration on April 14, 1987.[75]

Another regional convention is the European Convention of 1961. The Convention was adopted in Geneva on 21 April 1961; the main purpose of that Convention was to facilitate the efficiency of arbitration within Europe and in particular between the Western and Eastern European countries. Now I will look at this Convention closer.

[73] The Convention entered into force on June 16, 1976, OAS Treaty Series No. 42.
[74] J. P. Bowman, The Panama Convention and Its Implementation under the Federal Arbitration Act, The Hague, Kluwer Law International, 2003, p.11.
[75] Amman Convention entered into force on June 25, 1992.

The European Convention on International Commercial Arbitration 1961

The Convention[76] concluded during the cold war period, aiming to promote the trade between the eastern and western countries. The Convention has been developed by the United Nations Economic Commission for Europe. The Convention covers general issues of parties' rights to submit to arbitration, who can be an arbitrator, how arbitration proceedings should be organized, how to determine the applicable law and challenge and setting aside of awards.[77]

The Convention consists of 10 Articles which are; Article I - Scope of the Convention, Article II - Right of legal persons of public law to resort to arbitration, Article III - Right of foreign nationals to be designated as arbitrators, Article IV - Organization of the arbitration, Article V - Plea as to arbitral jurisdiction, Article VI - Jurisdiction of courts of law, Article VII - Applicable law, Article VIII - Reasons for the award, Article IX - Setting aside of the arbitral award, Article X - Final clauses.

The preamble of the Convention is as follows:

"…convened under the auspices of the Economic Commission for Europe of the United Nations, Having noted that on 10th June 1958 at the United Nations Conference on International Commercial Arbitration has been signed in New York a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Desirous of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries, Have agreed on the following provisions……"

The Convention applies to international commercial arbitration. However it does not define what is international and commercial.[78]

[76] United Nations, Treaty Series, Vol.484., No.7041., p.364.
[77] C. Şanlı, "21 Nisan 1961 Tarihli Avrupa Anlaşması ve Türk Tahkim Hukuku", Avrupa (Cenevre) - New York Sözleşmeleri ve Türk Tahkim Hukuku Sempozyumu, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1990, p.3., Lew et. al., op. cit., p.23.
[78] Şanlı, (21 Nisan 1961 Tarihli Avrupa Anlaşması ve Türk Tahkim Hukuku), op. cit., p.5.

The European Convention does not deal with the recognition and enforcement of arbitral awards. It leaves this to be dealt with by other treaties, including the New York Convention, to which the European Convention is a supplement.[79]

Under the European Convention, a somewhat different rule applies as regards the effect of the annulment of an award on its enforceability in another jurisdiction. The Convention provides that the setting aside of an award in one Contracting State shall be a basis for refusing to recognize and enforce it in another Contracting State only if the setting aside is based on one of the grounds set forth in the Convention.
Article 9 (1) of the Convention is as follows:

"(1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

a) *the parties to the arbitration agreement 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, or*
b) *the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
c) *the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;*

[79] Redfern, Hunter, op. cit., p. 475.; for the comparison of two conventions see. Akıncı, (Milletlerarası Ticari Hakem Kararları ve Tenfizi), p.110-113.

d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention."

These grounds are similar to those in the first part of Article 5 of the New York Convention but notably do not include the "public policy" grounds contained in the second part.[80]

Currently, the Convention had been ratified by 30 states. The Convention is still in operation but it never really achieved real international recognition.[81]

1.4.4 UNCITRAL Model Law

Besides the international and national conventions, the most significant step toward international legislative harmonization has come from the Model Law developed by the United Nations Commission on International Trade Law (UNCITRAL) and adopted in 1985.[82] Unlike the New York or Geneva Conventions, with the introduction of Model Law, the aim was not to draft an international convention, which then would have to be ratified by the states, in fact the aim was to create a model for a piece of legislation to be adapted by the national legislators and in this way to provide the states more flexibility to incorporate it in their own national legislation.[83] In this context, the rules of the Model Law were developed in an international context, and reflected different views from the international community.[84]

[80] J. M. Hertzfeld, "Enforcement of Foreign Arbitral Awards: The International Framework", June 11, 2002, p.13., http://www.51lunwen.com, (July 15, 2005).
[81] Lew et. al., op. cit., p.23.
[82] F. Gelinas, "Arbitration and the Challenge of Globalization", Journal of International Arbitration, 17(4), 2000, p.120.
[83] Blessing, op. cit., p.131.
[84] A. S. Reid, "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: are the two systems poles apart?", Journal of International Arbitration, v.21., i.3., July 2004, p. 227.

The Model Law grants to parties' fundamental autonomy, in choosing the procedural rules[85], the place of arbitration[86], timing[87], and the language to be used[88] in the proceedings. In the absence of an agreement on these issues, the Model Rules allows the arbitral tribunal to fill in the gaps.

Further autonomy is granted in Article 28, which gives the parties the right to choose the substantive law applicable to the dispute. According to the Model Law, an arbitral award must be in writing, must be signed by the arbitrators, and must state the reasons upon which the award is based unless the parties have agreed that no reasons are to be given or the award is on agreed terms. A final award terminates the arbitral proceedings, subject to the right of the parties to request correction or interpretation.

According to the rules of the UNCITRAL Model,[89] a party may apply to the competent court to set aside an arbitral award only if it can prove:

- Incapacity of the parties or invalidity of the arbitration agreement;
- Improper notice or other lack of due process;
- An award beyond the scope of the agreement to arbitrate;
- Improper arbitral procedure or composition of the arbitral board;
- That the award has been annulled or suspended or is otherwise not binding;
- That the subject matter of the dispute is not capable of settlement by arbitration under the enacting state's laws; or
- That the award is in conflict with the public policy of that state.

When we look at the current situation in Europe, some of the European countries adopted the Model law as a whole, while some of the others preferred to adopt certain of the provisions of it and preferred to follow it closely.[90]

[85] UNCITRAL Model Law, Article 19.
[86] UNCITRAL Model Law, Article 20.
[87] See. UNCITRAL Model Law, Article 21. "Arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
[88] UNCITRAL Model Law, Article 22.
[89] UNCITRAL Model Law, Article 34.
[90] For the list of countries, which have adopted the Model Law, see. http://www.uncitral.org.

CHAPTER II
ARBITRATION and EUROPEAN LAW

2.1 The European Union Law in General

The European Union Law is a unique legal structure developed in the process of European integration within the framework of the European Communities and the European Union. Previously, this legal system was called "European Communities law" or "European Community law". The term "European Union law" has been used since the beginning of 90's after the emergence of the European Union.[91] Today, the EU law has broader meaning than the European Community law and the European Community law is just a part of it.[92]

The basic principles of the EU law include the principle of the supremacy, the principle of direct effect and direct applicability.

The principle of supremacy means the priority of the norms of the EC law over the norms of the national legislation of Member States. The ECJ affirmed the "*precedence of Community law*" in the case of *Costa v. Enel*[93].

The principle of direct effect means that the EC law is binding and may have a direct effect for citizens, without any intervention on the part of national authorities. In another word, direct effect can be defined as the capacity of a norm of Community law to be applied in domestic court proceedings and to create individual rights enforceable by all persons concerned in the national courts.[94]

[91] With the entry into force of Maastricht Treaty on November 1, 1993.
[92] S. Weatherill, P. Beaumont, EU Law: The Essential Guide to the Legal Workings of the European Union, London, Penguin, 1999, p.452.
[93] Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.
[94] L. Thai, "The Relationship between EC law and National law", 2002, p.5., http://www.jur.lu.se, (August 07, 2005).

The ECJ stated in the case *Van Gend en Loos*[95] that:

"*the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights ... and the subjects of which comprise not only Member States but also their nationals*".

The Court therefore concluded that the Treaty provision at issue there "*produces direct effects and creates individual rights which national Courts must protect*".

Direct applicability of the EC law means that EC law is applicable in the Member States as part of their national law without any special regulatory enactment. This principle applies to EC primary law as well as to all regulations.

Moreover, general principles of the EU law include the principle of the protection of human rights and fundamental freedoms, the principle of proportionality, the principle of non-discrimination, the principle of subsidiarity etc.[96]

The autonomy of the Community legal order is a fundamental significance of the nature of the EC Law, it is the only guarantee that Community law will not be watered down by interaction with national law, and that it will apply uniformly throughout the Community. This Community specific interpretation is indispensable since particular rights are secured by the Community law and without it they would be endangered.[97]

The European Union law consists of primary and secondary law and has an original system of legal sources that form a complete system of sources with hierarchy of acts typical for such systems. EU law is made up of three sources, which together form the body of EU law often commonly referred to as the "acquis communautaire". These are; primary legislation, secondary legislation and other sources.

[95] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.
[96] The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether, in an area where there is joint competence, the Union can take action or should leave the matter to the Member States. Compliance with this principle may be monitored in two different ways, either politically or legally.
[97] "Autonomy of the Community Legal Order", http://europa.eu.int, (July 22, 2005).

2.1.1 Primary Legislation

European integration is based on four founding treaties and primary legislation mainly consists of these treaties, namely;

The Treaty establishing the European Coal and Steel Community (ECSC), which was signed on 18 April 1951 in Paris, entered into force on 23 July 1952 and expired on 23 July 2002, the Treaty establishing the European Economic Community (EEC), the Treaty establishing the European Atomic Energy Community (Euratom), which was signed (along with the EEC Treaty) in Rome on 25 March 1957, and entered into force on 1 January 1958, these two Treaties are often referred to as the "Treaties of Rome" and the Treaty on European Union, which was signed in Maastricht on 7 February 1992 and entered into force on 1 November 1993.[98]

The original founding treaties have been revised several times by the: Single European Act, Treaty of Amsterdam and Treaty of Nice.[99]

The primary law has priority over EU secondary law that is; legislative acts adopted and issued by the European Community and the EU institutions.

2.1.2 Secondary Legislation

Secondary legislation is used to implement the policies set out in the treaties. The main instruments of secondary legislation are:

- **Regulations,** which are directly applicable and binding in all Member States without the need for any national implementing legislation.
- **Directives,** which set legislative objectives with a time limit for the Member States, but leave them to decide how these objectives, are to be translated into national law.

[98] "European Treaties", http://europa.eu.int, (July 13, 2005)
[99] "An ABC of EU law**",** The European Commission Representation in the United Kingdom, http://www.cec.org.uk, (July 14, 2005).

- **Decisions,** which are binding on those to whom they are addressed and do not require national implementing legislation.
- **Recommendations** and **Opinions**, which are not binding.

2.1.3 Other Sources

Besides primary and secondary legislation, it should be taken into account that there are other sources of the EU law. For instance, EU law includes international agreements signed by the European Community and the EU and also includes case law of the European Court of Justice and the European Court of First Instance.

2.1.4 Relationship between Arbitration and European Law

The EU law and national laws of the Member States coexist and courts of the Member States apply European Law as part of their national law.[100] The direct applicability of EC law applies to primary law as well as to all regulations. This means that some instruments of the EU law is applicable in the Member States as part of their national law without any special regulatory enactment of the Member State.[101]

On the other hand, as I mentioned above, the EC law has supremacy over national laws. This means if a conflict exists between an EC norm and a national legal norm, then the EC legal norm takes precedence.

However the matters, which are not, regulated at EU level, stays within the competence of the national states. When we look at the EU law, it is not possible to talk about a harmonization of international commercial arbitration rules at the EU level, in contrary, these rules are codified in the acts which take place under the national legal frameworks of the Member States. Although arbitration is not regulated at EU level, the EU law therefore relevant to arbitration proceedings.

Moreover, the rapid development of arbitration as an alternative method of dispute resolution in international trade, including transactions involving EU trade, has increased the significance of questions relating to the application, enforcement, and

[100] Lew, et. al., op. cit., p.476.
[101] A. Fogels, "The European Union in Light of International and European Union Law", p.8., http://www.ius.lv, (July 23, 2005).

interpretation of EU law, both in arbitration proceedings and in related court proceedings.

2.2 References to the ECJ for Preliminary Rulings

As the judicial branch of the EU, the European Court of Justice has the responsibility of to ensure that the law is observed in the interpretation and application of the Treaties establishing the European Communities and of the provisions laid down by the competent Community institutions. To be able to carry out that task, the Court has wide jurisdiction to hear various types of action. The Court has competence, *inter alia*, to rule on applications for annulment or actions for failure to act brought by a Member State or an institution, actions against Member States for failure to fulfill obligations, references for a preliminary ruling and appeals against decisions of the Court of First Instance.[102]

Article 234 (ex 177) of the Treaty of Rome enables national courts and tribunals to refer questions of Community law to the ECJ for a ruling. Preliminary rulings given pursuant to the Article must be considered as binding not only on referring courts but also on courts of Member States generally. The Article is as follows:

Article 234 (ex Article 177)

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning;

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community ***and of the European Central Bank***

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

[102] The Court of Justice, official web site, http://www.curia.eu.int, (July 05, 2005).

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."[103]

At this point, we can ask the question, what is a court or tribunal, can an arbitral tribunal be considered as a court or tribunal for the purposes of Article 234 (ex 177) of the Treaty and may make requests to the European Court for preliminary rulings as provided for in that Article.

It is a matter for the ECJ to decide what sort of bodies are to be seen as courts or tribunals under the Article. In its rulings the ECJ interpreted the notion of a "court or tribunal" extensively so as to include judicial panels that are not necessarily considered as ordinary courts under the laws of the respective Member State.[104]

However, the necessity of it being a court or tribunal making the reference for preliminary ruling can be problematic in the context of voluntary arbitration. The ECJ has held that even though an arbitral body lays down a judgment according to law, and the award is binding on the parties, these facts will not be sufficient for it to be seen as a court or tribunal of a Member State.[105] For this to be so, there must be a closer link between the arbitration procedure and the ordinary court system in the Member State.[106]

When deciding on the matter, the ECJ took a number of factors into account, including; whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it applies rules of law, and whether it is independent.[107]

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[103] The words in bold were added by the Maastricht Treaty.
[104] See. Case 61/65, *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf,* [1966] ECR 261.
[105] Case 102/81, *Nordsee Deutsche Hochseefisherie GmbH v Reederei Mond Hochseefisherie Nordstern AG and Co. KG,* [1982] ECR 1095.
[106] P.Craig, G. Búrca, EU Law: Text, Cases and Materials, 2nd edition, Oxford University Press, 1998, p. 412.

Nordsee v. Reederei Mond

In the *Nordsee Case*,[108] three German shipping groups contracted for the joint construction of freezer ships and sought financial aid for this project from the EC. When it learnt that founding would be available for some but not for all of the ships they planned to build, the parties entered into a secret agreement to share the available financial aid equally among them irrespective of how the EC funds were divided. One of the shipping groups (Nordesee) later sought payment under their agreement from another of them (Nordstern) because it had built six ships, while the other had only built three. Nordstern refused to pay, alleging that the agreement was in violation of Community law. The crucial question was the legality of the pooling contract by reference to the EEC.[109]

The agreement contained an arbitration clause excluding recourse to the ordinary courts, and an arbitrator eventually heard the case.

The arbitrator was of the opinion that under German law the validity of a contract to share aid from the fund depended on whether such sharing amounted to an irregularity under the related community regulations. Considering that a decision on the point was necessary in order to make his award and he referred the matter to the court for a preliminary ruling.[110]

The ECJ held that an arbitrator who is called upon to decide a dispute between the parties to a contract under a clause inserted in that contract is not be considered as a "court or tribunal of a member state"' within the meaning of Article 234 (ex 177) of the treaty where the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration[111] and where the public authorities in the member

[107] Craig, Búrca, op. cit., p. 410-411.
[108] Case 102/81.
[109] Lew, et. al., op. cit., p. 477.
[110] Case 102/81, para. 6.
[111] Case 102/81, para. 11.

state concerned are not involved in the decision to choose for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator .[112]

If in the course of arbitration resorted to by agreement between the parties questions of community law are raised which the ordinary courts may be called upon to examine either in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award, it is for those courts to ascertain whether it is necessary for them to make a reference to the ECJ under Article 234 (ex 177) of the treaty in order to obtain the interpretation or assessment of the validity of provisions of community law which they may need to apply in exercising such functions .[113]

Consequently, it has been clarified that even though the courts and tribunals of the Member States encouraged seeking advisory opinions from the ECJ on issues of EU law, non-statutory arbitration tribunals cannot refer their questions directly to the ECJ for a preliminary ruling even if their seat is a Member State. The ECJ will need to satisfy itself that the body concerned is established by law and is permanent, its jurisdiction is compulsory, it applies rules of law and it is independent. Under that doctrine, an arbitration court will not be considered as a court or a tribunal within the meaning of Article 234 of the EC Treaty when parties do not have a legal or factual duty to refer their dispute to that court and the public authorities of the Member State concerned are not involved in the decision to prefer arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.

Recently in the case *Denuit v Transorient*[114] in which a dispute arose between a travel agency and its clients regarding the price of tourist package services. The tourists brought their claims before a Belgian arbitration court according to the arbitration clause of the initial agreement between the parties. The arbitration court was of the opinion that the outcome of the dispute was partly depending on the interpretation of specific provisions of Community law and thus stayed the proceedings and referred to the ECJ for a preliminary ruling pursuant to Article 234 of the EC Treaty.

[112] Case 102/81, para. 12.
[113] Case 102/81, para. 15.
[114] Case C-125/04, *Guy Denuit and Betty Cordenier v Transorient – Mosaïque Voyages and Culture SA*.

In its ruling the ECJ has confirmed, its Nordsee ruling and decided that a non-statutory arbitral tribunal is not a "jurisdiction"[115] in the sense of Article 234.[116]

2.3 EC Competition Law and Arbitration

EC competition law is mainly contained in Articles 81 to 89 of the EC Treaty. Article 81 (ex Article 85) of the treaty deals with the agreements and other forms of concerted action involving two or more undertakings while Article 82 (ex Article 86) deals with unilateral conduct by an enterprise with market power which restricts competition on the market. Beside these treaty provisions, there are some other instruments in the Community's competition policy such as regulations and directives.

This part of the thesis examines the relation between EC competition law and arbitration. It discusses the competence and obligation of arbitrators to apply EC competition law both when asked to do so and *ex officio.* At this point it examines the *Eco Swiss Case*[117] which is probably the most important case to consider the relationship between the EU Law and Arbitration. The part also looks at recent developments in EC competition law and their effects on arbitration.

2.3.1 *Eco Swiss v. Benetton*

The *Eco Swiss Case* probably the most important case to consider the relationship between the EU Law and Arbitration.

In this case, Benetton, a Netherlands company, concluded a licensing agreement for a period of eight years with Eco Swiss (Hong Kong) and Bulova (U.S.) in 1986. The licensing agreement was included EU Member Countries beside the others. Under the terms of the agreement, all disputes arising between the parties were to be settled by

[115] The language of the case was French, and in the French version of the Article 234, the term "juridiction" is used instead of "court or tribunal".
[116] At the date of 27 January 2005.
[117] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV,* [1999] ECR I-3055.

arbitration in conformity with the rules of the Nederlands Arbitrage Instituut and that the arbitrators were to apply Netherlands law.[118]

Since Benetton had given notice of termination of the agreement three years before the end of the period provided in the agreement, the parties entered into arbitration. During the arbitration proceedings neither the parties nor the arbitrators raised the question of the conformity of the license agreement with the competition law of the Community.[119]

Arbitrators made two awards; one of them was final partial award[120] and the second one was the final award[121] and ruled for compensation for Eco Swiss and Bulova. Subsequently, Benetton applied for the setting aside of these two awards to the Rechtbank (District Court) on the ground, *inter alia*, that they were contrary to public policy within the meaning of Article 1065(1)(e) of the Netherlands Code of Civil Procedure ("NCCP").

Article 1065(1)

"1. Setting aside of the award can take place only on one or more of the following grounds:

(a) absence of a valid arbitration agreement;

(b) the arbitral tribunal was constituted in violation of the rules applicable thereto;

(c) the arbitral tribunal has not complied with its mandate;

(d) the award is not signed or does not contain reasons in accordance with the provisions of article 1057;

(e) the award, or the manner in which it was made, violates public policy or good morals."

Benetton also claimed that the licensing agreement was null pursuant to Article 81 (former Article 85) of the EC Treaty, which sets forth rules on competition.

[118] Case C-126/97, para. 10.
[119] Y. Brulard, Y. Quintin, "European Community Law and Arbitration: National versus Community Public Policy", Journal of International Arbitration, 18(5), Kluwer Law International, 2001, p. 534.
[120] At the date of 4 February 1993.
[121] At the date of 23 June 1995.

Following the rejection of its demand on the stay of enforcement of the final award, Benetton applied to the Gerechtshof (Regional Court of Appeal). The Gerechtshof granted only the stay of enforcement and setting aside of the second award due to the incompatibility of the license agreement with Article 81 and for the first award it ruled that the demand for setting aside had been made after the expiration of the three-month appeals period.[122]

Then Eco Swiss appealed the decision of the Gerechtshof before the Hoge Raad der Netherlanden (Supreme Court of the Netherlands). The Hoge Raad observed that, an arbitration award is contrary to public policy within the meaning of Article 1065(1)(e) of the NCCP, only if its terms or enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. Prohibitions set forth in domestic competition law are not considered fundamental for these purposes and are not regarded as being contrary to public policy.[123] But, the Hoag Road wondered whether the position is the same when, the provision in question is a rule of Community law and referred several questions to the ECJ.

The essential question was, whether a national court to which application is made for annulment of an arbitration award must grant such an application where in its view, that award is in fact contrary to Article 81 although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which according to the applicable national law, is not generally to be invoked on the sole ground that because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.

The ECJ decided that, according to Article 3(g) of the EC Treaty (now, Article 3(1)(g)), Article 81 (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) (ex

[122] According to the Article 1064 of the Dutch Civil Procedure.
[123] Case C-126/97, para. 24.

Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.[124]

Where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) (ex Article 85(1)).[125]

Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata*, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle. In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement, which the interim award held to be valid in law, is nevertheless void under Article 81 EC (ex Article 85).[126]

On those grounds, in answer to the questions referred to it by the Hoge Raad the ECJ ruled that:

"1. A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (ex Article 85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

2. Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment

[124] Case C-126/97, para. 36.
[125] Case C-126/97, para. 37.
[126] Case C-126/97, para 48.

has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (ex Article 85)."

The Eco Swiss judgment has clarified a number of issues concerning the application of Community' competition provisions in the context of arbitration, such as:[127]

- Non-application or the misapplication of Articles 81 and 82 may give rise to the public policy defense during the enforcement of the award;
- It is clearly stated that this does not affect time limits and other restrictions, which limit the possible control of the award for purposes of legal certainty;
- The judgment shows that disputes concerning alleged infringements of Article 81 are arbitrable.

Before the judgment there was a tendency to the arbitrability of competition law claims in some countries such as United States, however the court made it clear for the Community Law.[128]

2.3.2 The Effects of EU Law on National Procedural Law and *Ex Officio* Application of Competition Law by Arbitrators

The allocation of competences within the Community results to implementation of Community law mainly at Member States level. Pursuant to Article 10 of the EC Treaty, the Member States are responsible for the implementation of the measures, which have been adopted at Community level for the achievement of the objectives specified in the EC Treaty. Consequently, the attainment of the Community objectives depends very much upon the cooperation of national authorities, which act in accordance with their own national procedural rules.

[127] Lew, et. al., op. cit., p.484.
[128] See. B. Hanotiau, "L'Arbitrage et le Droit Européen de la Concurrence" in L'Arbitrage et le Droit Européen, Actes du Colloque International du CEPANI du 25 Avril 1997, Bruxelles, Etablissements Emile Bruylant, S.A., 1997, p.34-46.

The ECJ, referring to Article 10, envisages two conditions to be met by national procedural law. First, the procedural rules relating to the enforcement of Community law rights by private individuals before the national courts may not be less favorable than those governing the same or a similar right of action on a purely internal matter (principle of equivalence). Second, these rules must in no case be laid down in such a way as to render impossible in practice the exercise of the rights, which have to be protected by the national courts (principle of effectiveness).[129]

In the judgments of *Van Schijndel*[130] and *Peterbroeck*[131] the ECJ had to deal with the question whether national courts have to consider Community law on its own motion even when the parties have not relied on them. The ECJ developed a case-by-case approach, which means that every case has to be examined independently. Moreover, in *Van Schijndel*, the Court of Justice qualified Article 81 as a "binding rule" and it is clear from the judgment that the Court considers that Article 81 has a mandatory character *erga omnes* as a public policy provision.[132] The classification of Article 81 as being a provision of public policy suggests its *ex officio* application, because it is a feature of public policy that it is not left to the disposition of the parties.

In its *Van Schijndel* and *Peterbroeck* judgments, the Court held that compliance with the principles of equivalence and effectiveness must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defense, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration. Such a balanced approach has been referred to as the procedural rule of reason.[133]

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[129] S. Prechal, et. al., " 'Europeanisation' of the law: consequences for the Dutch judiciary", Rechten University of Groningen publication, 2005, p.13.
[130] Joined Cases C-430/93 and C-431/93, *Van Schijndel & Van Veren v Stichting Pensioenfonds Voor Fysiotherapeuten* [1995] ECR I-4705.
[131] Case C-312/93 *Peterbroeck, Van Campenhout et Cie v Belgium* [1995] ECR I-4599.
[132] L. Gyselen, "Liability of Supranational, State and Private Actors - comment from the point of view of EU competition law -", Colloquium on Principles of Proper Conduct for Supranational, State And Private Actors in The European Union - Toward A *Ius Commune* -, K.U. Leuven and Universiteit Maastricht, on September 15-16 2000, p.9, http://ec.europa.eu, (August 25, 2005).
[133] Prechal, et. al., op. cit., p.13.

Under the concept of arbitrability normally the arbitrator had to deal with only the questions raised by the parties' agreement, if the parties do not claim a right and do not rely on EC law, the arbitrator did not need not raise the point *ex officio* and should not base his award on EC law. We should keep in mind that one of the significant features of arbitration is based on avoiding the strictly judicial approach concerning the proceeding.[134]

Even in *Eco Swiss v Benetton Case*, the ECJ did not answer the question directly, whether arbitrators must raise competition law on their own initiative even if this means going outside the scope of the dispute before them.

In practice, this is a difficult position for arbitrators on what position to take in proceedings involving claims for the execution of agreements, which may contain EC competition law aspects. Will the Arbitral tribunal have to consider such aspects *ex officio* when the national arbitration procedures generally prescribe only stay in the scope of the dispute by relying on facts and circumstances, which are invoked by the parties? If they don't take into account EC competition law, the award can be set aside because of public policy however if they go beyond the issues raised by the parties then another risk may arise, and the award may be subject to annulment proceeding because of the excess of jurisdiction.[135]

Another question on the *ex officio* application of EC competition rules by the arbitrators is what will happen if the parties deliberately, either in the arbitration clause/agreement or subsequently, to exclude the arbitrators from the jurisdiction of the competition issues?

For this questions, there are different approaches when some lawyers believes that it is not the arbitrators' role to police EC competition law or to decide issues not within its jurisdiction[136], some other lawyers suggests some practical solution such as to call the

[134] G. Zekos, "Treatment of arbitration under EU law", Dispute Resolution Journal, May 1999, p.4.
[135] See. New York Convention on the Recognition of Foreign Arbitral Awards, 1958, Article V(1)(c).
[136] See. Lew, et. al., op. cit., p.489.

parties a hearing, discuss the issue with them and explain the risk of unenforceability of the award.[137]

2.3.3 Regulation 1/2003[138] and Arbitrators

The European Community has rules to ensure free competition in the Internal Market and the European Commission is responsible for applying these rules throughout the Community, working closely with national governments.

European Competition law is mainly contained in Articles 81 and 82 of the Treaty of Rome. However there are several instruments for the correct application of the treaty provisions. Recently a new Regulation 1/2003 was adopted in the context of the modernization of European competition law and replaced Regulation 17/62 as from 1 May 2004.

By the new Regulation, there is a shift from a system of authorization (under which all agreements had to be notified to the Commission in order to obtain antitrust approval) to a legal exception system. The monopoly of the EU Commission falls, and NCAs (National Competition Authorities) take over together with National Courts to enforce the rules governing restrictive practices.[139]However, according to the Regulation, National Authorities are prohibited from deciding in the way of which conflict with those of the Commission.[140]

[137] See. T. De Groot, "The impact of the Benetton decision on international commercial arbitration", Journal of International Arbitration, Vol.20., i4., August 2003, p.365-374 (p.370) and also see. R. Mehren, "Eco-Swiss Case and International Arbitration", Arbitration International, Vol.19., No.4., 2003, p.469.
[138] Concil Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.
[139] M. Blessing, "Arbitrating Antitrust and Merger Control Issues", Swiss Commercial Law Series, Vol.14., 2003, p.33.
[140] Regulation, Article 11 and Article 16.

In short, the most essential features of the reform from the point of arbitration can be summarized as follows:

- Harmonize competition laws in Europe by requiring national courts and national competition authorities to apply EC competition rules over national law. Although, arbitral tribunals are not mentioned, the same applies to arbitral tribunals that their seat in the EU;
- Empower national courts and authorities to apply Article 81(3) directly, ending the Commission's monopoly on application of Article 81(3);
- Prohibit prior notifications for exemption in order to free up Commission resources, thus forcing parties to assess internally the competition implications of their practices;
- Increase the Commission's power of investigation and enforcement, allowing it to impose structural remedies, adopt interim measures and accept commitment decisions;
- Establish a network for coordination and information Exchange between national authorities and courts and the Commission.[141]

In its *Eco Swiss China Time v Benetton* judgment, the ECJ stated that Articles 81 and 82 are a matter of public policy and therefore must be respected and applied by the arbitrators.

Previously when an Article 81 issue was foreseen, or had arisen in a matter before an arbitral tribunal, it was at least possible to make an application to the Commission for an exemption under 81(3) from the effect of Article 81(1), under new regime there is no prospective application of Article 81(3) by the Commission (however the new regulation envisages some exceptions).[142]

So the matter is if an arbitral tribunal has to consider and directly apply the Article 81(1) of the EC Treaty, after this new regulation is it possible to extend this power to the Article 81(3). Because, when 81(1) prohibits arrangements that distort

[141] Dolmans, Grierson, op. cit., p.48.
[142] P. Lomas, "Jurisdiction over EC competition law issues", Legal and Commercial Publishing Limited, 2004, p.12., http://www.freshfields.com, (July 20, 2005).

competition, Article 81(3) saves arrangements under some conditions and if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

In the current situation there is no clear power for the arbitrators to apply Article 81(3) even though they are obliged to apply Article 81(1). Probably the question will be clarified by another decision of the ECJ.

2.4 EU Judicial Cooperation and the Place of Arbitration

Article 293 (ex article 220) of the Treaty of Rome envisages "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards" between the Member States.

In this scope, Member States enacted some Conventions during the integration process of the EU.

2.4.1 Brussels Convention and Brussels Regulation

The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[143] was created for the purpose of addressing questions of jurisdiction arising among Member States of the European Union by providing mandatory rules for determining jurisdiction in matters that come within the scope of the Convention.

Even though, Article 293 of the EC Treaty includes the simplification of formalities related to recognition and enforcement of the arbitration awards, Article 1(2)(4) of the Brussels Convention expressly excluded the arbitration from the scope of the Convention. The Article 1 of the Convention is as follows:

"This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters[3]. The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration."

In the related reports of the EC, the arbitration exception has been explained by the existence of many international agreements on arbitration[144] and expectations on preparation of a Protocol which will follow the European Convention providing a uniform law on arbitration[145]and will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. [146]

Afterwards, the Brussels Convention has been replaced and modified by the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes, known as the Brussels Regulation.[147] The countries covered by it are all the EU Member States except Denmark, which continues to follow the rules of the Brussels Convention. In the Regulation from the point of arbitration there is no change and arbitration still goes on to stay out of the scope.[148] Even though arbitration has been excluded from the scope explicitly, for the clarification of some controversial issues the opinion of the ECJ was required.

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[143] The Convention was signed at Brussels, 27 September 1968, Official Journal L 299, 31/12/1972, p.32-42.
[144] Particularly the New York Convention, 1958.
[145] The European Convention Providing a Uniform Law on Arbitration done on 20 January 1966, intended to unify arbitration law for all the European countries. The Convention never entered into force because it had not been ratified by the minimum required number of states. Belgium was the only state, which ratified the Convention.
[146]See. P. Jenard, "Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters", OJ C59, 5 March 1979, p.13., http://aei.pitt.edu, (August 01, 2005).
[147] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Official Journal L 12, 16/01/2001, p.1-23.
[148] See. Regulation, Article 1(2) (d).

2.4.2 The Arbitration Exception and ECJ Case Law

In the past, the rulings of the ECJ clarified some issues related to arbitration exception in Brussels Convention/Regulation. The *Marc Rich v Impianti* and *Van Uden v Deco Line* cases are the leading rulings of the ECJ in this scope.

2.4.2.1 *Marc Rich v Impianti*

In the *Marc Rich v Impianti*[149], ECJ had to consider a case where the existence of the arbitration agreement was treated as an incidental issue. The problem were raised between Marc Rich and Co. A.G., (registered in Switzerland) and Società Italiana Impianti P.A., (registered in Italy).

By telex message of 23 January 1987, Marc Rich made an offer to purchase a quantity of Iranian crude oil from Impianti. Impianti accepted the offer subject to certain further conditions. Marc Rich confirmed acceptance of those further conditions and sent a further telex message setting out the terms of the contract and an arbitration clause, which envisages that "the contract shall be construed in accordance with English law. If any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London."[150]

When the oil loaded, a dispute occurred between the parties on its quality and the buyer claimed damages, the seller commenced proceedings in Italy for a declaration non-liability. The buyer objected the jurisdiction of Italian courts and initiated arbitration proceedings in England. When the seller refused to participate in the arbitration the buyer asked the English court to appoint an arbitrator. The seller alleged that Brussels Convention has to be applied to the case. Also it argued that there was not a valid arbitration agreement.

[149] Case C-190/89, *Marc Rich & Co. AG v Società Italiana Impianti PA,* [1991] ECR I-3855.
[150] Case C-190/89, para. 3.

A reference was made to the ECJ by the English Court of Appeal as to whether arbitration exception in the Brussels Convention extended to litigation or a judgment where the initial existence of an arbitration agreement is the matter.

In the case, the ECJ decided that by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.[151] The exclusion provided for in Article 1 (2) (4) "extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation."[152]According to the court's decision in the case, in order to determine whether a dispute falls within the scope of the Convention the reference must made solely to the subject matter of the dispute.[153]

2.4.2.2 *Van Uden v Deco Line*

In the *Van Uden v Deco Line*[154]*,* the main issue was, whether the interim measures granted in support of arbitration proceedings fell within the arbitration exception. The problem were raised in the context of a dispute between Van Uden Maritime BV, (registered in the Netherlands) and Kommanditgesellschaft in Firma Deco-Line and Another (registered in Germany), concerning an application for interim relief relating to the payment of debts arising under a charter contract containing an arbitration clause which provided that all disputes were to be referred to arbitration in the Netherlands.

When the German Company failed to pay some invoices, Van Uden initiated arbitration proceedings in the Netherlands pursuant to the agreement and at the same time applied the Dutch court in order to obtain an interim payment for the outstanding debts.[155] The German party claimed that the Dutch court has no jurisdiction under

[151] Case C-190/89, para. 18.
[152] Case C-190/89, para. 29.
[153] Case C-190/89, para. 26 and also see. C. Ambrose, "Arbitration and the Free Movement of Judgments", Arbitration International, Vol.19., No.1., 2003, p.9.
[154] Case C-391/95, *Van Uden Africa Line, v. Kommanditgesellschaft. in Firma Deco-Line and Another*, [1998] ECR I-7091.
[155] Case C-391/95, Paras. 9-10.

Brussels Convention, which excluded the arbitration from its scope and alleged that the action could only be brought in Germany where it was domiciled.

The case went to the Dutch Supreme court and the court submitted some preliminary questions to the ECJ.

In the case ECJ stated that, in the situation where the subject matter of the case in connection with which the issuing of provisional measures is requested falls within the objective scope of the Convention, a court having jurisdiction as to the substance of a case in accordance with Article 2 and Articles 5 to 18 of the Convention also has jurisdiction to decide on provisional or protective measures which may prove necessary.[156]

However, in the case, the contract signed between Van Uden and Deco Line contained an arbitration clause and when the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case. In such a case, it is only under Article 24 of the Convention[157] that a court may be empowered to order provisional or protective measures.[158] Article 24 of the Convention (now Article 31 of the Regulation 44/2001) is as follows:

"*Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention (now Regulation), the courts of another Contracting State have jurisdiction as to the substance of the matter."*

According to the point of view of the ECJ, it must be concluded that where as in the case in the main proceedings, the subject matter of an application for provisional measures relates to a question falling within the scope of the Regulation 44/2001, the

[156] Case C-391/95, para. 19.
[157] Now Article 31 of the Regulation 44/2001.
[158] Case C-391/95, paras. 23-25.

Regulation is applicable. Accordingly, Article 24 (now Article 31) may confer jurisdiction on the court hearing that application even where arbitration proceedings have already been, or may be, commenced on the substance of the dispute. Consequently, the Dutch court had jurisdiction under Article 24 (now Article 31) to grant the interim relief requested by Van Uden.[159]

[159] Lew, et. al., op. cit., p.497.

CHAPTER III
THE REGULATION of INTERNATIONAL COMMERCIAL ARBITRATION in the EU MEMBER STATES

3.1 Generally

The law governing international commercial arbitration in European Countries has become increasingly delocalized in recent years, and this trend is spreading. It is important to remember that currently there is no effort in the field of international commercial arbitration, which is derived from the European Union. This is the case for recognition and enforcement of arbitral awards and also for the harmonization of arbitration laws of the Member States.

Even though there is no harmonization of arbitration laws of the Member States in the EU level, as I have examined in the previous chapters there is an interaction between the arbitration and EU law and the national laws and procedures of the Member States affect this interaction.

In this chapter, I will summarize significant features of national Arbitration Acts of the EU Member States.

3.2 Austria

Austrian Arbitration Law is governed by the Code of Civil Procedure dated August 1895.[160] The rules governing arbitration are contained in Articles 577-599 of the fourth Chapter of Code of Civil Procedure.

[160] The law has been amended by Federal Law of February 2, 1983.

The rules of the Code apply to all arbitrations with their seat in Austria and do not differ between domestic and international arbitration proceedings.[161]

Austrian arbitration law is currently not based on the UNCITRAL Model Law. On the other hand, a working group recently proposed draft legislation in order to adapt Chapter 4 deals with arbitration to the model law.[162] The main differences between UNCITRAL Model Law and arbitration law can be summarized as follows:[163]

- There are no explicit rules contained in the Code which govern the relationship of the jurisdiction of the courts and the jurisdiction of the arbitral tribunal;
- There is no possibility under Austrian law to bring the decision of the arbitral tribunal as to the challenge of an arbitrator before the court while the arbitration proceedings are pending;
- The Code does not give the power to grant enforceable interim measures to the arbitrators;
- The Code does not contain any rules regarding the taking of evidence by the arbitrators;
- There are no statutory provisions on the correction, interpretation, and amendment of the award in the Code.

According to the Code, the agreement must be in writing or contained in telegrams or telexes exchanged by the parties.[164]

The parties are free to agree on the procedural rules to be applied. In the absence of an agreement between the parties, the arbitrators may decide on the applicable procedural rules at their own discretion.[165] The Code only provides minimum standards of due

[161] C. Liebscher, I. Nimmerfall, **"**Austria", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.45.
[162] "Arbitration-Austria: Overview", International Law Office, January 2005, http://www.internationallawoffice.com, (July 05, 2005).
[163] Liebscher, Nimmerfall, op. cit., p.46.
[164] Austrian Code of Civil Procedure, Article 577 (3).
[165] Austrian Code of Civil Procedure, Article 587 (1).

process and stipulates that both parties must be heard and the arbitrators must establish the relevant facts of the case.

In the existence of judicial acts considered necessary by the arbitrators but which they have no jurisdiction to undertake will be carried out by the State Court that has jurisdiction on the application of the arbitrators.[166]

According to the Article 595 of the Code, Arbitration awards can be set aside by the state courts under following conditions:

- The absence of a valid arbitration agreement;
- Denial of a party's fair chance to present its case;
- Violation of statutory or contractual stipulations as to either the composition of the arbitral tribunal or the decision making of such tribunal;
- The failure of the arbitrators to sign the original copy of the arbitration award;
- Dismissal of the challenge of an arbitrator even though sufficient reason for the challenge existed;
- Excessive exercise of the arbitral tribunal's jurisdiction;
- Violation of Austrian public order or statutory provisions of Austrian law that cannot be avoided, even if the parties agree on the application of foreign law.

In Austria, arbitral awards are binding and enforceable, and if no appellate proceedings are foreseen by the parties, they are also final. Foreign awards are enforceable according to the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[167]

[166] Austrian Code of Civil Procedure, Article 589(1).
[167] The Convention entered into force on July 31, 1961. See. United Nations Commission on International Trade Law official web site, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, (July 18, 2005.)

3.3 Belgium

Belgium's arbitration law is regulated by the Articles 1676 to 1723 of the Belgian Judicial Code (BJC) that is adopted by the law of July 4, 1972 and was amended last time by the law of May 18, 1998.[168]

Even though, the amendments made in 1998 were inspired the Model Law, the Belgian law on arbitration is not based on the UNCITRAL Model Law. Instead of this, Belgium incorporated into its Judicial Code the provisions of the European Convention on Arbitration that signed at Strasbourg on January 20, 1966[169] within the framework of the Council of Europe and set forth a Uniform Law.[170]

The Belgian Judicial Code governs both domestic and international arbitration proceedings.[171]

According to the Code, the parties are free to determine the rules governing the arbitral proceedings.[172] According to the Article 1696(1), arbitrators are permitted to award preliminary or interim relief at the request of a party except for attachments or garnishments. Article 1677 requires an arbitration agreement, which is signed by the parties or other documents binding on them to show their intention to arbitrate. According to the Belgian case law, this condition is not required for the validity of the arbitration agreement, it has only evidential value.[173]

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[168] P. Maud, "How EU Law Affects Arbitration and the Treatment of Consumer Disputes: The Belgian Example", Dispute Resolution Journal, Nov 2004-Jan 2005, http://www.findarticles.com, (August 11, 2005).
[169] The Convention is only signed by Austria on November 17, 1966 and Belgium on January 1, 1966. Moreover, only Belgium enacted the said Model Law on February 2, 1973.
[170] Fouchard et. al., op. cit., p.73.
[171] J. Verlinden, S. V. Walle, "Belgium", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.58.
[172] BCJ, Article 1693(1).
[173] Maud, op. cit.

According to the Article 1704 of the Code, courts may set aside the award in the following circumstances:

- If it is contrary to public policy;
- If the underlying dispute is a non-arbitral dispute or if there was no valid arbitration agreement;
- If the arbitral tribunal has exceeded its jurisdiction or powers;
- If the arbitral tribunal failed to decide on one or more disputed issues that are inextricably linked with issues on which a decision has been rendered;
- If the arbitral tribunal was irregularly constituted;
- If due process requirements were not respected;
- If a mandatory rule of arbitral procedure was not complied with, to the extent that this had an influence on the arbitral award;
- If the award does not contain the reasoning of the arbitrators;
- If it is not signed, or if it contains conflicting provisions;
- If the award was obtained by fraud, if it was based on false evidence, or if one of the parties withheld a crucial piece of evidence.

Belgium has signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[174] and the Convention is directly applicable in the Belgian legal order so there is no legislation specifically implementing the Convention.

3.4 Czech Republic

Today, Arbitration proceedings in the Czech Republic are governed by Act No. 216/1994 Coll. "the Act on Arbitral Proceedings and Enforcement of Arbitral Awards" (AP Act).[175] The same arbitration law governs both domestic and international arbitration proceedings.

[174] The Convention entered into force on November 16, 1975. (See. http://www.uncitral.org, July 18, 2005)
[175] Dated 1 November 1994.

This law is based on the old Czechoslovak arbitration law-which give less autonomy to the arbitral tribunal and the proceedings- rather than the Model Law.[176] The most significant differences between Czech arbitration law and the Model Law can be summarized as follows:

- The Model Law enables the arbitrators to issue a preliminary relief. Under Czech law only state courts are authorized to do so,[177] According to the Act; interim measures are within the jurisdiction of the local courts.[178]
- Moreover in addition to the grounds for setting aside provided in the Model Law, Czech law provides that an award may be set aside if there are reasons for a new trial in civil proceedings. This ground may open the way to extensive judicial control over arbitral awards.[179]

All property disputes with the exception of disputes arising from the execution of a judgment or disputes caused by bankruptcy proceedings can be resolved in arbitration proceedings [180] however, the traditional field for dispute resolution through arbitration is still commercial.

According to the law, arbitration agreement must be in writing but if the agreements made by electronic means they can be deemed to be in writing if the parties and the context of the agreement can be clearly identified.[181]

The parties are free to agree on the law governing the proceedings and determine the set of rules to be applied to the proceedings between them, either by reference to existing rules or by drafting their own rules of procedure.[182]

The arbitration proceedings shall take place in the location agreed on by the parties. Unless the location is determined in this way, the proceedings shall take place in the

[176] E. Salpius, M. Pavlovic, "International commercial arbitration in eastern and central Europa", in A. Berkeley, J. Mimms (ed.), International Commercial Arbitration: Practical perspectives, London, the Centre of Construction Law & Management, 2001, p.333.
[177] M. Hrodek, P.Ledvinkova, "Czech Republic", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.114.
[178] AP Act, Article 22.
[179] Salpius, Pavlovic, op. cit., p.334.
[180] AP Act, Article 2.
[181] AP Act, Article 3.
[182] "Dispute resolution in the Czech Republic - Commercial disputes overview", February 2004, http://www.legal500.com, (August 02, 2005).

location determined by the arbitrators.[183] The parties may agree on the way the arbitrators should conduct the proceedings. Procedural issues may be decided on by the presiding arbitrator or by all arbitrators. If there is no agreement, the arbitrators shall proceed in a way they consider suitable so that the factual basis necessary for deciding on the case is found out without useless formalities and upon granting the parties equal opportunities to assert their rights.[184]

According to the Article 27 of Arbitration Act the parties may agree on the review of the award by other arbitrators; if so this review is considered to be part of the respective arbitral proceedings. When an arbitral award served on the parties it becomes enforceable in a court of law.[185] The enforcement of foreign arbitral awards based on reciprocity in the Act.[186] However Czech Republic is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[187] and Article 47 of the Act includes the following provisions:

"The provisions of this Act shall apply unless an international agreement binding on the Czech Republic and published in the Collection of laws stipulates otherwise."

3.5 Denmark

The new Danish Arbitration Act entered into force on July 1, 2005, before the new act, arbitration in Denmark is governed by the Danish Arbitration Act No. 181 of 24 May 1972.

The new Act is in compliance with existing international standards and is structured on the UNCITRAL Model Law.[188] The new act being much more detailed than the old act and brings the Danish rules in line with international standards and further providing legal protection by act to arbitration proceedings.

[183] AP Act, Article 17.
[184] AP Act, Article 19.
[185] Salpius, Pavlovic, op. cit., p.334.
[186] AP Act, Article 38.
[187] The Convention entered into force on January 1, 1993. (See. http://www.uncitral.org, July 18, 2005)
[188] C. Pedersen, "New Danish Arbitration Act from 1 July 2005", 2005, http://www.bechbruundragsted.com, (July 15, 2005).

The new Act governs many essential arbitration matters. For instance, the Act introduces rules on arbitration agreements entered into between the relevant parties, detailed provisions on the composition of the arbitration tribunal, and how to proceed with any objections raised against an arbitrator. The provisions will apply if these matters are not already governed by an agreement entered into between the relevant parties. In addition, the Act comprises detailed provisions concerning the competence of and proceedings before the arbitration tribunal. Furthermore provisions on the recognition and enforcement of arbitration awards made in Denmark or abroad are included in the Act.[189]

An important amendment to the former Arbitration Act is that both arbitration awards made in Denmark and awards made abroad can be enforced in Denmark in accordance with the rules of the Danish Administration of Justice Act (*"Retspleloven"*) thereon.[190]

Denmark is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[191]

3.6 Estonia

Currently, there is no Arbitration Act, which regulates arbitration in Estonia, except some general provisions of the Code of Civil Procedure (CCP).[192]

On the other hand, the new CCP, which passed by the Parliament on April 20, 2005[193] but not yet entered into force, contains a special chapter on arbitration. The new Code regulates the proceedings of domestic and international arbitration and creates a legal basis for *ad hoc* arbitral tribunals. The bases of the new Code are UNCITRAL Model

[189] Pedersen, op. cit.
[190] "New Danish Arbitration Act", August 8, 2005, http://www.br-law.com, (August 24, 2005).
[191] The Convention entered into force on March 22, 1973. (See. http://www.uncitral.org, July 18, 2005)
[192] T. Vaher, A. Ots, "Estonia", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.140.
[193] "The Riigikogu passed five Acts and a Resolution", The Riigikogu (Estonian Parliament) Press Service, April 20, 2005. The Code is expected to enter into force as of 1.1.2006. http://www.riigikogu.ee, (July 5, 2005).

Law, New York Convention and the practice of civil law countries (mainly German law) currently in the process of amending their corresponding legislation.[194]

Main differences between the UNCITRAL Model law and the Draft CCP can be summarized as follows:[195]

- Experts appointed by a tribunal may be challenged under the same procedure as arbitrators;
- Upon requesting assistance from a court in taking evidence, arbitrators have the right to participate in such proceedings and to ask questions;
- In case the parties have not agreed on the law applicable to the substance of the dispute and this does not derive from law, arbitral tribunal shall apply Estonian law;
- An arbitrator in the minority may add a dissenting opinion to an award;
- The draft stipulates that violation of the procedure for determining a tribunal's composition is grounds for setting aside an award only if it can be presumed that such violation had a material effect on the award.

On the other hand, presently, the Estonian Chamber of Commerce and Industry has a permanent court of arbitration for the settlement of disputes arising out of contractual and other civil law relationships, including foreign trade and other international economic relation.[196] In Estonia, the Law on Arbitration Court of the Estonian Chamber of Commerce and Industry dated 1991, amended in 1999 to comply with the international standards.[197] The Act provides that if the parties have not chosen a particular law to govern the dispute, then Estonian law will apply[198], the Act also refers to the enforceability of Estonian arbitral awards under the 1958 New York Convention.[199]

[194] C. Ginter, et. al., "Estonia", in Dispute Resolution 2005, Getting the deal through, 2005, p.68., http://www.sorainen.com/articles, (August 18, 2005).
[195] Vaher, Ots, op. cit., p.145.
[196] Estonian Chamber of Commerce and Industry official web site, http://www.koda.ee, (September 02, 2005).
[197] Salpius, Pavlovic, op. cit., p.335.
[198] The Law on Arbitration Court of the Estonian Chamber of Commerce and Industry, Article 63.
[199] "First Quarter 1999-Baltic States Regional Legal Newsletter-Estonia", 1999, http://www.hough-sarzickas-attorneys.lt, (September 04, 2005).

According to the Act an interested party may submit an application to Tallinn Court of Appeal for setting aside of an award, the reasons for the setting aside are similar to Article 34 of the Model Law.[200]

Estonia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[201]

3.7 Finland

Arbitration in Finland is regulated by the Arbitration Act 967/1992[202], which replaced the old Arbitration Act of 1928. The present act closely following the UNCITRAL Model Law.[203]

The Arbitration Act is applicable to all arbitrations having their seat in Finland, irrespective of whether related to domestic or international disputes. The act contains a fairly small number of procedural rules and only one mandatory provision, reflecting the principle of *audiatur et altera pars* (The arbitral tribunal shall give the parties a sufficient opportunity to present their case.)[204]

According to the Act, the arbitration agreement must be in writing[205] and during the procedure; the arbitrators can give partial awards during the proceedings.[206]

The Act provides that the action for unenforceability of an award must be filed within six months however for the nullity there is no time limit. According to the Section 40, nullity results from violations of ordre public, or from such ambiguity in

[200] The Law on Arbitration Court of the Estonian Chamber of Commerce and Industry, Article 7.
[201] The Convention entered into force on November 28, 1993. (See. http://www.uncitral.org, July 18, 2005)
[202] The Arbitraiton Act entered into force on December 1, 1992.
[203] Fouchard et. al., op. cit., p. 81.
[204] Finnish Arbitration Act, Section 27.
[205] Finnish Arbitration Act, Section 3(1).
[206] Finnish Arbitration Act, Section 5(2).

the award itself as to what was decided that enforcement becomes impossible. According to the Section 41, an award may be declared unenforceable if the arbitrators have acted beyond their "mandate" or have denied a party a reasonable opportunity to plead its case. The two other grounds for setting aside an award are violations of impartiality or the integrity of the proceedings.[207]

The Arbitration Act contains provisions related to the enforcement of arbitral awards rendered in Finland (Sections 43-45) and separate provisions (Sections 51-55), reflecting the New York Convention on the recognition and enforcement of arbitral awards rendered outside of Finland. All arbitral awards made in Finland, irrespective of whether related to a domestic or an international dispute are subject to the same set of enforcement and recourse rules. The grounds for refusing the enforcement of an arbitral award made outside of Finland are slightly different from those applying to awards made in Finland, however the enforcement procedure as such is same. Under Finnish law, a Finnish court may only dismiss an application for the enforcement of an arbitral award *ex officio* in case of the violation of the public policy of Finland.[208]

Finland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[209]

3.8 France

France has always been a popular venue for international arbitration. According to the statistics from 1996 to 2000, out of a total of 2421 new arbitrations filed with the ICC, France was by far the most popular seat with 492 arbitrations, compared to 378 in Switzerland, 222 in the United Kingdom and 178 in the United States. France's 1981 Decree on international arbitration was one of the first modern arbitration laws, and

[207] M. Kurkela, "Due process in arbitration: a Finnish perspective", Journal of International Arbitration, v21., i2., April 2004, p.223.
[208] P. Taivalkoski, H. Lindegaard, "Finland", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.151.
[209] The Convention entered into force on April 19, 1962. (See. http://www.uncitral.org, July 18, 2005)

even today remains more progressive than subsequent arbitration legislation in most other countries.[210]

French arbitration law is generally accepted as one of the best arbitration laws but not as a model internationally, for two reasons. First of all, the law is considered limited with the realities of French Law and the second reason is the law refers many matters to the provisions of domestic arbitration and this reality makes it very complex regulation to apply in a different state.[211]

The major reform of French arbitration law took place in the early 1980s. It was a two stage process; first, in 1980, domestic arbitration law was brought to update, then in 1981 specific rules were enacted related to the international arbitration.[212]

French law on arbitration is governed by the French Code of Civil Procedure (NCPC), which dedicates a whole book to arbitration.[213] Book IV, called "arbitration" forms the last part of the New Code of Civil Procedure. The first four titles of Book IV incorporate the provisions of the 1980 Decree into the Code as Articles 1442 to 1491. Then Title V (Articles 1492 to 1497) deals with private international law covering international arbitration. Lastly, Title VI (Articles 1498 to 1507) entitled Recognition, Enforcement and Means of Recourse with Regard to Arbitral Awards Rendered Abroad or in International Arbitration.[214]

Even though the French arbitration law has not based on the UNCITRAL Model Law, there are no significant differences between these laws. The main difference is the definition of international arbitration. The difference between domestic and international arbitration is explicitly recognized by the NCPC, as I mentioned above it dedicates two specific sections to international arbitration.

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[210] Speech of Emmanuel Gaillard, The Premier Forum for International Arbitration, Paris, January 1, 2002 http://www.iaiparis.com (July 22, 2005).
[211] T. Turhan, "Fransız Hukukunda Milletlerarası Tahkim", Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi? Sempozyum-Bildiriler-Tartışmalar, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1997, p.95.
[212] Fouchard et. al., op. cit., p.64.
[213] E. Kleiman, M. Raimon, "France", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.154.
[214] Fouchard et. al., op. cit., p.65.

According to the Code, arbitration is considered as international if it implicates international commercial interests.[215] The Code does not consider other elements, which are related to the arbitration to categorize an arbitration as international such as place of arbitration and substantive law.[216]

On the other hand the arbitrability of an issue governed by the French Civil Code, which notably provides that all persons may agree to arbitration in relation to rights that they can dispose of[217] and explicitly provides that arbitration is not possible for disputes about civil status, capacity of individuals, divorce.[218] This same article provides that arbitration is prohibited in all matters that concern public policy.

The NCPC requires that to be valid an arbitration clause has to be in writing.[219] According to the NCPC parties may determine the procedure and if the parties are silent in this respect, the arbitral tribunal shall determine the procedure, either directly or by reference to a national law or the arbitration rules of an institution. [220] There is no express provision on the interim measures, however it is accepted that parties may give this power to the tribunal.[221] However French case law shows that the existence of an arbitration agreement does not prevent the courts from ordering interim measures.[222]

According to the Article 1482, national arbitration awards may be subject to appeal unless such an appeal is waived, while international awards are not subject to an appeal. Under French law the basis for refusal to enforce international arbitration

[215] NCPC, Article 1492.
[216] Turhan, op. cit., p.80.
[217] The French Civil Code, Article 2059.
[218] The French Civil Code, Article 2060.
[219] NCPC, Article 1443
[220] NCPC, Article 1494.
[221] Lew, et. al., op. cit., p.591.
[222] Lew, et. al., op. cit., p.618.

awards rendered outside of France is the same as the grounds for annulment for international arbitration awards rendered in France.[223]

According to the Article 1502, challenge to recognition or enforcement of an award is available only on the following grounds:

- If the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
- If the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- If the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
- If due process has not been respected;
- If recognition or enforcement is contrary to international public policy.

France has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[224]

3.9 Germany

In Germany, sections 1025-1066 of the Code of Civil Procedure (ZPO) regulate arbitration.[225] When Germany considered making amendments during the late 1990s, mainly has inspired by the UNCITRAL Model Law.[226]

These new provisions of the Code are applicable for both international and domestic arbitration taking place in Germany and apply irrespective of whether the transaction in dispute is of a commercial character.[227]

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[223] T. Webster, "Terms of reference and French annulment proceedings", Journal of International Arbitration, v20., i6., December 2003, p.564.
[224] The Convention entered into force on September 24, 1959. (See. http://www.uncitral.org, July 18, 2005)
[225] These provisions of the Act have entered into force on 1 January, 1998.
[226] See. E. Yılmaz, "Alman Hukukunda Milletlerarası Tahkim", Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi? Sempozyum Bildiriler-Tartışmalar, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1997, p.152-153.

The differences between the UNCITRAL Model Law and the German Code can be summarized as follows:[228]

- The ZPO stipulates that, if the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that party may request a state court to appoint the arbitrator in a different manner[229]. The UNCITRAL Model Law does not contain such a provision.
- Failing a designation of the applicable law by the parties, the ZPO requires the arbitral tribunal to apply the law of the state "with which the subject-matter is most closely connected"[230]. The UNCITRAL Model Law, on the other hand, requires the arbitral tribunal to apply the law determined by the conflict of laws rules that it considers applicable.[231]
- Contrary to the UNCITRAL Model Law, the ZPO requires the arbitrators to decide on the allocation of the costs of the arbitration, including the costs of legal representation, taking into account the circumstances of the case, and, in particular, the outcome of the proceedings.[232]
- According to section 1032 of the ZPO, German courts are required to dismiss an action as "inadmissible" if a valid arbitration agreement exists whereas Article 8 of the UNCITRAL Model Law merely stipulates in general terms that, in such cases, the parties are to be referred to arbitration.

According to the ZPO, the arbitration agreement must be in writing, either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication, which provide a record of the agreement.[233]

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[227] J. Risse, , "Arbitration in Germany", German Law Journal, No. 2., February 1, 2003, http://www.germanlawjournal.com, (July 22, 2005).
[228] J. Koepp, F. T. Schwarz, "Germany", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.162.
[229] ZPO, Section 1034.
[230] ZPO, Section 1051.
[231] UNCITRAL Model Law, Article 28(2).
[232] ZPO, Section 1057.
[233] ZPO, Section 1031(1)

Regarding arbitral procedure, the arbitral tribunal has flexibility in procedural matters and is not bound by the procedural rules that apply in ordinary Court proceedings.[234] According to the Section 1042 of the ZPO requires the arbitral tribunal to treat the parties equally and fairly and to give the parties a full opportunity to present their cases. However, the procedural framework is generally characterized by a high degree of part autonomy.[235] If the parties have not agreed on procedure, and in the absence of provisions in the ZPO, according to the Section 1042(4), the tribunal will conduct the arbitration in such a manner, as it considers appropriate.

German law follows the free choice approach for obtain interim measures by the parties. A party has the choice to apply either to the court or to the arbitral tribunal to obtain the interim measure of protection sought. There are no restrictions imposed on court access. There is no need for a party to seek permission from the arbitrator to apply to the court.[236]

Section 1059 of the ZPO mentions recourse to the court against an arbitral award. The grounds for setting aside contained in section 1059 are nearly the same to those contained in the UNCITRAL Model Law.

Germany signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[237] According to section 1061 of the ZPO, recognition and enforcement of foreign arbitral awards shall be granted in accordance with the New York Convention.

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[234] D. Knottenbelt, "Fact-Finding in Continental European Civil Litigation and Arbitration", 2005 American Bar Association Annual Meeting, Section of Litigation, August 4-7, 2005, p.6., www.abanet.org, (August 3, 2005).
[235] H. W. Labes, "German Arbitration Law Reform New 10th Book of the Code of Civil Procedure (ZPO)", 2000, http://www.chiltington.co.uk, (August 21, 2005).
[236] J. K. Schaefer, "New Solutions For Interim Measures Of Protection In International Commercial Arbitration: English, German and Hong Kong Law Compared", ECJL, Vol. 2., August 1998, http://www.ejcl.org, (August 8, 2005).
[237] The Convention entered into force on September 28, 1961. (See. http://www.uncitral.org, July 18, 2005)

3.10 Greece

The Greek Law of International Arbitration (GLIA), which based on the UNCITRAL Model Law, was enacted in 1999.

Greek law provides for two different sets of rules on arbitration. Arbitration agreements concerning international commercial arbitration proceedings in Greece fall within the scope of the Greek Law of International Arbitration (the GLIA), which incorporates UNCITRAL Model Law provisions into Greek law. In any other case, the provisions on domestic arbitration in the Greek Code of Civil Procedure (the GCCP) apply.[238] The GCCP has been entered into force since September 16, 1968, and contains eight Books. Book Seven regulates arbitration. The Code of Civil Procedure treats arbitration as a method of settling certain private law disputes.[239]

The GLIA differs from the Model Law in the following ways:[240]

- Articles 33(3), 34(4), 35 and 36 of the UNCITRAL Model Law are fully omitted;
- The GLIA expressly recognizes an arbitration clause incorporated in a Bill of Lading as valid (a long prevailing view of the Greek courts, under GCCP provisions, but not directly recognized by the GCCP);
- The arbitral tribunal has 30 days to issue its decision on an arbitrator's challenge;
- The GLIA expressly provides for the allocation of costs and expenses, as well as the arbitrators' fees. The extent of win of each party to the proceedings is adopted as a principle for the allocation;
- An express prohibition of appeals against the arbitral award is incorporated in the GLIA.

[238] P. Yiannopoulos, N. Panou, **"**Litigants switch on to arbitration", International Financial Law Review, http://www.iflr.com, (July 18, 2005).
[239] D. Christodoulou, "Introduction to the Greek Legal System**"**, http://jurist.law.pitt.edu, (July 05, 2005).
[240] Yiannopoulos, Panou, op. cit.

Both the GLIA and the GCCP vest the arbitral tribunal with the authority to decide on the applicable procedure, unless the parties have chosen to apply the rules of an institutional arbitration. However, any applicable procedure must ensure that the parties will be treated equally and that they will be given a full chance to present their case.

Greece ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[241]

3.11 Greek Cypriot Administration

The law on arbitration has been based for a long time on the English, 1950 Arbitration Act. Today, international arbitration is based on the International Commercial Arbitration Law 101/1987.[242]

This law is based on the UNCITRAL Model Law. The basic difference being that it incorporates a definition of the word "commercial" within the law. The definition is as follows, "Commercial" is an arbitration if it refers to matters arising from relationships of a commercial nature, whether contractual or not.

According to the law, the parties are free to agree on the procedure to be followed in the conduct of the proceedings and on the rules of law to be applied to the substance of the dispute. Failing such an agreement, the decision is again left to the tribunal.[243]

Due to the fact that, the law is applicable only to international commercial arbitration, it clearly defines the words "international arbitration". According to the law, international arbitration is an arbitration between two parties who have their place of business in different states; or one of the following places is situated outside the State in which the parties have their places of business: the place of arbitration if determined in, or pursuant to, the arbitration agreement; 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 the parties have

[241] The Convention entered into force on October 14, 1962. (See. http://www.uncitral.org, July 18, 2005)
[242] Greek Cypriot Administration International Commercial Arbitration Law enacted on 29 May, 1987.
[243] Greek Cypriot Administration International Commercial Arbitration Law, Article 19.

expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[244]

The most important aspect of this law is the fact that the intervention of the courts is minimized. The court may set aside an award only for the determined grounds, which are same with the Article 34 of the UNCITRAL Model Law.[245]

Greek Cypriot Administration is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[246] It was incorporated in Law 101/87 that repeats the main provisions of the Convention in Section 36.

3.12 Hungary

On November 8, 1994 Hungary enacted an Arbitration Act based on the UNCITRAL Model Law.

The same arbitration law governs both domestic and international arbitration proceedings. However, the Arbitration Act contains specific provisions applicable to international arbitration proceedings. The Arbitration Act defines the meaning of international arbitration proceedings by setting out in essence that an arbitration proceeding shall be regarded as international if the parties are located in different states at the time of concluding the arbitration agreement.[247]

According to the Act, all disputes arising out of rights that are within the free disposition of the parties and in connection with their economic activity are arbitral.[248] The arbitration agreement must be in writing corresponds to the Model Law.

Procedural rules to be followed by the tribunal can be determined by the parties in the case of a lack of this kind of agreement between the parties; the tribunal may

[244] Greek Cypriot Administration International Commercial Arbitration Law, Article 2.
[245] Greek Cypriot Administration International Commercial Arbitration Law, Article 34.
[246] The Convention entered into force on March 29, 1981. (See. http://www.uncitral.org, July 18, 2005)
[247] C. Polgár, M. Németh, "Hungary", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005.
[248] Hungarian Arbitration Act, Section 3.1.

determine the rules of procedure at its own discretion. However, the Arbitration Act requires the equal treatment of the parties and states that in the course of the arbitration proceedings each party must be given the opportunity to present its case.[249] The tribunal will determine the applicable substantive law, rather than through conflict of law provisions, as provided in the Model Law.[250]

The Arbitration Act entitles the tribunal to take interim measures. Unless otherwise agreed by the parties, the tribunal may, upon request, order any party to take such interim measure. No appeals may be lodged against the awards of the arbitration tribunals.[251] Only the setting aside of the award may be applied for at the competent court for reasons specifically set out in the Arbitration Act.

Hungary signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[252]

3.13 Ireland

In Ireland, the International Commercial Arbitration is regulated by the 1998 Arbitration Act, which incorporates with the UNCITRAL Model Law.

The first Arbitration Act dated 1698 remained in force for over 250 years until the Arbitration Act of 1954.[253] The Arbitration Act of 1954, which was amended in 1980, still in force and continue to govern domestic arbitration.[254]

[249] Polgár, Németh, op. cit.
[250] Hungarian Arbitration Act, Section 49, as opposed to the Model Law, Article 28.
[251] Hungarian Arbitration Act, Section 58.
[252] The Convention entered into force on June 3, 1962. (See. http://www.uncitral.org, July 18, 2005)
[253] Dublin International Arbitration Center, http://www.dublinarbitration.com, (August 13, 2005).
[254] M. Carrigan, **"**Arbitration in the Republic of Ireland", December 2004, http://www.efc.ie, (July 12, 2005).

According to the Irish Act, the grounds for setting aside an award are mentioned in Article 34 of the Model Law and these limited grounds are the only means of recourse against an award and they are identical to the grounds specified in Article V of the New York Convention, 1958.[255]

The Arbitration Act, 1998, emphasizes the importance of the High Court which is the court empowered to perform certain functions indicated in Article 6 of the UNCITRAL Model Law.[256]

The Arbitration Act, 1998 provides that the time limit specified in Article 34 (3) of the Model Law and envisages three months period shall not apply to an application to the High Court to have an arbitral award set aside on the grounds that the award is in conflict with the public policy of the State.[257]

Ireland is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[258]

3.14 Italy

In Italy, arbitration is regulated by the Italian Code of Civil Procedure 1994.[259] International and domestic arbitration are regulated in the same code but they are subject to the different articles in the current provisions relating to international arbitrations Articles 832 to 838 and to foreign awards Articles 839 and 840, on the other hand, the Articles 806 to 831 of the same Code regulates domestic arbitration.

According to Article 832 of the Civil Procedure Code, arbitration will be regarded as international when:

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[255] C. Hóisin, "Ireland as a Venue for International Arbitration Five Years On - Where do we stand?", http://www.dublinarbitration.com, (August 03, 2005).
[256] E. Stewart, "Developments in Arbitration in Ireland", July 2003, http://www.dublinarbitration.com, (August 03, 2005).
[257] The Arbitration Act of Ireland, Section 13.
[258] The Convention entered into force on August 10, 1981. (See. http://www.uncitral.org, July 18, 2005)
[259] The code dated 1942 was amended on January 5, 1994 by the Law No. 25, published in the Gazzetta Officiale della Repubblica Italiana No. 12, dated January 17, 1994.

- At the time of execution of the arbitration agreement, at least one of the parties had its residence or its place of business abroad; or
- A relevant part of the obligation connected with the matter which gave rise to the dispute is to be performed abroad.

While arbitration in Italian law is not based on the UNCITRAL Model Law, however, it is generally considered that during 1994 reform, the Italian lawyers were widely inspired by the UNCITRAL Model Law.[260]

According to the Code, the arbitration agreements have to be in a written form.[261] In addition to this, parties are free to determine procedural rules, if there is no agreement between the parties, and then the conduct of the arbitration will be decided by the arbitrators.[262] However, the arbitrators may not grant attachments or other interim measures of protection,[263] if the parties have authorized the arbitrators to make interim orders, this cannot be enforced by the state judge, if the parties do not comply with them voluntarily.[264]

The amendment of 1994 introduced into the Code of Civil Procedure the new article 839, which deal with Foreign Awards, Recognition and Enforcement of Foreign Arbitral Awards and Article 840, which deal with Foreign Awards, Opposition. These articles are parallel to the provisions of the New York Convention, 1958.[265]

According to Article 839, whoever wants a foreign award to have effect in Italy must apply to the President of the Court of Appealing, in the absence of opposition becomes final. The award will be enforceable, in the case of the compliance with formal requirements[266] and if it is not contrary to public policy. [267]

[260] L. Salvaneschi, M. Frigessi di Rattalma, "Italy", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.205.
[261] Italian Code of Civil Procedure, Article 833.
[262] Italian Code of Civil Procedure, Article 816.
[263] Italian Code of Civil Procedure, Article 818.
[264] "Introduction to Arbitration and Alternative Dispute Resolution in Italy", February 2004, p.4., http://www.lovells.com, (August 16, 2005).
[265] S. Azzali, "Recent Cases:Italy", ITA Monthly Report, Volume III, Issue 7, January 2005.
[266] Italian Arbitration Act, Article 839(1).
[267] Italian Arbitration Act, Article 839(2).

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 to which Italy is a party has been executed by Law no. 62 of January 19, 1968. [268]

3.15 Latvia

Latvian arbitration legislation is contained in its Code of Civil Procedure dated 1999.[269] The Articles related to Arbitration of the Code mainly based on the UNCITRAL Arbitration Model Law.[270]

The Code of Civil Procedure does not distinguish between domestic and international arbitration.[271] The Code provides that any civil dispute may be referred for resolution to the arbitration, with the limited exceptions determined in the Article 487 of the Code. I believe that the most important of these exceptions is the one that excluding the matters where the state or municipal institutions is a party to the dispute.[272]

The Code requires that arbitration agreements be in writing[273] and this provision is harmonized with Article 7(2) of the UNCITRAL Model Law, with the exception that the Latvian statute does not provide that the arbitration agreement can be made by an "exchange of statements of claim not denied by another." It will be considered that the parties have entered into an arbitration agreement if in their contract or other written document they have referred to certain roles or documents providing for dispute resolution by means of arbitration.[274]

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[268] The Convention entered into force on May 1, 1969. (See. http://www.uncitral.org, July 18, 2005)
[269] The Code of Civil Procedure of Latvia, dated 1 March 1999, Part D, Articles 486-537, entitled "On Arbitration".
[270] U.S. & Foreign Commercial Service U.S. Embassy Warsaw, "Latvia-Country Commercial Guide 2004", http://www.buyusa.gov, (July 25, 2005). For contrary opinion see. Salpius, Pavlovic, op. cit., p.338.
[271] L. Fjodorova, "The Regulation of Arbitration in Latvia", 2004, http://www.european-arbitrators.org, (July 24, 2005).
[272] Salpius, Pavlovic, op. cit., p.338.
[273] Code of Civil Procedure of Latvia, Article 492.
[274] Z. Udris; I. Kacevska, "Arbitration in Latvia: urgent need for statutory reform", Journal of International Arbitration, v21., i2., April 2004, p.213.

The arbitral tribunal will determine the applicable procedural law, in the absence of the agreement of the parties.[275] The grounds for the refusal of the enforcement of an arbitral award are listed in Article 536 of the Code and the grounds are identical to the Article V of the New York Convention.

Latvia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[276]

3.16 Lithuania

In 1996, Lithuania adopted a law on commercial arbitration patterned after the UNCITRAL Model Law on International Commercial Arbitration.[277]

The same law applies to domestic and international commercial arbitration although the existence of different provisions for two types.[278]

Moreover, there are some differences between the Lithuanian Law of Commercial Arbitration and UNCITRAL Model Law. The main differences can be summarized as follows:[279]

- According to the Lithuanian Law, a national dispute to be treated as international if one or both parties to the dispute are Lithuanian economic entities in which foreign capital is invested;
- Unlike the UNCITRAL Model Law, Article 17, Article 20 of the Lithuanian Arbitration Law limits the arbitral tribunal to order interim measures, the tribunal only may order a security deposit, and while the district court may grant any other interim measures.

[275] Code of Civil Procedure of Latvia, Article 506.
[276] The Convention entered into force on July 13, 1992. (See. http://www.uncitral.org, July 18, 2005)
[277] Lithuania adopted the Law on Commercial Arbitration, I-1274 dated April 2, 1996 for an official translation from the Seimas (Parliament) of the Republic of Lithuania see. http://www.lrs.lt.
[278] P. A. Streeter, "Arbitration in Lithuanian Commercial Arbitration in Lithuanian Commercial Agreements: Establishment and Early Agreements: Establishment and Early Development", International Journal of Baltic Law Vol 1., No.4., December 2004, p.62.
[279] Streeter, op. cit., p.63.

In the Law, some types of disputes are expressly excluded from the arbitration, such as constitutional, family and labor matters. Moreover similar to Latvia's regulations also disputes in which one of the parties is a state-owned or local government owned enterprise are not arbitrable.[280]

Article 37 of the Lithuanian Law on Commercial Arbitration recourse to a court against the arbitral award may be made on the same procedural grounds as provided in Article 34 of the UNCITRAL Model Law.

Lithuania became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[281]

3.17 Luxembourg

In Luxembourg, the Code of Civil Procedure, Book III, Articles 1003-1028 relates to the arbitration. The courts recognize and enforce foreign arbitral awards.[282]

According to the Luxembourg different forms are required for the agreement and the arbitration clause, only the first needs to be in a document drawn up before the choice of arbitrators, whether a notarized act or a private document (the agreement is otherwise void). Unlike laws in other countries, the law in Luxembourg does not expressly sanction the principle of the independence of the arbitration clause; in practice, however, the decision regarding the valid form of arbitration proceedings is upheld, even where the rest of the contract is invalid, unless the parties have expressly excluded the possibility.[283]

Luxembourg is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[284]

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[280] Streeter, op. cit., p.65
[281] The Convention entered into force on June 12, 1995. (See. http://www.uncitral.org, July 18, 2005)
[282] U.S. Department of State, "Luxembourg", http://www.state.gov, (August 22, 2005).
[283] V. Federici (ed.), "European Chambers Of Commerce and Alternative Resolution Of Commercial Disputes", U.S. Federal Trade Commission web site, http://www.ftc.gov, (August 21, 2005).
[284] The Convention entered into force on December 8, 1983. (See. http://www.uncitral.org, July 18, 2005)

3.18 Malta

The Malta Arbitration Act has been enacted in 1996. Under the Act domestic and international commercial arbitration are regulated in different parts, Part V of the Arbitration Act deals with international commercial arbitration.

Whereas the provisions related to domestic arbitration contain a comprehensive set of rules of arbitration, these dealing with international commercial arbitration are brief and substantially refer to the UNCITRAL Model Law.[285]

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The setting aside of an award delivered under Part V is determined by the provisions of the Model Law, as are the grounds for refusing recognition or enforcement. In this respect, the Arbitration Act appoints the Court of Appeal as the competent Court to which a party applies for the recognition and enforcement of such an award.[286]

Malta is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[287]

3.19 Netherlands

Dutch Arbitration Act takes place in the Book IV of the Code of Civil Procedure dated 1986.[288]

The Book IV namely Arbitration Act of the Code consists of two titles. While title one[289] deals with arbitration in the Netherlands, title two[290] contains provisions governing arbitration outside the Netherlands.

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[285] "Malta: A Center for International Commercial Arbitration", 2002, p.3., http://www.emaadvocates.com, (August 01, 2005).
[286] "International Commercial Arbitration", Malta Arbitration Center, http://www.mac.com.mt, (July 16, 2005).
[287] The Convention entered into force on September 20, 2000. (See. http://www.uncitral.org, July 18, 2005)
[288] The Act entered into force on December 1, 1986.
[289] Dutch Arbitration Act, Articles 1020 to 1073.
[290] Dutch Arbitration Act, Articles 1074 to 1076.

Under Dutch law, no distinction is made between national and international arbitration proceedings. The Arbitration Act (Articles 1020–1076) is applied to any arbitration, the seat of which is located in the Netherlands, in any case of whether or not all parties to the arbitration are Dutch. On the other hand, the Arbitration Act has different rules for arbitration proceedings outside the Netherlands as far as the jurisdiction of the Dutch courts and the enforcement of awards are concerned (Articles 1074–1076).

The UNCITRAL Model Law was an important point of reference and source of inspiration for the Dutch Arbitration Act of 1986.[291] But, the Netherlands did not simply incorporate the Model Law.

Main differences of the Act from the Model Law can be summarized as follows:

- The Act provides an opportunity for the parties to demand consolidation or arbitral proceedings if another arbitral proceeding commenced before another arbitral tribunal in the Netherlands and concerning the subject matter of this arbitral proceeding; this possibility may be excluded by the parties.[292]
- According to the Code the arbitral award have to contain the grounds on which it is based. [293]
- Under Dutch law, the original of the final or partial final award have to be deposited to the registry of the district court.[294]

According to the Act, an instrument in writing must prove the arbitration agreement.[295] Articles 1036–1048 of the Act set out the procedural rules. The parties may agree on the conduct of arbitral proceedings in case of the lack of any agreement the rules are determined by the arbitral tribunal.[296] The parties may

[291] Y. Lennartz, "The Netherlands Strengthens its Position as an Arbitration-Friendly Country", www.nortonrose.com, (August 11, 2005).
[292] Dutch Arbitration Act, Article 1046
[293] Dutch Arbitration Act, Article 1057 (4)(e)
[294] Dutch Arbitration Act, Article 1058.
[295] Dutch Arbitration Act, Article 1021.
[296] Dutch Arbitration Act, Article 1036.

empower the tribunal for some types of interim relief[297], otherwise the court has the power to grant them.[298]

If the parties make a choice of law, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law that it considers appropriate.[299]

The grounds determined in the Act for setting aside of the award are similar to the Article 34 of the UNCITRAL Model Law. However in its wording the Act use "violation of public policy and good moral" while the Model Law prefer to use only the notion of public policy.[300]

The Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[301]

3.20 Poland

The Polish Civil Procedure Code, adopted in 1964 and amended on numerous occasions, is the basic source of arbitration in Poland.[302]

International arbitration is not regulated by a separate act in Polish law. Issues concerning domestic and international arbitration proceedings situated in Poland are mainly regulated by the provisions of art. 695 – 715 of the said Code but in the other parts of the Code there are provisions specially related to recognition and enforcement of the foreign awards.

The Polish national legislation related to international arbitration is far less detailed and less up to date than the provisions of the Model Law.

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[297] Dutch Arbitration Act, Article 1051.
[298] Dutch Arbitration Act, Article 1022.
[299] Dutch Arbitration Act, Article 1054.
[300] Dutch Arbitration Act, Article 1065 (1) (e).
[301] The Convention entered into force on July 23, 1964. (See. http://www.uncitral.org, July 18, 2005)
[302] A. Tynel, "Commercial Arbitration in Poland", http://www.pssp.org.pl, (August 12, 2005).

The general principle is that parties are free to determine the mode of proceedings to be applied in the arbitration. If the parties do not determine the mode of procedure before proceedings are commenced, the arbitrators should apply such mode of proceedings, as they consider appropriate.[303]

Some significant features of the Polish Arbitration Law can be summarized as follows:[304]

- All property related disputes except those arising from the labor relations and alimony are arbitrable.[305]
- The arbitration agreement must be in writing and signed by both parties.[306]
- The arbitral tribunal has jurisdiction to order interim measures but their effects are *de facto* restricted because they are not enforceable.
- Reasons for the award are mandatory.[307]

In the Code, the grounds for setting aside provided in the Model Law are accepted but in addition to these grounds an award may be set aside if there are reasons for a new trial (re-opening of the proceedings).[308]

Poland has been a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[309] Due to the fact that, where the New York Convention is applicable, national legislation concerning the recognition and enforcement of arbitration awards is excluded.

[303] A. Siemiątkowski, L. Zelechowski, "Poland", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005
[304] Salpius, Pavlovic, op. cit., p.343.
[305] Polish Code of Civil Procedure Article 697(1).
[306] Polish Code of Civil Procedure, Article 698.
[307] Polish Code of Civil Procedure, Article 708.
[308] Salpius, Pavlovic, op. cit., p.344.
[309] The Convention entered into force on January 1, 1962. (See. http://www.uncitral.org, July 18, 2005)

3.21 Portugal

In Portugal, arbitration is governed by Law nr. 31/86, of 29 August 1986.[310] The Law recently amended by the Decree Law no. 38/2003, dated 8 March 2003.[311]

Domestic and international arbitration are both governed by the same Law.[312] However, this Law includes special provisions (Article 32 to 35) deal with international arbitration.[313]

Despite the similarities of legal regime between the Arbitration Law and UNCITRAL Model Law, there are some differences between their provisions as follows:[314]

- Arbitration Law does not contain provisions regarding the conduct of arbitration proceedings, including application of statements of claim and of defense, rules on hearings and written proceedings, default of a party, expert evidence, correction and interpretation of award, etc;
- The Arbitration Law does not contain any provision related to the preliminary relief or interim measures to be granted by the arbitral tribunal;
- The UNCITRAL Model Law provides that an arbitral award may be set aside by the court if the award is considered to be in conflict with public policy of the State. Under Article 27 of the Arbitration Law, the limit of public policy was not included among the grounds to set aside the award;
- In the Arbitration Law, an application for setting aside may only be made within one month from the day of service of the arbitral award,[315] but in Model Law, this period is 3 months;[316]

[310] The Act entered into force on November 29, 1986
[311] M. Barrocas, "The Arbitration Process" in Global Practice Review, July 2004, p.10., www.legalweek.com, (August 05, 2005).
[312] M. C. Branco, M. E. Pina, "Portugal", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, p.290.
[313] Fouchard et. al., op. cit., p.76.
[314] Branco, Pina, op. cit., p. 290.
[315] Arbitration Law of Portugal, Article 28(2).
[316] Model Law 1985, Article 34(3).

According to the Law, arbitration agreement must always be in writing. An arbitration agreement included either in a document signed by the parties or coming out with exchange of letters, telexes, telegrams or other mean of telecommunication of which there is a written proof, is considered as concluded in writing.[317]

Parties can enter into an agreement about the procedural rules that will govern the process and the place where the arbitration work shall take place.[318]

However there are some mandatory principles to be followed in every stage of the proceedings:[319]

- Parties shall be treated with absolute equality;
- The defendant shall be summoned to present defense;
- In all stages of the proceedings the adversary system shall be observed; and
- Both parties shall be given the opportunity to present their case, either orally or in writing, before the final award is rendered.

Lastly, I would like to mention from the Decree Law no. 38/2003. The decree brought some new amendments but especially cleared an important discussion in Portuguese law, according to the Article 12(4) of the Law in case of the lack of consensus between the parties on the subject matter of the dispute the civil court of first instance should decide that issue.[320]

This kind of intervention is generally criticized by the scholars and with the entry into force of the new Decree, in case of this kind of dispute between the parties the arbitral court is explicitly entitled to solve the problem.[321] Portugal is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[322]

[317] Arbitration Law of Portugal, Article 2.
[318] Arbitration Law of Portugal, Article 15.
[319] Arbitration Law of Portugal, Article 16.
[320] A. S. Caramelo, "Recent Amendment to the Portuguese Law on Voluntary Arbitration", Arbitration International, Vol.19., No.4., 2003, p.508.
[321] Caramelo, op. cit., p.509.
[322] The Convention entered into force on January 16, 1995. (See. http://www.uncitral.org, July 18, 2005)

3.22 Slovakia

In Slovakia, the New Arbitration Act entered into force on July 1, 2002.[323]

The UNCITRAL Model Law inspires the contents of the new Act to a large extent. The Act regulates settlement of disputes concerning property, arising from domestic and international commercial and civil relations if the place of arbitration is Slovakia, as well as recognition and enforcement of domestic and foreign arbitral awards in Slovakia.[324]

The Slovak Arbitration Act provides for flexible arbitration proceedings, parties may agree on alternative procedures. On the other hand, the Act does not make a clear provision for choosing the applicable substantive law.[325]

According to the Act, arbitration agreement must be made in writing[326] and all property disputes, domestic and international, may be resolved through arbitration proceedings. However the disputes relating to the following matters are excluded from the scope of arbitration:[327]

- Creation, change or extinction of ownership title or other rights to real property;
- Personal legal status;
- Compulsory enforcement of decisions;
- Bankruptcy or composition proceedings.

Moreover, recently the Government of Slovakia discussed and approved a draft act amending and supplementing the Arbitration Act.[328]

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[323] Act No. 244/2002/Coll.
[324] Embassy of the Slovak Republic Commercial Department-London, http://www.slovakembassy-cd-london.co.uk, (September 07, 2005).
[325] Embassy of the Slovak Republic Commercial Department-London, op. cit.
[326] Slovak Arbitration Act, Section 4.
[327] Slovak Arbitration Act, Section 1.
[328] "Communiqué from 142nd session of the SR Government from 24th August 2005", The Slovak Republic Government Office Official Website, http://www.government.gov.sk/english, (September 02, 2005).

Slovakia is a signatory of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[329]

3.23 Slovenia

In Slovenia, arbitration continues to be governed by the two laws of the Socialist Federal Republic of Yugoslavia[330], one is the Code of Civil Procedure[331] (Articles 468a-487) the other is the Conflict of Laws Act[332] (Articles 1-3, 86-101).

The parties may exclude the court as the adjudicator of the dispute if they agree in writing that contractual disputes be solved by arbitration, in the former case, the applicable procedure and law must be determined.[333]

Slovenia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[334]

3.24 Spain

The new Spanish Arbitration Act was enacted on December 23, 2003, and entered into effect on March 26 2004.[335] The new law is based on the UNCITRAL Model Law on International Commercial Arbitration and it brings Spanish arbitral law and practice into conformity with international standards.[336]

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[329] The Convention entered into force on of January 1, 1993. (See. http://www.uncitral.org, July 18, 2005)
[330] Salpius, Pavlovic, op. cit., p.348-349.
[331] Adopted in Slovenia by the Constitutional Law on the Enforcement of the Basic Constitutional Documents on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No 1/91-I.
[332] Adopted in Slovenia by the Constitutional Law on the Enforcement of the Basic Constitutional Documents on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No 1/91-I
[333] U.S. Department of State, "Slovenia", 2005, http://www.state.gov, (August 15, 2005).
[334] The Convention entered into force on June 25, 1991. (See. http://www.uncitral.org, July 18, 2005)
[335] Law 60/2003 of December 23, 2003 ("the Arbitration Act") published in the Spanish Official Gazette on December 26, 2003.
[336] G. Stampa, D. J. A. Cairns, "New Trends in Spanish Arbitration" Dispute Resolution Journal, Feb-Apr 2004, p.1.

Before the enactment of the new Arbitration Act, the governing legislation for arbitration in Spain was the 1988 Arbitration Act replaced the old 1953 Act.[337] As compare to the new Act, the 1988 Arbitration Act had more conservative features compared to the international arbitration practice.[338]

The Act applies to any arbitration where the place of arbitration is in Spanish territory, whether of domestic or international character.

Spanish Arbitration Law 2003 follows the UNCITRAL Model Law. However, it has several differences from the Model Law such as: [339]

- If the parties have not agreed on the number of arbitrators, the regulation of the UNCITRAL Model Law is three. However the default rule in Spain is one arbitrator.[340]
- The act clearly states that the arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings.[341]

According to the Act, arbitration is international whenever any of the following circumstances exist:

a) That at the time of the conclusion of the arbitration agreement, the parties have their domiciles in different States.
b) That the place of arbitration, determined in accordance with the arbitration agreement, the place of performance of a substantial part of the obligations of the legal relationship from which the dispute arises, or the place with which the dispute is most closely connected, is situated outside the State in which the parties have their domiciles.

[337] Fouchard et. al., op. cit., p.78.
[338] Stampa, Cairns, op. cit., p.2.
[339] See for a more detailed analyze, F. M. Serrano, "The new Spanish Arbitration Act", Journal of International Arbitration, v.21., i4., August 2004, p.367-381.
[340] Spanish Arbitration Act, Article 12.
[341] Spanish Arbitration Act, Article 24(2).

c) That the dispute arises from a legal relationship which concerns interests of international commerce.[342]

Procedural autonomy exists in the Act, however, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.[343]

From the point of arbitrability, the Arbitration Act states that an arbitration agreement is valid and the dispute will be arbitral if the requirements under any of the following rules of law are met:[344]

- The rules of law chosen by the parties to govern the arbitration agreement; or
- The law applicable to the merits; or
- Spanish law.

The Act envisages that arbitration agreement have to be in writing, its mean should be a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement. According to the Act this requirement shall be satisfied when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other type of format.[345]

According to the Act, the Spanish legislator has first time confirmed, the authority of the arbitrators to grant interim relief. [346]

Spain is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[347]

[342] Spanish Arbitration Act, Article 3.
[343] Spanish Arbitration Act, Article 24(1).
[344] Spanish Arbitration Act, Article 9(6).
[345] Spanish Arbitration Act, Article 9(3).
[346] Serrano, op. cit., p. 373.
[347] The Convention entered into force on August 10, 1977. (See. http://www.uncitral.org, July 18, 2005)

3.25 Sweden

In Sweden, the arbitration is regulated by the Arbitration Act dated 1999.[348]

Historically, because of the political neutrality, Stockholm was considered as an acceptable place of arbitration for the former socialist states and China. With the new act, Sweden's two 1929 statues respectively entitled the Arbitration Act and the Act concerning Foreign Arbitration Agreements and awards which were revised in 1971, 1976, in 1981 have been repealed.[349]

Model Law played an important role as guidance for preparations of the new Swedish Arbitration Act of 1999. Even though the Swedish Act in many respects did not follow the wording of the Model Law and contains additions not contained in the Model Law. Generally, the Arbitration Act is considered to conform to the basic principles laid down by the Model Law. [350]

However, one of the significant differences is that there is no equivalent to Art 16.3 of the Model Law in the Arbitration Act, under which a party may request a court ruling without appeal on the jurisdiction of the arbitral tribunal while the arbitral proceeding is still pending. Nevertheless, a court may consider the tribunal's jurisdiction, and the parties are free to agree that such ruling should not be subject to appeal. Further, the Arbitration Act contains expedient rules concerning the handling of costs.[351]

The Swedish Arbitration Act of 1999 applies to both domestic and international arbitration. There seems to be general agreement that the distinction between domestic and international arbitration is difficult to draw and there is no wide international consensus as to what is international, and what is not. Moreover, Sweden has decided

[348] The Arbitration Act entered into force on April 1, 1999.
[349] Fouchard et. al., op. cit., p.79-80.
[350] J. Sekolec (Secretary of UNCITRAL), N. Eliasson, Report from the Symposium: "The Swedish Arbitration Act 1999, a Critical Review of Strengths and Weaknesses" on 7 - 8 October 2004, http://www.sccinstitute.com, (July 08, 2005).
[351] H. G. Bagner, K. Hastad, "Sweden", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.325.

not to restrict their arbitration laws to commercial matters only. This reflects the general expansion of the concept of arbitrability.[352]

According to the Swedish Act, a requirement that it be reduced to writing is not imposed for the validity of an arbitration agreement. However, it is generally considered that this liberal approach is of no practical significance. Because, it is not easy to prove the existence of the agreement when it has been made in orally. In addition to this, 1958 New York Convention stipulates written form, which is a prerequisite for recognition of the arbitration agreement outside the forum state, and hence enforcement.[353]

Sweden is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[354]

3.26 United Kingdom

The English Arbitration Act 1996 came into force on January 31, 1997. The Act has 110 sections divided into four parts: Part I (sections 1 to 84) consists of general provisions relating to arbitration pursuant to arbitration agreement; Part II (sections 85 to 98) consists of other provisions relating to arbitration such as domestic arbitration, consumer arbitration and statutory arbitrations; Part III (sections 99 to 104) relates to the recognition of foreign arbitral awards; and Part IV (sections 105 to 110) has general provisions.

The Act does not distinguish between domestic and international arbitration proceedings and applies to both of them when the seat of the arbitration is in England, Wales or Northern Ireland.[355]

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[352] P. Runeland, "International Commercial Arbitration: The Arbitration Agreement", International Commercial Arbitration Conference, Kilpatrick Stockton, London 17 September 2004, http://www.sccinstitute.com, (August 06, 2005).
[353] C. Söderlund, "A Comparative Overview of Arbitration Laws: Swedish Arbitration Act 1999, English Arbitration Act 1996 and Russian Federal Law On International Commercial Arbitration 1993", Arbitration International, Vol.20., No.1., 2004, p.75.
[354] The Convention entered into force on April 27, 1972. (See. http://www.uncitral.org, July 18, 2005)
[355] Scotland has adopted the UNCITRAL Model Law and has its own arbitration regime.

The English Arbitration Act is not based on the UNCITRAL Model Law[356], the main differences between these laws can be summarized as follows:[357]

- Contrary to the Model Law, English Arbitration Act regulates not only international commercial arbitration but also consumer arbitration agreements, statutory arbitrations;
- Contrary to the Model Law, the agreement to arbitrate need not to be signed by the parties;
- Contrary to the Model Law, in case of a valid arbitration agreement an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- Contrary to the Model Law the default provisions for the appointment of arbitrators envisage appointment of a sole arbitrator, not three arbitrators;
- If the parties' agreement provides that each party is required to appoint an arbitrator and one of the parties fails to make this appointment, other party retains the power to treat its party nominated arbitrator as the sole arbitrator;
- Contrary to the Model Law's 15 days time period, there is no time limit for the parties to oppose the appointment of an arbitrator.

The three principles the Act was designed to achieve are set out in Section 1 and it is expressly stated that the Act is to be construed in accordance with these principles:[358]

> (a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> (b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
> (c) The court should not intervene in arbitration save as provided by the Act.

[356] For a detailed comparison of these two laws; see. Reid, op. cit.
[357] E. Yeşin, "İngiliz Hukukunda Milletlerarası Tahkim", Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi? Sempozyum-Bildiriler-Tartışmalar, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1997, p.108.
[358] Marshall, op. cit., p.5., also see. Fouchard et. al., op. cit., p.72.

Moreover, the Act is divided into mandatory and non-mandatory provisions.[359] Section 4 provides that the mandatory provisions apply to all arbitrations whose seat is in England, Wales or Northern Ireland notwithstanding any agreement to the contrary. There are 21 provisions, which are mandatory,[360] these are:

- Sections 9-11 (stay of proceedings);
- Section 12 (power of court to extend an agreed time limit);
- Section 13 (application of the Limitation Acts);
- Section 24 (power of the court to remove an arbitrator);
- Section 26 (1) (effect of death of an arbitrator);
- Section 28 (liability of parties for the fees and expenses of an arbitrator);
- Section 29 (immunity of an arbitrator);
- Section 31 (objection to the substantive jurisdiction of an arbitration tribunal);
- Section 32 (determination of a preliminary point of jurisdiction);
- Section 33 (general duty of an arbitration tribunal);
- Section 37(2) (items to be treated as expenses of arbitrators);
- Section 40 (general duty of the parties);
- Section 43 (securing the attendance of witnesses);
- Section 56 (arbitrators' power to withhold award in case of non-payment);
- Section 60 (effectiveness of agreement for payment of costs in any event);
- Section 66 (enforcement of award);
- Sections 67, 68, 70 and 71 (challenges to award);
- Sections 72 and 73 (saving for the rights of a person who takes no part in the proceedings and loss of right to object);
- Section 74 (immunity of arbitral institutions);
- Section 75 (right of a solicitor to charge proceeds recovered to secure payment of his costs)

[359] Söderlund, op. cit., p.75.
[360] Marshall, op. cit., p.6.

The non-mandatory provisions of the Act allow the parties to make their own rules by agreement or to agree to adopt the rules of any arbitration institution, but apply in lack of such agreement.

According to the Act, arbitrators are competent to rule on matters touching their own jurisdiction[361]. The Act gives considerable freedom to the parties to decide the procedural and evidential rules of the arbitration and make them as flexible as they think appropriate. If the parties have made no agreement, the arbitrators decide all procedural and evidential matters.[362]

The Act provides that the arbitrators have the power to make provisional awards if the parties so agree but not otherwise.[363]

The Court have the power to make orders in support of the arbitration, such as to take the evidence of witnesses, to inspect or preserve property, for samples to be taken or experiments to be performed, for the interim sale of goods or for the grant of an injunction, but the parties are free to agree that these powers of the Court should be excluded.[364]

There are three bases upon which a party may appeal to the court against an arbitral award made in England and Wales or Northern Ireland.[365] First, a party may argue that the tribunal did not have substantive jurisdiction to make the award[366], secondly, a party may appeal on the grounds of serious irregularity.[367] These are mandatory provisions in the 1996 Act, and cannot be contracted out of. Finally, unless parties otherwise agree, a party to arbitral proceedings may appeal to the court on a point of law.[368]

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[361] Arbitration Act 1996 of England, Section 30.
[362] Arbitration Act 1996 of England Section 34.
[363] Arbitration Act 1996 of England Section 39.
[364] Arbitration Act 1996 of England, Section 44.
[365] W. Miles, C. Leathley, "England, Wales & N. Ireland", in The International Comparative Legal Guide to: International Arbitration 2005, London, Global Legal Group, 2005, p.135.
[366] Arbitration Act 1996 of England, Section 67.
[367] Arbitration Act 1996 of England, Section 68.
[368] Arbitration Act 1996 of England, Section 69.

The parties are generally free, either by adopting the rules of a particular arbitration institution, or by agreeing their own rules of procedure, to decide to what extent the Court should be able to intervene in the arbitration.

The Arbitral tribunal is permitted to make preliminary orders, unless the parties agree otherwise. In addition, the parties may agree that the tribunal also shall be entitled to make an order for provisional relief[369], although in the absence of that agreement the tribunal shall not have such power. The tribunal is authorized to grant such interim relief without having to seek the assistance of the court to do so.[370]

United Kingdom is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[371]

[369] Arbitration Act 1996 of England, Section 39.
[370] Miles, Leathley, op. cit., p.135.
[371] The Convention entered into force on December 23, 1975. (See. http://www.uncitral.org, July 18, 2005)

CONCLUSION

Even though the widespread use of arbitration in Europe, for the time being, there is no effort in the field of international commercial arbitration, which is derived from the European Union. This is the case for recognition and enforcement of arbitral awards and also for the harmonization of arbitration laws of the Member States.

In fact, the Commission and other institutions of the EU have demonstrated a surprisingly low level of activism in the field of international commercial arbitration. On the other hand, the significance of European integration and the relevance of EU law are evidenced in all areas of law including arbitration. In this context, some questions arise which relate to the application of EU law in arbitration proceedings, they also relate to the position of arbitration tribunals in the structure of European Courts. The ECJ has on several occasions been asked to clarify certain aspects of the relationship between arbitration and various aspects of EU law.

The reluctance to embrace arbitration is, for instance, evidenced in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (and also in Brussels Regulation). Even though, Article 293(ex Article 220) of the EC Treaty includes the simplification of formalities related to recognition and enforcement of the arbitration awards, Article 1(2)(4) of the Brussels Convention expressly excluded arbitration from the scope of the Convention. There is a similar approach in the Lugano Convention and Article 1(2)(4) of the Convention rules that arbitration is outside the scope. This provision is identical to the related Article of the Brussels Convention.

In the Jenard Report, the arbitration exception of the Brussels Convention has been explained by the existence of many international agreements on arbitration and expectations on preparation of a Protocol which will follow the European Convention providing a uniform law on arbitration and will facilitate the recognition and

enforcement of arbitral awards to an even greater extent than the New York Convention. However this expectation has never been realized. Even though it is not vital because of the existence of the New York Convention, today it is time for the EU to consider its own regulation in the field of recognition and enforcement of arbitral awards.

Another example of reluctance is the recent developments in the field of ADR. In 2002, a Green Paper on Alternative Dispute Resolution in Civil and Commercial Law has been prepared by the Commission. The aim of the Green Paper is to initiate a constructive debate on a certain number of legal issues, which have been raised as regards alternative dispute resolution in civil and commercial law. The questions in the Green Paper relate to the essence of the various means of alternative dispute resolution such as clauses in contracts, limitation periods, confidentiality, the validity of consent given, the effectiveness of agreements generated by the process, the training of third parties, their accreditation and the rules governing their liability. There were many responses to the Green Paper from organizations both within and outside Europe. The European Commission held a public hearing in Brussels on 21 February 2003. Following the public hearing, the Commission made public its decision to launch two initiatives as a follow up to the Green Paper. The two initiatives are: To develop a European plan for best practice in mediation (2003); A proposal for a directive to promote mediation (2004). However, Arbitration is explicitly excluded from the scope of these works as well.

When we examine the relation between Arbitration and the EU Law, the viewpoint of the ECJ is also important. The ECJ does not regard consensual arbitration as an alternative and independent method of dispute resolution, despite the fact that consensual arbitration has been accepted as a method of resolution for disputes arising from contracts involving the European Union itself. The courts of the Member States are encouraged to seek opinions from the ECJ on questions pertaining to EU law. However, private arbitrators are not authorized to address questions of interpretation of EU law to the court for preliminary ruling. It could be argued that if these tribunals could apply for preliminary ruling directly, it would help to provide uniformity in the

application of the principles of the EU law by arbitrators and this would result in a saving in time and cost to the parties.

Lastly, for the time being, there is no harmonization of international commercial arbitration rules at the EU level and as I have summarized in my Thesis, there are significant differences between the national arbitration laws of the Member States. These differences became even more prominent after the accession of new members. Therefore, a harmonization would be in the best interest of the EU itself and the parties who would like to solve their disputes in the EU territory. On the other hand, when harmonizing arbitration rules the party autonomy should be considered in great extent and state intervention should be minimized. In this way, this harmonization would likely help the European legal integration, the establishment of an arbitration friendly environment all over Europe and ultimately prevent the curtailment of European competitiveness.

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