CHAPTER-3

CONCEPTUAL AND THEORETICAL PERSPECTIVES

3.1 Introduction

Arbitration as an optional private process for settling disputes take place within a complex and vitally important international legal framework. With growth of international trade, the increasing complexity of international transactions and the disappointment with the traditional method of settling disputes, arbitration came in vogue, which implied that arbitration was distinct from other Alternative Dispute Resolution forms. It is a dispute settlement procedure that, like litigation in the State courts, leads to a final and binding result that will be given execution by the courts. The main difference between arbitration and litigation is that arbitration is consensual and the final award may treat only those matters that were referred to arbitration by the parties.

Arbitration can be a superior or an inferior alternative to litigation, depending on the circumstances of the case. It may have a great number of inherent merits and remarkable feature which can help resolution of a mammoth size disputes such as flexibility, confidentiality, finality and enforcement, etc. Though all of the above advantages of arbitration, it suffered from the fatal disease of uncertainty in definition, types and other legal formwork. Numerous attempts have been made in recent years to define arbitration. They have failed to produce any crystal clear formula, nor is it certain whether an effective formula, if it were to be found, would constitute a useful contribution rather than a sterile exercise.

In this Chapter, at the beginning, main features of arbitration are discussed. This paves the way for a detailed discussion on International Commercial Arbitration in the Indian Arbitration Act, 199. This Chapter also provides us with a theoretical framework to examine in the following Chapters the approach adopted by the Indian legal system in International Commercial Arbitration. In particular, it

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directs us to the relevant points, and guides us where in Indian law to look for these points.

3.2 Definition of Arbitration

It is often difficult to arrive at a universal acceptable definition of a concept as researchers usually have differing points of view. Most legal scholars and writers on arbitration have avoided defining the arbitration and have instead attempted to distinguish it from other methods of alternative dispute resolution.²

Le Roy Bennett in his book defines “an arbitration as the application of legal principles to a controversy within the limits previously agreed upon by the disputing parties.”³ This definition further states that a committee or panel of arbiters or judges is created either by special agreement of the parties or by an existing arbitral treaty. In agreeing by disputants to submit a dispute to arbitration, they also agree in advance to be bound by the final and binding decision of the arbiters.⁴ This definition is an inclusive description of arbitration. It states that arbitration has only embody a combination of both a contractual and jurisdictional element.⁵ The authorities and powers of the arbiters to act emanate from the agreement of the parties. They also perform their functions within a legal framework laid down rules embodied in national legal systems.⁶ It is also true to say that they perform “Semi-judicial” or “judicial-like ‘functions. Like national Courts, they conduct hearings, issue subpoenas, take evidence from witnesses, enforce final and binding award and sometimes award costs. They also expected to observe the rule of national justice. These functions and responsibilities are akin to those performed by the courts. However, by making reference to “a committee or panel of arbiter or judges.” A serious problem of Bent’s definition is that it does not reference to sole

⁴ Ibid.
arbiter. Practically more than often, single arbiter is appointed by the disputants to determine their dispute.

According to Sutton, “an arbitration is an optional agreement to submit present or future disputes to private persons for resolution, whether they are contractual or not.” This definition covers two main features. It clearly covers the arbitration clause by which the disputants agree to submit future disputes to arbitration as well as the referral of existing dispute to arbitration. One can say that this definition is lacking in that it merely embodies a contractual element and no jurisdictional considerations. It is true that arbitration is a method used for the settlement of disputes between parties, contractual or otherwise. Nevertheless, arbitral proceedings are also rule-based. The arbiters are governed by substantive laws that are applicable to the dispute and procedural laws that regulate the proceeding. These may be those of an arbitration institution, national laws or international law. Further, in the event that a party refuses to heed to an award of the tribunal, the courts may be approached for enforcement. It follows therefore that arbitration has a strong jurisdictional element.

Arbitration is an informal and flexible process. disputants may negotiate virtually every aspect of the arbitration process, including the number of arbiters who will hear the case; the place and time of the hearing; the applicable law; the availability, types, and amount of discovery; the timetable of events; the evidentiary standards; the appropriateness of expert witnesses; whether or not attorneys will represent the parties; and the use of prior post-hearing briefs.

According to Clause (a) of Article 2 of the ML(1985) the expression ‘arbitration’ is defined as under: “arbitration is the means by which the parties to dispute get the matter settled through the intervention of an agreed third person.”

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9 Clause (a) of Article 2 of the Model Law (1985).
In other words, arbitration is an optional private process that is carried out pursuant to an agreement to arbitrate the disputed matter.  

A definition of arbitration can be found in any dictionary. Some definitions are given below for understanding the term arbitration:

i. According to Halsbury’s law of England arbitration can be defined as “the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction.”

ii. The Wharton’s law lexicon defined arbitration as “the determination of matter in dispute by the judgment of one or more persons, called arbiters, who in cases of difference usually call in an umpire to decide between them.”

iii. According to American Arbitration Association “Arbitration is a reference of a dispute by voluntary agreement of the parties to an impartial person for determination on the basis of evidence and argument presented by the parties, who agree in advance to accept the decisions of the arbiter as final and binding.”

iv. Black’s law Dictionary arbitration defined “as a method dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”

v. According Encyclopedia Britannica “Arbitration is a means of settlement of disputes or differences by the decision not of the regular and ordinary courts of law but of a person or persons who are called arbiters and who are appointed by the parties or with their actual or constructive consent.”

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vi. According Webster Dictionary Arbitration can be defined “as the hearing and determination of a cause between parties in controversy, by a person or persons chosen by the parties.” It states that arbitration may be done by one person; but it is usual to choose two or three called arbiters; or for each party to choose one, and these to name a third, who is called the umpire. Their determination is called the award.”

vii. According Byrne’s Law Dictionary, the term arbitration can be defined “as the determination of disputes by the decision of one or more persons called arbiters. Practically every question that can be determined by a civil action may be referred to arbitration.” Russell in his book entitled ‘Arbitration’, quoted above definition and rightly pointed out that “the essence of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of a Court.”

3.3 **Principal Characteristics of Arbitration**

Whilst there is no universal accepted comprehensive meaning of arbitration, there is a general consensus about the characteristics or main features of arbitration. Its principal characteristics are:

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3.3.1 *Arbitration is one of the best methods for the settlement of disputes*

Arbitration is the best available method for resolving all type of disputes particularly commercial disputes. All over the world, arbitration has been accepted as the most efficient method available to participants in national and international level is viewed by parties as a cost effective, swift and neutral to the time consuming and expensive of traditional courts.

There can be no arbitration, if there is no dispute. In arbitration as in litigation it is popular for the disputant parties to resolve their dispute after the arbitration has commenced. There is no longer any dispute for the arbitral tribunal to consider, once the disputant parties have reached an agreement to settle the dispute. Nevertheless, as provided in Article 30 of the ML (1985), “(1) If, during arbitral proceedings, the disputants resolves the dispute, the tribunal shall terminate the proceedings and, if requested by the disputants and not objected to by the tribunal, record the settlement in the form of an arbitral award on agreed terms.

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(2) An arbitral award on agreed terms shall be made in accordance with the provisions of Article 31\(^{20}\) and shall state that it is an award. Such an arbitral award has the same status and effect as any other award on the merits of the case.\(^{21}\)

It will be noted that the tribunal could object to recording the settlement as an arbitral award. That is a form of protection to the arbitral tribunal and to the arbitral process if the arbitral tribunal believes that an award would be improper under the circumstances. Some arbitration regimes do not particularly permit the arbitral tribunal to object to recording the settlement of the disputants in the form of an award, though there could be other tools available to the arbitral tribunal in an appropriate case.\(^{22}\)

### 3.3.2 An arbitration is Consensual\(^{23}\) or Semi-Consensual

The arbitration agreement is the basis form of any consensual arbitration, so that there cannot be an arbitral reference in the lack of a legally valid and enforceable arbitration agreement.\(^{24}\) On the other words, the legal foundation of arbitration is the arbitration agreement. If there is arbitration agreement, or if it is legally valid, a dispute can be submitted to arbitration but if there is no arbitration agreement, or if it is legally invalid\(^{25}\) (it is not in doubt, but it is contended that the arbitration agreement is for some particular reason invalid), a dispute cannot be

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\(^{20}\) Article 31 of the Model Law (1985) reads as; *Form and contents of award; (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30. (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place. (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party. See more details at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf >, accessed date on (15/05/2013)](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf)

\(^{21}\) Article 30 of the Model Law (1985).

\(^{22}\) For example, Bolivia, Law No. 1770, Art. 51 (enacted 11 March 1997).

\(^{23}\) Existing or entered or created by mutual consent without formalities such as a written document or ceremony. See more details in The US Legal dictionary (free online dictionary), <http://definitions.uslegal.com/c/consensual/> , accessed date on, (15/12/2013).


submitted to arbitration, and even if it is submitted, the award would not be legally binding.

Arbitration has to be created on the agreement of the disputants. Consent forms the very foundation of arbitration proceedings - from beginning to end they are based on consent. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between them, it also means that the authority and power of the arbitral tribunal is limited to that which the parties have agreed. Consequently, the arbitral award rendered by the tribunal have to resolve the dispute that was presented to it and have to not pronounce on any issues or other disputes that may have arisen between the parties. As provided in Article V of the NYC (1958); “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, . . . if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that :...(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...”

In most cases, arbitration is only Semi-Consensual. Most arbitration agreements are in the form of an arbitral clause in the main contract evidencing the transaction between the disputant parties or as a separate submission agreement. The arbitral clause evidence the intention of the parties for the settlement of disputes that may arise in the future, without necessarily knowing, specifically, what sort of disputes will ever occur. If a dispute does arise, the disputant parties could no longer be in agreement that the dispute ought to be submitted to arbitration.

3.3.3 Arbitration is a private procedure but not necessarily confidential

Arbitration is an important vehicle for the resolution of disputes, supported by a strong national policy favoring the arbitration of disputes. One of the potential advantages of the process is that it is private. Third parties can be prevented from observing the proceedings. Parties to the arbitration can contract to prevent each other from disclosing arbitration communications to third parties. In addition,

arbiters are ethically bound to preserve this confidentiality unless otherwise required by law. Less clear is whether the law can require the disclosure of those arbitration communications for purposes of discovery and admission in other legal proceedings.

It is true that arbitration proceedings generally are private and do not produce published opinions comparable to the judgments of courts. It is not correct, however, to assume that information revealed in arbitration is automatically confidential.²⁷

Arbitration has generally been more secretive than litigation because arbitral decisions have traditionally been unpublished. In other words, many parties choose to arbitrate rather than to litigate precisely because they do not want the subject matter of their dispute to become public. However, the perception and preservation of confidentiality is not guaranteed as often, and in most jurisdictions, it is only implied obligation not expressly provided for and protected by law. Some common law jurisdictions like the UK or Malaysia recognize the confidentiality of arbitration whilst other likes Australia and the USA, have rejected the concept that arbitration is subject to a confidentiality privilege.

3.3.4 Arbitral award is final and binding on the disputant parties

An important characteristic of arbitration is that in most situations the award made by an arbitral tribunal is final and binding upon the disputant parties: either because the disputant parties have agreed this expressly in the arbitration clause, or because the arbitration rules referred to by the disputant parties exclude any appeal against the award.²⁸ Many arbitration rules clearly explained about finality and binding of arbitral award, such as:

a) “Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay ....” [Art. 28(6) of ICC Arbitration Rule]

b) “The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.” [Art.32 (2) of UNCITRAL Arbitration Rules, 1976]


c) “Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.” [Sect. 58 of English Arbitration Act of 1996]

d) “The arbitral award has the same effect between the parties as a final and binding court judgment.” [Sect. 1055 of German Civil Procedure Code (1998), Zivilprozessordnung]

e) “Recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…”[29] [Art. 3 of the NYC, 1958]

3.4 Types of Arbitration

There are many types of arbitration depending upon the terms of arbitration agreement, the subject matter of dispute and the law governing the arbitration. These types are as follows;

![Figure 3.2: Types of Arbitration](image)

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29 It is upon this basis stone that the entire edifice of ICA is built.
3.4.1 Ad hoc Arbitration

Ad hoc arbitration refers to arbitration where the disputants and the arbitral tribunal conduct the proceeding according to procedure which is either be agreed by the disputants or, in default of an agreement, laid down by the arbitral tribunal at the preliminary meeting once the arbitration has begun. The term Ad hoc can be used in two different senses; an agreement to refer an existing dispute and or an agreement to refer either future or existing dispute to arbitration without an arbitral institution being specified to supervise the proceeding, or atleast to supervise the procedural rules for the arbitration. The second sense is more common in international arbitration. Thus, Ad hoc arbitration is arbitration agreed to and arranged by the disputants themselves without recourse to the help of an arbitral institution.

3.4.2 Institutional Arbitration

In this sort of arbitration, disputants are not free to decide the rules and procedure but they are abiding by the rules and procedure of the specific institution. Typically, the commercial contract between the parties will contain an arbitration clause, which will designate an institution as the arbitration administrator. The clause will incorporate by reference the terms, conditions, and rules of the arbitral institution. In those proceeding, the governing body, i.e., the arbitral institution, sets the arbitration rules and provides a modus operandi for the appointment of arbiters and, absent agreement between the disputants as to who will save as arbiter/s, the parties will be required to select, or the institution will appoint, the arbiter/s from a list maintained by the institution.

Unless modifications consented to by the institution are agreed upon by the disputants, the arbitration procedure is governed by ,and the process is administered by ,the institution’s rules, whether the arbiter/s are member of the institution’s panel of arbitration or are non-members, chosen by the parties or chosen as the neutral chairperson by the party designated arbiters.

The London Court of International Arbitration, the Chartered Institute of Arbiters (headquarter in UK), the American Arbitration Association (headquarter in USA) and the International Court of Arbitration (headquarter in Paris), associated with the International Chamber of Commerce, and rendering their services
effectively and successfully. The advantages of institutional arbitration to those who can afford it are apparent. It is undoubtedly true that institutional arbitration is comparatively expensive than Ad hoc one but there are lot of positive point exists in institutional arbitration. For most are: (i) an established set of rules which assure that the arbitration will get off the ground with dispatch. And, (ii) background administrative services to the tribunal, and to the parties themselves, which assist in bringing the arbitral proceeding to a successful conclusion. Care should be taken, however, in the selection of an arbitral institution. There are approximately 1200 institutions, organizations and businesses worldwide offering institutional arbitral services. There are many organized and famous arbitral institutions; some of them are as follows:

a) International Court of Arbitration of the International Chamber of Commerce (ICC);\(^{30}\)

b) American Arbitration Association (AAA);\(^{31}\)

c) International Centre For The Settlement of Investment Disputes (ICSID);\(^{32}\)

d) London Court of International Arbitration (LCIA);\(^{33}\)

e) Singapore International Arbitration Centre (SIAC);\(^{34}\)

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\(^{30}\) The ICC Arbitration is a flexible and efficient procedure for resolving domestic and international disputes. The awards are binding, final and susceptible of enforcement anywhere in the world. There are no restrictions as to who can use ICC Arbitration or who can act as arbiters since its inception; the Court has administered more than 19,000 cases involving parties and arbiters from some 180 states. See more detail: <http://www.iccwbo.org/index_court.asp>, accessed date on (07/08/2012).

\(^{31}\) The AAA is a not-for-profit organization with offices throughout the U.S. The AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). See more detail: <http://www.adr.org>, accessed date on (10/08/2012).

\(^{32}\) The ICSID is an autonomous international institution established under the Washington Convention with over 140 member States. The ICSID is a member of the World Bank Group and is headquartered in Washington, D.C., United States. The main purpose of ICSID is to provide facilities for arbitration and conciliation of international investment disputes. Today, ICSID is strongly considered to be the leading international arbitration institution devoted to investor-State dispute settlement. See more detail: <https://icsid.worldbank.org/ICISD/Index.jsp>, accessed date on (22/08/2012).

\(^{33}\) The LCIA is one of the longest-established international institutions for commercial dispute resolution. It is also one of the most modern and forward-looking; playing a significant part in the development of arbitration practice. The LCIA arbitration rules are universally applicable, being suitable for all types of arbitrable disputes, regardless of disputant parties’ location, and under any legal regime. Although the LCIA is headquartered in London, the disputant parties are absolutely free to agree the seat, or legal place of the arbitration. In April 2009, the LCIA India as the first independent subsidiary of the LCIA launched in New Delhi, with rules that are closely modelled on the LCIA rules. See more detail: <http://www.lcia-arbitration.com/index.htm>, accessed date on (05/09/2012).
f) Stockholm Chamber of Commerce (SCC).  

Institutional arbitration has essentially developed as a result of emerging specialist arbitral institutions. The arbiters are usually selected from a panel maintained by the institution and normal apply a system of conflicts resolution to reconcile the laws of the state to which the institution belongs with international law in order to determine the most disadvantages to developing countries. First, it is normally quite expensive, especially if the dispute involves large amounts of money. Furthermore, shorter time limits can be detrimental to the respondent party. Lastly, certain bureaucratic delays built into the institutional process may present unreasonable burdens to both parties in the dispute. For these reasons, Ad hoc arbitration, following the Model Rules formulated by UNCITRAL, is becoming more popular.

3.4.3 Contractual Arbitration

It may be called Consensual arbitration or Contractual in built arbitration as well. Every arbitration which comes into being by a contract through the consent of the disputants for settlement of their disputes is a contractual arbitration. It may come into existence either before the disputes or after the dispute. Where by the contractual agreement, the whole deal of the transaction is provided for and the parties agree to insert an arbitration clause as an integral part of the contract itself for the purpose of resolving their existing or future disputes through the mode of arbitration, it is a contractual arbitration and where for future disputes this is so

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34 The SIAC was established in July 1991 as a not for profit non-governmental organization to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia. The SIAC arbitral awards have been enforced by national courts in Australia, the People's Republic of China, Hong Kong, the Republic of India, Indonesia, the United Kingdom, United States of American and Vietnam amongst other New York Convention (1958) states. See more detail: <http://www.siac.org.sg>, accessed date on (18/08/2012).

35 The SCC is part of, but independent from, the Stockholm Chamber of Commerce and was established in 1917. The SCC provides efficient dispute resolution services. Today SCC is one of the major arbitral institutions worldwide. The SCC does not itself decide disputes. The function of the SCC is to: a) administer domestic and international disputes in accordance with the SCC’s rules; b) administer domestic and international disputes in accordance with other procedures or rules agreed upon by the disputant parties (e.g. the UNCITRAL Arbitration Rules); and c) provide information concerning arbitration and mediation matters. See more detail: <http://www.sccinstitute.com/>, accessed date on (02/08/2012).
provided it is termed as contractual in built arbitration. The arbiter’s number, name or the institution or expert body with whom they are to be appointed are mutually agreed upon beforehand, in this type of contractual arbitration. For existing disputes, the disputants arrive at the mutual names, or refer their choice of the arbiters for appointment depending up the nature and volume of the dispute which has to be resolved.

The agreement by the disputants to refer the matter of dispute to the arbitration may be found in the principal contract itself or it may be gathered, located or implied from the real documents, oral conversation details, correspondence details and the like, as a separate part of agreements in reference to arbitration, the differences, disputes, claims/counter claims and the like, between disputant parties for an amicable solution.

3.4.4 Statutory Arbitration

Where for settlement of disputes, the solution is statutorily provided through the mode of arbitration, the disputant parties, in case of disputes because of its provision in the statute by which the transaction happens to be governed. In the case to abide by the arbitration method for resolution of the dispute has no alternative, it is imposed by the law of the land and consent for arbitration between the disputants has no place, though the consent of the disputants in other kinds of arbitration has an important place. For instance; - Section 43(c) of the (Indian) Trusts Act, 1882 Section 31 of (Indian) North Eastern Hill University Act, 1973 and Sections 24 of the Defence of Indian Act, 1971 reads as; (1) Any student or candidate for an examination whose name has been removed from the rolls of the University by the orders or resolutions of the Vice-Chancellor, Discipline Committee or Examination Committee, as the case may be, and who has been debarred from appearing at the examinations of the University for more than one year, may, within ten days of the date of receipt of such orders or copy of such resolution by him, appeal to the Executive Council and the Executive Council may confirm, modify or reverse the decision of the Vice-Chancellor or the Committee, as the case may be. (2) Any dispute arising out of any disciplinary action taken by the University against a student shall, at the request of such student, be referred to a Tribunal of Arbitration and the provisions of sub-section (2) of section 30 shall, as far as may be, apply to a reference made under this sub-section.


37 Section 43 of the (Indian) Trusts Act, 1882 reads as; Power to compound, etc. - Two or more trustees acting together may, if and as they think fit, (c) Compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust;...”

38 Section 31 of the Defence of Indian Act, 1971 reads as; Procedure of appeal and arbitration in disciplinary cases against students : (1) Any student or candidate for an examination whose name has been removed from the rolls of the University by the orders or resolutions of the Vice-Chancellor, Discipline Committee or Examination Committee, as the case may be, and who has been debarred from appearing at the examinations of the University for more than one year, may, within ten days of the date of receipt of such orders or copy of such resolution by him, appeal to the Executive Council and the Executive Council may confirm, modify or reverse the decision of the Vice-Chancellor or the Committee, as the case may be. (2) Any dispute arising out of any disciplinary action taken by the University against a student shall, at the request of such student, be referred to a Tribunal of Arbitration and the provisions of sub-section (2) of section 30 shall, as far as may be, apply to a reference made under this sub-section.
31\(^{40}\) & 32\(^{41}\) of the Defence of Indian Act, 1971 are statutory provisions which deal with statutory arbitrations.

Thus statutory arbitration differs from the above three kinds of the arbitration in two vital aspects. First, while Ad hoc, Contractual and Institutional arbitrations are

\[\text{\textsuperscript{39}}\text{Section 24 of the Defence of Indian Act, 1971 reads as; Payment of compensation.-Whenever in pursuance of section 23, the Central Government or the State Government, as the case may be, requisitions any immovable property, there shall be paid to the persons interested compensation the amount of which shall be determined by taking into consideration the following, namely: - (i) the rent payable in respect of the property or if no rent is payable, the rent payable in respect of similar property in the locality; (ii) if in consequence of the requisition of the property the person interested is compelled to change his residence or place of business, the erasable expenses (if any) incidental to such change; (iii) such sum or sums, if any, as may be found necessary to compensate the person interested for damage caused to the property on entry after requisition or during the period of requisition, other than normal wear and tear: Provided that where any person interested being aggrieved by the amount of compensation so determined makes an application within the prescribed time to the Central Government or the State Government, as the case may be, for referring the matter to an arbitrator, the amount of compensation to be paid shall be such as the arbitrator appointed in this behalf by the Central Government or the State Government as the case may be, may determine: Provided further that where there is any dispute as to the title to receive the compensation or as to the apportionment of the amount of compensation, it shall be referred to an arbitrator appointed in this behalf by the Central Government or the State Government, as the case may be, for determination, and shall be determined in accordance with the decision of such arbitrator.

Explanation.-In this section and in Section 31, the expression “person interested” in relation to any property includes all persons claiming or entitled to claim an interest in the compensation payable on account of the requisitioning or acquisition of that property under this Act.

\[\text{\textsuperscript{40}}\text{Section 31 of the Defence of Indian Act, 1971 reads as; Compensation for acquisition of requisitioned property.- (1) The compensation payable for the acquisition of any property under section 30 shall be the price which the requisitioned property would have fetched in the open market if it had remained in the same condition as it was at the time of requisitioning and been sold on the date of acquisition. (2) Where any person interested is aggrieved by the amount of compensation determined in accordance with sub-section (1), he may make an application within the prescribed time to the Central Government or the State Government, as the case may be, for referring the matter to an arbitrator appointed in this behalf by the Central Government or the State Government, and the amount of compensation to be paid shall be such as may be determined by the arbitrator in accordance with sub-section (1). (3) The provisions of section 25 and section 26 shall apply in relation to the acquisition of any property or the determination of compensation for such acquisition as they apply in relation to the requisitioning of any property or the determination of compensation for such requisitioning. (4) Where there is any dispute as to the title to receive the compensation or as to the apportionment of the amount of compensation, it shall be referred to an arbitrator appointed in this behalf by the Central Government or the State Government, as the case may be, for determination, and his decision thereon shall be final.

\[\text{\textsuperscript{41}}\text{Section 32 of the Defence of Indian Act, 1971 reads as; Power to make rules.- (1) The Central Government or the State Government, as the case may be, may, by notification in the Official Gazette, make rules for carrying out the purposes of this Chapter. (2) In particular, and without prejudice to the generality of the foregoing powers, such rules may prescribe - (a) the procedure to be followed in arbitration proceedings under this Chapter; (b) the period within the owner of any property or any other person interested in the amount of compensation may apply to the Government concerned for referring the matter to an arbitrator; (c) the principles to be followed in apportioning the costs of proceedings before the arbitrator; (d) the method of payment of compensation; (e) the manner of service of notices and orders; (f) any other matter which has to be, or may be, prescribed.}]}
based on the consent of the disputants, there is no question of consent in case of statutory arbitration. Secondly, the first three arbitrations are absolutely voluntary whereas statutory arbitration is obligatory and binding on the parties as the law of the land.  

3.4.5 Domestic Arbitration

Domestic arbitration is usually limited to and concerned a single State. The laws of a single State usually govern the contracts, and the arbitral proceedings are governed solely by the laws of place of arbitration. The parties are often residents of that State. If their assets are found in the State in which the award is made, enforcement will be sought in the courts of that State. In essence, all dimensions of arbitration are local and no international or foreign interests are involved. For instance, under the Indian Arbitration and Conciliation Act, 1996, the meaning of the term Domestic arbitration was given as:

a. The arbitration takes place in India;
b. The subject matter of contract is in India;
c. The merits of the dispute are governed by the Indian Law; &
d. The procedure of arbitration is also governed by the Indian Law.  

3.4.6 International Commercial Arbitration

Generally, the nature of the dispute and the disputants determine whether the dispute is International or Domestic. Few Domestic arbitration laws, the same rules apply to both and they do not clearly distinguish between International and Domestic arbitration, such as those of UK, Germany, Netherland, Czech Republic, Austria and Slovenia. Most legal regimes, such as USA, China, France, Hungary, Iran, Romania, Australia, Switzerland or Ukraine do make this distinction.

No doubt, International arbitration differs from domestic arbitrations in that the first involves parties from different countries and deals with international trade matters. According to Redfern & Hunter when a classification is made to determine

whether the arbitration is international, attention is normally given as to where the company has its seat of management and control.\textsuperscript{44}

Like other literature, there is not a global definition or uniform understanding among the countries on the exact meaning of the term ‘International’ in the context of ICA. In defining the term, two criteria or approaches are used, either alone (Like as Switzerland and Netherland) or in combination.\textsuperscript{45} First criteria is by analyzing the nature of the dispute so that an arbitration is international if it involves the interests of international business or trade. The wide adoption of this test is within the ICC Court of Arbitration in Paris. They do not give any crystal clear definition of an ‘International Arbitration’, but do give the following guidance:

\textit{“The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country or when it is concluded between a State and a subsidiary of a foreign company doing business in that State.”}

This is definitely a comprehensive interpretation, and would include a subsidiary of a foreign company arbitrating against a State even when that subsidiary is incorporated in the State against whom it is arbitrating (although apparently not two subsidiaries of foreign companies arbitrating against each other about a contract to be carried out in the same State).

The alternative criteria are focus attention on the parties, their nationality or habitual place of residence or, if the party is corporate entity, the seat of its central control and management.\textsuperscript{46} This approach is predominate. For instance, Article 1.1(a) of the European Arbitration Convention, 1967 and Swiss Arbitration Law or the English Arbitration Act of 1975 which gave effect to the NYC (1958), applies to agreements which are: \textit{“Arbitration Agreements concluded for the aim of resolving


\textsuperscript{45} See,Article 1492 of French Arbitration Decree, 1981.

\textsuperscript{46} Redfern & Hunter,, 2004, op.cit, 15.
disputes arising from international trade between legal or physical persons having, when concluding their agreement, their habitual place of residence or their seat in different contracting countries. Later, the USA and Switzerland adopt similar approaches.

The ML (1985) was specifically designed to apply to International arbitration, and as a result necessarily required a definition of international arbitration. It is a marriage of the both criteria set out above; in addition to the situs test and opt-in test. The draftsman of the ML (1985) defined ‘International’ as follow:

“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 is situated outside the State in which the parties have their place of business:

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

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

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

From another point of view, it is axiomatic to speak of ICA rather than international arbitration. Why this qualification of ‘Commercial’? In some countries, arbitration is sustained only in respect of commercial contacts. For example, under the GP of 1923, contracting States are obliged to recognize the validity of an

47 The situation of the arbitration proceedings outside the place of business of one the parties.

48 The parties expressly agreeing that the subject matter of the arbitration agreement relates to more than on country.

49 Article 1(3) of the Model Law, 1985.
arbitration agreement arising from a contract “relating to commercial matters or to any other matter capable of settlement by arbitration.” The qualification is also important in distinguishing ICA from international arbitration between the States concerned with boundary disputes and other issues. Moreover, in seeking recognition and enforcement of a foreign arbitral award under the NYC (1958), it is important to know whether the legal relationship out of which the arbitration arose was or was not a commercial relationship.

The phrase “Commercial” in arbitral jurisprudence does not lend itself to any universally accepted definition. The general practice of many jurisdictions is to define ‘Commercial’ so as to cover all types of trade or business transaction. The ML (1958) does not define ‘Commercial’ but provides in the footnote to its Article 1 (1) as follows:

“The term “Commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.”50

3.4.7 Foreign Arbitration

Arbitration is said to be Foreign Arbitration where the place of arbitration happens to be place outside of territory of a State. The arbitral award out of such foreign proceedings is also called as a Foreign arbitral award and is enforced as such. The rules of Domestic award will not be applicable in the enforcement of Foreign award.

50 The Model Law Article 1 (1), footnote.
For better understanding, the Calcutta High Court (India) in Case Serajuddin v. Michael Golodetz,\(^{51}\) laid down the necessary conditions relations relating to term ‘Foreign Arbitration’ or essential elements of a foreign arbitration, resulting into the foreign arbitral award -these are as following points:-

a) Arbitration should have been held in foreign lands;

b) by foreign arbiter(s);

c) Arbitration by applying foreign laws;&

d) As a party foreign national is involved. In the instant case since the case was decided on the basis of American Arbitration Law, on foreign land involving a foreign party under a foreign arbitration, it was held to be a foreign arbitration.

In Foreign and International arbitration, there seems one prime difference. In case of international arbitration, India can also be a venue/place of arbitration while in case of Foreign Arbitration the place, party and subject matter are always of foreign ingredients.\(^{52}\)

### 3.4.8 Look Sniff Arbitration

In this kind of arbitration, arbiter plays the role of expert. No specialist comes from outside but arbiters only perform the role of expert. Arbiters are responsible to see everything in the proceeding himself and then come with decision. In this sort of arbitration, no formal hearing takes place. The disputants have to put each and every thing in one go ,i.e. arguments, evidence, relief sought, etc., have to produce in one slot only. After submitting everything by disputants, arbiters made the inspection and then deliver the arbitral award. In brief, in this sort of arbitration, arbiters and the specialists are in same bus.

### 3.4.9 Flip Flop Arbitration

In this kind of arbitration disputants make out their own case, for example, what is the allegations, supporting document, how the damages can be quantified, etc., is been work out by the parties only. In the other words, in this type of

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\(^{51}\) AIR 1960 Cal.49, (Indian kanoon).

arbitration, everything is clearly research by the parties only. The parties can put everything on paper with the reasons and submit to the arbiter/s then arbiter read all the written arguments put forth by the parties and make out the decision. In this type of arbitration, arbiter/s are not allows to bring his own knowledge. They have to look only the written submission of the disputants and have to pass the award. Practically, this type of arbitration is not prevails in many legal regimes such as India.

3.4.10 Fast Track Arbitration

Fast Track Arbitration is a new type of arbitration and also achieves the impetus in today’s scenario of dispute resolving system. In Fast Track Arbitration, disputants can settle their disputes rapidly and also it is cheap to run. In this kind of arbitration disputants can glue the time and also it could be possible that they made the agreement with the arbiter that he will not take any of the case before firm up the present case. It means that, arbiter has to give full time attention and concentration to the case and try to come to an end in the stipulated time.

The essence of the Fast Track Arbitration is that the time limit is fixed for every action to be taken by the disputants or arbiter/s. The disputants are not permitted or allowed to seek extension of time or postponement of any matter by the arbitral tribunal. The present international commercial transaction is complex and chockablock of heated discussion where the parties could not afford to opt for dispute resolve system, which is time consuming. So, in this regard, Fast Track Arbitration is considered to be effective because it is time–bound dispute resolving system. It provides structure, which requires all parties to evaluate their case, set priorities, and adopt the best Alternative Dispute Resolution (ADR) strategy which could be accomplished in a short period of time. Hence, this type of arbitration is self designed arbitration in each party set the rules with the aim to solve dispute within stipulated time with ultimately beneficial to both the parties in dispute. Generally, Fast Track Arbitration provides the speedy justice, because “justice delayed is justice denied.” 53 Traditional arbitration is an improvement over

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traditional legislation in the courts and Fast Track Arbitration is an improvement over traditional arbitration.

3.4.11 Online Arbitration

Online Arbitration is the best available method for resolving all disputes particularly commercial disputes. All over the world, Online Arbitration has been accepted as the most efficient method available to participants in national and international level is viewed by parties as a cost effective, swift and neutral to the time consuming and expensive of traditional courts.

The arbitration, which conducted through electronic means such as the internet, and shows how they can be solved. There has been lot of debates in the question of whether an arbitration conducted by the use of electronic means such as, electronic mail, telephone, fax, etc., is a valid within the current legal framework provided by national and international treaties. There is no doubt that the parties are free to agree on the use of electronic means for the conduct of arbitral proceedings or on the exclusion of such use. This flows from the fundamental concept of party autonomy, which is explicitly mentioned in many arbitration laws. Failing agreement by the parties, the arbitral tribunal may agree on electronic means, provided that this does not create a situation such that one party is unable to access some information. There has been an explosion in the speed and quantum of development of information technology based industrial growth primarily in the area of communication and commuting with integration of complex hardware and software systems. Since IT is such an integral and pervasive part of our lives a paper on arbitration would not be complete without a perspective on online dispute resolution. The primary causes of IT disputes are the multiplicity and complexity of products and services in a condensed time frame, resulting in complex obligations among contracting parties.

The online disputes are further characterized by parties not being by geographical boundaries, rapid technology and human resource turnover. A lay person, not an integral part of the industry, would not be able to comprehend the high monetary stakes involved apart from the fact that obligations extend beyond a single political jurisdiction making rapid enforcement of decree almost impossible.
Disputes may be segregated into E-Commerce, software malpractice, Intellectual Property related disputes, corporate disputes and employment disputes or more commonly breach of contract. Resolution of most IT disputes requires knowledge of technology, a practical approach and command sense rather than knowledge of jurisprudence.

It is important to remember that in all kinds of arbitration, Minimum principle of natural justice is the landmark. If the disputant’s principle of natural justice has not follow, then it cannot be the arbitration but might be the decision. Minimum principle of natural justice means that arbiter must treat disputants on same par and also he should give the fair and full opportunity to both the disputants.

3.5 The Four Theories of Arbitration

Over the years, four main definitional theories have evolved. An understanding of these theories is necessary because the scope and limits of the national court’s intervention in the arbitral process as well as the scope and limits of the powers of the arbiters is influenced to a very great extent by the theory of arbitration accepted in a particular jurisdiction. These four theories are: the Jurisdictional theory, the Contractual theory, the Mixed or Hybrid theory and Autonomous theory.


3.5.1 **The Jurisdictional Theory**

The main focus of this theory is the significance of the supervisory power of the States to regulate all arbitration procedures taking place within its territory. Proponents of Jurisdictional theory clearly ignored the significant of the will of disputant parties to an ICA. They maintains that the validity of the arbitration agreement, the authorities of the arbiters,\(^{56}\) the scope of submission, the arbitration procedures and validity of an arbitral award is decided by the rule of laws of the seat and the enforcing State in the same way as judgment made by the national courts. The theory therefore stress that there is a close linked between arbitration agreement and a State law. So, validity of arbitration agreement cannot be carried out without the regulation of a national legal system.

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One of the most famous protagonists of this school of thought was Professor Mann, Fritz Alexander. He maintains every country has the right to regulate and supervise any activities carried out within its territory.\(^{57}\) Therefore, the State where the arbitration is conducted regulates the arbitral proceedings and the efficacy of the process.\(^{58}\) The parties’ arbitration agreement is binding on them not just because they have mutually consented to such an agreement, but because a national legal system decides to attach legal consequences to their agreement. Any acts of arbiters that against the Public Policy and mandatory rules of the place of arbitration are regarded as judicially unjustified.\(^{59}\) In other words, the intention of the disputant parties as manifested in their agreement can only be binding to the extent to which they are sanctioned within the mandatory rule of laws and Public Policy of the place where the arbitration is conducted. Following this premise, for example, the US Supreme Court in case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,\(^{60}\) clearly stated that the praise’s arbitration agreement for resolving an anti-trust dispute with domestic context is contradict the Federal policy of USA. The same idea can also be found in Mann’s work:

“No one has ever or anywhere being able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of autonomy of the parties exists only by virtue of a given system of municipal law and in different system may have different characteristics and effects.”\(^{61}\)

Additionally, he also believes that the use of the phrase “International Commercial Arbitration” is a misnomer because in the legal sense, no ICA exists. The premise of Professor Mann, Fritz Alexander’s argument is that an arbitration as a system of Private (International) Law necessarily derives its legal validity from a

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\(^{58}\) Ibid.


\(^{60}\) 473 U.S.614 (1985).

national legal system. Furthermore, international conventions and bilateral treaties governing arbitration apply only by virtue of their incorporation into national law. For example, under the Article V(1) of the NYC (1958) in lack of express choice of proper law, the validity of arbitration agreements,\(^6^2\) the arbitral procedures\(^6^3\), arbitral awards\(^6^4\) has to be decided under the law of the State where the arbitration take place. In conclusion, Mann has maintained that “It is in the highest interest of the State….. to maintain the principle of judicial review of arbitration not only to develop the law, but also to ensure the administration of justice and to avoid the risk of arbitrariness.”\(^6^5\)

The Jurisdictional theory as well divided into two—Judgment and Delegation (Municipal law) theories.

\(\text{a)}\) **Judgment Theory**

This theory is based on the argument, that task of the arbiter was to judge and the arbitral award, he produce, was, consequently, to be treated as an act of jurisdiction. In the first half of the 20th Century was developed the theory that in the absence of the arbitration agreement, the arbitral award would not have the legal existence. Absolutely, it didn’t mean that award was a contract. It was crystal that arbiters were not judges and that their arbitral award was not a judgment. The duty of the arbiter was to evaluate and examine the submission of the parties, resolve the dispute, that is to say, judge.

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\(6^2\) Art. (V) (1) (a) of 1958 the New York Convention says as: “…(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.”

\(6^3\) Art. (V) (1) (d) of 1958 the New York Convention says as: ”(d) 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”.

\(6^4\) Art. (V) (1) (e) of 1958 the New York Convention says as: “…(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”.

This theory corresponds with the ideas of Lainé\textsuperscript{66}, klein\textsuperscript{67} and pillet\textsuperscript{68} who support the idea that the award has an alike effect to judgment. They stated that no arbitration can legally exist or be performed without the parties’ agreement; however they denied that the parties’ arbitration agreement comprises the jurisdiction of the arbitration.\textsuperscript{69}

There were two main criticisms of the Judgment theory. The first criticism was targeted to the statement that arbiter was a judge. This argument was based on the view that to hold such position, the arbiter had to perform a public function and have his position conferred on him by the State. The arbiter cannot be judge, because he doesn’t hold any of the State’s authority and power and this was cross-purposes with what was said on this theory. The parties’ agreement was the main source of the arbiter’s authority. The activity performed by the arbiters was that of judging and that, consequently, the final result of their endeavors was a judgment, but it was not said that it was a State judgment. The criticizers of the theory confused the nature of the act of judging with the source of the authority of its best-known exponents. They stated that arbiter is a private judge and that once a claim is submitted to a person invested by the law with the power to reject or accept the claim by the application of a rule of law; one is in the presence of a jurisdiction.\textsuperscript{70} On these bases, one can agree that arbiters are judges and the arbitral awards are jurisdictional acts.

The second argument was that separation of the agreement to arbitrate and the arbitration award reflected neither arbitral practice nor arbitration law. The scope of arbiter’s authority remains limited by the parties’ agreement and the disputant parties can revoke the arbiter’s authorities by consent at any time because his nomination directly drives from the parties’ arbitration agreement. In order to settle dispute between disputant parties, the arbiter is not totally free, because they need to


\textsuperscript{68} A.Samuel , 1989.op.cit., 52.

\textsuperscript{69} Yu, Hong-lin., 2008. op.cit., 262.

\textsuperscript{70} A.Samuel ,1989.op.cit., 53.
follow the procedure agreed by the disputant parties, insofar as it accords within whatever is the relevant applicable law. Otherwise, parties can refuse to accept the arbitral award on the grounds of the Article V (1) (d) of the NYC (1958).\textsuperscript{71}

\textit{b) Delegation (Municipal Law) Theory}

The second, Delegation (Municipal Law) theory, states the source of the arbiters’ authority as being the State rather than the disputant parties’ contract and arbiter in order to settle dispute between disputant parties has to possess a delegated authority given by a State in which he sits to conduct arbitration.\textsuperscript{72} This is the idea upheld by Moutulsky who emphasized that “arbiter is individual who the legal system allows to perform a function that is in principle reserved to the State.”\textsuperscript{73}

Unlike the Judgment theory, arbiter here performing a public function as a temporary judge. It was stated that national legal systems gave the right to arbiter to act and if it’s so the same powers must set the limits of the arbiter. It was as well said that the State had the monopoly over the administration of justice on its territory.

So the consequence was that the enforceability of the award was therefore subject to its validity by the court where the recognition or enforcement is sought. The ‘\textit{lex facit arbitri}’\textsuperscript{74} formula stands in the Delegation (Municipal Law) theory, which said that it is the law of the seat of the arbitration that gives the arbiter the power to judge. Because of this special granted by the State, arbiters are regarded as resembling judges of national court and an arbiter, similar to judge, is also required to follow the law and observe the public policy and mandatory rules of the \textit{lex fori} to settle the dispute between the disputant parties.\textsuperscript{75} The meaning of this theory is that every sovereign State is entitled to prohibit or permit the carrying-on of any activity within its territory. It means that every arbitration is subject to the law where it takes

\textsuperscript{71} Art. (V) (1) (d) the New York Convention of 1958 says as: ” 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”.

\textsuperscript{72} Yu, Hong-lin, 2008.op.cit., 261.

\textsuperscript{73} Moutuls. “ECRITS”, Dalloz, Paris (1974), 14; See also A.Samuel, 1989.op.cit., 55.

\textsuperscript{74} The law of the country in which an action is brought. See Oxford Dictionary, 3rd Ed. (2010), <http://www.oxforddictionaries.com/definition/english/lex-fori.>, accessed date on (12/12/2013).

\textsuperscript{75} Ibid.
place. The main argument of Municipal Law theory about the nature of arbitration is not that the State should or should not in fact, control arbitration tightly, but that where the State does pass laws which control the way in which they are to be conducted, any breach of those laws committed within the State’s territory is an unwarranted infringement of its sovereignty.

As all other mentioned theories, the Judgment and the Delegation (Municipal Law) theories in some way are right. On the other point of view they put too much emphasis on the place of arbitration. The one of the reasons to refuse the Delegation (Municipal Law) theories lies on the complete account of the nature of arbitration is that, in direct contrast with contractual theory, insufficient consideration is given to the role of the parties’ agreement. The arbitration agreement and main contract are the essence of arbitration. Another criticism of these theories that the country has monopoly over the administration of justice and that this administration cannot be given to anybody else, especially– arbiter. Finally both theories are right that the Municipal law theory is often not used by arbiters.

3.5.2 The Contractual Theory

The Contractual theorists contented that arbitration is a contractually chosen substitute for the national courts and that any recourse to the courts is a deviation from the process agreed to by the parties. Therefore, arbitration is based on the agreement between the parties. Contemporary disciples of the Contractual Theory thus argue that because arbitration is contractually chosen by the parties, when their dispute is resolved by the arbiters, there is no dispute to take to the courts. According to the proponents of this theory, the parties have the maximum freedom to decide the relevant issues concerning the arbitration procedures and this maximum freedom should generally not be interfered with by the powers of any States. Although they admit in fact that the disputant parties’ agreement can be directly influenced by relevant national laws. They also believed that there is not exist any strong link between the law of the place in which the arbitration take place and the arbitration proceedings.

77 Yu, Hong-lin, 2008.op.cit., 265.
Practically, the Contractual Theory is divided into Classical and Modern Contractual theories.

a) Classical Theory

This theory is based on the statement that an arbitral award was a contract, which was made or complete by the arbiters as agents of the disputant. It was stated that it was the parties’ agreement to arbitrate that gave the arbiters’ authority to make the arbitral award. They in turn, in settling the dispute, were acting as agents. The arbiters’ decision therefore completed or formed part of arbitral agreement made by the disputant parties. This was the main feature in the “Classical” version of the Contractual theory.\textsuperscript{78} This theory was strongly upheld by Merlin and Foelix.

Proponents of this theory believed that arbiters were not judges, because they did not perform any public function. During the dispute resolution process they did not use any State power as they don’t have any. Since their decision-making process were wholly depended only on the will of the disputant parties and were not limited by local restrictions or State’s pressures, they should be enforced anywhere in the world (although is not absolute).

In later development of this theory was said, that the power of an arbiter could have, as it sole base, the will of the parties without there being any need for intervention on the part of the State.

Although upholding the Classical theory, a number of Contractualists disagree with this idea that an arbiter was the agent of the disputant parties. Bernard and A. Samuel are representatives of this group. Dr. Samuel has strongly criticized the application of the agent/principle relationship to the relation between the arbiter and the disputant parties to the arbitration and states that the arbiter cannot be regarded as an agent of the disputant parties for a number of reasons.\textsuperscript{79} Two main reasons have been given by him. First, the authority and power of an arbiter, unlike that of an agent can be made irrevocable and the duty of the arbiter to render an impartial and unbiased award is inconsistent with an agent’s obligation to conform

\textsuperscript{78} A.Samuel, 1989.\textit{op.cit.}, 33.

\textsuperscript{79} \textit{Ibid.}, 48.
to the wishes of the principal. And, secondly, since the agent could not do something that principal is incapable of doing, an arbiter cannot be acting on behalf of the disputant parties in conducting the arbitration because the disputant parties lack the legal capacity to judge impartially the merits of their dispute.  

b) Modern Theory

The second, the Modern version of the Contractual Theory states that arbitration was still essentially private and/or Contractual in nature, belonging to the law of obligations rather than to civil procedure. The arbiters were private individuals chosen by the private individuals to settle their dispute and that arbiters were not given power by the state to act on its behalf.

The award was considered as the private act ‘acte prive’ and it was not put to any particular jurisdiction category. It was emphasized that arbitration was a private institution and not activity conducted by the State.

From another point of view, the arbitration was linked with the contract. Marlin and Foelex maintain that first of all arbitration agreement is a contract. Further it was developed that that the arbiter derived all his authority and power to act from the arbitration agreement. The Modern Contractual Theory abandoned the idea of Classic Contractual Theory, that arbiter acts as agents of the parties on the ground, that arbiter like a judge has a task to determine the rights and obligations of the parties.

The Modern Contractual Theory was widely criticized by Balladore Pallieri, Bernard and Klein for:

➢ Distorting the real nature of arbitration.

The main duty of arbiter to evaluate the argument put forward by the disputants and make the final and binding arbitral award on the merits of the dispute is too fundamental to the nature of arbitration to be treated merely as a reason why arbitration forms a juridical category of contract all its own.  

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80 Ibid.
81 Ibid., 45.
Theory strongly fails to provide an explanation of the global duty of arbiter to give the disputant parties neutral and impartial hearing and, where so required, to apply the law in resolving their disputes. A difficulty is that the Contractual Theory doesn’t provide a clear way of distinguishing between the arbitration and other similar contractually based institutions, such as conciliation and mediation.

- **Not being compatible with common Municipal laws and international conventions or treaties on the subject.**

The principal consequence of the Contractual Theory is that the arbitral award can be enforced in anywhere in the world where the disputant parties seek to rely on it. First of all it would be inconceivable to allow a State court to set aside foreign arbitral awards, which have been made abroad under the law of another State. Second, as a result of Article V (1) (e) of the NYC (1958), an arbitral award cannot enforce which has been set aside in its origin State.\(^{82}\)

We have seen that neither the Modern nor the Classical version of the Contractual Theory is consistent with notable features of existing arbitral law, some touching on the very definition of the concept of arbitration.

### 3.5.3 The Mixed (Hybrid) Theory

The Jurisdictional Theory and the Contractual Theory provides an unsatisfactory and analogical explanation of the modern framework of ICA. Under these situations, as Dr. Lew pointed out, it is not unexpected that a compromise theory with a mixed or hybrid character has developed.\(^{83}\) The Mixed (Hybrid) theory tries to reconcile the dual nature of arbitration, that is, the Contractual and the Quasi-judicial nature of arbitration. The Mixed (Hybrid) theory was created by Professor Surville, and developed in 1952 by Professor G.Sauser-Hall.

Professor Sauser Hall suggesting that, "although deriving its effectiveness from the agreement of the disputant parties as set out in the arbitration agreement,

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\(^{82}\) Art. V (1) (e) of the New York Convention (1958) reads as: ‘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.’

arbitration has a jurisdictional nature involving the application of the rules of procedure”.

He strongly believed that it is not possible for arbitrations to be unbound that is, to be carried out beyond the control of every national legal system and that arbitration should be submitted to the law of the seat of arbitration. The application of the law of the seat of arbitration and the use of its courts, according to him, works efficiently and just in the majority of cases.

The major distinguishing feature of the Mixed (Hybrid) theory presents a certain picture of the true nature of arbitration by demonstrating that although an arbitration agreement is a contract and must be held sacred, the arbitration proceeding remain subject to national law. This feature of the Mixed (Hybrid) theory separates it from the Jurisdictional and Contractual theories. The both theories are restrictively narrow constructs in that are essentially a one dimensional evaluation of the nature of arbitration. The Contractual Theory looks at arbitration from a contractual point of view whereas the Jurisdictional theory does not recognize the importance of the consent of the disputant parties to the arbitration agreement and concentrates entirely on the Jurisdictional character of arbitration (the supervisory powers of the courts of the lex fori and the enforcing countries). A proper theory of arbitration has to acknowledge the interaction of both its consensual basis and the legitimacy a support conferred on the process by national legal systems. The consent of the disputant parties is guaranteed by the national laws which determine the legitimacy and efficacy of the choice made by the disputant parties. There is thus a strong link between State law, ICA, international treaties and conventions. After 39 years in 1991, Professor G.Sauser-Hall’s idea is accepted by some practitioners, Messrs Redfern and Hunter, who summarize the Hybrid nature of arbitration as follows:

“International Commercial Arbitration is a Hybrid. It begins as a private

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85 Ibid.

86 Ibid.

87 Ibid.
agreement between the disputant parties. It continues by way of private proceeding in which the wishes of the disputant parties are of great importance. Yet it ends with an award which has the binding legal force and effect and which, on appropriate conditions being met, the courts of most States of the world will be prepared to recognize and enforce. The private process has public effect, implemented with the support of the public authorities of each State, expressed through its national law.”

The Mixed (Hybrid) theory strongly upholds the national court judicial review in arbitration proceedings, especially the setting aside function. However, the performance of this function of the national courts has to be restricted. It is submitted that an exceedingly fine balance has to be straight between arbitral autonomy and a minimum competes for national court judicial review. Exceedingly autonomy for the arbiter without any control by national court may create a situation of arbiter’s misconduct. On the other hand, exceedingly judicial review by national court, party neutrality may be considerably less. The failure to always maintain this balance would ultimately reduce the attractiveness of arbitration as a private means of dispute resolution. The ML (1985) maintains this balance by recognizing the maximum autonomy of the disputant parties and also provides restrictively narrow grounds on which the arbitral award may be challenged before the national courts at the seat of arbitration.

3.5.4 The Autonomous Theory

The Autonomous theory views arbitration from a perspective quite different from Jurisdictional Contractual and Hybrid (Mixed) theories, which is relatively new. Compared to the aforesaid theories, it has gone beyond the reality of modern ICA. This theory was created in 1965 by Dr. Rubellin Devichi. She believed that the real character of arbitration (flexible, speedy and easy-controlled character of the arbitration proceedings) should be recognized as an autonomous character of ICA.

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The Autonomous theory deeply focuses on such issues as the role of arbitration, its objectives and its methodology and examines the arbitration process itself. Thus, the Autonomous theory proceeds from the assumption that arbitration must be viewed from a broader context and that rather than emphasizing the nature of the process, the emphasis should be placed on its objectives. It is argued that a crystal clear picture of arbitration can only be presented by considering its use and purpose and the manner in which it responds to the need of the business community and is therefore an independent legal system.

The Autonomous theory looked beyond the structure of the institution to arbitration social and economic context. The important argument of this theory is that the arbitration must be recognized as unrestricted party autonomous by its nature, in order to give the expansion in his actions. There are two descriptions of arbitration which labeled ‘Autonomous’:

i) The refusal of the traditional above mentioned theories of arbitration;

ii) The exposition of the ‘Autonomous’ approach by which the leading protagonists of the Autonomous theory like, professor Berthold Goldman or professor Arthur Von Mehren suggest to replace them.

We can see that recent arbitration law was developed much further than it was talked in theories. It is obvious that modern arbitration has apart from all of four theories. Professor Hong-Lin strongly denies all mentioned theories, although, he seems to accept the Mixed or Hybrid theory when he states that “different aspects of arbitration, such as the triangular relationship between parties, arbiters and states, can only be satisfactorily explained by a theory that comprises both contractual and jurisdictional elements.” But generally, Professor Hong-Lin strenuously contradicts with the all aforesaid theories when believing that they fail to “provide a satisfactory explanation covering current developments and all the different aspects of International Commercial Arbitration.” According to him, arbitration is not based on parties’ agreement and jurisdictional elements are the fundamental basis

92 Ibid., 151.
for arbitration. He concludes that the Contractual element just works within the limits of the Jurisdictional elements which are the foundation of the arbitration framework. By so doing he strongly supports the Mixed (Hybrid) theory but cuts short its Contractual limb in the process.

Professor Hong-Lins’s theory would have been suitable some half century (50 years) ago when arbitration was exceedingly controlled by State laws. Nowadays, most legal regimes have moved from the days when arbitration functioned strictly within the clutches of judicial systems. The disputant parties demand a say in the manner their disputes are resolved. In logical response to this demand, several countries have strongly revised their laws to provide for complete party autonomy. Most of the well-known international arbitration institutions always revise their rules of law to meet the challenges of the private sectors even the public sectors. Though it is trite that arbiters have to comply with the relevant mandatory State rules and Public Policy considerations, the desires of the disputants are not as limp as professor Hong-Lin suggests. The private sectors are a compelling force in shaping the landscape of arbitration. Therefore any try to elimination or cut short the contractual limb in defining arbitration will make such definition insufficient and incomplete.

No doubt, arbitration results from the parties’ arbitration agreement. Its however functions within a specific legal framework. State laws and International arbitration institutions do not only secure that arbitral proceedings are impartial and neutral, but that their arbitral awards are enforced. Therefore a mere Jurisdictional or Contractual definition devoid of each other cannot stand. Together, they form a symbiotic whole. In reality, an acceptable definition can only embody a combination of Jurisdictional and Contractual elements. One may therefore say that arbitration is the informal process by which private individuals, acting within the admissible legal framework, determine a dispute submitted to them by agreement of the disputant parties.

Ibid.
3.6 Arbitration Agreement

An arbitration agreement is an optional agreement in which two or more disputant parties agree that a dispute which has arisen or which arise between them and which have an international character, shall be settled by one or more arbitraters.

No doubt, the legal foundation of arbitration is the arbitration agreement. If there is arbitration agreement, or if it is legally valid, a dispute can be submitted to arbitration but if there is no arbitration agreement, or if it is legally invalid, a dispute cannot be submitted to arbitration, and even if it is submitted, the award would not be legally binding. Under most legal regimes, international treaties and multilateral conventions, an arbitration agreement has to be written. Nevertheless, at State with common law jurisdiction, an oral arbitration agreement is also legally valid.95 But under Article 7 (2) of the ML (1985), an arbitration agreement should be written, but so far as the existence of an agreement is alleged by one party and not refused by another, it can be in any other form. In Article 178(1) the Swiss Federal Act of Private International Law of 1987 provides that “The arbitration agreement shall be valid if made in writing, by telecopy, telegram, telex or any other means of modern communication that establishes the terms of the agreement by a text.” In Section 1031 of German Arbitration Law, 1986 as well as Section 5 of English Arbitration Act, 1996 provide a more comprehensive picture on the writing requirement, with the final emphasizing “References in this Part to anything being written or in writing include its being recorded by any means of new communication.”96 The English Arbitration Law, however, does not need the arbitration agreement to be signed by the disputants.97 The arbitration law of some other States, on the other hand, is less detailed about the writing requirement in arbitration, for instance, Article 1021(1), the Netherlands Arbitration Act of 1996 reads that “an arbitration agreement must be proven by an instrument in writing.” Accordingly, the only requirement is that there is evidence of the arbitration agreement. Only when it is

96 The English Act goes further and states “Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.” In other words, the parties may consent to submit their disputes to arbitration by an oral agreement or by performance of the contract, on the condition that the terms of a reference to arbitration are in writing.
97 Carr, Indira, 2005.op.cit., 638.
argued that there is no arbitration agreement will its existence have to be proven by an instrument in writing.\textsuperscript{98}

A restrictively narrow interpretation of the writing requirement flies in the face of modern communication technologies as well as recent developments in arbitration practice, as agreements are concluded by data messages in Electronic Commerce (E-Commerce), or they are concluded in accordance with usage recognized by the disputants, or usage of which the disputants are aware or should be aware. Hence, in current years, there has been an attitude towards a wider interpretation of the written requirement, especially with the introduction of new or modern instruments for communication. On March 2000, the UNCITRAL Working Group II (Arbitration and Conciliation), which was devoted to a possible revision of the ML (1985) and issues raised with the interpretation of the NYC(1958),\textsuperscript{99} considered it as essential that the arbitration agreement should be in a form that is “reachable so as to be useable for subsequent reference.”\textsuperscript{100} The Working Group reviewed Article 7, and provided a draft Article 7 that, among others, regarded data message as a form of writing. It defined the data message as “\textit{Information generated, sent, received or stored by electronic, optical or similar means, including but not limited to, Electronic Data Interchange (EDI), Electronic Mail (E-mail), telegram, telex or telex}.”\textsuperscript{101} If arbitration agreements come as an indispensable part of the main contractor with, though separate from it, they are classified as “arbitration clauses”. If they are made with regard to a dispute that has already been arisen, they are categorized as “submission agreements”. An international arbitration agreement shows the details of an arbitration process, for example, the types of disputes to be settled, the way arbiters are to be selected and their authorities and powers, the procedure to be followed, and the substantive law to be applied. Only


\textsuperscript{99}The Working Group work began in March 2000. For more details see; Sorieul, Renaud. “\textit{Update on Recent Developments and Future Work by UNCITAL in the Field of ICA}”, Journal of International Arbitration, vol. 17, no. 3 (2000); 163-84.

\textsuperscript{100}\textit{Ibid.}, 546.

persons who have the legal capacity to enter into an arbitration agreement, under the contract law of a pertinent State, can do so, otherwise the agreement is legally void.

An established doctrine in most legal regimes is the autonomy of arbitration clauses from the main contract (the Separability Doctrine).\(^ {102}\) This means that if the main contract is considered as legally invalid, the arbitration clause can still be valid.\(^ {103}\) This is in line with the Kompetenz-Kompetenz theory (Competenz-Competenz theory) according to which the tribunal may rule on its own jurisdiction.\(^ {104}\) The rationale reason for the autonomy of arbitration clauses is that if one of the disputants disputes the validity or existence of the main contract, still the tribunal may have jurisdiction to consider the dispute. The autonomy of arbitration clause (Doctrine of Autonomy of Will) also means that even if the tribunal decides that the main contract is legally invalid or void, since the arbitration clause is valid, the disputants may have some rights. Lack of such autonomy would mean that the invalidity of the main contract brings about the invalidity of the arbitration clause. In such a case, the arbitral tribunal would not have any authority and power to decide on the validity of the main contract, and this result would automatically be to the advantage of the party claiming the invalidity of the main contract.

There are two kinds of arbitration agreement – the arbitration agreement or the arbitration clause. The first is an agreement to submit existing disputes to arbitration; an agreement of this kind is commonly referred to as an arbitration “submission” agreement or, simply, a “submission to arbitration agreement”. The second, and more popular, is an agreement to submit future disputes to arbitration. This kind of agreement usually takes the form of an arbitration clause in the principal agreement between the disputants.

Submission agreements are usually long, whilst arbitration clauses are usually short. It deals with an existing dispute and can be tailored exactly to fit the circumstances and to provide in detail how the tribunal should deal with the dispute.

\(^ {102}\) See, for instance, Article 16(1) UNCITRAL Model Law on International Commercial Arbitration; and Section 7, English Arbitration Act of 1996.


\(^ {104}\) Ibid.
The arbitration clauses deals with disputes which may arise in future, does not usually go into too much details, since it is known what sort of disputes will arise and how they should best be handled.

3.7 Parties

Like every contract, in arbitration also there must be two parties, which have been named as ‘Respondent’ and ‘Claimant’ in an arbitration proceeding instead of ‘Defendant’ and ‘Plaintiff’ of civil suits. The arbitration agreement may be between two or more persons, or between body of persons or between incorporated bodies and also between the person(s) and incorporated body(ies). They are, therefore, considered as a part of the pillars of the arbitration contract because their decision and agreement to resolve their dispute by means of arbitration, instead of judicial authority, is the reason behind the issuing of the arbitration contract.

In reality, special qualifications and conditions are required so that all parties have recourse to arbitration. This is a consideration for all parties to arbitration and specifically preserves the interests of a person who may lack qualifications. There are two types of qualification for disputant parties as fallow:

a) Qualification of obligation: This is the validity of the person to get her or his rights. This includes such things as the right of inheritance or the paying of indemnities from a person's losses. It is applicable to the young, adults, the sane and the insane.

b) Qualification of performance: It is known as the validity of a person legally capable of saying or of performing a task. All disputant parties to arbitration should have the complete capacity to exercise their rights to correct arbitration; parties should have the same capacity to act as the Contractor.

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105 S.S.Misra., 2010. op.cit, 48.
3.8 Arbiter

The disputant parties to an arbitration agreement who have the legal capacity or competent choose a third party, or arbiters, to decide on their disputes. This is of key importance, as it is said “The choice of the private individuals (a third party) who compose the tribunal is crucial and often the most decisive step in an arbitration. It has truly been said that arbitration is simply as good as the arbiters.”

The disputants usually choose experts who are proficient with the law and the potential or actual disputes between them. For example, they might appoint specialists in international trade, or in specific international and national laws, or in certain international conventions and treaties or even specialists from different subject. The arbiter(s) should, on the one hand, deeply familiar the nature of the disputes, in order to be able to arbitrate. On the other hand, they deeply should familiar the procedural law governing arbitral proceedings, in order to conduct arbitration and make an arbitral award that satisfies legal principles, and is enforceable.

The number of arbiters is also key important. While a sole arbiter expedites the arbitration process, a panel of arbiters can assure the quality of the process by bringing more expertise. A panel of arbiters, each representing a party or having a specific expertise, is preferred. In a panel of, for example, three arbiters, each party might appoint one arbiter, and the third is selected consensually, or by the two arbiters or an appointing professional or legal authority. Under some legal regimes, some mandatory rules of laws with regard to the number of arbiters and other features of an arbitral tribunal have to be complied with. Arbiters identify the issues, as put forward in writing by a party, follow the procedure, and conduct the proceedings. They should examine the events leading up to the dispute, and assess

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109 Based on his experience in construction claims in Kuwait, Brian W. Totterdill remarks that civil engineers, not lawyers, are the best people to resolve construction disputes by ADR procedures. He argues, “Who knows more about the causes of disputes than people with experience of causing disputes on their own projects?” see more details; Brian W. Totterdill, “Construction Claims: Results from Major Tribunal Findings in Kuwait”, Arbitration, Vol. 68, No. 2 (2002), 154.

the damage, where applicable. Arbiters can also suggest some potential solutions to the parties before reaching the final decision. In the end, they issue their arbitral award, by applying the substantive laws.

3.9 The Arbitral Process

The procedural law governing arbitral proceedings is, in principle, chosen by the disputants. Taking into account the nature of their trade, the disputants can select suitable laws that provide a quick and efficient way of dealing with the disputes that might arise. Some legal regimes, however, have non-mandatory or mandatory rules of laws for regulating arbitral proceedings. For example, the English Arbitration Act, 1996 lists the mandatory provisions of the Act. 111 Most other municipal arbitration laws do not make such a crystal clear distinction between their mandatory provisions and otherwise. It is critical that, in making an arbitral award, the mandatory rules of laws at the seat of arbitration are taken place are complied with. Otherwise, it might render the arbitral award valid in that State, and probably in any other places where it is not to be enforced. 112 Permanent bodies of international arbitration may also provide procedural rules for conducting arbitration, and sometimes restrict the authority and power of the disputants to select the appropriate regulations as they wish. The ML (1985) introduces particular rules for arbitral proceedings that are increasingly used in international arbitration, and seen as satisfactory in many legal regimes. 113 The procedural rules in some Ad hoc arbitration are left to the arbiters to determine.

The parties also choose the language(s) as well as the place of arbitration proceedings (the seat of arbitration) and the place of issuing its arbitral award. They usually choose a third State or a State where appropriate law or proficient help is accessible, or where the law facilitates enforcement of the arbitral award. Selecting a State as the place of arbitration proceedings is sometimes regarded as the tacit consent of the disputants for applying the national law of that country on their

111 Schedule I, the English Arbitration Act of 1996.
The seat of arbitration is legally significant to arbitration so that some legal regimes, for example, the English Arbitration Act, 1996, do not recognize an arbitration agreement without a seat, or an arbitration agreement that does not have any attachment to the mandatory rule of law of a State or territory. On some instances, arbitration proceedings may take place in more than one State or territory. In such especial cases, establishing the seat of arbitration becomes an additional task undertaken by legal officials, taking into account all linked circumstances.

3.10 The Laws of Arbitration

The disputants to an international arbitration decide about the appropriate law that is to govern the ruling in an arbitral process. Under the UNCITRAL Arbitration Rules of 1967, Article 33 emphasize that “The tribunal shall apply the rule designated by the disputants as applicable to the substance of the dispute.” The disputants might select, for example, the principles of international law or general principles of the law, the national law of any State, or the international convention as well as treaties.

With reference to all substantive or procedural issues, the disputants can express their agreement or implicitly imply it, unless it is prohibited by the mandatory rules of law in the State where the arbitration proceedings are taken place. When no tacit or explicit choice is made by the disputants, the arbiters must select the substantive law.

3.11 Award

The final and binding result of an arbitration process is an arbitral award. It will be issued in a legal optional process by the arbitral tribunal. Such an arbitral

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decision which is binding on all the disputants involved is the rationale for arbitration and the end of its function. The arbitral award is recognized under most legal regimes, in the sense that it will have true legal effects. In fundamental principle, there cannot be an appeal against an arbitral award. Most legal regimes also vigorously restrict the possibility of the national Court judicial review of arbitral awards.

The arbitral tribunal in an arbitration procedure may make various kinds of decision, like as interim, final, partial, interlocutory or preliminary awards, procedural and injunctions orders. According to Article 26.7 of the London Court of International Arbitration Rules of 1998, “The Arbitral Tribunal may make separate arbitral awards or orders on different issues at different times. Such arbitral awards shall have the same effects and status as any other award made by the arbitration tribunal.” A serious difficulty is that there is no crystal clear distinction between these phrases and under various arbitration regimes and national legal systems, a similar phrase might be used differently. Confusion may occur, especially when enforcement of an arbitral decision not disposing of all the matters referred to arbitration is sought abroad.118 Final arbitral awards are those that settle a dispute completely. Hence, a final arbitral award that does not leave some of the disputes between the disputants undecided (absolutely, does not dispose of all the disputes) or in doubt cannot be maintained.119 On the other hand, Preliminary and Interim awards settle matters that must be settled before the substantive dispute is considered. These include matters such as the substantive applicable law, the arbitral procedure, the authority and power of the arbiters, and the competent of the arbitral tribunal. Partial awards settle only some parts of a dispute between the disputants.120 Interlocutory awards are those that are compulsory for protecting the fundamental and basic rights of a party before the arbitral tribunal reaches the final decision. This type of award generally provides for interim relief or protection from the possibility of dissipation of the perishable goods of one of the disputants or security for the

recovery of final arbitral awards. Interim injunctions and orders are also granted for the purpose of providing interim relief and conservatory measures. To this sorting of arbitral awards should be added declaratory awards that are derived from the Doctrine of Liability.\textsuperscript{121}

Interim measures of protection cannot be legally valid, unless it is true proved that there would be damage not adequately rectifiable by a final arbitral award of damages. It is, however, mean that this protection rule excludes any measure for securing losses that might be compensated for one of the parties by an arbitral award of damages. So, it is strongly believed that interim arbitral awards may be rendered, when repairing the damages are relatively more complicated by the award of damages. For example, there should be a logical possibility that the requesting party in during the arbitration process will succeed on the merits of the dispute,\textsuperscript{122} and that there is a logical balance of convenience or strong linked between the damage done to the requesting party in the lack of the measure and the damage done to the other party of dispute by the measure.\textsuperscript{123}

It is vital to make a crystal clear distinction between final arbitral awards and other kind of awards, because several international treaties and conventions deal with these arbitral awards differently, when they are to be enforced. For example, under the NYC (1958), however, the only arbitral award that is not yet binding, regardless of being final or not, can be refused recognition of that award. It has been emphasized that “Partial or Interim arbitral awards are also enforceable under the New York Convention as long as they finally settle a part of the dispute.”\textsuperscript{124} Under the GC (1927), the national court can delay the recognition of a Partial award.\textsuperscript{125}

The arbitration tribunals’ decisions may be classified as findings, orders, awards and the like. Given that unfortunately there is no precise definition or


\textsuperscript{122} On the condition that determining such a possibility does not affect the discretion of the tribunal to make other decisions.


\textsuperscript{125} Article 2, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.
consensus on the meaning of the phrases in the legal communities, it is prudent that
the rendering authorities use the label very carefully. The phrase “award” has legal
implications that are especially vital when enforcement is sought. It has been said
that the term covers final arbitral tribunal on the matters of substance, jurisdiction or
procedure, simply if the arbitral tribunal labels its decision as an arbitral award.126

3.12 Defining and Types of Public Policy

3.12.1 Definition of Public Policy

In order to better understand when the public policy exception can be
valuable used as a protective
device, it is crucial to define its precise meaning. But
unfortunately, there is no certain view and consensus on the meaning of the phrase
Public Policy in the legal communities. As result of that, some legal writers and
researchers vigorously fear an immoderate abuse of the clause.127 No doubt it is for
this particular reason a famous criticism, Judge Burrough in Richardson v. Mellish
(an old English case) described that, “it (public policy) is an unruly horse and once
you get astride it, you don’t know where it will carry you”.128

Concerning an attempt of defining the meaning despite the arising serious
difficulties, the important thing, there is not a global definition or uniform
understanding of public policy. This is not the main point. Thus, it is even serious
challenging to attribute an unambiguous definition to the provision. Because of a
lack of a universal definition, each State has to be analyzed independently with
regard to how it interprets the phrase.129 That means; the public policy of on State
may not be the same as the public policy of another State.130

126 Emmanuel Gaillard & John Savage. “Fouchard Gaillard Goldman on International Commercial
127 Minehan, Karen E. “The Public Policy Exception to the Enforcement of Foreign Judgments:
128 Burrough, J. “Richardson v. Mellish”, 2 Bing. (1824); 229-252.
239.
130 Hunter, Martin, and Gui Conde E. Silva. “Transnational Public Policy and Its Application in
Investment Arbitrations.”, The Journal of World Investment 4, No. 3 (2003), 367.
Another actual reason why it is so difficult to approach the phrase of public policy is its character of a value terms. Defining value phrase are on the edge of unattainable. Firstly, the priority of values phrase differs from State to State and time to time. What might be irrelevant in one State might be of great importance and interest in another State. For instance, an international transaction for importation of Liquor in to Muslim States such as Saudi Arabia or Iran may be illegal on public policy grounds applicable in aforesaid States, but such a transaction would not be contrary to transnational public policy.

Secondly, a value phrase indicates being temporary or dynamic. Hence, the basic foundation of a public policy rule alters from place to place and time to time. Something that was considered acceptable in the past might become generally unsuitable in the present or in the future and conversely. Because of the changes the national courts are forced to redefine the term of public policy any time a disputant attempts to invoke it.

According to Section 328 (4) of German Civil Procedure Code (1998), Zivilprozessordnung, a Court has to refuse enforcement of the judgments or arbitral awards in cases which a breach of the basic values or fundamental principles of German State policy or of German mandatory rule of laws is threatened. It emphasized that the enforcement of a foreign arbitral award may not touch upon the basic values and the fundamental principles of German monetary rule or when enforcement of that award would be intolerable. Such a serious difficult situation would mainly arise if the enforcement of the judgments or arbitral awards would violate basic principles and fundamental rights.

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132 Ibid., 213.


Under the Swiss law, ‘Public Policy’ has both a procedural and a substantive aspect. Article 190 (2) (e) of Swiss Private International Law Act, 1987 clearly stipulates that arbitral award may be challenged before the Swiss Federal Supreme Court if the arbitral awards are incompatible with Swiss order public (public policy). Swiss Federal Supreme Court has recently in case X (S.p.A.) v. Y(S.r.l.) held that “an arbitral award is inconsistent with public policy if it disregards the essential and widely recognized values which, according to the prevailing values in Switzerland, should be the founding stones of every legal order.”

Under English law, if the face of a foreign arbitral award points towards or even involves committing a crime against fundamental English concepts of humanity and liberty or a tort or a breach of mandatory rule of law, it would be considered as being contrary to public policy. Also, some particular acts such as a commercial contract dealing with Slavery, Drug Trafficking, Paedophilia, Terrorism, Prostitution, Fraud and Corruption in international trade, or whatever is contrary to basic principle of morality and justice are regarded as against public policy. Practically, the English law, it is strongly recommended that the public policy grounds be applied narrowly.

A similar case can be found in the USA jurisprudence. Under US Law, it is contrary to public policy to breach safety regulations, commit sexual harassment frequently, and commit medical negligence persistently. In Somportex Ltd. v. Philadelphia Chewing Gum Corp (1970) the USA Federal Court has to deny enforcement of a foreign judgment if such enforcement ‘injures the public morals, the public health, the public confidence in the purity of the administration of the law, or undermines that sense of security for individual rights, whether of personal

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138 Ibid., 166.


liberty or of private property, which any citizen ought to feel’. And also, in case Parsons & Whittemore Overseas Co. Inc. v. Societe General de l’Industrie du Papier (RAKTA), the USA Federal Court held that an arbitral award is against public policy, if its enforcement would breach most fundamental notions of justice and morality of the forum country. International convention or bilateral Treaty obligations of a State are also regarded as an integral part of its public policy.

Practically, the national Courts of the States use different wording structure in their definitions. Each country might even delimit the scope of public policy measures differently. Because of this, there is no single uniform definition. However, the most of these different ‘definitions’ indicate many resemblances. The main noticeable similarity is that all States seem to require a breach so profoundly in its scope that it would entirely violate basic principles and fundamental rights in case of an enforcement of the judgment or award. Therefore, it has been relatively easy to abuse or exploit the concept of public policy in order to uphold the basic interests of nationals of the Forum State. For example, Lucy Reed claims that Turkish Courts, in some cases, unjustifiably have taken advantage of the issue of public policy to deny enforcement of foreign arbitral awards that were to the disadvantage of Turkish disputant parties.

### 3.12.2 Types of Public Policy

With understanding the important of the meaning of Public Policy, it can divide into four major types:

#### 3.12.2.1 Domestic Public Policy

When arbitral award is associated with a particular State, only that State’s domestic policy will be considered by the enforcing State Court. The Court

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143 Tweeddale, A. G., 2000, op.cit.; 159-60.
analyzes whether enforcement of the judgments or arbitral awards would contravene the norms (standards) and the well established fundamental principles of that State’s justice and morality.\(^\text{146}\)

The Domestic Public Policy is expressed by the mandatory rules of that State and its judicial practices. Although if the local court or the disputants involved can raise a strong case that enforcement of the judgment or award would violate the Domestic Public Policy, fraud in the arbitration agreement or due process violations for instance (such as corruption), then enforcement of that judgment or award will be refused.

### 3.12.2.2 International Public Policy

Practically, The International Public Policy is an especial confusing expression. According Hunter and Guido ‘the term International Public Policy is a ‘red herring’, because it tends to confuse the casual observer into thinking that it involves supra-national element.’\(^\text{147}\) When arbitration has an international character and different countries are involved, the enforcing court should not only consider its own PP but also that of interested nations and the needs of international commerce.\(^\text{148}\) There is a sort of balancing of great interest and depending on the case at hand and the interests of the involved States a determination is made as to which State’s policy will prevail. International Public Policy is generally construed more liberal than that of its domestic counterpart.\(^\text{149}\) Thus most legal regimes specifically made a clear distinguish between Domestic and International Public Policy. For instance, USA Federal courts in case Parsons & Whittemore Overseas Co. v. Societe Generale del L’Industrie du Papier, emphasized that “International public policy cannot be identified to that of the domestic one, but needs to be given supra-national emphasis.”\(^\text{150}\) Also State courts suffered from the fatal disease of sluggish moving in

\(^{146}\) *Ibid.*


\(^{150}\) Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier, 508 F. 2d 969 (2d Cir. 1974).
invoking the Public Policy grounds out of “concerns for international comity, respect for foreign law and arbitral tribunals and the advancement and smooth functioning of international commerce.”\textsuperscript{151}

In 2002, Final report (Recommendations) on public policy by International Law Association defines International Public Policy as: “The body of principles and rules recognized by the State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition and enforcement of said award would entail their violation on account either of procedure pursuant to which it was rendered (procedural International Public Policy) or of its contents (substantive international public policy).”\textsuperscript{152}

No doubt, the International Public Policy standards which are applicable to international arbitral awards have to be distinguished from domestic ones.\textsuperscript{153} In some jurisdictions like Civil Code of France recognized this distinction between domestic and international arbitral awards as to the subject matter of International Public Policy: “arbitral awards shall be recognized in France where their existence has been established by the one claiming a right under it and where recognition of the same would not manifestly be contrary to public international order (International Public Policy in England).”\textsuperscript{154}

3.12.2.3 Regional Public Policy

Basic values or fundamental principles of a particular political or economic region as its actual content are one of the indispensable characteristics\textsuperscript{155} of this type of Public Policy. Most principles of Regional Public Policy closely relevant to arbitration are drawn from the international agreements giving birth to the regional entity. Instances of an embryonic Regional Public Policy can be found in the States of

\begin{itemize}
  \item \textsuperscript{153} Olefirenko, Kostyantyn.,2010,op.cit., 29.
  \item \textsuperscript{154} Article 1498 of French Code of Civil Procedure.
\end{itemize}
the European Union (UE), The Organization for the Harmonization of Business Law in Africa (OHADA), Mercosur agreement (it is an economic and political agreement between particular States in American continental), North American Free Trade Agreement (NAFTA), and perhaps in the near future, amongst the States of Asia with the development to of regional agreements such as the proposed East Asia Community (EAC) or the South Asian Association for Regional Cooperation (SAARC). The law of the EU serves as a best model of this type of Public Policy.

3.12.2.4 Transnational Public Policy

Some researchers and legal experts suggest a new classification, namely transnational public policy. Most significant contribution in to development of this new theory was made by P. Lalive in his report to VIII International Congress on Arbitration, ICCA in 1986. Since that time debate over Transnational Public Policy has been intensified, because it is seriously vague and difficult to apply.

Fundamental values and basic of mandatory rule of laws, basic ethical standards, the during moral consensus, customs and usages of the international business community are to be applied without inquiring if the dispute is related to any particular State or taking into account the Public Policy of the interested States. New commentators vigorously believe that this has diverse benefits like flexibility and uniformity and that this kind comes into play when arbitration is governed by the principles of *Lex Mercatoria*. The Swiss Federal Supreme Court in the famous case the Swiss *Westland-Helicopters case* has held that the order public (public policy) under Article 190(2) (e) of Swiss Private International Law, 1987 is limited to transnational values.

Practically, the Transnational Public Policy is highly controversial because of the lack of any distinguishing features of International Public Policy. Both the

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International Public Policy and Transnational Public Policy are cross-border in nature and have extra-territorial scope with foreign element; sometimes they are used interchangeably. The absence of crystal clear instructions as to what constitutes transnational principles and its broad resembles with International Public Policy raises questions as to its very existence.

3.13 Recognition and Enforcement

An arbitration tribunal, unlike a national court, does not have the authority and power to enforce its arbitral award. However, since the disputants give their consent in the arbitration agreement to be bound by the tribunal’s decision, the binding award issued by the tribunal is capable of being enforced legally. Therefore, the winning party can ask the national court to enforce the award if the losing party does not comply with it. In most legal regimes, domestic awards are usually enforced by the State Court, though they must go through a formal procedure. In some States, awards are automatically regarded as court decisions, and are enforced as if they were issued by the State Court. There are serious obstacles with regard to foreign arbitral awards. Nevertheless, Courts usually do not refuse enforcing arbitration awards, barring for reasons like as inconsistence with Public Policy or procedural irregularity in the arbitration procedure. It is shown that just a few cases of awards have been refused enforcement by the State Courts.

Notwithstanding disputant parties to international commercial disputes regularly comply with arbitral awards, some disputant parties might not do so, or there are some companies linked to governments that are not swift enough in complying with the awards. In these cases, enforceability of arbitral awards is vital. What makes arbitration a preferred mechanism of dispute settlement in international business is that it is relatively awards disposing of all claims submitted

to the tribunal as well as any other decision rendered by the easy to ask for enforcement of an arbitral award in a foreign State, whereas national court rulings issued in a State are not easily enforceable in another.\footnote{Marielle Koppenol-Laforce et al. “International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law”, London: Sweet and Maxwell, (1996), 93.} While there are specific international conventions and treaties for enforcement of both court rulings and arbitral awards, the international conventions and treaties for the reciprocal enforcement of judgments have not much greater acceptance internationally than that international conventions and treaties govern the enforcement of an arbitral award.\footnote{Redfern & Hunter, 1999.op.cit., 24.}

There are several international or multilateral conventions as well as treaties for enforcing awards that are made in one State and are to be enforced in another. The sole vital international convention for the recognition and enforcement of foreign arbitral awards is the NYC (1958).

The NYC (1958) needs not just enforcement of foreign arbitral awards, but also emphasis their recognition. Some other municipal laws or international conventions and treaties exclusively stipulate enforcement of arbitral awards, or do not make a clear distinction between recognition and enforcement. Recognition of an arbitral award mostly considered as the key step before enforcement of an arbitral award. It is the declaration of a legal position, and as like does not call for any action. Enforcement of an arbitral award, on the other hand, entails a positive legal action, like as distain of assets or detention, to force the debtor to do its obligation under the arbitral award.\footnote{Ibid., 449.} When there is no liability in an arbitral award, its recognition, rather than enforcement, may be requested.\footnote{Reichert & Murphy. “Enforceability of Foreign Arbitration Decisions: Publicis SA v. True North Communications Inc”, Arbitration 67(2001), 370.} Similarly, arbitral awards of declaratory nature, such as those of the applicable law, the jurisdiction of the tribunal and the likes, merely entail recognition. Moreover, recognition of an arbitral award means that it cannot be subject to another proceeding, whether arbitral or judicial. Specially, this may be of interest to a winning defendant who wants to
protect himself against future legal actions based on similar claims.\textsuperscript{168} In such a case, recognition of the negative effect of a \textit{a res judicata} award is sought.\textsuperscript{169} In some cases, a request for the enforcement of an arbitral award may be postponed, for example, because the losing party does not possess sufficient property. Thus, given that recognition of an arbitral award is the first step before enforcement, the winning party may apply for the recognition of the arbitral award, in order to make enforcement faster in later stages, when sufficient property is accessible.\textsuperscript{170}

\subsection*{3.14 Appealing Against an Award}

Most legal regimes do not allow an appeal against an arbitral award to the arbitration tribunal itself. For example, under Article 4 the Panama Convention, 1975, States that an arbitral order or award is not appealable. Very few international conventions, treaties or national laws, however, recognise the possibility of appealing against an award. According Greek Arbitration Law, it is possible to appeal against an arbitral award.\textsuperscript{171} Moreover, it is possible to contemplate the lodging of an appeal in Ad hoc arbitration.

What most legal regimes allow is the correction or the interpretation of an arbitral award in a strictly limited scope of typographical, mathematical or electrical mistakes or any other errors, which has to be requested within a time limit.\textsuperscript{172} Some famous international arbitration institutions, like as the Chinese International Economic and Trade Arbitration Commission (CIETAC) and the Stockholm Chamber of Commerce (SCC), allow the disputant parties to request consideration of a necessary issue about which the arbitral tribunal wrongfully did not made a decision.\textsuperscript{173} The Amman Convention on Commercial Arbitration of 1987 permits the correction of material errors in an arbitral award. Article 33 of the Amman Convention, 1987 reads as:

\begin{itemize}
\item 168 Alan Redfern & Martin Hunter. 1999, op.cit., 449.
\item 169 Reichert and Murphy, 2001, op.cit., 372.
\item 171 Horvath, Gunther J. \textit{“The Duty of the Tribunal to Render an Enforceable Award”}, Journal of International Arbitration, vol. 18, no. 2, (2001), 150.
\item 172 \textit{Ibid.}, 149.
\item 173 \textit{Ibid.}
\end{itemize}
“1. If there is a material error in the arbitral award, the tribunal, either by its own motion or upon written request of one of the disputants, may correct this error after having notified this request to the other party and provided that this request is made within fifteen days following the date at which the written award was received.

2. The decision to correct a material error is made on the award itself and is deemed to be an integral part thereof. Both disputants must be notified of the decision to correct.”

In general, while the practice of not providing for an appeal against arbitral awards, under most municipal laws and international conventions as well as treaties, is justifiable, it may be reasonable that international arbitration institutions allow some kinds of appeal, as many of them actually do, if the disputant parties opt for it.

3.15 Conclusion

An arbitration as an optional private process is increasingly regarded as the favorite method of dispute settlement in international trade. In the lack of a single international Court having jurisdiction over international commercial disputes, the disputants to such disputes have to resort to settlement mechanisms upon which they can all agree. Arbitration provides the disputants with such a mechanism. They would be able to choose the arbiters, the procedure and the substantive law that they find appropriate for their type of disputes. They can arrange for the seat of arbitration to be in a neutral State, convenient for both disputants. This also means that in arbitration as compare to litigation, the disputants to a dispute have maximum autonomy to control over the way the dispute is handled. Moreover, it is a quick and confidential way of settling differences, though such confidentiality is not absolute.\textsuperscript{174} Although arbitration is not necessarily less expensive than litigation, it is possible to arrange its various stages in such a way that avoid excessive expenses, particularly since arbitral awards are not subject to appeal. Usually, arbitration is an informal, private, quick and, more importantly, flexible mechanism for resolving all

\textsuperscript{174} for a way of example, within the context of English law, it has been said that there are four exceptions to the confidentiality of arbitration documents: 1) when the parties agree on disclosure of the documents, 2) when the court orders disclosure for the purpose of an action by another court, 3) when disclosure is reasonably necessary for protecting the interests of one of the parties, and 4) when disclosure is in public interest.
kinds of disputes especially commercial disputes. Although all Alternative Dispute Resolution (ADR) mechanisms provide the disputants with a consensually agreed settlement method, the advantage of arbitration over other Alternative Dispute Resolution (ADR) methods that are based on negotiation, such as mediation, is that it leads to binding arbitral awards. Another important feature of arbitration is that arbitral awards can be enforced at law. In other words, arbitral awards have legal effects. Enforceability of arbitral awards is particularly important with regard to international commercial disputes, because while foreign court rulings might not easily be recognized in a State, there are many international conventions as well as treaties that facilitate enforcement of foreign arbitral awards.