Chapter 3
The UNCITRAL Rules
CHAPTER- 3
THE UNCITRAL ARBITRATION RULES

3.1 Introduction
The UNCITRAL arbitration rules have been created to reach disputes settlements in international trade, when problems arise or if there is any arising problem, it saves the time of the parties in the dispute. Generally, if the parties have not agreed to refer the problem to the arbitration or they referred to the regular court. It may decide by the court to refer the case to arbitration, but the parties appoint the rules which can govern upon their case. The UNCITRAL arbitration rules have one of the most classical procedures to solve international commercial disputes, if the parties in agreement have selected its rules to govern the process of hearing. The UNCITRAL arbitration rules are of two versions, one is Act of 1976 and another is revised in 2010, but they are essentially similar, because of the common philosophy behind of its rules to settle disputes of trade problems. The rules work under the agreement of the parties, in fact, it differs from other arbitration institutions and requires the involvement of all parties in the trade relationship. The main objective of UNCITRAL is the progressive harmonization and unification of international trade law. The parties apply the UNCITRAL arbitration rules to the solution of international trade problems because the rules of UCITRAL are common rules of dispute settlement for whoever which is from different territory or different systems of law. In the field of arbitration mechanism resolution, the parties shall transmit a notice to the each other by any means of communication. Therefore, in the arbitration mechanism the notice of arbitration and the response of notice by the claimant is a very important for the process of the UNCITRAL arbitration. Thus, the parties apply the arbitration mechanism based on the notice for their dispute settlement, following which the appointment of the arbitrators and provision will be selected by the parties so that agreed by the parties. In case of the challenging arbitrators, appointing authority may appoint the arbitrators, but the arbitrators shall disclose their independence and impartiality. All of the provisions in the field of arbitration such as the place of arbitration, language… and others must be appointed under the agreement of the parties. The parties within the period of time appointed by the arbitrators must submit
the statement of claim and statement of defence and the evidence because these are necessary in order to commence the arbitration hearing. The hearing of the arbitration in event of an oral hearing or in the written statement of the hearing shall be governed by the tribunal. It also shall be based on the UNCITRAL rules with adequate notice of the date; time, place and if the oral hearing will conduct shall be in front of camera. The parties may waiver of the right to object so that they shall communicate to each other and arbitral tribunal. The waiver shall be with reasons and be justified. The hearing of the arbitration is managed by the arbitral tribunal however; the jurisdiction of the arbitral tribunal might be under the question by the parties.

3.2 The object of the UNCITRAL

In international trade, all rules exist to facilitate with ease of trade. The objects of UNCITRAL are “to further the progressive harmonization and unification of the law of international trade”. So it aims to create a unified, predictable, and stable procedural framework for international arbitrations without stifling the informed and flexible character of such dispute resolution mechanism, the rules aimed to be acceptable to common law civil law and other legal systems, as well as to capital importing and capital exporting interests.197 Also international traders, however, often want to legislate their own right and obligations; and indeed, many prefer to use standards from contracts drawn up by their own trade association. It is needed to fully bear in mind that commercial law is not merely about the application of principles (international theories or doctrine) but the interpretation of contracts using methods entered into a state’s own domestic legal culture.198

The harmonization means to unify of rules to simplify of the dispute settlement which no new legal rules can be establish. (The harmonization also provides the unification of rules).Harmonization is not new rules to conflict with domestic rules and interpretation of national laws because recently in a common law system and civil law some countries prefer to join the international conventions to harmonize and unify their rules under harmonizing of the rules in international commercial law. In fact, as it is already noted, harmonization of international commercial law is by the State’s adoption and execution of international conventions. In addition, many aspects of

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197 Supra Note,7,p.67.
198 Supra Note,111, P.15.
trade have resulted in poor coverage of the issues partly, because certain areas remain unregulated or are regulated in a manner quite contrary the international measure. For example the Vienna Convention on the International Sale of goods leaves out issues of contractual validity, formality, national rules resulting in a diluted form of harmonization. But as noted, the objective of UNCITRAL is to harmonize international rules for dispute settlement so it does not contravene domestic law.

The first aspect in harmonization is the general or “equalization”, thus the equalization is in essence simplification (which translates into the reduction of transaction costs). It consists of two parts; 1) the model law on cross Border Insolvency 2). The UNCITRAL Bill and Note convention which is the UNCITRAL Bill “trans-national” and Notes convention is the legal system transit with the negotiable instrument.

Second is the aspect of specialization which seeks to accommodate special needs and features of International transactions and disputes, and one of the substantive purposes is to cater for the special needs or features of international transactions. The United Nations Sales convention is truly a world sales law, as this convention was based on solid research and on the good work of UNIDROIT that led to the Hague uniform laws in 1964. The crucial value added by UNCITRAL was the universal representation. Modernization seeks to take into account changes in values in technology or in financial or commercial practices; such as the Draft convention on Assignment of receivables in International Trade. It provides greater fairness in the allocation of risk, and more consistency with the rules in other modes of transport. The role of UNCITRAL may cooperate with multi and bilateral development agencies, therefore, de-localized solutions for de-localized borderless commerce like with United Nations Sales convention. The UNCITRAL includes 36 members which are divided between the United Nation’s members, at last so 36 members’ states which are arranged in the following five groups:

A) African States (nine States);

B) Asian states (seven States);

C) Eastern European States(five states);

D) Latin American States (Six States);
E) Western European and other states (nine states).

3.3 Philosophy behind the UNCITRAL arbitration rules

In accordance with article 6(2) of UNCITRAL 1976; “agreed upon by the parties” arbitration agreement accepted in the UNCITRAL and if “the appointing authority refused that (refuse of contract or agreement) shall be under signal of the parties to avoid of the appointment. The arbitration agreement is between disputing parties and under agreement the parties submit the case to the arbitral tribunal and it to be followed by arbitrators. According to section 6(1) of the Act of 1996 that no need to sign of the parties, therefore if there is no agreement, how the parties can submit their agreement to the UNCITRAL regard less to the signature of agreement; in clearing of the subject; In Arab African Energy Corp Ltd .Vol. produkten Netherlands BV [1983] Rep.41.200 It is just seems in making the agreement reasons needs to speed for hearing for helping the parties, they cannot prove facilities of the hearing. Arbitration rules for international trade case is under reasons of the parties to arbitrate of their subject by arbitration process as well as the UNCITRL, as noted that the UNCITRL arbitration is established to resolve trade and commercial disputes.

The UNCITRAL arbitration rules without any supervision from institutions such as, ICSID, the ICC, and the London Court of International Arbitration, or the American Arbitration Association. Each of these institutions may be designated as an appointing authority to choose the presiding arbitrator (or sole arbitrator) in the absence of an agreement by the parties. Legal guide on electronic funds transfer 1987 covers issues of counter trade and automatic data processing. It is also working to unify the international conventions to settle disputes between the parties or contracting states, it approves international principles which are accepted by the countries. The UNCITRAL harmonizes with universal conventions such as the Special Drawing Right (SDR) of the International Monetary Fund. To unify of rules the UNCITRAL especially regards to the international protocols and international conventions.

3.4 The purpose of the UNCITRAL arbitration rules

Arbitration agreement generally is with local rules of countries in the world, but new international trade producers provide the need to use the international arbitration institutions. In the United Nations conventions and other international principles in between the countries and procedures for the recognition and enforcement of the award has been made. In recognizing and enforcing of the award, countries shall consider arbitration agreement and on the basis of international conventions to recognize and enforce of the foreign award, municipal of the rules inside of the country, and also public policy of the country shall be observed. It must be noted that the foreign award is related with policy and justice or morality. But in certain civil law situation an award is considered as foreign, irrespective of the place where the award was made because the convention of 1958 United Nations is not limited to arbitration on commercial matters and foreign awards, it takes in consideration differences between persons, physical or legal.

The UNCITRAL with respect to intervention convention and international negotiable instrument or nation rules of states and agreement between the parties gives an advisory to establish certain current methods and practices for the working of the international group trade as well as for the interpretation of the rules. The arbitration is standard practice for parties to an international contract for solving of problems arising between contracting parties and choice of the UNCITRAL arbitration rules for dispute settlement is one of the best procedures to ensure justice.\(^{201}\) The scope of the UNCITRAL to unify with international trade law to settles dispute is with the conferences of the UNCITRAL as provided in the article 14 of Vienna conference 1980 which empowers the parties to make or fix the provision “expressly” or “implicitly”. It also provides in accordance to article 55 the parties with the power to fix any provision for their contract.\(^{202}\)

3.5 The UNCITRAL duties

The UNCITRAL rules should invite Governments as well as governmental and non-governmental organizations to support and encourage the establishment of regular, systematic bilateral and multilateral cooperation among arbitration centers and other


\(^{202}\) Ibid.p. 342.
organizations concerned with a view towards advancing the balanced use of arbitration facilities in both developed and developing countries, it also is in trade between countries having different economic systems. With respect to regions where there are no arbitration organizations or where the existing organizations are insufficiently developed, the UN could provide the technical and material assistance needed for establishing or strengthening of such organizations. The UNCITRAL should be the protector and coordinator of the organizations concerned therein. The UNCITRAL could provide recommendations to these centers based on which they should recall and give effect to the resolution incorporated in the final Act of the 1958 UN conference on International Commercial Arbitration.

UNCITRAL should encourage and sponsor the establishments by non-governmental organizations of an International organization of commercial Arbitration. The main objective of the organization should be the promotion, on a universal scale, of cooperation among organizations concerned with international commercial arbitration; its tasks would include the creation of a permanent framework for such co-operation, the establishment of a documentation and information centre, the publication of an international journal, the preparation of draft laws on international commercial arbitration for submission to UNCITRAL, the organization of congresses and symposia and the standardization of the rules of procedure of permanent arbitration centers. The organization would not have executive power with regard to its member organizations and would not interfere with bilateral or regional multilateral cooperation. The main duty of the UNCITRAL is cooperation among the countries alongside the UNCITRAL would also promote the arbitration mechanism facilities with regard to international commercial dispute settlements in developing countries and developed countries.

3.6 The concept of Arbitration

In general, arbitration is a method of resolving civil disputes; it may define differently, in distinct sets of laws, and hence it differs from conciliation and mediation. As noted, it is a mechanism for the resolution of disputes which take place, usually in private, with respect to an agreement between two or more parties. Arbitration plays an important role in the public civil justice system. Arbitration is a mechanism used for disputing a resolution. An important advantage of the arbitration

the parties shall in to account the personality, professional qualifications, experience, availability and cost of possible arbitrators before committing themselves to the procedure. In practice, the parties are not free to choose the judges; because, the judges have no experience in the commercial arbitration. The parties are reluctance or inability to agree on a court system to have jurisdiction over the subject matter.\textsuperscript{204}

Arbitration has been employed over a long period of time and is the oldest judicial system. In fact the arbitration process is a swift way to solve an international trade dispute between parties, and reaching a consensus regarding the applicable law and policy is reinforced by the trade customs and usages of the (various trades) international business associations as well as in the effort to harmonize and unify economic law both on an universal and on a regional level.\textsuperscript{205} The base of arbitration is a contractual agreement. The procedures of hearing are free from the national or international substantive and procedural law can be flourishing. The arbitration process is amicus curiae to the international dispute settlement if the parties intend to choose the arbitration process. It is a faster than the judicial process as they convene to the hearing directly. Hence, the tribunal hearing on investment dispute shall have the authority to accept and consider amicus curiae submissions.\textsuperscript{206} But that authority has been given by the agreement of the parties.

3.7 Advantages of arbitration

One of the advantages proclaimed by the adherents of arbitration is that the tribunal can decide cases on the basis of equity rather than law such as course is not open to the courts. However, when this became applicable to the court as well, the representatives of trade and commerce were the first to complain.\textsuperscript{207} The advantages of the arbitration are saving the time and costs of the parties but it is varies from place to place because of different modifications in developing countries and developed countries. It also differs in the court processes of hearing, where the parties complain, ‘the legislature authorized the judges to act more and more like arbitrators by permitting them to base their decision on equitable consideration. Co-existent with

\textsuperscript{205} Supra Note, 129, P.284.
\textsuperscript{207} M.Schmitthof, Clive, das neue Recht des welthandel’, 47,1964, p.382.
this development was “the continuous strengthening of the judicial law” which made possible a more careful consideration of elements of justice in each particular case.

The arbitral procedure generally is considered as being within the control of the parties. Mandatory local rules, however, cannot be overridden by this agreement, because the arbitration is made under the control of the parties. Even where mandatory rules are not involved, national law may have an influence on the conduct of arbitral proceeding simply because arbitrators will tend to model the arbitral procedure, to the extent that they can, on the formal procedures, they are most familiar with article16 of UNCITRAL arbitration rule states; unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal’ and also article 6 provides; the appointing authority shall use the following list procedure, unless both parties agree that the list-procedure should not be used. Further, in article 21 (1) of UNCITRAL; “the arbitral tribunal shall have power to rule on objection” and article 21 (2) provides “shall have the power to determine the existence or the validity of the contract”.  

The arbitration is a free mechanism to dispute settlements, if the parties make no express choice, international law will be used wherever is applicable in the different circumstances. Accordingly, noted in article 22 of the ‘autonomy of wills’ and the arbitral tribunal shall apply the law designated by the parties that is the law determined by the conflict of laws rules which it considers applicable. If the parties have not designated a law, the tribunal can take the decision as amiable compositeurs or ex aequo et bono but only if expressly authorized by the parties.

Arbitration rules are especially effective in civil matters including, some groups or persons, because most of people cannot select arbitration about the subject matters such as crimes, it is in jurisdiction of regular courts. According to Rittner, in 1963, he correctly spoke of the “arbitrational function of the judge in civil matter”. According to E.Mezer, critics of private arbitration are met with the argument that the parties themselves have agreed to resolve their dispute by arbitration and that this (arbitration process) being “the free will of the parties involved”. It should be respected rather than resisted. In many cases, the commercially weaker party to the contract has to accept the demands of the stronger party, a party is given a “take it or leave it

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208 Supra Note, 129, P.78.
209 Supra Note,78,p.287.
agreement since its commercial life often depends on maintaining its commercial relations with the stronger party, there is no choice but to sign the agreement. In arbitration process the parties cannot impose provisions to the each other, accordingly, powerful trade organization are encouraging, if not compelling, their member and persons who enter in to contracts with their member to agree, as far as they can lawfully do so, to abstain from submitting their disputes to the decision of the court of law” 210

The problem has been arisen from the international relation, because the international relation had been created by the private party. The international mechanism exists to solve the international problems with the especial procedures. One of the important international institutions created by the United Nations as well as the private mechanism is arbitration available for the parties (in case of international trade or commercial disputes). All the international institutions are helping to the solution of the problems as well as promote of global economic. The advantage of international institutions is that to harmonize and unify of the international principles for the trade communications. To conclusion, it can be said that “the intention of the parties to evade any kind of binding law under the guise of the so-called equitable decision”. It makes little difference that both parties to the litigation dislike any provision designed to protect the public, or if one of the parties is stronger and can thus deprive the weaker party of his lawful remedy. 211 The result is that through arbitration commercially influential groups can build up their own legal order. The parties are following the international mechanism to reach a solution but international principle given by the all institutions may be in contrary of the policy of the parties.

The arbitration is unlike mediation and conciliation as ADR mechanism procedures is one the procedures which is governed by both the parties. In fact, it impossible to breach the final awards by a party otherwise he was not satisfy of that (the parties must accept the arbitration award because it is binding on the parties), thus arbitration on the other hand is more akin to judicial settlement. Once the parties have agreed to set up the arbitration for the resolution of their dispute, their right to withdraw will be construed as a breach of the arbitration agreement and that will not be looked upon by the courts of law favorably. The parties can use arbitration to remove a major obstacle

210 Ibid, P.382
211 Ibid, p.383.
to good relations. The parties can limit the investigation of wider questions which may create more problems in the arbitration process, for example in a Rainbow Warrior Case, France and New Zealand the tribunal asked for a ruling the amount of compensation to be paid by France for sinking the vessel in Auckland Harbour and the future of the two France intelligence agents who were serving prison sentences in New Zealand for carrying out this action.\(^{212}\) The Second Case is that of the Alabama Claims, disagreement between Great Britain and the United States over whether the tribunal was authorized to award compensation for indirect damage almost led to a failure of the arbitration. In general, it is assumed that arbitration has the following benefits:

First, Confidentiality and privacy are preserved. In fact, the parties are keen to settle disputes by the arbitration because they appoint the arbitrators, who have substantial experience in the trade or industry in question and someone equipped to be a splendid umpire in resolving disputes about reasonable conduct in business, the presumed contractual intention of the parties etc. Second, Informality of the proceedings; is the base of the arbitration because the parties under international rules in commercial or trade must appoint the arbitrators by agreement as well as mutually decide upon the procedure of arbitration process and also appoint the place of arbitrate or where the arbitral tribunal shall begin to arbitrate about dispute settlement. Third, it lower costs: it is the motivation to the parties to appoint the arbitration mechanism. Efficiency; one the important, benefits as it means that the effect of the arbitral tribunal award is upon the parties and the parties have agreed to accept the what (the result of arbitral tribunal as called award) made by the arbitral tribunal. Technical specialism; in this parts the experiences of the arbitrators are very important for the parties. The experiences of arbitrators play important role to appoint as the arbitrator, experience includes substantial experience in trade or industry may make a splendid award. One of the aspects of arbitration in formality is experience of the arbitrator, because the process of arbitration derived from the experiences.

\(^{212}\) Supra Note.53, P.87.
3.8 Arbitration agreement

The construction of arbitration agreement is by the parties while arbitration is under governance of applicable law and administered by the arbitrators. It gives power to the arbitral tribunal to decide the dispute and define the scope of that power. The arbitration agreement may be made before the dispute arises between the parties preemptively indicating that if such a dispute arises, the case must be referred to arbitration process. Spiritually the arbitration agreement is different from the trade contract of the parties (is not in contrary of the trade contract). The arbitration clauses are considered a separate and distinct agreement, it is not affected by claims of invalidity of the main contract, and the separate doctrine is embodied in numerous arbitration laws and rules.\(^{213}\)

The reference (basis of beginning) to commence of arbitration process is arbitration agreement, in global trade relation between the parties to make a connection with others. It has to be done by an agreement. It may include some provisions or conditions that the parties must consent to. The consent of the parties to be agreed with arbitration process should be clear. It will interprets with arbitral tribunal, because the arbitral need to be aware of consent (the consent shows the intention of parties) whatever the parties show the consent with signature of agreement. The effect of the interpretation of the arbitration agreement is to confer jurisdiction on the arbitration tribunal to decide the dispute between the parties.\(^{214}\) This jurisdiction is conferred to the arbitral and the domestic courts have no jurisdiction to decide on the validity of the agreement. To adjudicate of the jurisdiction is the first action to do by arbitral tribunal in relating to the arbitration process where the arbitral tribunal appointed. The majority of international arbitration instruments relate only to arbitration agreements which are in written form. As a matter of fact, arbitration agreements are in practice generally expressed in written form.\(^{215}\) Swiss law 1987 Act provides that as an arbitration agreement shall be valid if made “in writing” by equipment of telegram, telex, telescopier (telexcopy) or any other means of communication which permits it to be evidenced by a text”. The New York convention emphasizes on a signature of arbitration agreement. The ECAFE rules and Geneva protocol are not applicable solely to written arbitration agreements because

\(^{213}\) Supra Note,117, P.19.

\(^{214}\) Supra Note,125,p.159.

article 1 (2) of the ECAFE states that in all case where parties have “agreed” that disputes shall be referred to arbitration” and article I of Geneva protocol refer the majority of international instrument which contain requirements as to written form as provisions of arbitration agreement should be “in writing”. So to define the notion of “in writing”, United Nation’s Convention expressed in article II (2) and article 1(2) (a) include that an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. In accordance with article1 of UNCITRAL Arbitration rules, and article 60 of ECHR the arbitration process is commenced when “the requirement of an arbitration agreement in writing is universally accepted in international arbitration” (whether as an intrinsic element of validity or as a probative requirement). Article 6 (1) of the ECHR provides that a whole of disputes (any criminal charge, parts of the trial in the interest of moral, public order, national security in a democratic society, the private life of the parties, which they may prejudice the interest of justice) should not be arbitrated, but competition law disputes and other disputes arising out of market regulation rules, text law dispute on the validity of arbitral awards, with the agreement of the parties can be arbitrate. Because award of the damages or other monetary compensation are ‘possession’ in the sense of Article 1 Protocol I to the ECHR, (European Court of Human Right). 216

The arbitration agreement shall contain the subject matter to arbitrate, because it is often alleged that should not be void, to refer the subject matter to the arbitration based on agreement, therefore, the validity of arbitration agreement is by all provisions, or arbitration agreement is illegal, if it is in contrary to public policy. In the past, it was difficult for certain countries due to public policy concerns however, currently these issues have been addressed by those countries. Previously, English courts had substantial difficulties with this question which it solved with the judicial decision. So England has provided that in each country the interpretation of (final decision) to do usually is in accordance with its cultural, tradition and the judicial decision suppose in the position of Article 16(1) of the model law that an arbitration clause which forms part of contract agreement is independent of the other terms of the contract so that the invalidity of the rest of the contract does not invalidate the

agreement to arbitrate.\textsuperscript{217} The jurisdiction of arbitral tribunal includes interpreting of the arbitration agreement, otherwise, if the agreement is in contrary to the public policy where the arbitral took place or where the winner party will apply to recognize and enforce, the arbitral tribunal may make decision which the agreement is not valid. The arbitration process is created by a contract. This necessarily means that whatever power the arbitrator has is largely dependent on that agreement.\textsuperscript{218} To affect the contract between the parties or by one party, in the case, Fahem&Co. v Mareb Yemen Insurance Co.Ltd [1997] 2 Lloyed’s Rep 738, the defendant has sent a telex to the claimants which were expressed to be an “offer” for sale of sugar with price to be advised later by separate telex. The telex acts as an arbitration clause. The claimants accepted the offer by telex. Cresswell J. referred to the decision of the court of Appeal in Zambia Steel & Building Supplies Ltd v Clark & Eaton Ltd [1986] 2 Lloyd’s Rep 225 where O’Conner L.J. said: “if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient”.

\textbf{3.9 Scope of arbitration Agreement}

When the contract and the arbitration clause have been considered to negotiate about the object of obligations, that party will not normally plea on the basis of lack of consent; most likely, the party who applied for setting disputes will base his plea on such other grounds such as the in-arbitrability of the dispute, fraud in the inducement, illegality or public policy, or the fact that the claim is outside the scope of the arbitration clause or that the clause itself has lapsed. The scope of the arbitration may be found in the definition of the commercial, because the kind of subject matter determines possibility to solve with arbitration process. Also the agreement of the parties will extend scope of arbitration. Finally, it may be said that the field of commercial relationship is important for the parties to refer in to the arbitration resolution.

It depends on the intention of the parties as to how much it extensively authorizes. That determines any conceivable connection to their contractual relation to the subject of arbitration. The scope of arbitration clauses are a handful of formulation, these

\textsuperscript{217} Supra Note, 96, p.148.
\textsuperscript{218} Supra Note, 111, P.658.
formulation includes “any” or “all” disputes: i) arising under this agreement”; ii) arising out of this agreement; iii) “in connection with this agreement” and iv) “relating to this agreement.” Alternative formulations are also used, including: v) “all disputes relating to this agreement, including any question regarding its existence, validity, breach or termination”; or VI) “all disputes relating to this agreement or the subject matter thereof.” Thus all of the arbitration processes are premised on the parties’ submission to the agreement so as to determine the scope of the agreement. At the same time, they will select a pre-existing set of procedural rules designated for Ad Hoc arbitrations. International agreement under some conventions defined; 1907 Hague convention for pacific settlement of International disputes articles 1-2-8-9-36 to 38, article 33 of United Nations charter, ICSID convention articles 25, 28, 35, 55-58, New York convention article I(3) and II(1), the UNCITRAL Model law article7, the UNCITRAL Rules 1976 and revised 2010, ICC arbitration Rules.

3.10 Importance of arbitration agreement

This arbitration agreement aim could be best achieved by the drawing up of unification model law applicable to disputes arising from international trade, which would contain certain basic norms with regard to matters such as the form of the arbitration agreement and its effects, principles for the establishment of the arbitral tribunal, the possibility of choosing a foreign arbitrator, the finality of arbitral awards and the possibility of choice between arbitration according to the rules of law and arbitration according to equity. 220

3.11 Power of the arbitration agreement

The power of the agreement in the arbitration process is given legal validity when the agreement comes in to force between the parties, so, the arbitration agreement is an important provision required to commence the process of arbitration as noted in the section 33 of 1996 Act which states ‘general duty is the right of the aggrieved party in an arbitration to bring an action under section 68 to have an award set aside or varied on the basis of a serious irregularity’. This section provides that the application of the parties must examine by arbitral tribunal because the application of the parties shall

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219 Supra Note, 7, P.76.
be reasonable, otherwise the decision of final award will be changed. (This is concerned to the correction and computation errors or any other errors of a similar nature occurring in the award). If the application was irregular and varied the final award will be set aside, and thus the application shall be regular and also it is a duty of the tribunal to consider that the application is regular. The irregularity of the agreement is dependent on the parties which made the agreement, and the arbitral tribunal cannot make the agreement (because the parties must make agreement to refer to the arbitral and arbitral in binding to make award not agreement) as it is provided in the section 68 of 1996 Act; a) failure by the tribunal to comply with section 33 of this rule, in fact, the arbitral tribunal should act with its duty to act fairly and impartially because the arbitral tribunal is independent of judicial courts and it is private process. Recently In the case of, Fletamentos Maritimos SA v.Effjohn International BV [1997]2Lloyd’s Rep.302 it happened in common law system in 1997;221

Facts:
Disputes arising from a co-operation agreement were referred to arbitration. The applicant applied to remove the arbitrators and umpire under section 23(1) of the 1950 Act arbitration. The section states:

1) Where an arbitrator or umpire has misconduct Removal of himself or the proceedings, the High Court may remove him.
2) Where an arbitrator or umpire has misconduct himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.
3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application. So they argued that there had been “misconduct by the arbitrators in that the umpire was guilty of misconduct in the manner and extent of his participation of the proceeding”. They also claimed that the arbitration had misunderstood their application for discovery and failed to give them a fair hearing and failed to give reasons for its action and claimed that one of the arbitration was biased. The final decision was that it is not the policy of the law to require a party to

221 Supra Note,111, p.428.
arbitration who could justly complain about unfairness, which fell short of misconduct to invest in the arbitration process and then to challenge the award when he could have had the unfairness put right before the substantive hearing. The power to remit under section 22(1) ; “In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire”. In the section 22 of arbitration Act 1950 could apply to interlocutory ruling. On the facts, the umpire was entitled to sit with the arbitrators and retire with them. Until the arbitrators had made up their minds, the umpire might be called on to make a decision. His presence and participation was therefore both sensible and desirable. Although the umpire had intervened more frequently than other umpires might have done he did not intervene to such an extent that it could be said he had overstepped the line. This result provides that the arbitration agreement between the parties which it has been nominated for the umpires and the arbitration proceeding.

Based on serious irregularity in an arbitration to bring action under section 68 to have an award set aside on basis of serious irregularity that irregularity is taking any of the following forms:

a) Failure by the tribunal to comply with section 33.

b) The tribunal exceeding its power (otherwise than by exceeding its substantive jurisdiction under section 67: 1) parties to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court. For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. This particular provision is concerned with the excess of procedure powers. The function of arbitrators is not to make temporary financial adjustment between the parties pending the resolution of the dispute unless this is what they have agreed the arbitrators can do. But it may be different to refer the case to international arbitral tribunal.

c) (C) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

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222 Section 22, replaced by section 67(3), 68(3), 69(7) with the new Act.
d) (D) Failure by the tribunal to deal with all the issues that were put to it;

e) (E) Any arbitral or other institution or person vested by the parties with
powers in relation to the proceedings or the award exceeding its powers;

f) (F) Uncertainty or ambiguity as to the effect of the award;  

3.12 Compliance with the arbitration agreement

In general, the arbitration process commences with an agreement which made
between the disputing parties. It cannot be derogated from by the arbitral tribunal
without the consent of the disputing parties, and any variation will be made with the
agreement of the disputing parties, regard in various procedural issues such as
arbitrator disclosure, impartiality and independence, observance of due process
applicable time limits and power of the arbitrator applicable law and the various
procedural steps to be taken by the disputing parties.  

3.13 Arbitration agreement and court process

An arbitration agreement is between the parties, but along the provisions given by the
state as well as the court irrespective of the place of the arbitration. All measures and
application of the parties cannot affect or be in contrary to the arbitration agreement.
The agreement is made on the basis of the relation between the parties to submit to the
arbitral tribunal, however, it arises from the intention of the parties. If the arbitrators
will not act by the provisions of the arbitration agreement and on the terms in which
submission was made to arbitral tribunal, and also in accordance with the provision of
the New York convention article V (1) (c) the award will be refused to the recognition
and enforcement, the article provides:

“If the award deal with difference not contemplated or not failing within the terms of
submission to arbitration, or if it contains decision on matters beyond the scope of the
submission to arbitration”. And it also provides by article 34 (2) (iii) and article 36 (i)
(a) (iii) of the Model law have the same provision. As a noted, the provision of the
contract in connection to arbitration is important then the US court interpreted “the
international Chamber of Commerce recommended clause which provides for

223 Supra Note,111.P.428-429
224 Supra Note,91, P.128.
arbitration of ‘all disputes arising in connection with the present contract’ must be
construed to encompass a broad scope of arbitration issues, it embraces very dispute
between the parties having a significant relationship to the contract regardless of the
label attached to the dispute”.

Therefore, the tribunal and its decision will depend upon interpretation of the words of
the arbitration agreement and the intention of the parties, in the light of the law that
govern that agreement, linking words such as “in connection with”, “in relation to”, “in
respect of”, “with regard to”, “under” and “arising out of” are also important in any
dispute as to the scope of an arbitration agreement. 225 It is necessary to determine
whether a particular claim or defence has a sufficient connection with the contract to be
covered by the arbitration agreement. The arbitration tribunal may need to examine a
claim or defence in relation to the wording of the arbitration agreement.226 The validity
of the process of arbitration should be with arbitration agreement made by the parties.
In arbitration mechanism the system of appointing only two arbitrators may be
impracticable for the generality of international commercial arbitrations. To fill the
replacement of which the arbitrator unable to do his function or for other reasons fails to
act without undue delay any party may request the national court at the place arbitration
for his or her removal. The parties should also locate their arbitration in a state whose
laws are adapted to the needs of modern international commercial arbitration.

Although the arbitral tribunal usually has discretion to direct this, other language may
be used or a document may be admitted in their original language without the need for
a translation. In the arbitration process, entry of judgment shall be under the
permission of the parties, depending on the law of the country in which the arbitral
took place in. All of the provisions need to be in the arbitration process such as time
of hearing; the provision for appointment of the experts by the tribunal; provision for
interim awards; provision for the costs of proceeding; and provision concerning the
award. In addition, the parties may arrange some more provisions for a better quality
of the proceeding. In accordance with the article 21(2) of model law an arbitration
clause “which forms part of contract and which provides for arbitration under the
rules shall be treated as an agreement independent of the other terms of the contract”.
The following the provision of the UNCITRAL Rules, is provided by the model law.

225 Supra Note,97,p.154.
Article 16 (1) Model law provides that “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement for the purpose”, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitration tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”. Therefore, according to the LCIA arbitration rules article 23 (1); “An arbitration clause which form or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement”. A decision by the Arbitral tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause. Swiss PIL Act, 1987, article 178 (3) provides;

“The validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid”. In the Gosset case, the French Court de Cassation recognized the doctrine of separatbility in very broad terms which are as follows: “International arbitration, the agreement to arbitration, whether concluded separately or included in the contract to which it related, is always save in exceptional circumstances completely autonomous in law, which excludes the possibility of being of it affected by the possible invalidity of the main contract”. The English Arbitration Act1996 provides that an arbitration agreement contained in another agreement “shall not be regarded as invalid, non-existent or ineffective because that other agreement didn’t come in to existence”. 227 Where such arbitration clauses are adopted, most national courts will recognize and give effect to the parties’ wishes to arbitration any disputes between them.

3.14 The requirement of written agreement

According to arbitration mechanism regimes, the subject matter must be referred to arbitration, the rules shall govern the arbitration agreement where the parties have agreed in writing.228 The UNCITRAL secretariat in its preparatory study for the model law found this to be an almost universal requirement of domestic laws.229 In accordance to the same provision, a part from usual forms of written agreement, this

228 Article 1 of UNCITRAL 1976.
229 The position is provided by section (2) (a) based on section 4(1) of the Commercial Arbitration Act 1984 (NSW), Section 3(1) of the International Arbitration Act 1974 and article 7(2) of model law.
requirement can be satisfied, inter alia, by an exchange of statements of claim and
defence in which the existence of an agreement is alleged by one party and is not
denied by another. Note, however, that where no written agreement exists, a party
may, in exceptional circumstances be able to invoke the court’s inherent jurisdiction.

230 But it has been modified by UNCITRAL 2010 as per this revision; in general the
parties shall be referred to the rules of UNCITRAL arbitration. 231

3.15 Rights of third party in the arbitration

The right of the third party in the arbitration process is very important in international
laws because application law is dependent on the parties. It may be a general rule for
a procedure to discuss about the participation of a third party in the arbitration hearing
tribunal. The application of third party must be received within a limit time which has
been fixed before and also after counseling both from parties. The non-disputing party
shall have a significant benefit on the arbitration proceed, thus non-disputing party
shall state the reason upon which the application is based on, to submit the reasonable
documents to the tribunal and both parties. The application for submitting the
documents should be undisrupted from arbitration process. Thus, to examine the right
of the third party the arbitral tribunal shall consider the provision of the application
law, whilst the ICSID rules provides that the participation of the third party is with the
consent of the both parties, and also in the English arbitration law the third party
won’t be in the arbitration process without consent of both parties as well as the
circumstances of the arbitration are independent from the third party without his/her
consent. This provision is silent in the UNCITRAL arbitration rules and model law
but logically it is obvious to know the participation of the third party (non-disputing
parties) is in contrary of the consent of disputing parties. Therefore, all agreement
affect to the parties, not anybody whoever is non-disputing party but generally the
arbitration agreement may be flexible to be useful for third party. It is a private
relationship, it may happens so fast by operation of the “group of companies” in
certain circumstances and be extended to other member of the same group of
companies, and secondly, by operation of general rules of private law, principally on
assignment, agency, and succession. 232

230 Supra Note, 102, P.735.
231 Article 1 of UNCITRAL Arbitration Rules 2010.
232 Supra Note, 97, p.148.
3.16 Jurisdiction of contract

The contract is based on the relationship between the parties, it is reasonable to make the contract applicable to the different states of the parties. Therefore, the contract should be based on the international convention and international principles established to limit the problems between the parties where the parties function in different states. The contract determines the jurisdiction of the place where the parties may apply to the court, as it states in Article 5 (1) of Brussels Convention; “in matter relating to contract…the place of performance of the obligation…, but the problem is the definition of “contract”. The contract of the parties saves the rights of parties to appoint the place of arbitration and is a map for arbitrators to solve the problem, inter alia, contract clarify the number of arbitrators and details of arbitration proceeding and obligations of the parties. The parties in international relationship shall make a contract to clarify what they are obligated to do receive. In fact, the importance of jurisdiction of the contract made by the parties is highlighted in the following case:

A similar issue was taken up in the case of Boss Group Ltd v. Boss France SA [1996]4 ALL E.R 970, in that case, the plaintiff sought a declaration in England that no contract of distribution ship of its products in France ever existed between it and the defendant. The defendant had previously claimed damages based on this “contract” in France. The defendant applied to stay proceeding on the grounds that the English court did not have jurisdiction to hear the matter under article 5 (1) as already stated above, and consequently the declaratory relief should not be granted. The judge at first instance dismissed the plaintiff action on the basis that article 5(1) which specified that this could not be invoked by a plaintiff who denied the existence of any contractual relationship with the defendant. The contract is important for the court proceed in fact the authority of national court determines by contract of parties to refer the case to; in Kleinwort Benson v.Glasgow city Council [1997] 4 ALL E.R.461, the majority of the House of Lords held that where the action is a restitution claim. It must be established whether the claim was based on unjust enrichment or a contractual obligation. In the case the contract was never in existence being a contract void… that was not in the contemplation of article 5(1) and as such the general rule that action must be taken at the country of the defendant’s domicile. Accordingly, if no contract was made and no existed the performance of the article 5 (1) of Brussel convention is impossible.

233 Supra Note,111,p.371.
3.17 Notification of parties

The notice of statement of claim shall be sent to other party to start the arbitration process. The purpose of the communication is to inform the arbitral tribunal and other party, but the other party need not to reply to the claimant. Also the rules do not make provisions for the respondent to reply to the notice of arbitration with a “short answer” (it provides in the UNCITRAL Rules 1976). But in accordance with article 4 of UNCITRAL 2010, the response of the notice of arbitration is very important. The response time is limited by the rules to a short period of time 30 days since the notification received. The response of notice of arbitration shall include: the name and contact of each respondent and his or her detail information and the notice may include any plea relating to matters of jurisdiction. In accordance with article 3 (1) of UNCITRAL 1976, the arbitration proceedings by the claimant to ensure that the respondent received the notice and sufficient information to apprise him and also delivery using electronic means at his address or any notice shall be physically delivered. Article 2(2) of UNCITRAL Rules 2010 provides that it shall be deemed to have been received. In accordance with the article 2.2 of 1976 rules and article 2.6 of 2010 official days and non-business day at the residence or place of business is a very important in taking a time of hearing in arbitration and the period of time for hearing is extended until the first business day which follows based on the UNCITRAL Rules. The importance of notice of arbitration to be received by the respondent is to calculate the period of time to commence hearing. The condition of article 4 of UNCITRAL 1976 provides the claimant to notify the statement of claim to respondent. The statement of the claim shall be clear for submission to the arbitral tribunal as it is provided that in article 3 (4) (c) of UNCITRAL through the sub Para of article 18, “the claimant may annex to his statement of claim all documents party deems relevant or may add a reference to the documents or other evidence he will submit”. If representatives or assistance of both parties participate in arbitration proceedings, the function of representatives is binding on the parties. But each of them shall inform his agency to arbitral tribunal and also other party. The assistance includes translators,

235 Art.3.3 (a)to(g) UNCITRAL Rules 2010 provides that the notice of arbitration shall include the following: a) A demand that the dispute be referred to arbitration; b) the names and conduct details of the parties); Identification of the arbitration agreement that is invoked; d) Identification of any contract or other legal instrument out of or in relation to which the dispute arise or in the absence of such contract or instrument, a brief description of the relevant relationship; e) A brief description of the claim and an indication of the amount involved, if any; (whilst the art.3 Para 3 (g) provides that the general nature of the claim and an indication of the mount involved, if any); f) the relief or remedy sought; g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.
paralegals and perhaps even travel agents. The powers of attorney submitted usually take the form of letters from parties that simply announce that a certain person or law firm will act as a representative.\(^{236}\) In accordance with article 2.4 of 2010 and article 3.3 of 1976 the notice of arbitration to the parties or to the respondent is very important. It includes a proposal for the designation of an appointing authority and appointment of a sole arbitrator or arbitrator.

The award of arbitration shall be notified by the parties to each other as stipulated in several international instruments. The OAS Draft Uniform Law article 17; and also the ECAFE Rules article VII (6) provides that the parties shall be dully notified of the arbitration award, it states that by copies of award, which shall notify. Because article 41 of the European rules states award shall be communicated by registered letter. This letter means that whatever the arbitral tribunal made. It also provides by the CE Uniform Law Article 23, the UNIDROIT Draft in article 24, wherein the president of the tribunal is required to communicate a copy of the award to each party. It shall be deposit to the parties in the place of the arbitration in accordance with the CE Uniform Law 23 (2) and the UNIDROIT Draft article 24. The president of the arbitral tribunal shall deposited the original of the award with the registry of the court having jurisdiction, and also inform the parties of the deposit. And it shall be in the place provided by the arbitration agreement, in absence of place of arbitration the place of business habitual residence or mailing address of the addressee is applicable.

3.18 Enforceability of agreement

If null and void, inoperable or incapable of being performed, in accordance with article II (3) of New York Convention the enforceability of the award is impossible. In the event of lack of actual consent of the parties and if the national court finds that the sized agreement is with fraud, duress, misrepresentation, undue, influence or waiver of a party or parties to refer the agreement or subject matter to the arbitration so it is impossible to enforce the award. The lack of legal capacity by a party will render the agreement null and void, the ineffectiveness of international arbitral awards on the basis that the arbitration agreement was not binding on the parties but the provision of applicable law plays an important role between the parties.\(^ {237}\) Inoperability in an arbitration agreement occurs by *res judicata*, because the matter (or


\(^{237}\) Supra Note,83,p.12
the same) has previously been decided in another legal forum by the parties. Incapable performance of arbitration agreement depends on some conditions, but inoperability or nullity and other forms are and an arbitration agreement could be incapable of being performed. If the language of contract was, or if a specific arbitrator could not attend to the arbitration, or perhaps if the place of arbitration was no longer available, these could render the arbitration agreement incapable of being performed. If the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place. In accordance with the New York convention, all formalities shall be required, such as the signatory of agreement in writing. The signature can be an agency but the agent must act within the scope of his or her authority. There must be proof that the agent had actual authority to act for the principal.

3.19 Representation of parties

It is not obligatory, under any of the instruments examined, that parties should appear in person before an arbitration tribunal. All the international instruments to the arbitration provide that the representation may be designated by the parties as it depends on the parties and is indeed according to the international instruments like article 30 of European rules; article 16 (4) of the CE Uniform law; article VI (8) of the ECAFE Rules and article 17 of the UNDROIT Drafts which are very broad. The parties may be represented “by person of their choice or “by others”, but those articles provides that the parties will be free to choose representation. It seems in accordance with all instruments in principle that parties may designate a representative to appear at a hearing or to present his case. It does not prevent the arbitral tribunal from proceeding with the arbitration and rendering an award.

3.20 Arbitrability of the subject matter

Although, the process of arbitration is depends on the arbitration agreement and must be in accordance with the international standards. The subject matter should have ability to arbitrate, it would not be against the law or the public policy of local jurisdiction to try to arbitrate dispute where the arbitration took place. In addition, in patent law, the disputes arising out of agreement to license a patent normally would

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238 Supra Note,117,p.34.  
be arbitrable, because those disputes are essentially contract disputes. So the validity of the patent will not be arbitrable and finally, any contract between the parties may arbitrable under the arbitration agreement. Today most disputes are being settled by arbitration except for those that are governed by criminal law, family law and patent law, concession of rights by administrative authorities, and the protection on intellectual property.

The permissible limit of an arbitral matter consequently varies among countries as the arbitrability of the subject matter may consider numerous law and procedures. The national laws having ability to be law applicable for international subject matters to arbitrate, however the law applicable is depends on the parties’ agreement. The arbitration process is a private mechanism though it is possible for the parties to choose national law as applicable law. In general, national interest and public policy in any country is very important, if the national law appointed applicable law shall be in accordance with national interest or public policy. In view of the diversity in the contracting States and with regard to the subject-matters which are non-arbitrable, it has been suggested that a list of non-arbitrable subject-matters should be drawn up for each state. The types of non-arbitrability of subject-matters are involves Securities law, competition laws, anti-trust laws, the validity of intellectual property rights (patents, trademarks, etc.) matrimonial status, bankruptcy rights and the protection of certain weaker parties. It depends on the nature of public law of the country in which the arbitral took place to arbitrate. The areas where arbitrability is excluded vary from state to state; however as a general rules, arbitrability is usually permitted in all matters that fall within the boundaries of private law. Thus, in Mason CJ accepted Colman Js’ statement in the English High Court decision in Hassaneh Insurance Co of Israel v Mew, if the parties to an English law contract refer their disputes to arbitration they are entitled to assume in the least that the hearing will be conducted in private. The assumption arises from a practice which has been universal in London for hundreds of years [is], I believe, undisputed; it is a practice which represents an important advantage of arbitration over the court as means of dispute resolution. The informality attached to a hearing held in private and the candour to which it may give raise is an essential ingredient of arbitration. In this situation the

240 Supra Note,8,p.99.
case provides that the arbitration process is private, and institutional arbitration rules reflect the concept of the privacy of arbitrations. This is based on the privacy of arbitration argued for imposing obligations of confidentiality.

3.21 Non arbitrability of subject-matters

Indian law provides the award will not be enforced by a court in India, if, it is satisfied that the subject matter of dispute was not capable of being settled by arbitration under Indian law. The following categories of disputes among other are not capable of settlement by arbitration; A) disputes are binding on a third party or the public at large; B) dispute which, under an act, are required to be settled by special court; C) disputes arising from or founded on an agreement which is void on subject being unlawful; D) criminal matters involving non-compo unable offences; E) disputes involving public interests or public policy; F) disputes relating to personal status; G) disputes leading to an award imposing fine or a term of imprisonment.

3.22 The application law

To appoint the applicable law to solve of international problem depends on the parties to choose. It is very important to the arbitration process as emphasized in UNCITRAL Arbitration rules article 1 Para 1of 1976 and revision of UNCITRAL in the article 1 para3 of 2010 which states that the rules which govern the arbitration process unless these rules are in conflict with a provision of the law application from which the parties cannot derogate in this situation the provision shall prevail. United Nations has subsidiary parts for that purpose. According to the trade division of the United Nations the contracting state make agreement to use the rules, but after appointing the law of the arbitration process the arbitral tribunal has to follow with that, on the basis of the law applicable to the arbitration contract.242 On the basis of the place of the award where made, 243 and the law of the country where the award shall be enforced.244 According to Mezger; only the arbitration contract can determine whether an agreement is subject to arbitration or not.245 The problem of the application law in arbitration proceeding which involve contract among foreign countries is that it is

243 Ibid, Sec.1 (D) 42.
244 Ibid,Section 2
possible to apply more than one law to the arbitration procedure. Article 33 (1) of UNCITRAL arbitration rules provides “the tribunal shall apply the law designated by the parties”. In this part of article, the parties are allowed to determine more laws. In fact, more law (applicable law can be more single law, for example, ICSID arbitration rules, and one of national law for arbitration) may support the arbitration process, and also help to find the solution of the problem. This is a right of the parties to apply unification law to be procedure of the arbitration, but failing such designation by the parties this right is conferred to arbitral tribunal and shall apply the conflict laws. According to Article (33(1), of UNCITRAL the agreement of the parties is on the basis of the arbitration procedure. The condition of subject matter is very important (subject maters arbitralibty) the parties have to consider that to appoint law applicable. So, if the law applicable is conferred to the arbitral tribunal, it (law applicable) shall apply by the conflict of law where the parties have not agreed upon.

The United Nations’ agreement Article V, section I (a) states; if for any reason the parties don’t designate the application law, the law of the country; in which the award has been rendered shall govern”, in UNCITRAL arbitration rules public interests and policy of the country the parties took place will be govern, as it stated that the contract of the parties determinate the procedure for arbitrators. The UNCITRAL procedure can be a model to arbitrate of the problem, some views are opposite of governing of the law of the country where the parties took place of arbitration,(in which the award has been rendered shall govern) because it may say that the law of the place contrast to the aim of the parties. At first, the public policy of the country is important, as this view, the public policy and the agreement of the parties are governed the arbitration process. It is a draft in the Institute for the unification and harmonization of Private law in Rome.246

The Copenhagen of 1950 follows the same concept247, in which the parties apply any rule they select to be law of application. It usually considers the situation of the case of the arbitration to be capable to refer to the arbitration, and also article III of the International Chamber of Commerce states; (accepts the prevalence of will of the parties generally) it means that parties’ intent determines the law applicable for arbitration.248 Even the United Nations agreement recognizes the unrestricted will of

246 Supra Note,76,P.407.
247 Supra Note,245 at 87,pp.56,66.
248 Ibid,at.86,P.29.
the party to determine the applicable procedural law. The parties shall submit the law application to the tribunal; it is one of the duties of the tribunal to apply the agreement and law of application from the parties, but the parties are limited to apply any rules to be a law of application, also arbitrators are limited to choose the law applicable unless the parties haven’t determined. They (arbitrators) have to regard to the agreement of the parties. As stated in UNCITRAL arbitration rules Article 33 (2), unless the parties have expressly authorized the arbitral tribunal to do so, and the law applicable to the arbitral procedure permits such arbitration.

Generally, the applicable law has to be chosen by the parties, thus the arbitrators are restricted to choose the law applicable. The arbitrators (arbitral tribunal) are just free to appoint law applicable where the parties have not agreed the tribunal can make decision on the own method which the law application made. But the arbitrators who have been appointed to act as amiable compositeure are usually authorized to decide their own method of procedure. The amiable compositeure clause means that the parties have abandoned, as much as any right to appeal or seek any legal remedy against the award, but the arbitrators have to follow the laws and procedures that the parties appointed. Amiable compositeure requires the existence of an express agreement of the parties involved. A clause is saying that the arbitrators are supposed to act as “amiable compositeure” is sufficient. Article VII sub-article 2 of the European convention states that when this type of decision corresponds to the will of the parties and to the law which is applicable to the arbitration procedure even without such an agreement the arbitration arbitral tribunal has to consider the provision of the contract and the commercial practice according to this article.  

Applicable law in the international contract should be clear up with international conventions. It gets possible to consider the law of agreement will determine by the contracting States but the contracting States should be membership of the convention. Choice- of-law rules will remain relevant even if all States become parties of the United Nations Sales Convention. The convention itself refers to these rules in the following three contexts. The reason of the arbitration may be limited to the interpretation of the award, and contrast of that, the reasons may support a good interpretation of the award. With the choice of law application to the arbitration

249 United Nations agreement, article, V, S.I.d.
250 Supra Note, 76, p.409.
agreement, the parties can choose the law of any country to apply to the proceeding of their arbitration. It is customary that the law of the place where the arbitration takes place will not only apply to the arbitration proceedings but also the arbitration contract itself. \(^{252}\) As far as international arbitrations go, it seems that they can be subject to international concepts of commercial law or the lex mercatoria. In light of section 46(1) (b) of the 1996 Act, it is quite conceivable that the lex mercatoria could be applied.\(^{253}\) But as already stated; the process of the arbitration is dependent on the arbitration agreement made between the parties and thus the parties appoint the law application which will rule the dispute settlement because, it is a principle of validity of the award. In accordance with article 1 (2) of the UNCITRAL Arbitration Rules which state that, “these rules shall govern the arbitration except that where any of these rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail”. It simply makes a renvoi any law that any assert it as ‘applicable’…arbitration rules designed for ad hoc arbitrations between private parties anywhere in the world cannot contain any universally valid statement on which law is the law of the arbitration.\(^{254}\) In accordance with article 26 (1) of UNCITRAL, at request of either party, “the arbitral tribunal may take any interim measures…including measures for the conservation of the goods…or the sale of perish goods”. It seems that the law applicable by the arbitral tribunal is free to appoint, if the permission has been issued by the parties to be selected. But if such measures are to take effect in another country the law of that country will inevitably apply article 1(2) leaves it to the arbitrator to work out all applicable mandatory rules, looking at each of the potentially relevant laws connected with the arbitration. And also article 32 (7) provides; if the arbitration law of country where the award is made requires the tribunal shall comply with this requirement. This article refers to requirements that may additionally be imposed by the law of the place where an award is physically made.

It consists in the article 16(3) of LCIA that the law applicable to the arbitration (if any) shall be the arbitration law of the seat of the arbitration, unless the parties have expressly agreed in writing on the application of other arbitration laws. Again it states in article 3 (b) of WIPO referring to the article 59 (b), which reads as follows; ‘the law applicable to the arbitration shall be the arbitration law of the place of arbitration

\(^{252}\) Supra Note,111p.410.

\(^{253}\) Ibid,p.424.

\(^{254}\) Supra Note,216,p.183.
[as defined in article 39] unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration’. At last, in accordance with article 1(1) of SIAC Rules, article 1(2) of the UNCITRRAL rules, article 17(2), article 14(2) and 25 of ICIA rules the law of the seat will normally govern over the arbitration proceeding which the parties cannot derogate.255

In accordance with article (3) of the 1927 ICC Rules, which permits amiable composition with the agreement of the parties, it emphases the provision of article 1 (1) of UNCITRAL arbitration Rules which states that…the parties to a contract have agreed in writing that dispute in relation to that contract, by contrast, the original proposal for this rule provided for compliance only, with the law of the country where the case is tried.256 According to article 16 of ICC rules 1955, the arbitration proceeding shall be governed broadly, and internationally and also refer to the validity of arbitration agreement to the law applicable in the merits. Again in accordance with article 35 of ICC rules which states that the coverage of the law of the place of the proceedings… no international instrument or municipal law intends to give effect to awards that have been set aside where made…when the law of the seat and the law of the place of enforcement prescribe conflicting requirements. Article 15 (1) directly provides the arbitral tribunal to consult with the parties on which law’s requirements to follow…the tribunal must comply with that law. The arbitrators should as a principle have to apply the provisions of law chosen as supplement when those would conflict with mandatory rules of the controlling forum. Arbitral tribunal will usually avoid making general pronouncements on either the lex arbitri or more specifically, the procedural law applicable unless they are required to do so to resolve a specific problem that arises in the proceedings. In international commercial agreements the parties are entitled, under the general principle of arbitration to choose the law applicable to the procedure of arbitration, must be read as subordinate to the principle of effectiveness derived from article V (I) (e).257

255 Ibid.,p.187.
256 Ibid.,p.188.
257 Ibid.,p.200-205
3.23 The application of law of the parities

Applicable law will govern over the arbitration process; the authority of the parties is depending on agreement to choose, because bearing certain rules for the purpose of hearing. The parties are empowered to select the law of arbitration process, it may occurs in some situation which the parties have not agreed to the application of law, then it must be gathered from factors such as an implied terms and the general tenor of the agreement, which the place where the agreement was drawn up and executed or the transaction is closed determines law applicable of arbitration. So it may consider that in such situations, different national laws may apply to the arbitration agreement and individual reference. The procedures which have been made by the parties are govern the arbitration process, however, if the parties have not chosen the law of applicable to govern the process of the arbitration, the law of applicable appoint by arbitrators, the law applicable is important to recognize and enforce of final award, if it is not respected the award may be set aside. When the parties contractually agree to arbitrate under a set of arbitration rules…an arbitral institution accepts the role to administer the arbitration and the arbitrators accept their nominations. The institution and the arbitrators agree to comply with and give effective to the terms of the parties’ agreement. It contains a stipulation that would make the arbitration process fall foul of a given law, including the law of the seat. When arbitrators accept their appointment or nomination; they are bound to give effect to the arrangement that the parties agreed upon, but the arbitrators or arbitral tribunal as well are not immune from claims of misconduct. As stated in the New York convention article V (1) (d), the law cannot be construed as permitting arbitrators and the arbitral tribunal to make awards that is contrary to the agreement of the parties. In such a situation, the tribunal applies the law of seat of arbitration because the law applicable does not determine by the parties. It seems, both parties have to plea on the basis of the law application made by the arbitral tribunal.

3.24 Source of applicable law

The source of applicable law in international arbitration is numerous; there is no single source of arbitration law. Arbitration law legitimizes such agreements and provides legal support for their recognition and enforcement. Thus it includes; international conventions, arbitration agreement, national legal systems, habitual

258 Supra Note,102,p.742.
259 Supra Note,216, p.171.
260 Ibid,p.172-175
conduct of proceedings in various trades, rules of arbitral institutions, precedents conventions have. Over a period of time, it has brought about uniformity and certainty in law across jurisdictions. The international conventions are generating confidence for corporations to invest and do business in different national legal systems. The main source of international arbitration for dispute settlement is the arbitration agreement that includes law applicable and specific procedures the parties intended to do. An arbitration agreement identifies the parties to the dispute defines the dispute or type of dispute that can be referred to arbitration, contains the tribunal’s mandate, applicable law, and seat of arbitration. \(^{261}\)

National legal systems are a source of arbitration law in various places and distinguish between domestic and international law. The Habitual conduct of proceeding in various trades is depending on some procedure unique to territories of some countries as like English law or similar to the system of law in numerous countries. The rules of institutions are set as standard provisions for the conduct of arbitral proceedings in general and are prepared by arbitral centre of institutional( some of international institutional has fix arbitral board for arbitration). These rules provide that when a dispute is submitted to their representative institutional rules, their rules will apply, as per the agreement. \(^{262}\) But the rules of conduct do not apply to the international arbitration as a source of applicable law.

**3.25 Proper law of the arbitration agreement**

The law applicable to the arbitration agreement should be distinguished from the law governing the capacity of the parties to arbitrate (subjective arbitrability) and the amenability of the subject matter of a dispute to arbitration. The parties are free to choose the proper law governing the international commercial arbitration process. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. If there is no expression to choose the law governing the contract as a whole, and the arbitration agreement in particular, there is, in absence of contrary indication, a presumption that the parties have intended that the proper law of the contract as well as at the law governing the arbitration agreement are the same as law of the country in which the arbitration is agreed to be held. \(^{263}\)

\(^{261}\) Supra Note,241, p.2.  
\(^{262}\) Ibid, p.4.  
\(^{263}\) Supra Note,8,p.177.
3.26 Substantive law

To define the substantive law shall say that the parties on the basis of their own interests are free so that they have a right to apply a general principle of law. As the substantive law to be the procedure for solution in the arbitral tribunal, parties have been fully aided to deprive the regular court of any jurisdiction over their litigation and to subject their case to the arbitration. Arbitral tribunal bound to make final decision based on substantive and procedural law which is most favorable to the commercially strongest party. The result is the establishment of a genuine legal and economic order outside of government control. 264

3.27 Choice of Substantive law

All nationals arbitration acts provide that failing any designation by the parties, the arbitral tribunal shall apply the law of the state with which the subject-matter of the proceedings is most closely connected. (The parties choose the substantive law) under national arbitration legislating for direct choice of law and also institutional arbitration rules, therefore the international arbitration mechanism granted that some opportunity to the arbitral tribunal to select the applicable law. (If the parties have not determined the arbitrators have authority). They deem appropriate, either “directly” or through the application of the choice of laws that the arbitrators consider appropriate. 265 So the choice of law shall be made by the parties as stipulated in the New York Convention; the tribunal shall decide a dispute in accordance with such rules of law (as may be agreed by the parties). In accordance with article 35(1) of UNCITRAL Rules 2010, article 17 (1) of the ICC rules ICLA Rules, article 22 (3) ICDR Rules article 28 (1) and some national arbitration rules such as article 33(1) International Arbitration Rules that provides the recognition of final award shall be under the substantive law. It is related to the autonomy of the party in arbitration process, thus party autonomy in arbitration is quite unlimited. Whatever restrictions different legal systems may place on the right of the parties to choose the law to govern their relations those limitations can only bind the courts of that legal system. 266

265 Supra Note, 8, p.911.
266 Ibid, p.931.
3.28 Proof Substantive Law

The arbitration process has designated by the parties and the arbitral tribunal executes the hearing of arbitration. It states in article 33 of UNCITRAL which the arbitral tribunal shall apply to the parties to designated application of law. In failing of such designation “the arbitral tribunal shall apply the law designated by the conflict law rules which it considers applicable”. The authority of the arbitral tribunal is about the law of applicable which may be fine the law applicable from any statute, case law, international rules or principles and text books. Failing by the parties, the arbitral tribunal must follow an impartial (neutral) and clear approach to appoint the law applicable so that the parties understand the issue which concern the arbitrators and can have an input in to the arbitrator’s discussion and conclusion. The importance of law applicable is in finalizing of decision by the arbitral tribunal. The arbitrators should plea the law applicable and they have to be as amiable compositeur or ex aequo et bono with whatever they determined in making decision. If the tribunal identifies the law is legal issues would to determine possibility for being law applicable. It will facilitate that the legal argument will be focused, and responsible to the substantive law. The authority of arbitral tribunal to have a power to determine rules of hearing is based on the article 27 of UNCITRAL model law. ²⁶⁷

3.29 The law Applicable to the substantive

The law applicable to the international commercial arbitration is determined by the agreement of parties to solve the dispute settlement by which rendering of arbitrators to examine the concept of provision exist (or available) in the subject matter. If the parties have not chosen the law applicable the arbitral tribunal shall apply to the law applicable to dispute. Model law, UNCITRAL arbitration rules and also Rome Convention and others rules are basic principles with regard to the right of parties to a contract to choose expressly or by implication, the law which is to govern their contractual relationship. Both the international conventions and the model law on international commercial arbitration confirm that the parties are free to choose for themselves the law applicable their contract. ²⁶⁸ The Washington Convention article 4 provides: “the arbitral tribunal shall decide a dispute in accordance with such rules of

²⁶⁷ Supra Note,199,p.254.
²⁶⁸ Supra Note, 97,p.95.
law as may be agreed by the parties”. And also, article (1) of the UNCITRAL provides: “the tribunal shall apply law designated by the parties as applicable to the sustenance of the dispute”. Article 17 (1) of ICC Arbitration Rules states: “the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute”. The parties are generally free to make agreement in various terms to determine the law or principle to a dispute arising out of that trade or commercial contract. But the contract should not be contrary to public policy or national interest of country of the arbitration taken place and to be the seat of arbitration. Accordingly, the parties do not allow the choice of a foreign law to override the mandatory rules of law of a country to which all the factual elements of the contract point. Instance, one such case is of a father and son’s breach of Iranian revenue law and export controls the father and son had agreed to submit their dispute to arbitration by the Beth Din, the court to the Chief Rabbi in London, which applied Jewish Law. Under the applicable Jewish law, the illegal purpose of the contract had no effect on the right of the parties and Beth Din proceeded to make an award enforcing the contract. In declining to enforce the award, English court of Appeal stated; “the court is in our view concerned to preserve the integrity of its process and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.  

3.30 Appointment of Arbitrators

In general the appointment of the arbitrators with the agreement of the parties is according to section II of UNCITRAL, articles 8 to 11, that states; the appointment of arbitrators shall be by the parties, and thus it cannot be over turned on the basis of fact or law. An arbitrator can misinterpret the law or make an egregious mistake based on the facts of case, and counsel will generally be unable to vacate the award resulting from the mistakes. Generally, each party has to appoint one arbitrator and then the two arbitrators have to appoint a third party who will be the president of the arbitral tribunal. A recent relevant example is the Supreme Court case (of commonwealth Coating Corp.v.continental Casualty Co). In this case, the third arbitrator, considered a person of special confidence and neutrality did not disclose to the parties and that he

269 Ibid,p.96.
270 Supra Note,117,p.122.
had prior dealing with one of the parties that these dealing were connected with the general operation in issue in the case to be decided by the arbitration tribunal. The majority of the Supreme Court took the position that the award had to be set aside even if the lack of disclosure was not based on any international wrong, since arbitration rests on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. So the tribunal usually includes three arbitrators, however, parties might want to have one who is a lawyer—usually the chair—and any one or two who are individuals with experience in the field. In international trade the experiences of the arbitrator is a very important factor and the non-lawyer may use his or her specialized knowledge to unfairly sway the tribunal. The availability of the arbitrators is important for the parties at the time of hearing or to be present at any time in which the parties would like to connect with him or her. The method selection is related to the arbitration agreement and if a case referred to an institutions is up to the regulations of the institution, then parties must select the arbitrators from the list provided by the institution in question. At first, each party shall select one arbitrator then the two arbitrators select a third one who becomes the chairman of the arbitral tribunal. In a case regarding the Libyan Nationalization cases, oil was discovered in Libya in 1959, and soon thereafter western oil companies negotiated concession agreements with the government, pursuant to a Petroleum Law of 1955, adopted during the reign of King Idris. In 1969, a military coup led by Colonel Muammer Gaddafi overthrew the monarchy and established a socialist people’s Arab Republic. In the period of 1971 to 74, the Libyan government carried out the Nationalization of all the interests and properties of the Western oil companies, including in particular, subsidiaries of British Petroleum (BP Libya), Texaco and Atlantic Ridgefield (Libyan American Oil Company or LIAMCO). Each of these companies had been operating in defined areas of Libya pursuant to concessions issued in accordance with the petroleum law…Each of the concession also contained an elaborate arbitration clause, providing for each party to appoint one arbitrator and for the two arbitrators so chosen to appoint an umpire, but if one party failed to appoint an arbitrator then for a sole arbitrator to be appointed by the president of the International court of justice.

271 Supra Note, 201, p. 381.
In accordance with the ICC Rules article 12 (5) each party selects one arbitrator, unless the parties have agreed otherwise, the third arbitrator is selected with an interview. (It) the interview should be limited to information about the arbitrator’s qualifications, experience, and availability. Therefore, whoever will be the presiding arbitrator in will be selected by the ICC Court of arbitration. The presiding of arbitral tribunal depends on the skill and experiences of the third person, thus the two arbitrators empower to select the third person. Article 13 of Working Group of UNCITRAL provides that for the appointment of arbitrators, nationals of any state may be appointed as arbitrators, but subject to the arbitration agreement no person should be disqualified by law from being appointed as an arbitrator on the ground of his/her nationality. So the basic agreement of the parties to resort to arbitration should be respected. The number of arbitrators must be limited to three arbitrators, in accordance with article 14 of Working Group of UNCITRAL which provides that the number of arbitrator shall be equal to the number of parties, three arbitrators shall be appointed and a sole arbitrator.

In arbitral tribunal of the international chambers of commerce, the members of the tribunal are appointed by a so-called court of arbitration which is “an international arbitration agency composed of members appointed by the administrative board of the international chamber of commerce”. Furthermore, today most of the arbitration cases are handled by permanent institutional arbitration tribunals. Normally, the rules of procedure of these tribunals do not permit the parties to appoint arbitrators freely. In fact, some of the institutions have in selecting from list formed by the institution. Second procedure to appoint the arbitrators is by the third person whoever is outside the institutions but has got good experiences in international trade law, though this person authorized to select the third arbitrator. This procedure usually is existence in European countries especially in England. Chosen from the list that arranged also on the other stage of selecting the appointment of arbitrator given to the third person who chosen by the institution, it happened into the England and use institution because these institutional party do not given opportunity to appoint an arbitrator in spite of existence of international trade problem, that chosen the arbitrators and procedure of the tribunal to hearing of the case. The London Court of arbitration has prepared a list of candidates for the office of arbitrators. It (the London Court of Arbitration) appoints the arbitrators for particular case from the said list. The list was suggested
partly by the board of the London Chamber of Commerce and partly by the London City Corporation. The parties have a right to express a suggestion for some of their candidates to the London court arbitration to be an arbitrator in the tribunal; however London court is free to make its own choice. As already noted, The American Arbitration Association (AAA) is the biggest arbitration organization in the world in using a list system. The arbitrators are chosen from the list of candidates, whenever the parties themselves cannot agree on or have not provided another “method” for, the appointment of arbitrators. This is the same a regular court in the national law. The parties may agree that the entire case is to be decided by one arbitrator. Under the article 7 of International Chamber of Commerce the parties may suggest the name of this arbitrator jointly ‘to the court of arbitration for confirmation’. Failing such an agreement, the member of the tribunal is appointed by the court of arbitration.

According to the article 1 of ICC the UNCITRAL rules an authority is existence to appoint the sole arbitrator which will follow sub-article 3 and the article 6 of the UNCITRAL arbitration and also the ICC will choose qualified persons having the necessary professional and business back ground primarily from among those who have previously acted as arbitrators under ICC arbitration rules. Also the ICC advises the appointment under the UNCITRAL arbitration rules by requesting all parties to appoint a sole arbitrator. Thus, according to ICC UNCITRAL appointing authority rules, the appointment of a sole arbitrator, shall be doing it in writing. To fulfill of the appointing a sole arbitrator the ICC may through its court of arbitration constitute an arbitration committee which may decide unanimously or it also may refer to make a decision by Plenary Session of ICC court of arbitration. The second role of ICC UNCITRAL arbitration rules about the appointment of the second arbitrator in the arbitration procedure is done by its own discretion to ensure that the second arbitrator is impartial and independent of each party; ICC UNCITRAL would like to do the procedure separate from the parties because the second arbitrator is on behalf of a party in default.

Differently of the national of the parties shall be corresponding with an unify law to arbitration process, the parties have to designated the law applicable in the arbitration agreement in some positions there is no guarantee that the person designated in the agreement to act as an arbitrator will be willing and able so to act at the time when

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273 Supra Note,207, p.381.
dispute eventually arises.\textsuperscript{274} In accordance with the article 8 (3) and (4) of the ICC Rules where is to be a sole arbitrator, and parties fail to nominate one within 30 days from the communication of the request for arbitration to the other party, the arbitrator will be appointed by the ICC’s court. Accordingly, pursuant to the articles of LCDR, LCIA, WIPO and ICSID where the three arbitrators need to be third arbitrator will be appointed by the ICC court, unless appointing by agreement of the parties within a limited time. The appointing authority is sending the list of the arbitrators to the each party. In ad hoc arbitration where the parties have not designated an appointing authority in their arbitration agreement, and are unable to designate one after the dispute arises, it is necessary to consider whether recourse to competent court is possible. If not, the arbitration agreement is in operable, a sole arbitrator or of the presiding arbitrator in an international commercial arbitration may have to perform function against a background of conflict between the rules of procedure agreed by the parties and the requirements of the law of the place of arbitration, a conflict of culture and legal background of the parties’ representatives.\textsuperscript{275} The model law provides that the national courts have a power to appoint arbitrators where necessary as it states in the article 11, and in the England Arbitration Act 1996 section 18 provides; “court the power to make an appointment where the arbitration agreement provides for an appointing authority to perform the task and the authority refuses or fail to do so”.

3. 31 Designating an appointing authority

In accordance with general international arbitration rules, if the parties have not agreed upon an appointing authority to appoint an arbitrator, a party may request the Secretary General of Permanent Court Authority to designate one. The authority of the appointing authority arises where the parties have not agreed to appoint sole arbitrator. Generally, if the parties have not agreed to appoint the sole arbitrator, at request a party to the appointing authority to select the sole arbitrator. It probably occur the appointing authority refuse the request of a party or failing to do, then the third opportunity, is available if a party submit the documents can request secretary General of Permanent Court Authority. The authority of the Permanente Court is a

\textsuperscript{274} Supra Note,97, p.187.
\textsuperscript{275} Ibid, p.189-190
third position of the appointing, and the secretary–General after receiving the documents and organization or individual institutions to perform the function of appointing authority. The secretary General does not usually give reasons for the decision. Parties and their advisors must be aware that it is better to nominate an appointing authority at the time of preparing their arbitration clause or submission agreement, since failure of this leads to delay. 276 This provision depends on the refusal of request by the parties.

3.32 Power of the Appointing Authority

The appointing authority is derived from the arbitration agreement; at request a party the general discretion of the appointing authority is to appoint the sole arbitrator. It is free to select the procedure of appointment but both of the parties jointly request the appointing authority to appoint a sole arbitrator. It may also apply the list procedure, the list procedure includes with the names of individual of sole arbitrator, firstly, this list shall submit to the disputing parties to the rank the names of candidates or cross out of unsatisfactory names then return the list to the appointing authority again. The appointing authorities, guided by such choices, appoint the sole arbitrator on behalf the disputing parties. So, the power of the appointing authority arises from disputing parties, and accept the provisional of appointing and also the parties shall accept the sole arbitrator which appointed, the appointing authority renders a service to the disputing parties and not to the arbitrator and does not enter in to and nor does it concludes any contract with the arbitrator it appoints. 277 The arbitration process is controlled by the disputing parties and the arbitrator to the extent that the disputing parties delegate their power. 278

3.33 Composition of the arbitral tribunal

The panel of arbitral tribunal shall be made within fifteen days after receipt of statement of defence by the respondent. According to article 5 of UNCITRAL, if the parties have not agreed that, three arbitrators shall be appointed, it which may be done at any time even during the proceedings of arbitration. Each of the two party-appointed arbitrators will usually be of the nationality of the nominating party,

276 Ibid, p.194.
277 Supra Note,91,p.89.
278 Ibid,p.128.
bringing to the tribunal a special knowledge of the commercial law and practice of that country. The composition of tribunal shall be under the agreement of the parties but in accordance with article 6 of UNCITRAL rules that states “the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties”. If “no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party’s request therefore, either party may request the Secretary-General of the permanent Court of Arbitration at the Hague to designate an appointing authority”. The arbitrators may only appoint if the parties have not agreed to appoint of the arbitrators.

If no agreement has been between the parties, either party may request a third party to appoint the arbitrators, but the travaux preparatoires reflect the fact that if the appointing authority is an institution, there will be benefits in terms of continuity and expertise, without excluding the possibility of using an individual.279 The appointing authority shall use the list-procedure that includes; full names, addresses, nationalities, description of their qualifications of the proposed arbitrators, then the parties are empowered to select arbitrators and return the list to the appointing authority; and the authority selects a sole arbitrator from the approved names on the list taking in to account the order of reference. To appoint the arbitrators in compliance with UNCITARL Rules procedure, the parties must appoint in accordance with article 6 that; if the parties have not agreed to appoint the arbitrators or it may be that a party refuses to appoint one within thirty days from receipt of notice of the other party’s appointment of an arbitrator, the party who has appointed its arbitrator may then request the appointing authority to appoint the opposing party’s arbitrator. To appoint arbitrators by the appointing authority the parties must submit a copy of the arbitration agreement, the information which the appointing authority needs to do so.

3.33.1 Selection of arbitrators

The potential experience and knowledge of arbitrators are very important, in fact, these provisions shall consider of appointment the arbitrators. As noted in the article 7 (2) of AAA ICDR Rules where ex parte communications with arbitrators are acceptable, “no party or anyone acting on its behalf shall have any ex parte communications with the arbitrators.”

279 Supra Note,235,p.178.
communication relating to the case with any arbitrator or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection”. This situation provides that the parties are empowered to appoint availability for determination of arbitrator. And also article 5 (1) of the IBA Rules of Ethics allows for ex parte contact as long as the parties’ enquiries are designated to determine the arbitrator’s suitability and availability for appointment and provided that the merits of the case are not discussed. In international commercial arbitration the important issue with regard to selection of arbitrators is their commercial background. It is usual that at least one member of the tribunal is a lawyer or a person with sufficient knowledge about arbitration law and practice. In international context, one may face difficult problems of procedure or conflict of laws, these problems can be better handled by a lawyer than by a lay person with expertise in another area.280

3.3.3.2 Number of arbitrators

The appointing of the arbitrators will be determined in accordance with the chosen arbitration rules or if no rules have been agreed upon, it will be on the basis of the applicable law. All international arbitration instruments which deal with the matter leave the question of the number of arbitrators to the parties, in the first instance, although a certain limitation on the number of arbitrators might be appointed by the agreement between the parties is contained in the CE Uniform law, article 5 (2) requires that “if the arbitration agreement provides for an even number of arbitrators an additional arbitrator shall be appointed”. Where the parties do not agree on the number of arbitrators, the European rules article 4, the CE Uniform law in article 5 (3), the OAS Draft Uniform law in article 7 states and the IBRD Convention in article 37 (2) (b) provide for an arbitral tribunal consisting of three members. The UNIDROIT Draft in article 7 each party shall appoint one arbitrator, and where there is an even number of arbitrators, they “shall appoint another arbitrator who shall, as of

280 Supra Note,125,p .233.
right, be president of the arbitral tribunal. Article IV (4) of the European Convention provides for appointment of “sole arbitrator, presiding arbitrator, umpire or arbitrator.

3.33.3 Sole arbitrator

The sole arbitrator exists in common law tribunals. It involves less cost which makes it more lucrative than a three member tribunal. A sole arbitrator potentially is faster than a three member tribunal as it is not necessary to co-ordinate the busy schedules of three arbitrators to find time for a hearing generally in common law countries, if the parties have not agreed on the number of arbitrators a sole arbitrator is to be appointed, provided in article 8 (2) of ICC Rules; “where the parties have not agreed upon the number of arbitrator the court shall appoint a sole arbitrator, save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators”. The English Act provides in section 15(3); “if there is no agreement as to number of arbitrators, the tribunal shall consist of a sole arbitrator”.

3.33.4 Three member tribunal

The main advantages of three arbitrators are that they can discuss the case with each other which will improve the quality of the award; the three arbitrators will reduce the risk of misunderstanding. As already stated, the arbitration process relays on the scientific or technical knowledge required of the three arbitrators. On the whole, while the legal background of the parties may differ from each other because the parties are from different legal background and national laws, thus they appoint arbitrators with especial experiences (probably some of the arbitrators are familiar with both legal background of parties) which can be very reassuring. Such a background can be helpful in understanding the case put forward, but there may be problems within the tribunal if one of the arbitrators is violating the confidentiality of the tribunal’s deliberations. So in accordance with CIETAC Rules article 24, DIS Rules section 3(1) and UNCITRAL Rules article 5 provides that the arbitral tribunal shall involve three arbitrators. Article 5 of UNCITRAL rules provides, “If the parties have not previously agreed on the number of arbitrators (one or three) and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed”. The applicable law determines the number of arbitrators, if the institution did so without any prior consent of the parties the award rendered would be open to appeal under article V (1)
(d) of New York convention. The Stockholm Chamber of Commerce is an exception of this rule as article 16 (1) SCC Rule contains a presumption in favour of a three member tribunal but allows the institution discretion to appoint a sole arbitrator where appropriate. Some of institutions decide to appoint more than one arbitrator where the dispute is involved.

3.34 Duties of the UNCITRAL arbitral tribunal

The duties of the arbitrators imposed by the arbitration agreement and law applicable is done before the arbitrators are appointed or during the course of the arbitration, or both. One of the duties of the parties may be to impose an arbitral tribunal in a certain period of time to issue an award. It depends to the arbitration agreement submission to arbitrators which is to be read under the auspices of the rules of arbitration, and these applicable rules impose specific duties on the arbitral tribunal imposed by the parties themselves. The arbitrators are liable in the same way as the judge for “deliberate actions which cause damage to the parties or to third party”. The wrongful act which arises from the arbitrators to the parties would to be liable for remuneration of that damage in both common and civil law systems. The arbitral tribunal shall arbitrate under the law of arbitration, if arbitral tribunal does not do its duties under the law of arbitration, it must refer to the law applicable to intervene with respect to the national law of the arbitration place where the arbitral took place; In some jurisdictions there is no opportunity for concurrent court control, and aggrieved party must wait until the end of the proceedings before challenging the award.

The arbitral tribunal act with the international rules and applicable law, and it should rule on a plea of the parties and its jurisdiction. Thus, all of the discussion in the arbitral tribunal should be by all members of the arbitral tribunal under the submission agreement unless the absent party has failed to attend a meeting or a hearing, having been given proper notice to do so. The duty to act judicially means that each party must be accorded equality of treatment and given a fair opportunity to present its case. Basically it provides in the article 15 (1) of UNCITRAL arbitration rules, “at any stage of the proceeding each party is given a full opportunity of presiding his case”.

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282 Supra Note,97, p. 238.
284 Ibid,p.246.
The arbitral tribunal in UNCITRAL arbitration process will choose some rules and constitute an agreement on procedure which should be applied by the tribunal or where no agreement, it can choose. The duties of the UNCITRAL is not limited by some rules or by agreement of parties, the UNCITRAL can arrange any rules which help for hearing procedure. In some situation, the period of time of the case is over in hearing, but arbitration differs from other parts of hearing in regular procedures so that in arbitration to examine the case by the arbitrators in process of the arbitration is different. In fact, the arbitrators shall regard to main principle of the Arbitration Act Arbitration process is amiable compositeur to arbitrate of the case. The arbitrators are free for using of their knowledge because the arbitrators are famous arbitrators which have appointed by the parties, although the procedure is has elected by the parties. In different situation if the procedure is not enough for hearing they can appoint rules which support of the hearing.

In according to international conferences on trade and business, the UNCITRAL secretariat has to prepared a commentary view on the draft that have been established between the parties. Also the UNCITRAL has a protector duty or supporting of the trade relation in international business, though, the UNCITRAL prepared rules to join of the countries or who will do the trade by its viewpoints. This view which that the UNCITAL has to help of the merchants has mentioned in the Vienna convention in March-April of 1980. In the UNCITRAL a decision for any cases is a political; if states do not to ratify or accede of award through the UNCITRAL convention nothing to do with regard. The UNCITRAL has to unification and harmonization of rules between the contracting states. It has to exist international negotiable instruments law to make interpretation conventions, in fact some conventions have to dispute settlement or in making aspects to prevent or prohibit of problem in international trade is missed. Because to dispute settlement in international trade law harmonic of the rule is very important which any tribunal can reach to effect award.

In accordance with article 32 (2) (b) of UNCITRAL model law, under the agreement of the parties or during the hearing of the arbitration at request of the parties the arbitral tribunal shall issue order for the termination of the hearing. It is clear that the arbitral tribunal shall order but the arbitral tribunal must accept the applied of the parties, though it is acceptable to apply of the parties to terminate of the hearing in fact the arbitration process is governing by the agreement of the parties. The
agreement of the parties is determining all producers of hearing but the request of the parties in hearing to terminate of the process is different in that it needs for the acceptance of arbitral tribunal. So, on case of agreement by the parties, the arbitral shall order for the termination. But if the parties requested to terminate of the arbitration process the arbitral tribunal shall make it in forming of an award with all requirements of arbitral tribunal award and reasons of requested. Because of the reasons to request for the termination of hearing may save right of third parties, eventually the parties shall pay the cost of arbitrators.

The second reason for the termination of the arbitration process, under article 32 (2) (c) of Model which provides that if the continuation of the arbitral proceeding “becomes unnecessary or impossible”, thus the arbitral tribunal shall make an award with reasons what it becomes unnecessary, or if the proceeding of the arbitral becomes impossible, the arbitral tribunal shall make an award or by an order for termination of the arbitration proceeding. The tribunal shall write reasons of impossibility, and also shall inform to the parties to be impossibility of the hearing of arbitration, then it is not necessary to be agree with the parties. In fact, after determining of the arbitral tribunal, it is in a power situation to do its duties regardless to permit of both parties. The termination of the arbitral hearing by an order or an award shall communicate to the parties; though it absolutely is obvious differ between orders an award with their effects.

One of the duties of arbitral tribunal is that to have chosen of the application law of the arbitration dispute, that duty imposes on the arbitral tribunal to act fairly and impartially as between the parties giving each party a reasonable opportunity to put his case and address that of his opponent. It shall be for the arbitral to decide all procedural and evidential matters, subject naturally always to the intention and agreement of the parties.285 Another duty of the arbitral tribunal is hearing of the case which it explained in to the English Arbitration Act 6 article 33, which states: to act fairly and impartially as between the parties. It must ensure that the rules of natural justice are prioritized. Both the parties must be given a reasonable opportunity to put their cases and defend themselves. These duties are mandatory and set out in section 33 of English Arbitration Act. In the important note of this duty must be that the parties cannot exclude the contract to derogate or omitted of that provision. Thus, the

285 Supra Note,111,p.424.
effect is that, tribunal is not subject to any rigid procedure requirement as in jurisdiction proceeding but a flexible requirement of fairness and impartiality. The process of arbitration through the duties of the arbitral tribunal is depend on the relationship between the parties and the arbitrators so ICSID rules provides; article 15(1),45(6),46,48(2)(6) the arbitral tribunal shall apply to the parties which at any stage of the proceeding each party is given a full opportunity of presenting his case. The parties have not allowed in making any contract in contrary of law of the arbitration. Consideration with this general duty is existed in any rule to save of the right of the aggrieved by party in an arbitration to bring an action under section 68 to have an award set aside or varied on the basis of a serious irregularity. It is provided that applicant has or will suffer substantial injustice from the irregularity. 286 On other hand, the arbitral tribunal shall commence to the arbitration process without a demand of the parties, and the agreement of the parties is base of a demand to initiate of process, while the arbitral tribunal shall a demand from the parties to submit all documents.

3.35 Power of Arbitral tribunal

The base and source of arbitrators’ power is under the arbitration agreement made between the parties in writing, thus the risk of changed circumstances or the discovery of gaps beyond the requirements of hardship or similar institutions of the applicable substantive law is to be borne by the parties. The agreement of the parties and appointment conferred the power to the arbitrators any power over and above that allowed by the relevant law, 287 an instance, the UNCITRAL rules article 15 (1) provides “conduct the arbitration in such manner as it consider appropriate, provided that the parties are treated with equality and that at any stage given a full opportunity of presenting his case”. The arbitrators have a power to determine the place of arbitration, unless agreed by the parties, and determination of the language or languages of proceedings, the law applicable to the substance of the dispute unless agreed by the parties.

The power of the arbitral tribunal has been granted under the agreement of the parties, it has got power to order to evidences- taking, it depends inflict on the rules of

287 Supra Note,97,p.235.
the applicable law applied by the parties. Generally, the arbitral tribunals have a power to request from a competent court of States for assistance in taking evidence. The 1976 UNCITRAL rules do not constitute anything like an eventually balanced compromise between different jurisdictions, being heavily slanted towards continental practice, and do not empower the tribunal to order general discovery of relevant documents. The parties can draft their own provisions dealing with discovery for inclusion in the arbitration agreement. Generally the authority of the arbitral tribunal is under the rules of law applicable by the parties and the agreement of parties. The LCIA Rules article 22 (1) (b) and (c) provides that the tribunal has got power to order to disclose documents and other materials, while article 20 of ICC Rules does not expressly permit arbitrators to order discovery, however, this authority [to order production of documents] is implicit in the arbitrators’ mandate under article 14(1) to establish the facts which “by all appropriate means”. Article 23 of AAA commercial rules permits pro-hearing discovery; “although this language does not specifically authorize an arbitrator to order pre-hearing discovery”, it confers on arbitrators broad powers to ensure that evidence is presented at arbitration hearings and so factual issues are sufficiently developed. The disclosure is under article 68 and 69 of 1907 Hague convention interstate arbitration.

3.36 Source of arbitrators’ power

The source of the power of arbitrators in the arbitration process may derive from law of the place of arbitration (lex arbitri), the basic authority to adopt or the supplement of contract. It is the law applicable to the arbitration in accordance to the UNCITRAL arbitration rules. The contract of the parties previously given the power to the arbitrators, a significant problem with this relationship between the arbitration agreement and the lex arbitri is that, only few arbitration laws contain express provision dealing with the arbitrators’ authority to adopt or supplement contract. The power of arbitrators supported by the UNCITRAL arbitration rules but also to support the power of the arbitrators the act of 1999 Swedish in article 1020(4) provides; “the parties may agree to submit…to arbitration…the modification of, the legal relationship between the parties”. 288 Contrary of that viewpoint about the power of the third party and interveners outside the procedural, the UNCITRAL arbitration rules

288 Supra Note,199, p.278.
considered to be a power for the arbitrators which in agreement made by the parties. The effect of any decisions taken by the “tribunal” in that direction can only be interpreted according to the law of obligations. Consequently, they have to be judged according to the law applicable to the contract.\textsuperscript{289} The view of action of the arbitral tribunal to decide under the law of obligation in accordance to the UNCITRAL given by the contract, in fact, on base of the arbitration agreement the parties may challenge the arbitrators or expert and witnesses of each other.

### 3.37 Jurisdiction of the arbitral tribunal

In accordance with article 21 (1) of UNCITRAL arbitration Rules jurisdiction of the arbitral tribunal exist with the arbitration agreement, the question as to the competence and jurisdiction of arbitral are ultimately a matter for the relevant national court to settle in accordance with the \textit{lex fori}. Article 21 (2) provides that the arbitral tribunal shall have a right to govern and examine the validity of arbitration agreement but clauses of arbitration are separate of the agreement. So, the validity of the arbitration clause has not affected to the contract. It provides which in article 21 (2) ‘under these Rules’, it shall be treated as an agreement independent of the other term of the contract’. Thus the decision of arbitral tribunal in which that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The time limit to a plea by the tribunal shall be raised not later than in the statement of defence or with respect to a counter-claim, and in reply to the counter-claim. This time limit may supply a jurisdiction for the tribunal. A case, in the Chevron v. National Iranian Oil arbitration, the tribunal found that a jurisdictional objection raised eight months after the statement of defence was filed, without evidence or reason sufficient to raise substantial doubt as to the claimant’s nationality was not raised according to article 21 of NAFTA.

The intention behind the general rule was to ensure that proceedings were conducted efficiently, bearing in mind that an early resolution of jurisdictional issues could yield substantial Cost savings. The article 21 (4) of NAFTA tribunal during the Methanex (Partial) arbitration, when considering whether to hear an objection to jurisdiction as a preliminary question, weighted up the potential costs savings in terms of both time and money against the practicality of splitting the proceedings into two, given that the

\textsuperscript{289} Ibid, p.279.
jurisdictional issues were to a large extent intertwined with the merits of the case. At the request of the party to the arbitral tribunal discretion, to order to the parties to decide in which further written statement annex a new evidences. Situations including amendment of experts and jurisdictional issues or preliminary questions may also necessitate further written statements.\textsuperscript{290} The time limit to submit the statements under the article 23 of UNCITRAL arbitration rules may not possible to exceed than forty-five days since the request of the party, but the request of the party shall be in writing. It is clear from the \textit{travaux preparatoires} and from the wording of article 23 of UNCITRAL arbitration rules; the forty-five days limits so ‘intended to serve as a general guideline’, which may be adopted by a tribunal as necessary. But the article said allowed to the arbitral tribunal to extend the time limits fixed by the tribunal, so if it ‘justifiable’ may possible to extend.

Jurisdiction of arbitral tribunal of the UNCITRAL is not similar to other institutional arbitration to the disputes settlements in the international sovereignty. The UNCITRAL rules provide that the parties have to submit their documents in accordance to articles 24 and 25, but the arbitral tribunal have the power to rule on objections and determine the existence or the validity of the contract of which an arbitration clause which forms part of a contract. The arbitral tribunal shall have the power to make a decision that the contract is null and avoid, but it shall not entail ipso jure the invalidity of the arbitration clause. The arbitral tribunal may regard to some policy for the gearing of the arbitration. In general, the arbitrator only has authority to answer the questions referred to him and if arbitrator exceeds his jurisdiction his award can be challenged as a nullity.\textsuperscript{291} The agreement of the parties to submit the case to an arbitral provides to refer the jurisdiction to make decision; sometimes an arbitral tribunal must stay within its terms of reference, competence or authority. Jurisdiction of the arbitral tribunal may challenge where it is asserted that some of the claims that have been brought before the arbitral tribunal do not properly come within its jurisdiction. Also the challenge of jurisdiction may arises a partial of jurisdiction of the arbitral tribunal as to counter claim by signing a memorandum may effectively bring new claims within the jurisdiction of the arbitral tribunal. Under some

\textsuperscript{290 Supra Note,235,p.201.}
\textsuperscript{291 Supra Note,53,p.89.}
arbitration rules, where the arbitral process has already begun, new claims may only be added with the permission of the arbitral tribunal.

Effectively, if the arbitral tribunal does exceed its jurisdiction the award will be set aside or refused to the recognition and enforcement in whole or in part by a competent court. Such a provision provides in the article V (1) (c) of New York convention; “the award deals with a difference no contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration”. So the jurisdiction of the arbitral tribunal may limit by the agreement. It may the whole dispute in issue is outside the scope of the arbitration agreement or not arbitrable under the applicable law. Jurisdiction of the arbitral starts by the time of the acceptance to examine the circumstances of the arbitration process and also capacities of the parties in reliance on a false representation, about illegality of the contract in the country which it was made, if the contact (and hence the arbitration clause) is not valid or is non-existent, then the basis for the arbitral tribunal to convene to decide...is valid is not immediately apparent. An arbitral tribunal must able to look at the arbitration agreement, the terms of its appointment and any relevant evidence in order to decide whether or not a particular claim or series of claim comes within its jurisdiction. As already noted, the jurisdiction depend on the arbitration agreement to give a right to the arbitral tribunal in which it support with article 21 of UNCITRAL arbitration rules provides:

1) The arbitral tribunal shall have the power to rules on objection that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2) The arbitral tribunal shall have the power to determine the expectance or the validity of the contract of which an arbitration clause which forms part of a contract and which provides for arbitration under these rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and avoid shall not entail ipso jure the invalidity of the arbitration clause”.

The ICC Rules then provide, that in terms similar to those adopted in the UNCITRAL Rules, that ; article 6 (4) “ unless otherwise provided, the arbitral tribunal shall not

292 Supra Note.97, p.250.
293 Ibid,p.251.
cease to have jurisdiction by reason of any claim that the contract is null and avoid or allegation that it is non-existence provided that the arbitral tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims peals even though the contract itself may be non-existent or null and avoid”. Generally, the jurisdiction of arbitrators related to agreement of the parties so the some international instruments provides that “in taking a decision concerning the existence or the validity of arbitration agreement, court of contracting state shall examine the validity of such agreement”, the European Rules are different in that, article 18 of that expressed “the arbitrators shall be entitled to decide upon the existence or the validity of arbitration agreement, or of the contract of which the agreement forms part”. Similar to that is the European Rules article VI.3. And the CE Uniform law. So that potentially the agreement of the parties should be valid to be enforce of the award and jurisdiction of the arbitral tribunal.  

The courts have the jurisdiction to decide on the validity of arbitration agreement. After the conclusion of the international arbitration agreement, as under these agreements decision of tribunal on the validity of arbitration agreement can be reviewed when recognition or enforcement of the award is sought. Under the Geneva Convention article 1 (a) provides that “the said agreement in not valid under the law to which the parties have subjected it or, failing any indication there on, under the law of the country where the award was made”. The award can be annulled; if there is no valid arbitration agreement.

3.38 Challenge of arbitrators

Generally the challenge of arbitrator rise where justifiable doubts as to the qualities of the arbitrators, but it may extended as to doubts to a financial or personal interest in the outcome of the arbitration, or family or commercial ties with either party’s counsel and agent. Challenge of the arbitrators in the arbitration process is depend on the some provisions which have made in the arbitration rules. It is different between the arbitration rules thus the performance of the action to challenge is the same procedure as to the challenge the arbitrators, article 9 of the UNCITRAL states; “A prospective arbitrators shall disclose to those who approach him in connection… so

295 Supra Note,117, p.271.
this art granted a right to the third parties to challenge of the arbitrators” but it shall be as to the justifiable doubt as to his impartiality or independence, before arisen that a right to challenge. It must consider of possibility of the third parties to participate of the challenge, though the arbitrators before commence of the arbitral hearing shall inform the parties as to impartiality and independence of himself. It is also possible before commence of the arbitration hearing the arbitrators have been given the all information to the parties as to impartiality and independence of themselves. The parties, if the arbitrators have been submitted their information, shall inform to tribunal and each other to keep the right of the third parties.

The parties have a right at any time of the hearing challenge the arbitrator who has not conditions to continue of the hearing but shall be justifiable doubts. It states in the article 10 of the UNCITRAL, challenge of the arbitrators shall be with circumstances that justifiable doubts as to the arbitrators though what justifiable doubts is to challenge of the arbitrators. In fact, this is silent in the article 10, but sub-article (1) provides “any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence”. So, if the arbitrator’s impartiality or independence is doubts, it may the parties challenge he/she. In the second part of the article 10(2), the challenge may arise after the appointed has been made for any reasons of a party becomes aware, so the reasons are not clear that what reasons are to challenge of arbitrators.

The challenging of the arbitrators shall be within 15 days; this time limit has to send a notification of the challenge of the arbitrators to the other party, the arbitrator who is challenged and to the other members of the tribunal. The notification shall be in writing and state the reasons for the challenge, thus, in case, the notification does not send within 15 days or it has been sent without statement of the reasons and if it does not in writing, it may refuses by the tribunal to challenge the arbitrator, in addition, the challenge of the arbitrator would be agreed by the other party. If the other party agree with the challenge of the arbitrator, the arbitrator may also, after the challenge, withdraw from his office.

Though, it is not possible to the challenge without the agreement (disclose to each other) of both parties. The duty of the party, who challenged the arbitrator, is as the same procedure to appoint of the arbitrator at initial of the hearing. According to the article 12 (1), in case of does not agree to the challenge, the decision of the challenge
will be made by the appointing authority but it depend on the parties which have not agreed. If the arbitrator withdraw from his office and other party does not protest to the challenge, this imply acceptance of the validity of the grounds for the challenge. The authority of the appointing authority to the challenge of the arbitrator has stipulated. The appointing authority has empowered to appoint arbitrator to be replace, though to appoint an arbitrator the procedure of the articles 6 to 9 shall be consider.

In case of Iran-US the challenge was about Judge Briner, were included; a relationship with the parent Corporate of a party; Physical assault on a fellow arbitrator; an arbitrator’s handling of Proceedings; breach of confidentially of deliberations; and Previous advocacy on behalf of a country formerly adverse to a sovereign party, as that case stated that may widely extended by the challenging party. The challenging of arbitrators may as to the impartiality and indecencies of arbitrators in fact it is a very important. So failure to act in based on lack of impartiality and independence provides in article 13 of UNCITRAL Rules in which it may be with awareness for reason pre or post appointment. Then challenging of the arbitrators shall communicate to arbitral tribunal, arbitrator and other party.

The time limit to challenge the arbitrator, the drafters made clear that after the time limit expires the right to challenge is waived. So, the purposed of notice is to enable the other party to decide if he will agree to the challenge, and the challenged arbitrator to decide whether to withdraw. In challenging of arbitrator, according to article 12 of UNCITRAL Rules, if the other party does not agree to the challenging or the arbitrator who challenged dose not withdraw from his office in all cases the appointing authority will designate and replace substitute arbitrator; when the initial appointment of arbitrators, was by an appointing authority, it does have jurisdiction for the challenge in case of Iranian challenge to Judge Mangard, initiated on 1 January 1982, the designated appointing authority took an informal approach, requesting views from both the Judge himself and the state Agents on certain points, through oral discussion and by letter. If a sole arbitrator resigns, then the appointment procedure will be govern by article 6, and if a party-appointed arbitrator or presiding arbitrator

296 Supra Note,235,p.186.
resign, then the appointment procedure will be govern by article 7 of UNCITRAL Rules.297

The applicable National law may impose restriction in this respect, thus death or resignation, failure to act, incapacitation and also continuing in the absence of an arbitrator, but ‘de jure or defect to impossibility of performing his function, and all circumstances that made it legally or physically impossible for an arbitrator to perform his functions. In general, the challenge of arbitrators is on the biased of “justifiable doubts as to his impartiality or independence”. Article s10 (1) and (3) of LCIA Rules provide within fifteen days of be aware with any circumstance, and LCC Rules the period of challenging is thirty days. If the parties choose the ad hoc Arbitration, local law will determine whether a party has the right to challenge an arbitrator prior to the rendering of a final award.

To determine the validity of a challenge shall be a matter for the arbitral tribunal. In accordance with article 58 of the IBDR Convention, requires that decision on any proposal to disqualify an arbitrator be taken by the other members of the tribunal. The decision is to be made by the chairmen of the Administrative Council of the International Centre for Settlement of Investment Disputes established under the Convention. The ECAFE Rules article III (1) and (2) states that it should challenge be rejected by the arbitrator an appeal may be made to the ECAFE Centre for Commercial Arbitration, which shall for this purpose utilize the special committee to determine whether or not the challenge is justified. According to the UNIDROIT Draft and CE Uniform, article 13 (1) and (2) that a ‘challenge must be addressed by a party to the arbitral tribunal before the award is made’, so that a challenge should be made “as soon as the challenger becomes award of the ground of challenge” if within a period of ten days the arbitrator challenged has no resigned “the challenger shall on pain of being barred, bring the matter before the authority within a period of ten days”.

3.39 Concept of impartiality

It only means that from the legal, social and cultural background. The parties may be favourably disposed towards the appointing party which may even be necessary to fulfill the special functions of a party appointed arbitrator in arbitration with parties

297 Ibid, p.188.
from different countries. The main reason to appoint arbitrators to be a member of tribunal is impartiality, so if the chairman’s impartiality is not impaired by ex parte contracts with the appointing party to receive views on the acceptability of potential nominees. The partiality and independence of a sole arbitrator or of the presiding arbitrator means the qualifications, experience and integrity of the arbitrator should be essential criteria, the country in which the arbitrator was born, or the passport carried, should be irrelevant.

3.40 The concept of Independence

This is related to past dependent relationship between the arbitrator and one of the parties in arbitration proceedings. The independent arbitrator needed to ensure that justice has been done. It is the arbitrators’ duty to disclose their impartiality and independent from neither party nor their representatives as it noted foreseen in most arbitration. Where that is the case, it follows from an implied term of the agreement between the parties and the arbitrator. The remedy of sanction to breach of arbitrators’ duty is removal of that arbitrator. It usually occurs with the challenging of the arbitrator by the party by virtue of lack impartiality and independent. Thus the differentially of a nationality of sole arbitrator and presiding of the arbitral tribunal is a basic way of the selecting of them. Already the sole arbitrator and presiding of arbitral tribunal shall disclose of their impartiality and independent to communicate to the parties. As it provides in article 11 (2) of UNCITRAL which “the challenge shall be notified to the other party, to the arbitrator” also article 12 of Model law states “shall without delay disclose”, it must say before challenging by the parties as to the each other appointment of the arbitrator to clear of impartiality and independent of arbitrators, they should disclose their impartiality or independent.

3.41 Replacement of an arbitrator

In accordance with the article 13 Para 1 and 2 in event of the death or resignation of an arbitrator and fail to act or in event of de facto inability of his performing function during the course of the arbitral proceedings, a substitute arbitrator shall be appointed, it may be under the agreement of the parties. In case the parties have not reached agreement to appoint, at request of party, be appointed by the appointing authority. It

298 Supra Note,125,p.265.
is a procedure in making appointment, the appointing authority shall use the following list-procedure unless the parties should not be used or the list-procedure is not appropriate for the case. The appointment of substitute arbitrator by the parties or appointing authority shall be within a period of time of 15 days. In general the method of appointment shall be according to the method agreed upon by the parties. The appointing authority shall communicate to each of the parties and refer the list containing to the parties and each party return list after having deleted the name[s].

Reasons of the replacement of the arbitrators are the same as to the provisions which had not been in to the arbitrator’s condition to arbitrate. According to article 14 of the UNCITRAL “if any other arbitrator is replaced, such prior hearing may be repeated at the discretion of the arbitral tribunal”, so any hearing held previously shall be repeated. In addition, to repeat previously decision it depends on the discretion of the arbitral tribunal and arbitrators. The WIPO arbitration rules of article 34 provides that; “whenever a substitute arbitrator is appointed, the tribunal shall, having regard to any observations of the parties, determine in its sole discretion, whether all or part of any prior hearing are to be repeated”.  

3.42 Repetition of hearing

In accordance with article 14 of UNCITRAL rules; it seems to be repetition of all provisions of the previous hearing unless the tribunal would like to decide for repetition. There is no clear newly constituted tribunal that must decide on the issue of repetition or merely replacing members and the main members of the tribunal article 14 of UNCITRAL provides that if ‘any’ hearing held previously shall be repeated, thus in repeating the hearing, there shall be no need to submit all evidence again, because article is silent to clear the time of hearing for repetition. Aim of the arbitration process is to find a way for solution of the case which was referred to the arbitral, though, the international arbitration is a mechanism to solve international or domestic, in case the parties have selected it, because the arbitration is an amiable hearing with the opportunity of the appointing the arbitrators in which granted to the parties. So, in the event of the challenging of the sole arbitrator as the presiding of the arbitral tribunal and resignation or death of an arbitrator the hearing of the arbitration shall be repetition if any arbitrator is replaced. But it is not limited to repeat prior

299 Supra Note, 97, p.215.
hearing by the arbitrators replaced, because it is discretion of the arbitral tribunal. In contrary to this point the replacement of the arbitrator is in accordance with the challenge of that member under nondependent and impartiality of a member who was replaced due to that provision. Thus, invalidity of the award has made it impossible to repeat. It may consider between the regular court and arbitration exist a different to repeat the prior hearing. Because of it is not possible for the regular court to repeat a prior hearing in case of the judge is changed or replaced. It may be possible to repeat oral hearing as has been stated in the article18 of the ICSID entitled resumption of processing.

3.43 Proceeding of arbitration

According to article 15 (1) of the UNCITRAL Rules, the fundamental principle which must be taken into account by arbitrators during the proceeding in the rules, as aforesaid article states which “subject to the rules”, it considers the arbitral tribunal shall do under law applicable. However, the arbitral tribunal may fill any lacuna in the rules by “borrowing” procedural models in whole or part from a legal system or another set of rules (by incorporating such rules or referring to them as ‘guidelines). The arbitral tribunal shall provide that the parties have to treat with equality. Thus equality of the parties is very important. This is aimed at guaranteeing in the material sense of justice and fairness. In a case, sample of the clarity of equality, it is which foremost Tehran Inc. The tribunal held that if one party was permitted to present an extensive memorial and exhibits without allowing the other party to file a memorial, then ‘the delicate balance of equality would be tipped’ and material inequality of treatment would result. So, it needn’t be the same in all circumstances, needn’t be the equality that this does not prejudice either party’s right to present its case.

In all stages, a full opportunity is given to the parties to present the case in the proceedings of arbitration, because this point may be refused to recognize and enforce the award where it has not considered. It provides that by article 36 of model law, the award is invoked by the arbitral tribunal proceeding or was otherwise unable to present the case; so denial of an opportunity to the arbitral proceeding of presenting the parties’ case is a reason to refuse to recognize and enforce an award. The modification of the rules in writing as to the arbitral discretion by the parties limited, the arbitrators may not derogate from mandatory provisions of the law applicable to
the arbitration. In accordance with the article 5 of the UNCITRAL rules ‘at any stage of the proceeding, the arbitral tribunal shall hold hearing for the presentation of evidence or for oral argument’. These provisions need to request a party to the arbitral tribunal to do so. The arbitration process deemed to begin on the date the administrator receives written notice of arbitration from the claimant. It also provides in the article 4 (2) of the LCC Rules and article 1 (2) of LCIA; article 3(2) of the UNCITRAL arbitration rules. However, the arbitration is deemed to commence on the date of the request of claimant and with receiving statement of defence by the defendant. To commence the arbitration process the provision of hearing shall exist like a proposal about the method of choosing arbitrators, the number of arbitrators, unless it has not still agreed the place of arbitration, and so. But it may differ under international rules of arbitration in accordance with the ICC Rules. Thus, these rules provide that the claimant shall send the request for arbitration only to the ICC Secretariat, not to the other party, and then the secretariat sends a copy to the respondent. The participation of third person might be possible, as if the third party has a right to the subject matter of arbitration for submitting his or her evidence need to contact to the arbitral tribunal. It provided that by the article 15(1) the UNCITRAL Arbitration Rules 1976, and in the 2010 UNCITRAL arbitration rules article 17. It depends on the third party to participate in the arbitration hearing to do so. But to accept and commence the hearing based on the arbitral tribunal. In accordance with the UNCITRAL arbitration rules, the presentation of the case shall be an opportunity for both parties, unless the parties agreed otherwise, and accepted by the tribunal. The hearing of the arbitration is documentary process, thus it needs to examine all documents of the parties and to communicate the same to the parties. But it deems that the arbitral tribunal shall hold the hearing at any time that the parties applied to the presenting of the documents. Again this is a strategy of the arbitration process where the parties referred to that, because ‘if either party request and ‘if the arbitral tribunal does not give an opportunity to the parties it may be refuse to recognize and enforce final award, as the article 36(1) (ii) provides that “unable to present his case”. The hearing process will need to request the parties to participate to the hearing with the new evidences. It is so obvious in the absence of such request the arbitral tribunal shall decide whether to hold such hearing so that it will has done during the hearing. It

300 Supra Note,235,p.191.
is a right of the parities to request what is necessary to the arbitral tribunal, but as the rules provide under request of a party with the reasons to the presentation of evidence to give enough opportunity to present his case. The request shall be for justification with the communication to the other party by the parties. At the same time, the request of either parties in the absence of that communication it is done by the tribunal to communicate to the other party. So, the hearing of the arbitration is governed by the arbitral tribunal and both of the parties, in absence of the especial provisions by the parties, the arbitral tribunal shall continue the process of the hearing until the final decision is made.

To commence the hearings through domestic and international procedures, it needs to request a party or both of the parties. In the arbitration proceeding, it is necessary that an agreement is made by the parties and then upon request the tribunal appoints the time of hearing, date and place in accordance with agreement. Thus, the tribunal shall communicate to the parties what it decided for hearing, to enable opposite party to prepare its response. In accordance with the article 25 of UNCITRAL rules, the adequate notice needs to be communicated to the parties and there should be no difference between the oral or documentary hearing. Time limit for communication of the witnesses is fifteen days, failure to present a witness Para (2) of the aforesaid article of the UNCITRAL rules provides that a tribunal may refuse to accept the witnesses, as the tribunal is free to determine the manner in which witnesses are examined. The witnesses may submit the statement to testify or orally testify in writing, so tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. The evidence should not be rejected on technical or formal grounds. The term “weight” was added to the text of article 25 (6) of UNCITRAL rules at the final stage of drafting in order to emphasize the wide discretion the tribunal has when evaluating evidence.\textsuperscript{301}

The hearing on the request of either party, if the parties agreed to make a hearing, it would be most usual detailed for submission agreement prepared where a dispute has arisen. The task of organizing hearing in a major international commercial arbitration should not be underestimated,\textsuperscript{302} if requested to do so by the arbitral tribunal. The hearing is governed by the arbitral tribunal in fixing the time at the request of the

\textsuperscript{301} Ibid.,p.207.
\textsuperscript{302} Supra Note,97, p.316.
parties, so the administrative arrangements may be made by one of the parties or sole or presiding arbitrator or secretary and registrar appointed by the arbitral tribunal. In organizing hearing in a major international commercial arbitration, a suitable hearing room must be provided, with ancillary rooms facilities for the parties and the arbitral tribunal. Access to a photocopying machine and to telephones and fax lines, facilities are required for each party to have documents typed, checked for an effective hearing.

The obligation of arbitration mechanism imposed to the parties, because obligations are saving the rights of the parties. In accordance with the article II of the New York Convention on the Courts of signatory: “the court of a contracting state, when seized of an action, in a matter in respect with the parties have made an agreement within the meaning of this article shall, at the request of one of the parties refers the parties to arbitration, unless it finds that the said agreement is null and void inoperative or incapable of being performed”. And also article 8 of model law provides: “1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.2) where an action referred to in paragraph (1) of this article has been brought, arbitral proceeding may nevertheless be commenced or continued, and an award may be made”.

The UNCITRAL notes on organizing arbitral proceeding contains useful advice, as follows:

“Whether one period of hearing should be held or separate periods of hearings”.

The arbitration usually initiates with a one period of hearing, this hearings is in separate period of hearing, which has an advantages. The period of hearing are easier, however, the advantage of one period of hearings is suitable that it involves less travel costs, memory will not fade, notwithstanding the longer hearing is more difficult to acceptable all participants (the parties, witnesses, experts, arbitrators).Ultimately, separate period of hearings are easier to schedule and, they leave time for analyzing the records and for negotiations between the parties aimed at narrowing the points at issue by agreement. It is easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearing, and avoid that one party would unfairly use up a
disproportionate amount of time.\textsuperscript{303} The counsel with the parties may be possible to make final decision.

In hearing the parties are able to send representatives or lawyer to the hearing process because it is a right of the parties, so it is provided by the article 4 of the UNCITRAL rules and the LCIA arbitration rules article 18. It is clear that the arbitral tribunal may not exclude a party who wishes to be present from any session of hearing. The arbitrators indirectly are lawyers of the parties but the parties also have a right to dispatch a representative to the arbitral process. The provision of the pre-hearing has been noted in the Internal Guidelines of the Tribunal set out in the article 22: “whether any further written statements, including any reply or rejoinder are requested by the arbitrating parties or required by the arbitral tribunal. Article 24 Para 2 provides: fixing a schedule for submission by each arbitrating party a summary of the documents or list of witnesses or other evidence it intends to present, but it also provides in Para 3; fixing a schedule for submission by each of any documents, exhibits or other evidence which the arbitral tribunal may then require”.

Pre-hearing may save the time of the hearing to make final decision, the ICSID convention articles 22 and 33 provide; “1) at the request of the secretary-general or at the discretion of the President of the tribunal, a pre-hearing conference between the tribunal and the parties maybe held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding. 2) At the request of the parties, a pre-hearing conference between the tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement”.

\subsection{3.43.1 Time of hearing}

The time of the hearing shall be fixed by the arbitral tribunal which should not exceed 45 days. In accordance to article 23 of UNCITRAL, the beginning of the period of time in the arbitration process is under the governance of the arbitral tribunal, so to read the papers and understand the case and what has been submitted to the arbitral tribunal (arbitrators). The period of time is limited because the time should not exceed 45 days of timetable made by the arbitral tribunal from the communication to the parties in writing. If by the time of the arbitration hearing, objects have narrowed and

\textsuperscript{303} Ibid, p.317.
are clear, there may not be that much difference between the parties. This would give the tribunal the opportunity, without prejudice to the arguments of the parties. For this reason, it will often be of great help where arbitrators are able to set down…the time parties will have to present their arguments and their case…even then the drastic limitation of time rarely prejudice the presentation of the case of a party. The communication of the time by the arbitral tribunal to the parties shall be with the statements of claim and defence but the time limit of hearing may extend if it the extension is justified. It does, however, have the advantage of ensuring equality between the parties and can preclude one party hijacking arbitration and the presentation of evidence or argument.  

The duty of the arbitral tribunal shall give the parties adequate advance notice of the date, and time. In fact, the timetable determined is base of hearing for the parties and also the arbitral tribunal. So, even the time of the presence of the witnesses and expert witness, the time table also determines the oral hearing of the arbitration. It may differ between the statements hearing and oral hearing because the time of the oral hearing may not exceed 15 days while the statements hearing is 45 days.

3.43.2 Obligations of arbitrators

International Bar Association (IBA) provides that the general standard is that an arbitrator must decline appointment if he has doubts as to his impartiality or independence or if a reasonable person would have justifiable doubts on the arbitrators’ impartiality and independence. The circumstances must raise doubts that are justifiable, about the arbitrators’ neutrality. Therefore Independence: According to a numerous laws as the UNCITRAL Model law article 12 (1-2); UNCITRAL Rules article 12 (1); LCIA rules article 5. (2), 10(3); LCDR Rules article 7 (1); LCC rules article 11 (1); IBA Rules of Ethics article 3 (1); generally means that the arbitrator has no financial interest in the case or its outcomes. Impartiality: generally means that the arbitrator is not biased because of any preconceived notions about the issues and has no reason to favour one party over another.  

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304 Supra Note,119,p.256.
305 Supra Note,117,p.136.
3.43.3 Evidence of the parties

Basically the important part of arbitration hearing is the weight of evidence, to be burden of the parties, to prove the reasons of the action, and the evidence supporting the parties. In the realistic procedure of arbitration tribunal practice does not support the proposition that a claimant would have to prove his/her case beyond all reasonable doubt. The standard of proof varies according to the circumstances. In accordance with the article 24 of the UNCITRAL Rules, arbitral tribunal may request to the parties to make a summary of documents within a period of time, a tribunal has the discretion as to request a summary and as to impose time limit upon the party to whom the request is made. The arbitral tribunal may request to the parties to provide specific documents to be burden of hearing, as it provides in article 3 of the IBA Rules on the taking of evidence in International Commercial Arbitration allows parties to submit ‘Request to Produce’ to the tribunal.

In accordance with international Bar Association of 1999 edition of its rules on the Taking of Evidence article 9 (2) provides: “the arbitral tribunal shall at the request of a party or on its own motion, exclude from evidence or producing any document, statement, oral testimony or inspection for any of the following reasons: a) Lack of sufficient relevance or materiality; b) legal impediment or privilege under the legal or ethical rules determined, but the Arbitral tribunal to be applicable; c) unreasonable burden to produce the requested evidence; d) loss or destruction of the document that has been reasonably shown to have occurred; e) grounds of commercial political or technical confidentiality that the arbitral tribunal determine to be compelling; f) rounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling; g)considerations of fairness or equality of the parties that the Arbitral tribunal determines to be compelling”.

In general, the evidence bases of the hearing in arbitration process support the statement of the claim and defence because of its burden of proof, to find the facts of case in the hearing. Thus all arbitration rules provide that in order to commence the hearing there need to be burden of the proof of the statements of claims or defenses as provide in the UNCITRAL Rules article 24 (1) “Each party shall have the burden of proving the facts relied on to support his claim or defense”. 2) …a party to deliver to the tribunal and to the other party”. The presenting of evidence may be divided to
some category of production of contemporary documents; testimony of witnesses of fact (written or oral); opinions of expert witnesses (written or oral) and inspection of the subject-matter of the dispute. The production of documents in the international arbitral tribunal is easier and less time consuming; the evidentiary weight of contemporary documentary evidence is clearly more substantial than that of oral evidence that is not tested by an effective challenge, either through lack of expertise on the part of the opposing party’s advocate or lack of time during the course of the hearings.  

The main cause for the practice primarily based upon the evidence contained in contemporary documents is the application of the so-called “best evidence rules”. In relying on the practice reflected in the rules of the major arbitration institutions. In ICC arbitration, the parties are required to produce the documents on which they and rely on their respective request for arbitration answer. The LCIA Arbitration Rules article 15 (6) provides; “all essential documents on which the party concerned relies, and which have not previously been submitted by any relevant party, and (where appropriate) by any samples and exhibits”. The UNCITRAL Rules article 18 also provides; “the claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit”. As these rules states, submitting of evidence in order to the arbitral tribunal with time limit to support statements of claim or defense because in accordance with the IBA Rules of Evidence article 3 provides;

1. Within the time ordered by the arbitral tribunal, each party shall submit to the arbitral tribunal and to other parties all documents available to it on which it relies, 2) within the time ordered by the Arbitral tribunal, any party may submit to the Arbitral tribunal a request to Produce. 3) A request to produce shall contain; a) (i); a description of a requested document sufficient to identify it, or ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonable to exist; b) a description of how the documents requested are relevant and material to the outcome of the case; 4) within the time ordered by the arbitral tribunal, the party to whom the request to produce is addressed shall produce to the arbitral tribunal and to the other documents requested in its possession, custody or control as to which no objection is made. 5) If the party to

306 Supra Note, 97, p. 298.
whom the request to produce is addressed has objections to same or all of documents requested, it shall state them in writing to the arbitral tribunal within the time ordered by the arbitral tribunal. 6) The Arbitral tribunal shall, in consolation with the parties and in timely fashion, consider the request to produce the objections. The Arbitral tribunal may order the party to whom such request is addressed to produce to the arbitral tribunal and to the other parties those requested documents in its possession, custody or control as to which the Arbitral tribunal determines that; i) the issues that the requesting party wishes to prove are relevant and material to the outcome of the case, and ii) none of the reasons for explanation of that art to clear of duties of the parties to submit their documents to the tribunal and in ordering of the arbitral tribunal, the article.9 (2) of IBA to support of the practices of the parties provide; the arbitral tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any document, statement, oral, testimony or inspection for any of the following reasons:

a) lack of sufficient relevance or materiality ; b) legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable ; c) unreasonable burden to produce the requested evidence ; d) loss or destruction of the document that has been reasonably shown to have occurred; e)grounds of commercial or technical confidentiality that the arbitral tribunal determine to be compelling ; f) grounds of special political or institutional sensitively (including evidence that has been classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling ; or g) considerations of fairness or equality of the parties that the arbitral tribunal determines to be compelling”.

It simply indicates that the authenticity of the document is “agree”, in the sense that each party agrees that it is an accurate copy of an existing document.\textsuperscript{307} If the authenticity of documents is disputed, arbitral tribunal usually orders that the originals must be produced for inspection. The documents shall be clear for submission or if the evidence needs to be translated into the language of the arbitration the parties must do on the order of the tribunal as it provides in the UNCITRAL Rules article 17 (2); “the arbitral tribunal, may order that any documents annexed submitted in the course of the proceedings, shall be accompanied by a translation into the tribunal”. The

\textsuperscript{307} Ibid,p.304.
evidences should be acceptable by the tribunal, if the evidences are not submitted to the arbitral tribunal with statement of claim and defence, it obviously becomes inadmissible, because the final award will be set aside, at any rate.

3.43.4 Submission of Evidences

The submission of documents to the arbitral tribunal is through different methods such as, Courier, Fax, E-mail with or without attachments, on diskettes’, or on CD-ROMs’. When using electronic methods the parties should also think about the format of the document and whether to use doc, Pdf, or rtf formatting, and maybe specific software for word processing and spreadsheets. A safe solution is to send a hard copy of the most important documents by post or special courier after they have been sent electronically.

3.43.5 Marshalling of evidence

In accordance with article 25 (2) of the UNCITRAL Rules: “if witnesses are to be heard…each party shall communicate to the arbitral tribunal and to other party”. Said Para (4) of article “the arbitral tribunal is free to determine the manner in which witnesses are examined”. While examining the witnesses the arbitral tribunal is free to interview or any of the procedures to determine ensures to the statements of witness. Although in such condition in contrary the arbitral limit to interview the tribunal made a detailed procedural ruling allowing such interview, with certain restrictions that the equality of the parties and the integrity of the proceeding would not be frustrated. If the legal representative the parties cannot interview a witness based on the ethical rules of his bar and such ethical rules are applied in the arbitration process, the arbitral tribunal may order no need to do interview of witnesses. The marshalling the evidence is obligated to the parties; each party for transmission to the tribunal and the other party shall submit all information which needs to be the burden of proving the facts riled upon to support his claim or defence.

3.44 The testimony of witnesses

The testimony is one of the factual evidences to be a part of the hearing in the arbitration process, the UNCITRAL Rules article 25 provides “in the event of an oral hearing the arbitral tribunal shall give the parties advance notice. It stipulates the oral
hearing a principle into the international commercial arbitration. “Witnesses will give their testimony”, where any investigation into the factual background of the dispute is necessary, it is usual for an arbitral tribunal to hear the evidence of witnesses at a hearing. 308 The hearing of the witnesses shall be held in “camera” as it states in the UNCITRAL rules article 25 (4) and the presentation of the witnesses with the provision, which the arbitral procedure determined shall be to do. The witnesses to present by the parties shall be before to start the hearing, the arbitral tribunal itself indicates to the parties which, if any, of the other witnesses, it wishes to hear in person. Article 25 (2) and (4) of the UNCITRAL Rules stipulate; 2) if witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony”. 4) The arbitral tribunal is “free” to determine the manner in which “witnesses are examined”.

The IBA Rules 1999 article 4 to emphasize states; 1) within the time ordered by the arbitral tribunal, each party shall identify the witnesses on whose testimony it relies and the subject -matter of that testimony.2) Any person may present evidence as a witness, including a party or a party’s officer, employee or the representative. 3) It shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses”.

3.44.1 Fact Witnesses

The international witnesses also differ markedly between common law and civil law. In litigation, lawyers of common law tend to take lengthy depositions in order to learn what information witnesses of the opposing side possess. Because depositions are taken under oath, if the witness changes story, counsel will bring this out on cross-examination during, using the prior deposition testimony. Lawyers of Civil law, fact witnesses in litigated matters are generally not considered very important. Witnesses generally cannot be questioned in advance by opposing counsel, and at the hearing they will be questioned only by the judge, not the counsel. 309 In international arbitration, however, the statements of witness may be restricted it adds to the

308 Ibid, p.305.
309 Supra Note,117, p.179.
statement at the oral hearings. In common law, followed by direct examination, the system is referred to as “adversarial” but in civil law for examining the witnesses is by “inquisitorial”, in continental tradition, arbitrators see cross-examination as a method for eliciting information not for destruction of a witness. Witnesses must appear in person for testimony in accordance with IBA rules of Evidence article 8 (1) the tribunal shall permit to the use of video conference or other technology for that particular witness. To the cross –examination of the witnesses the system of law governed upon the arbitration play a very important role because it differs in common law and civil law systems. In common law the applicable law selected by the parties play important role. In contrary, in civil law procedure, cross-examination of witness by the parties is not permitted. However, in jurisdiction, international arbitration, cross-examination of witness is permitted on the request of a party. Article 8 of the IBA rules on the taking of Evidence provides that questions to a witness during direct and indirect testimony may not be unreasonably leading.

3.44.2 Expert witnesses

Where the international arbitration involves high technical issues, the testimony of an expert may be required. The tribunal generally has the discretion to choose an expert even if the parties have not asked to do so. The tribunals invite the parties to agree on the entire choice of expert. However, the expert is normally empowered to obtain information from the parties he/she needs to render an opinion. Final report contains opinions and conclusions, and usually describes how the expert reached those conclusions, the method, information, and evidence that were relied on.\textsuperscript{310} Thus, in accordance with the Article 7 of the IBA Rules of Evidence at the request of a party, require inspection of “any site, property, machinery, or any other goods, samples, systems, processes, or documents, as it deems appropriate, the parties have the right to be present at the inspection. Accordingly, the tribunal in its discretion may order to a party to appoint expert to meet, confer, and record in writing any issues of disagreement and the reasons therefore. The article 35 of model law provides; “the recognition and enforcement of arbitral award needs to be binding, and upon application in writing”, also the party relying on an award or applying for its

\textsuperscript{310} Ibid, p.186.
enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original agreement or a duly certified copy thereof.

The article IV of New York convention provides, that the party who is seeking for recognition and enforcement shall submit the duly authenticated original award or a duly certified thereof, but authenticated original award approved by the national courts of arbitral place or notary or consoler, however, the convention is silent as how this certification shall be approved, or should be effected. To recognize and enforce the award, if it needs to be translated, it shall be translated by an official translator or a diplomatic authority. Courts normally accept a translation made in the country where the award was made or in the country where enforcement is sought. The delay to submit application to recognize and enforce, cannot be denied by the component court for recognition and enforcement. The court, in which the party has applied, under the provision, needs to submit such permission for enforcement from the court in the country where the award was made, does for recognition and enforcement.

3.44.3 Situation of Expert in commercial arbitration

The experts’ experience also is one of the evidences in which the parties determine to be as factual claim or defence. It usually needs to use the experts in international arbitration because of the especial subject matters in international trade law support to be clear with the experts. Therefore, experts help to investigate the quantification of a claim. To help the expert through the incorporation of international or institutional rules of arbitration the UNCITRAL Rules article 27, article 20 (4) of ICC Arbitration rules, the LCIA Arbitration Rules article 21, provide that expert evidence would be appointed by the parties to support the claim or defense. The appointment of the expert may be determined by the arbitral tribunal without consultation with the parties and in the absence of arbitration agreement, the arbitral tribunal needs to use the experts’ technical assistance arbitral tribunal in order to understand complex technical matter at a proper decision. There is no good reason to prevent it from obtaining such assistance. Thus, presented parties shall choose the expert with a list of individuals and institutions.311

The UNCITRAL Rules article 27 (4) provides; “the parties shall have the opportunity to be present and to interrogate the expert”. Continually, “the parties shall give the

311 Supra Note,97,p.310.
expert any relevant information or produce for his inspection any relevant documents or goods that he may require”. The article 6 of the IBA Rules on taking of evidence provides: 1. The arbitral tribunal may appoint one or more independent tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The arbitral tribunal shall establish the terms of reference for any tribunal-Appointed expert report.

1) The tribunal Expert shall, before accepting appointment, submit to the arbitral tribunal and to the parties a statement of his or her independence from the parties and the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections to the tribunal-Appointed Experts’ independence. The arbitral tribunal shall decide promptly whether to accept such an objection.

2) Subject to the provision of article 9(2), the tribunal-Appointed Expert may request a party to provide any relevant material, information or to provide access to any relevant documents, goods samples, property and site for inspection. The authority of a tribunal-Appointed Expert to request such information or access shall be the same as the authority of the arbitral tribunal. The parties or their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a tribunal-Appointed Expert and a party as to the relevance, materiality or an appropriateness of such a request shall be decided by the tribunal, in the manner provided in Article 3(5) through 3(7). The tribunal-Appointed Expert shall record in the report non-compliance by a party with an appropriate request or decision by the Arbitral tribunal and also shall describe its effects on the determination of the specific issue.

3) The tribunal Appointed Expert shall report in writing to the Arbitral tribunal. The Tribunal-Appointed Expert shall describe in the report the method, evidence and information used in arriving at the conclusions.

4) The arbitral tribunal shall send a copy of such expert report to the parties. The parties may examine any document that the tribunal-Appointed Expert has examined and any correspondence between the Arbitral tribunal and the tribunal-Appointed Expert. Within the time limit ordered by the Arbitral Tribunal, each party shall have the opportunity to respond to the report in a
submission by the party or through an Expert report by a party-Appointed Expert. The tribunal shall send the submission or Expert on issues raised in the parties’ submissions or in the expert report to the tribunal-Appointed Expert and to the other parties.

5) At the request of a party or the Arbitral tribunal, the tribunal-Appointed Expert shall be presented at an evidentiary hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the parties or by party-Appointed Expert on issues raised in the parties’ submissions or in the Expert Reports made by the party-Appointed Expert pursuant to article 6. (5). All these provisions emphasize the philosophy that, if a technical issue is important enough then the arbitral tribunal decides to appoint an expert, it is important enough that the parties should have full opportunity to challenge the experts’ opinion by reasonable methods.

Expert evidence is normally furnished in the form of written reports in the first instance, usually, at the same time any written statements of witnesses of fact if the parties or each party present conflicting evidence of technical opinion, the expert witnesses must be prepared to appear in person before the arbitral tribunal for examination.\(^{312}\) The experts shall appear for testimony of an evidentiary hearing unless the parties agree otherwise and the tribunal accepts this agreement.

The report of the experts has to be submitted to the arbitral tribunal but he is an individual member of the arbitral tribunal which enables to obtain the opinions of the experts on specific issues. In a case the expert witness submitted written reports as part of the tribunals’ pre hearing briefing; then they were cross-examined and re-examined by the parties’ counsel at the end of all the oral testimony and before the closing arguments. The Tribunal drew up an agenda of disputed “expert” matters and sat across the table from the two experts discussing the agenda items one by one in a quite informal manner; and, finally, the parties’ counsel were offered an opportunity to ask further questions for clarification purposes.

In the Iran-USA claim tribunal has adopted the approach of the appointment of expert by the parties, as an accepted role of the parties to produce evidence by an expert in the article 27 (1) and (4) of the UNICTRAL arbitration rules. The Rules go on to provide that, at the request of either party and after delivery of the expert’s report, the

\(^{312}\) Ibid, p.312.
expert may be heard at a hearing at which the parties must be given the opportunity to be present and to interrogate the expert; and that, at this hearing either party may present expert witnesses to testify on the points at issue. The arbitral tribunal accepted the report appointed by the parties as those applied to other forms of evidence in the same arbitration. At the hearing, an expert witness gives oral evidence of matters of opinion beyond that contained the written report submitted to the arbitral tribunal and to the other party, this additional evidence should, strictly speaking, be ruled in admissible. The subject-matters to be a basis of the submission of the evidence are a very important. 313

3.44.4 Appointment of experts

The arbitration process may, in some circumstance, need to examine the case of dispute with one or some experts. Thus, in accordance with section (1) (a) (i) the power for the arbitral tribunal to appoint and instruct its own technical experts. Thus, to appoint an expert who does not support their case 314 for hearing by the arbitral tribunal, it needs to be clear of evidence and documents submitted, but if the experts appointed the parties shall submit all documents and relevant information or procedure for this inspection, any relevant document or goods that he may require. But the report of the expert shall be in writing and the expert appointed shall communicate to the parties because the parties may discuss with the experts and shall give opportunity to express their opinion on the report in writing. The advantage of appointing a tribunal expert, at the outset, rather than a party appointed expert, is to take control of the expert process. The expert appointed does not support the case of the parties. Thus the purpose of appointment is, to clear the process of examination of documents. So, the parties should have an opportunity to hear all of questions put to the expert, to challenge that and to examine the expert whatever the tribunal appointed expert does, must be done openly, in front of both parties, and the arbitral tribunal. 315 To challenge the experts report after submitting to the arbitral tribunal the parties shall request to either expert, the either party may be heard at a hearing where the parties shall have opportunity to be present. According to some of arbitration rules at hearing either party may present expert witness in order to testify on the points at issue. To challenge the expert determined by arbitral tribunal, if the parties or a party intents to

313 Ibid, p.313.
314 Supra Note,119,p..254.
315 Ibid, p.255.
present expert, witness shall communicate to the arbitral tribunal and other party. Then the expert appointed by arbitral tribunal shall hear to the questions of a party who challenged the report of the expert. Subsequently after that the arbitral may make decision. The expert may be appointed by the parties or arbitral tribunal, if a party would like to appoint an expert, it is not possible unless communication with other party is done. Thus, it has been suggested that two factors which should be considered are the complexity of the issue before the tribunal and the expediency of or appointing an expert in all the circumstances of the case. A tribunal will also be entitled to give any later interpretation of the terms of reference required. Where the experts have appointed by the parties, they (the parties) should submit all relevant information and documents or goods which is required for examination by the experts. Failure to provide relevant information to the experts it may refuse the application by a tribunal of the default. As the article 27 of the UNCITRAL rules provides that a copy of the report of the expert shall be communicated to the parties. Ultimately the report of the expert depends on the expert’s qualifications, the procedure he had followed in developing his opinions (including consideration of the parties’ comments); the thoroughness with which he had verified information provided by the parties; and the thoroughness of the report, including citation to evidentiary support. In accordance with the sub-paragraph 4 of the article 27 of the UNCITRAL rules provides, “a tribunal must hold a hearing at which both parties are given the opportunity to interrogate the expert”. However, the travaux preparatoires confirm that the drafters supported the use of party-appointed experts at any stage of proceedings.316

3.45 The inspection of the subject-matter

The arbitral tribunal governs the subject–matter, this is usually a site inspection and mainly arises in connection with construction contracts and dispute arising out of the performance of process plan and so forth. It is in modern practice, for models, photographs, drawings or even videotapes and films to be used to fulfill the purpose that would have been served by a site inspection. The arbitral tribunal has a power to make a site inspection. In some different situation, it may request the parties to produce the subject-matter of the dispute for examination. The parties may agree to produce the subject-matter by themselves. Unless the parties specifically agree, otherwise, the arbitral tribunal will normally be careful to ensure that the principle of

316 Supra Note,235,p.211.
equality of treatment is strictly observed. The arbitral tribunal should take an inspection at present of the parties, will not make a site inspection in the presence of the representatives of both parties. Whenever, the award comes to enforce, the arbitral tribunal were to make an inspection in the presence of one party alone.

The inspection of the arbitral tribunal is the internal policy for arbitral tribunal but this is silent in independent institutions the UNCITRAL Rules, and the ICC Rules. It refers to the parties to make obligation for the experts in which appointed as it provides in article 27 (2) of the UNCITRAL, the LCIA Rules article 21 and the AAA commercial arbitration Rules article 33. While the WIPO Arbitration rules, article 50 makes specific provision for any inspection or investigation that the arbitral tribunal may require, the parties may present at each inspection. In accordance with the article 34 (2), (3), (4), of the ICSID Arbitration rules which provides that the arbitral tribunal has a power to “visit any place connected with the dispute or conduct inquiring there” if the arbitral tribunal deems it necessary; and they call upon the parties to cooperate in this with the expenses forming part of the expenses of the parties. The WIPO Rules also provide experiments to be conducted and for the provision by the parties of “primers” and “models”. Principally, the arbitrability of all subject-matter referred to the arbitration process a very important point to select arbitration mechanism. Article 2059 of France Civil Code provides that “all persons may enter into arbitration agreements relating to the rights that they may freely dispute of”. And article 2060, aforesaid rules, provides that disagree went to arbitrate dispute in a series of particular field such as family law and “more generally in all matters that have a public interest”. Section 1030(1) and (2) of the German Code of civil Procedure provide that any claim involving an economic interest can be subject to arbitration, as can claim not involving an economic interest of which the parties may freely dispose.

3.46 Place of arbitration

The place of arbitration may be chosen by the parties of arbitration process. Dispute has little connection with the state where an arbitration take place but place of arbitration, in all the arbitration is not important situation for hearing of the dispute settlement. However one of the important duties of the parties and then with the

317 Supra Note,97, p.315.
arbitral tribunal for appointment is regarded to appoint the place to arbitrate the international dispute settlement. The parties are free to determine the place of arbitration, generally in arbitration process the parties have a right to determine all procedures and the place where the arbitration will take place to do so.

According to general principles the appointment all the arbitration provisions shall be by both of the parties. It provides that in article16 of the UNCITRAL rules which shall be appointed by the parties if the parties fail to make choice the arbitrators (tribunal) may appoint it, “the arbitral may determine the local arbitration within the country agreed to the parties”. Because one of the circumstances of the hearing and making an award to recognize and enforce the award in place which appointed so that the UNCITRAL rules notes in organizing arbitral proceedings at para.22 numeral number of non-binding ‘factual and legal factors that may influence choice of place. These include considerations of neutrality, practical legal considerations flowing from the law in the country which arbitration took place and legal considerations relating to enforcement outside that country. The changing of place of arbitration by tribunal and determine an outside place of arbitration to inspect for witnesses or holding a meeting for consultation among its members at any place shall have regard to the legal considerations in title of ‘having regard to the circumstances of the arbitration’.

The intention behind this provision is to dissuade arbitrators from choosing attractive or glamorous meetings places with no link to the arbitration.\(^{318}\) Inspection of goods, other property or documents shall be under them by given sufficient notice to enable the arbitrators to be at such inspection, so that, in general inspection at any place shall be with rules of that place. The award shall be made at place of arbitration it deems appropriate for the arbitral tribunal to make decision, if no appointing authority has yet been chosen, and then the place of arbitration will be determined by the Secretary-General. Because if the award rendered regardless to the arbitration agreement provisions such place of arbitration, it is one of the reasons to refuse the award. The (Lex arbitri) selected depending on the decision of the parties and they shall be in a “neutral” forum. In accordance with article 1 (3) of the New York convention many countries recognized and enforced the final award, so the arbitration award should be held in a place where the infrastructure is sufficiently developed to permit reasonable

\(^{318}\) Supra Note.235,p.193.
transportation to and fro the location where basic technology is available (phones, Faxes, Interment access), and where the political and economic structure is stable.\textsuperscript{319}

The \textit{Lex Mercatoria} delocalized seat of arbitration proceedings, it is using a loosely organized system of transnational legal principles, rules, and standards derived from the usage, customs and, practice of international commerce, general principle of law, transnational rules, are a method of decision making, customary commercial law. Also Transnational substantive rules of law and trade usages and the method of their application usually use to international economic transactions .A set of substantive rules developed to regulate international trade in the business community, which are derived “not only from international commercial dealings, standard clauses, international conventional and arbitral tribunal awards but also from various sets of legal rules issued by the International Chamber of Commerce (ICC) or other international organizations. The \textit{lex mercatoria} similar to general principle of international law, it may apply between two States. The States may apply the UNIDROIT principles, as well as general principles of international law. If a contract made between the private company and a State to govern upon the contract the \textit{Lex Mercatoria} governed, however, the State may insist on its domestic law to apply for contract and the domestic law shall be applicable to dispute arose but it is related to agreement of the both parties. Parties try to deal with potential changes in the law by including a stabilizations clause, which provides that the State will not amend the contract by legislation without the consent of the other party.

In international arbitration rules place of arbitration should be appointed elsewhere without changing the legal suits of the arbitration. It is according to article 20 of model law, LCIA Rules article 16(2); SCC Rules article 20(2); LCC Rules article 18(2); ICDR Rules article 13(2). Accordingly, an arbitration clause is standard form of contract providing for arbitration in the country of one party, usually the economically stronger, may be found to be unacceptable.\textsuperscript{320} The arbitration in a third country may be strongly preferred by parties if it offers better opportunity for the enforcement of the award.

\textsuperscript{319} Supra Note,117, p.48.
\textsuperscript{320} Supra Note,215,p.267.
3.47 Effect of court’s place of arbitration

Under the auspices of the international center for settlement of disputes article 44, any arbitration proceeding shall be conducted in accordance with the provisions of this section and, except as the parties otherwise agree, if any question of procedure arises which is not covered by this section or the arbitration rules or any rules agreed by the parties, the tribunal shall decide the question. As noted that the arbitration agreement of the parties is given, irrevocable, and the parties shall follow the agreement to decide by the arbitrators. And also, if a party fails to participate in the proceedings, the other party will find in the ICSID machinery effective means to allow the proceedings to take place and eventually result in an arbitral tribunal award.321

The parties are free to choose a mechanism to the dispute settlement to the international cases but they are not in force if the parties would like to agree to dispute by arbitration proceeding. Thus, the parties shall run all provisions which are necessary to the arbitration hearing in accordance with the agreement and the law of applicable. So the domestic courts cannot intervene into the hearing but if the parties are willing to participate, the domestic court may intervene into the hearing of arbitration mechanism. However, the consent of the parties is necessary, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of their consent to arbitration under the circumstances of ICSID Convention. But the recognition and enforcement of final award shall be under the jurisdiction of the national courts at request and with writing an application of a party. So, if any reason, one party refuses to co-operate in the proceeding, other party must, seek judicial assistance to enforce the arbitration agreement, overcome the reluctance of the defaulting or obstructive party to participate in the proceedings, or ensure the effectiveness of the award. Although, all of conventions and national laws require that the arbitration agreement shall be “in writing”.

3.48 Language of arbitration proceeding

The arbitration agreement includes some provisions which depend on the parties to pursue them, so in such agreement, the parties shall determine the language of hearing. Where the parties have not agreed to determine the language of hearing the

arbitral tribunal shall ‘promptly after its appointment’ determine the working language(s). The language of hearing is a very important in arbitration process. The language(s) agree by the parties or in case of determining by the arbitral tribunal to be used in the statement of claim and statement of defence and any further written statement and in the proceedings. In accordance with article 17 (2) of the UNCITRAL rules, the language of proceedings applied to all written statements by the parties as well as to the oral proceedings, it provides documents annexed to the statements of claim or defense or supplementary documents exhibits submitted, and delivered shall be accompanied by the parties. It may be multiple languages agreed for proceeding, it shall be accompanied by the parties simultaneously. In a case, in computer Science Corporation\textsuperscript{322}, the Tribunal refused to allow a Post-Hearing Memorial received in Farsi only, rather than in both Farsi and English. But usually the parties waive the requirement for the use of two languages in respect of a particular document.\textsuperscript{323} The tribunal without the prejudice of the parties may give the reasonable opportunity to correct the defect if a party has not yet provided to translate the documents.

3.49 The notice of the hearing

According to article 2 of the UNCITRAL under the title of notice, calculation of periods of time, such as notice of notification and communication or proposal are deemed to have been received” to the other party, because the arbitration mechanism is private proceeding to the dispute settlement for the parties to save time and money and reached the final award during short time. Thus, it shall be done with the provision of the rules appointed by the parties, because the parties shall have related together for the communications and shall make notice to each other, including all decisions to commence the proceeding or proposals of the parties and if a party would like to challenge the arbitrators, decision of challenging shall be communicated to the other party by physical delivery to the addressee. It may be impossible for a party to find the real address by any reasonable inquiry and deliver physically; delivered at his habitual residence, place of business or mailing address. Ultimately, it is very important for the parties to deliver the notice of claim or defence to each other so that

\textsuperscript{323} Supra Note,235,p. 194.
the notice shall be delivered. Sophistically, this point of the arbitration will keep
ing rights of the parties and they have to respect to that procedure, because of arbitration
is optional mechanism and there is private hearing for the parties. The notice of
arbitration shall include a demand that the parties refer the dispute to arbitration,
which they intent to settle the dispute with the arbitration process. However, the
demand shall include all specifications of the parties; the arbitration agreement of the
parties determines the procedures of the dispute to refer to the arbitration. General
nature of the claim, the relief or remedy sought by a claimant the proposal as to the
number of arbitrators, and the notice shall be complete in future demand, if the parties
have agreed about the number of arbitrators. They should submit the agreement of
appointment of arbitrators to the arbitral tribunal and if the arbitrators appoint by an
appointing authority the submission shall be with a proposal by the notice.

According to article 20 of Model law at any stage of proceedings, however stipulated
“at any stage” is too broad but the arbitral tribunal shall hold hearing for the
presentation of evidence by witness, or for oral argument, it may request to hold the
hearing in absence. The arbitral tribunal shall decide whether to hold such hearing or
whether the proceedings shall be conducted on the basis of documents and other
materials. The communication of all documents to the other party is a very important
and the oral hearing based on request of a party should be substantive argument not
for procedural arguments.

3.50 Oral hearing

International trade is connected to traders in two States or two places with different
countries, culture and laws. Generally where the trade problems arise between traders
effectiveness upon in documenting trade relation, regardless to all principle of
relationship, the dispute refers to the process of the hearing to solve the problem. One
of the ways of the process of hearing to do so ,unless the parties agree otherwise, in
the oral hearing it shall be made after submitting the arbitration agreement by the
parties’ request as the Article 24(1) of the model law provides, “oral proceeding a
must if requested by a party, unless the parties had agreed otherwise”. It has clear that
in trade the parties shall make document related to oral proceeding depending on the
agreement made between the parties. Accordingly, the trade document of a party may
be against who requested for oral hearing. Thus the international trade law does not
support the parties to solve the problem. In fact, agreement of the parties has determined to make the oral hearing. Oral hearing proceeding uses the expert’s report in hearing with examining of documents or bills of the parties which submitted to the arbitral tribunal. This oral hearing is regardless to the place of arbitration where the arbitral tribunal took place.

3.51 Statement of arbitration proceeding

In writing of statement of arbitration proceeding, it is a very important, that, the statement shall be communicated to the other party and arbitrators within a period of time limit. It provides that article 18 of the UNCITRAL rules require for the statement. In accordance with the article 23 of the UNCITRAL Rules the time limit should not exceed forty five days, but it may change at the request of the parties and accepted by the arbitrators (tribunal). In general all documents and arbitration agreement shall annex to the statement of arbitration to submit to the arbitral during the time limit. The article 18 (2) states that the statement of claim includes “a statement of the facts supporting to make arranging a statement of defence. The claimant may annex a list of all relevant documents to the statement of claim, though the rules do not oblige claimant to do so. 324 Failing to submit a statement of claim by the claimant during a period of time in which determined in accordance with the article 28 of UNCITRAL rules, if ‘no sufficient cause’ is demonstrated for the claimant’s failure. So, the tribunal may allow the claimant to complete the statement of claim. In case of Cyrus Petroleum (Award) the tribunal dismissed the claim on the ground that neither the claim nor the claimant’s subsequent filings detailed the substance of the claimant’s allegations or provided any evidence to support them: Despite the tribunal allowing ample time for correction of these defaults, in this sample, his defective statement should be with sufficient cause it shall say that statement of the parties, is logical for arbitration process. According to the article 19 of UNCITRAL Rules require that the statement of defence shall submit to the arbitral tribunal within time limit, because the article 23 of UNCITRAL Rules provides the same meaning of the statement. So, the statement of defence is in reaction to the statement of claim. In Cyrus Petroleum 325, the statement of claim was unable to respond, the tribunal ordered the claimant to respond to these objections and when the

324 Ibid, p.196.
325 Jaime Lys Margie, Hulley enterprises Ltd v. the Russian Federation (PCA) case No: AA226-Final Award.
claimant failed to do so within allotted time, the tribunal informed the parties that it “intended to decide the case on the basis of the pleading and documents before it’ and subsequently dismissed the claim. The respondents also annex all documents to the statement of defence. So, it will not prejudice the respondent’s right to provide additional or substitute documents at a later stage in proceedings.\textsuperscript{326}

The tribunal may allow the respondent to make a counter-claim arising out of the same counter or relay on the claim arising out of the same contract for the purpose of a set-off. The counter-claim is a separate claim which remains valid even if the original claim has been dismissed, but the acceptance of counter-claim should be justified. In case of Anaconda-Iran, the tribunal of Harris International Telecommunications stipulated that a delay of one or two days would not ordinarily result in a counter-claims’ dismissal. At last, the counter-claim arises at the same contract of the parties but the counter-claim shall connect with subject-matter of the arbitration.

3.52 Provision of Amendment

The amendment will happen where the parties submitted the statement of the claim, statement of the defence, so it may be permitted to amend unless the arbitrators give the permission to the parties, and this approach was rejected in favour of allowing either party to make amendments. Albeit, with the provision that the arbitrators retain the power to disallow amendments. In accordance with the article 20 of UNCITRAL rules, “a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement”. So the amendment should not alter the substance of the claim or defence, in fact, it becomes a new claim or defence. Thus, if the new entity is not a party to the agreement in forming the basis of the arbitration, its introduction will not normally be within the scope of the arbitration clause or agreement. The amendment may, in some instances, invite a new party into the proceeding. Either the amendment of the statement of claim or defence shall be in an equal situation, it shall not be prejudice to other party. In wasting house arbitration requested to the tribunal for declaratory relief to addition to the monetary relief previously sought, it was rejected during the hearing on the basis new factual and legal issues. However, if an amendment is ultimately held to be

\textsuperscript{326} Supra Note,235,p.197.
frivolous in relation, the amending party may be responsible for costs incurred by the other party.

3.53 Concept of public policy

The model law, the UNCITRAL arbitration rules, the judgment and civil jurisdiction Act 1920 (section 4(1) (a) (v) and section 9 (2) (f) and Act of 1933) provide specific concept of public policy. The allied to the defence of public policy and the protection of trading, Interest Act; 1980, section 5 provides that judgments given in a foreign country ordering the payment of multiple damages shall neither be recognized nor enforced by the court in the UK. It has been defined as a “principle of judicial legislation or interpretation founded on the current needs of the community”. It exactly concerns to matters of public good and the public interest and is different time to time, if the public interests have arisen. Thus, it may consider that public policy in different circumstances is somewhat open-textured and flexible. The public policy cannot remain static in any community which the public policy has been given. So, the public policy would be almost unnecessary if it was to remain in fixed moulds for all time.327 It may involve justice and moral interests, thus the application of the doctrine of public policy in the field of conflict of law is more limited than in the domestic law because the courts are slower to invoke public policy in cases involving a foreign element when a purely municipal legal issue is involved.328 In case Fritz S Cherk v. Alberto Culver Co. (1974)41 L.Ed.2d.270 (270 and 281) the U.S. Supreme Court held that: has disapproved a parochial refusal by the courts of one country to enforce an international arbitration agreement as well as the parochial concept that all disputes must be resolved under our laws and in our Court. It has been observed, we cannot have trade and commerce in the world markets, international waters exclusively on our terms governed by laws, and subsequently resolved in our courts.

3.54 Interim measures

It is a jurisdiction of the arbitral tribunal to stops the process of the hearing. It usually occurs at beginning of arbitral tribunal process or during the process, order is issued for the interim measures by the arbitral tribunal to preserve evidence, protect assets,

327 Supra Note,8,p.106.
328 Ibid,p.108.
or in some other way to maintain the status quo pending the outcome of the arbitration proceeding themselves.\textsuperscript{329} In accordance with article 26 of UNCITRAL rules, the arbitral tribunal grants the interim measure to conserve or restore the status quo of perishable goods, preserve evidence that relevant to the resolution of the dispute. So, the arbitration rules provide interim measures to grant just at request of a party, it deems that if the interim measures are required for the conservation of the goods, forming the subject-matter in dispute, preserve evidence, the arbitral tribunal itself issues them. But it shall be reasonable possibility with examining by the arbitral tribunal, it is one of the important provisions that the arbitral tribunal must satisfy to grant interim measures. It has got a jurisdiction upon the subject matter of the dispute before ordering an interim measure. This protects the party who is subject to the measure should it turn out to have been wrong in light of the final award.\textsuperscript{330}

In accordance with the article 26 (3) of UNCITARL Rules; relationship with national court in the consideration of interim measure, the law of the place of arbitration may restrict a tribunal power to grant interim measure by reserving such power to the national courts. But this part of Article as ‘a request for interim measure addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement, at first this shows that important position of arbitration agreement, and also to cooperate court and tribunal in which the court of the place of arbitration and/or the court contractually designated as the proper courts for issuing measures. The existence of an arbitration agreement implied that the arbitral tribunal had the right to order an interim measure for protection but it should be limited, because of model law article 24 (4) provides that it shall not be in contrary to arbitration agreement, it permits to tribunal to decide about the subject-matter. It balances equality between the parties; the time-limit to submit documents might be too short, because international commercial is different from national process to participate in hearing or submitting evidence, so in giving more time to do, it shall be flexible by the arbitral tribunal.

\textsuperscript{329} Supra Note,97,p.332.
\textsuperscript{330} Supra Note,235,p. 209.
3.55 Power of Arbitral tribunal

The power has been granted to the arbitral tribunal under the agreement of the parties. The power of arbitral tribunal such as order to the evidences-taking, where interim measures are required issue, and do so. Generally, the power of tribunal depends on the rules of the applicable law applied by the parties. In fact, the arbitral tribunals have a power to take evidence. As the 1976 UNCITRAL rules do not constitute anything like an eventually balanced compromise between different jurisdictions, being heavily slanted towards continental practice, and do not empower the tribunal to order general discovery of relevant documents. The parties can draft their own provisions dealing with discovery for inclusion in the arbitration agreement. The authority of the arbitral tribunal is under the rules of law applicable by the parties and their agreement. Thus, the LCIA Rules article 22 (1) (b) and (c) provide that the tribunal has got power to order to disclose documents and other materials, while article 20 of ICC Rules, does not expressly permit arbitrators to order discovery. This authority (to order production of documents) is implicit in the arbitrators’ mandate under article 14(1) to establish the facts “by all appropriate means”. Article 23 of AAA commercial rules permits pro-hearing discovery; although this language does not specifically authorize an arbitrator to order pre-hearing discovery, it confers on arbitrators broad powers to ensure that evidence is presented at arbitration hearings so factual issues are sufficiently developed. The disclosure is under article 68 and 69 of 1907 Hague convention interstate arbitration.

3.56 Waiver of right to arbitrate

In accordance with the both of Model law article 8 and the UNCITRAL arbitration rules article 30 to waive right by the parties if any provision of arbitration process has not been complied with their objections or the recognition and enforcement of arbitration agreement by national courts. Especially article 8 of model law provided that when a party in invoking the agreement requests its enforcement “not later than when submitting his first statement on the substance of the dispute”; in addition, waiver necessarily entails a loss of the right to arbitrate under article 8 the waiver of right will be found when the party seeking arbitration substantially invoke the judicial
process to the determent or prejudice of the other party.\textsuperscript{331} The termination usually happens where the final award made by the arbitrators become a final and binding on the parties, if the arbitral tribunal has not received request to correct in the award or given an interpretation of the award or any error computing and an additional award. It may happen during the arbitration process the parties or a party waiver to settle the dispute of the case with arbitration mechanism, as it provides that in article 8(1) of model law; “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”. Thus if a party applied to a court for interim relief cannot be considered a waiver of the right to arbitrate if the request for relief goes beyond the preservation of evidence or the maintenance of the status quo it may be considered a waiver.\textsuperscript{332} However, it should consider to waiver the frustration of the arbitration agreement, is a part of waiver of right to arbitration.

\textbf{3.57 Award of Arbitration}

In accordance with the International Arbitration Procedure the award of the arbitration depends on the final discussion or decision of the arbitral tribunal but the award which made will be public because this procedure is provided by the UNCITRAL rules article 32 (5); “the award may be made public only with the consent of both parties”, thus the consent of the parties is important. In case between Hassneh Insurance v. Mew, the award was “potentially a public document for the court or enforcement and the award could be disclosed without the consent of the other party. The award provided that an award may be made public “only with the consent of all parties or as required by law”. In Sweden, it appears that there is no implied duty of confidentiality in relation to either the arbitral proceeding or the award, although it is accepted that arbitration is fundamentally a private process and this is one of its perceived advantages. In accordance with the international arbitration procedures that the publicity of award is free with agreement of the parties, as already stated the article 32 (5) of the UNCITRAL rules contain any express restriction on the freedom of the

\textsuperscript{331} Supra Note,7,p.421.

\textsuperscript{332} Supra Note,117,p .163.
parties in this respect.333 The award of UNCITRAL made under the arbitration rules shall be final and binding on the parties, it stated in the Article 34 (2) of UNCITRAL 2010, “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”. The award may interpret or needs a correction, so may request the arbitral tribunal within time limit, and it shall be considered by the parties within 30 days of receipt of award with notice to the other party. it occurs where a party requests to interpret of award, because the provision of the requesting provides according to article 36 (1) of UNCITRAL arbitration rules which, “either party with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature”.

The award of the arbitration is usually final to be binding on the parties so that the parties only apply to recognize and enforce within time limit. Otherwise, it is a disadvantage of the arbitration process, as it provided in all said international instruments to be able to be applied for the arbitration. However, the time limit in the different international instruments vary, it exactly depends on the rule applied by the parties, so the time limit is differently based on the law applicable. It may start from one month to two years since the time has computed and the date on which the arbitration agreement was concluded. The extension of time limit needs to be with an agreement between the parties; the arbitral has no jurisdiction to extend the time limit unless the parties permitted them to do so. In some circumstances, the arbitrators may allow to extend the time limit of hearing. Those circumstances are a) replacement of an arbitrator b) to hear the witnesses or the taking of experts opinion or the other reason which the arbitrator with award of the parties extend the time of hearing. The parties are not likely to agree easily on whether an extension is in fact essential or sufficiently adequate for the arbitrators.

The arbitrators shall make the final awards, in failing a majority; the presiding arbitrator alone shall make the award. The factual final award basically is important to recognize and enforce. The concept of final award includes that the interim, interlocutory and partial awards issue by the arbitral tribunal, in accordance with aforesaid international instruments the award shall not prejudice to the parties and shall contain the question whether a settlement, arrived between the parties to an

333 Supra Note,97, p.32.
arbitration proceeding. So result is only for the enforcement of awards, because it is important requirement reason for enforcement. As already noted international instruments provide that the reason of the award unless the parties express the reason, shall not be given reasons for awards. By the end judgment the whole of the judge’s thinking on the fact and the law should have been laid bare, that who run my read.\textsuperscript{334} It should be fair to assume that he has not been led to his decision by matters. The decision may later be held to have been right or wrong but in last there should be no real doubt what and why he decided.

Normally, in end of arbitration hearing the tribunal shall issue an award to clear that to the dispute settlements. The award may be challenged by the parties or the court of state in which a party applied to recognize and enforce, for assuming the award is made in a convention state, it may be enforced under the New York convention. The final award terminates the duties of the tribunal, which becomes \textit{funtus officio}. Thus the final award is a situation able to review and issue any necessary corrections or interpretation and it award has affected res judicata. This means that the same issues cannot be arbitrated or litigated again between the same parties, as long as the award is not vacated. According to UNCITRAL arbitration rules the duty to give full reasons with the award is now standard practice. In all rules, reasons including finding of fact are generally relevant to an appeal on a point of law. The arbitral tribunal to arbitrate of international disputes in international commercial cases, after hearing, will issue the award that decision which an entitled award and decision binding. According to all views, the arbitration hearing is not like mediation which the parties can only recommend.

### 3.57.1 Form of award

The New York convention article II provides that the award shall be ‘in writing’, thus writing is a requirement to recognize and enforce in country where the winner party applied to do. Article 48 of the ICSID convention also provides that this convention inspired from the New York convention to be in writing and also to consider article 79 -80 of 1970 Huge Convention. Base on the Model law article 31, article 1472 of French NCCP, article 1701 of Netherlands Arbitration Act all provide which to sign

\textsuperscript{334} Supra Note,7,p.1007.
the final award. Suppose the parties agreed that no signature is required on the award, or agreed no reasons must be included in the award, but in general speaking almost all arbitration rules provide that the arbitrators shall sign and give the reason where the awards issue. It states in article 32 of Model law, French NCCP article 1473, Netherlands Code of Civil procedure, article 1057 (3), the ICSID Convention article 48 (2). Alternatively, article 189 of SLPIL provides which an award may be signed by the chairman alone to do. So, accordingly, sometimes refusal of the one arbitrator to sign final award simultaneous, majority of the arbitrators shall explain for refusal and it will be explained by the chairman of the tribunal. Thus, the signature of the award under international instruments like the UNCITRAL Model law article 1 (2), and article 34, the Netherlands Code of Civil Procedure article 1704 (2) (b) and (i), is required.

The reason of award shall be given according to the article 31(2) of the UNCITRAL Model law, and the European Convention article VIII which provided that the parties “shall be presumed to have agreed that reasons shall be given for the award, “except where: a) they “expressly declare” to the contrary or b) they “have assented to an arbitration procedure under which it is not customary to give reasons for awards,” and neither party requests reasons. It is possible to recognize and enforcement the award under the national arbitration laws. 335 If the reasons have not been provided by arbitrators, it is ground for setting aside award, but the lack of reason on the award also does not violate the public policy.

3.57.2 Consent to the awards

It does occur where the parties are agreed to settle the disputes simply, if the parties in reaching a negotiated that one option is simply dismiss the subject to the arbitration. Consent of the award is often perceived as providing a greater degree of certainty and enforceability than a simple settlement agreement.336 Article 30 (1) of the model law provides that, if the parties reach a settlement during the arbitration, the tribunal “shall” if requested by the parties and not objected to by the arbitral tribunal; record the settlement in the form of an arbitral award on agreed term. Article 36 (1) 2010 UNCITRAL Rules, LCIA rules, article 26 (8), ICC Rules article 26, provide that the tribunal is not obliged to give reasons for such an award.

335 Ibid, p.1006.
3.57.3 Partial of awards

Depending on the jurisdiction of the arbitral tribunal, however, in some cases, the parties may either challenge or seek to confirm the partial or interim award in court without waiting for the final award which resolves the entire dispute. It cannot be as a final award in arbitration process, it might not be recognized and enforced under the New York convention, if either party does not perform his obligations. It breaches the arbitration agreement and it is impossible to be binding an award if either of parties does not participate to the arbitration hearing. Thus the missing party has been notified and had every opportunity to participate, both orally and in writing, in the arbitral process.\textsuperscript{337}

3.57.4 Validity of award

One of the duties of arbitral tribunal is to take decision and it must be final as well as binding on the parties and reasonable with signature of the majority of arbitrators. It shall communicate to the parties but if the parties applied to be public or if required by a legal duty at the end of the processes of hearing, “failing to meet some of the requirements as to from, such as not stating the date and place of arbitration, would not necessarily invalidate the award, there is no reason to give a disgruntled party any basis to begin an attack on the award”.\textsuperscript{338} It provides by article 30 (1) of ICC rules, “imposes a six-month time from the beginning of the arbitration to the rendering of the final award”. And it also states in clause (2) the time limit may be extended, however, and frequently is”. A lack of clarity could lead to requests for interpretation or even to attempts to vacate. The discretion of the arbitral tribunal limited to the arbitration agreement made for arbitration.

3.57.5 The interpretation of award

It should be rendered by the arbitrators whereas it obviously determines what the award’s terms mean. The interpretation of award obviously based on the request of a party. Article VII.2 of ECAFE Rules and IBRD Convention article 50 (2) provide which by requesting of a party to the arbitral tribunal within a period of short time to

\textsuperscript{337} Supra Note,117,p.193.
\textsuperscript{338} Ibid, p.194.
rule, it varies whereas some of rules provide thirty days and some of them more, though it shall be after making the award. The interpretation differs from the revision of the award it usually describes to be obvious to the parties. In fact, the revision of award is considered with new evidence within specific time limits on the ground of the discovery of facts unknown at the time of the proceeding. Therefore, in accordance with the article 51 (1) of IBRD Convention, it should be “of such a nature as decisively to affect the award”. The last step of the arbitration hearing is a publication of award; the only international instruments, however, which contain a provision on the matters is the IBRD Convention in article 48 (5) which states that the centre for settlement of international disputes is not to publish an award without the consent of the parties.

3.58 Finality of award

The finality of international arbitration awards rendered with the decision of the arbitrators within a period of time limit communicates to the parties. It varies within the different rules, but all of the international instruments provide that the award should be final article 18 of the OAS Draft Uniform law states that “arbitration awards have the force of a final judgment,” similar to Geneva Convention article 1 and also United Nations Convention article V.1 (e) provides that the decision of the tribunal instruments expression of “binding” as a finality of award. It is executor in the state which was rendered. In the eventually, the matter of the finality of award depends on the law applicable on the parties. Thus, on the matter of enforcement with finality of award, in the course of the United Nation conference on International Commercial Arbitration was observed that while “courts should remind free to refuse the enforcement of a foreign arbitral tribunal award” if such action should be necessary to safeguard the basic right of the losing party or if the award would impose obligations clearly incompatible with the public policy of the country of enforcement. The extent of judicial control over recognizes and enforcement of arbitral tribunal awards must be defined with precision to avoid the possibility which a losing party could invoke without adequate jurisdiction of multiplicity of possible grounds for objections of the enforcement of awards rendered.  

339

339 Supra Note, 215, p.278.
3.59 Recognition and enforcement of award

The recognition and enforcement of the award of arbitration rendered within the jurisdiction of the national courts; if the award refused, it does not recover all aspects of the enforcement process. It should be in accordance with the provision of the national courts. The Geneva Convention in article 1 and similar to article III of the UN Convention, the OAS Draft Uniform article 18, article 55 (3) of IBRD Convention provide that arbitral tribunal awards “shall be enforced in accordance with the rules of the procedure of the territory where the award relied upon”. According to international instruments like the CE Uniform law article 29 (2), Article 26 of UNIDROIT Draft, the UN Convention article V, the OAS Draft Uniform law article 19, and the CE Protocol article 2, shall consider that if the final award conflict with the public policy, public order, or order national interests, or if the award conflict with the principles of law of arbitration place where the arbitral took place may be refused.

3.60 Failure of Substantive jurisdiction of arbitrators

The UNCITRAL rules, article 21 permits the parties to challenge an award on the basis that the arbitration did not have jurisdiction when making the award. The grounds of challenge include:

1) The lack of a valid arbitration agreement;
2) The arbitration agreement does not cover the dispute in question;
3) The arbitrators have not been properly appointed.

These provisions are also emphasized by the article 34 (2) of the model law, it states; the domestic court does not have right to examine jurisdiction of arbitrators directly unless a party has applied so a party who failed in the arbitration process does not have power to apply from the court. Under the old law, there was no express power given to the supervisory court to declare an award null and void for want of jurisdiction.340

3.61 Recognition and enforcement of award by regular court

The recognition and enforcement of awards by the regular courts is the only possible remaining hindrance to full party autonomy in the field of arbitration. In many commercial circles it is considered a breach of honor to refuse to accept an award as

340 Supra Note,111,p.426.
final, thus compelling the winning party to bring a formal complaint in the regular courts.\textsuperscript{341} The rules and regulation of many arbitration tribunals require that the parties to waive any legal remedy might be sought in the regular courts against the award. The article 29, section 2 of the Settlement and Arbitration Rules of the International Chamber of Commerce provides that each party subjecting himself to the jurisdiction of their arbitration organization thereby “accepts the obligation to execute immediately the award and to refrain from the use of all those legal remedies about which he can dispose”.

In accordance with article 14, London Arbitration Rules, the award states; no use shall be made by either party of the reasons “even if they disclose an error of fact or law or in connection with the award”.\textsuperscript{342} It states that the recognition and enforcement depend on the reasons which are given by the arbitral tribunal. The first international agreement to establish the obligation of the contracting states to recognize and enforce foreign awards was the Geneva Protocol of 1927 Act article 1 sub-article provides an award based on an arbitration agreement, a recognized as effective and admitted for execution as well as enforcement in conformity with the rules of procedure of the country in which the award is presented for execution. But the award must have been rendered with the territory of one of the contracting states and considered a foreign award. So, enforcement and recognition of foreign award under Geneva agreement has been made, depends on a number of pre-condition.

At the beginning of proceeding to hearing of arbitration, arbitral tribunal must examine validity of the arbitration agreement and lawful procedures, thus invalid arbitration agreement is limited to choose arbitrators and to establish arbitrators group for hearing. The purpose of validity of arbitration agreement is generally important. The UNCITRAL Arbitration rules Article 21 (2) notes that “shall have power to determine a rule on objections”. Convention of the Execution of Foreign Arbitral Awards, September 26, 1927, article I (a) (c) existence or the validity of the contract, in this part, the article states which “have power” but the parties have been appointed the arbitrators, that have already given power. Stipulating, there is no need that agreement has been made, issue some order for arbitral tribunal to determine the validity of the arbitration. The recognition and enforcement of the award must not be inconsistent with the public policy and the principle of public law of the country is being demanded.

\textsuperscript{341} Mathies,N,13,p.p.105,(p.410)
\textsuperscript{342} Ibid,p.411.
3.62 Recognition and Enforcement of foreign award on the common law

The rule to recognize and enforce the award by the common law depends on final award if it is made, so to defend the defendants could raise in resisting an application by the plaintiff to have the arbitral award recognized and enforced by the common law include:

1) The arbitration’s lack of jurisdiction; it means that the arbitral tribunal had no jurisdiction which that made award that was wrong.

2) The award was obtained through fraud; it resists to say that fraud originally is a reason of the action to the arbitration but regardless to the regular court procedure so if the award made through fraud again, if invalid award is made a party has a right to prevent from the recognition of the award.

3) Public policy consideration; it is different country to country.

4) Breach of rules of natural justice. Natural justice may be means all procedures which it covers. But as it considers into the section 66 (1) Arbitration Act 1996 (which replaces the section 26 of the 1950 Act) provides;

“As award is made by the tribunal pursuant to arbitration it may leave national court, and be enforced in the same member as a judgment or order of the court to the same effect.”

3.62.1 Under model law

According to the article 8 of model law which the condition of refusing of arbitration award is under general conditions of the domestic court if it found that arbitration agreement is “null and void, inoperative or incapable of being preferred”. Where the subject matter referred to the arbitration, it shall be with the request of the parties; the model law represents two advances on the New York convention. First, it fixes a time before which the application for enforcement, namely before submission of the first statement on the substance of dispute. Secondly, it allows the arbitration to continue pending to determine by the court of the application to refer the matter to arbitration. The parties may submit a subject matter to the arbitration by an agreement directly without applying to the court.

343 Supra Note.111,p.410.
344 Ibid,p.739.
According to articles 35 and 36 of Model law the composition of the arbitral tribunal or arbitral procedure is not in accordance with the agreement of the parties, in appointing the arbitral tribunal, at beginning of the hearing of arbitration the arbitrators will recognize (their jurisdiction) by themselves. Convention on the recognition and enforcement of foreign arbitral award 1958, article I to II provide that convention govern in applying to recognize and enforce of the foreign award, then it executes by application of the contracting states, and the convention is getting to recognize the foreign award without the application of the contracting states to the convention the awards are unenforceable by themselves. The contracting states for applying may have a legal relationship, but no need to be a contractual term for legal relationship. Article II of the convention deals with the recognition of the arbitration agreement to concern a subject matter whether it is capable settle by arbitration.  \[345\]

3.62.2 New York convention

The discretion refuses a stay of judicial proceeding drastically, it has curtailed in relating to the international arbitration agreement. It can show that the agreement in international relationship is related to the relationship between both of the parties so that according to the international arbitration Act 1974, s.7 (2); subject to this part, where; a proceeding instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; it states that a domestic court may intervene for enforcement of award but it depends on the policy and public morality where the award may apply to recognize and enforce, or the court may interpret an award. The matter in the agreement is capable to settle under arbitration, national law may exclude from arbitration, categories of disputes on grounds of public policy.  \[346\]

In Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd, 22 Gleeson CJ articulated the current judicial approach to these questions. When the parties to a commercial contract agreed, at the time of making the contract, if the dispute has not arisen yet, to refer to arbitration out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals; the appropriate tribunal should be determined by fine shades of difference in the legal charter of individual issues, or by the ingenuity of lawyers in developing points of agreement. Gleeson went on to say;

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\[345\] Ibid, p.31 para 3
\[346\] Supra Note, 102, p.737 and 738.
“It is consistent with the modern policy of encouragement of various forms of alternative dispute resolution, including arbitration, mediation and conciliation, that courts should facilitate, rather than impede, agreement for the private resolution of all forms of dispute, including disputes involving claims under statutes such as the trade practices Act 1974”.

3.62.3 Public policy of the final award

Article 34 of model law and section 19 of international Arbitration Act 1974 provide which for the avoidance of any doubt, that an award is in conflict with public policy. It is an ill-defined legal concept which has been judicial compared to ‘unruly horses once you get astride it you never know where it will carry you’. The concept has been considered mainly in relation to enforcement provisions. The parties are free to choose rules which will govern over the case, it depends on the parties as it already noted that usually international principles are interesting rules for the parties. Hence the breaches of securities law and Anti-trust laws were not arbitrable on rounds of public policy. In a case; in the leading case of Mitsubishi Motors Corporation v Soler-Chrysler-Plymouth Inc, the US Supreme Court rejected the agreement that anti-trust claims were in appropriate for arbitration owing to the ‘pervasive public interest’ in enforcing anti-trust law. Many of the decisions refusing enforcement of arbitral award on round of public policy concern fraud or the breach of natural justice. Errors of law do not per se conflict with public policy. However, decision in deliberation and manifest disregard of the law may be liable to set aside. Accordingly, it notes in article 42 of the Commercial Arbitration Act 1984 (NSW) rations the remedy of set aside limited to the rounds of misconduct of the arbitral tribunal, misconduct of the arbitral proceedings or the improper procurement of the arbitration agreement and the award.

3.62.4 Refusal of award

Ground to refuse the enforcement of foreign arbitral awards is under article V of New York convention, but the obligation on a national court to recognize and enforce

arbitration awards is subject to limited exceptions. The refusal of the arbitration award is possible where the award violates which public policy of the country where the award applied; a court shall not refuse the enforcement of award if one of the exceptions is satisfactory. In accordance with article V of New York convention to refusal of arbitration award, enumerates several grounds on which enforcement may be resisted; a) invalidity of arbitration agreement, b) incapacity of a party to enter into an arbitration agreement c) violation of due process d) arbitration acted beyond its jurisdiction e) improper constitution of arbitral and serious departure from agreed procedure, g) the award is not yet final or binding or is a subject -matter to a setting-aside procedure that provision shall be rejected.

Incapacity; the incapacity relates to arbitration involving a state party which invokes the defense of sovereign immunity.\(^{348}\) In the case of D.LT.Holiding Inc.v. Grow Biz International,Inc,\(^{349}\) ‘non-existent’ was a reason and had refused because the court stated that the respondents had failed to prove that they lacked the financial ability to participate. In arbitration process lack of ‘non-existent’ is a reason to refuse on the arbitration clause. Accordingly, the capacity of the parties in making an agreement is very important. The parties shall give proper notice of the appointment to the arbitrators. Thus, if the parties have not given a proper notice there is a reason to refuse the application of the award for recognition and enforcement. This is a ground to refuse enforcement may overlap with the international public policy defence of article V (2) (b). The provision to be a proper notice of the parties shall be before starting of hearing; it is due to the recognition and enforcement of the award.

### 3.63 The non-arbitrability Doctrine

In accordance with the article V (2) (a) of NSW, an arbitral award need not be recognized if “the subject-matter of the differences is not capable of settlement by arbitration under the law” of the country where recognition is sought. Also, the other international commercial arbitration conventions and treaties contain similar to exceptions. Model law specifically provides which categories of disputes may be

\(^{348}\) Supra Note,235,p.16.

treated not capable of settlement by arbitration. Various national laws refuse to permit arbitration to dispute subject matter in concerning labor or employment grievances; intellectual property; competition (antitrust) claims; real estate; domestic relations; and franchise relations.\textsuperscript{350} Moreover, in fact, finding process in arbitration usually is not equivalent to judicial factual process. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply rights or common procedures to the civil trials such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.\textsuperscript{351} The court has recognized “arbitrators have no obligation to the court to give their reasons for an award”. Historically, agreements to arbitrate future disputes were often the focus of anti-arbitration sentiment. Private parties are free to settle law suits, they have commenced concerning almost all kind of claim (including; employment consumer, securities, and domestic relations claims). To be arbitratable of subject matter, significantly subject matter should be concerned to the law of country where the agreement organized. It is important to preclude conflict with the law of the country.

3.64 Illegality and fraud

Illegality or fraud of contract made between the parties to govern arbitration process differs case to case, it is accepted that allegations of illegality of the main contract do not necessarily lead to the non-arbitrability of the dispute. This is only where the provisions which lead to illegality are of such kind that they require to dispute for decision by the state courts.\textsuperscript{352} In general, it is not important to consider that the illegality of the contract refer to arbitration, it should be separate from the arbitration agreement. So, if the agreement is related to the bribery or corruption credible allegations of bribery not only affect main contract the tribunal lacks jurisdiction to hear the dispute and investigate truth of those allegations of bribery. Relying on doctrine of separatability arbitration tribunal the courts have come to the conclusion that the arbitration agreement as such is generally not tainted by alleged corruption which only affects the main contract. Despite the international public policy implicates that it felt that the tribunal should be allowed to decide whether or not there was bribery or corruption involved.\textsuperscript{353}

\textsuperscript{350} Supra Note,7,p.422.  
\textsuperscript{351} Ibid, p.428  
\textsuperscript{353} Ibid,p.215.
3.65 Set aside of final award

To set aside an award depends on the challenging of award unless it will not direct to a court by a party, a losing party can bring action to set aside an award on procedural or public policy grounds. The losing party has got two options to challenge an award, firstly, in the court of the sites, secondly, in the court where the prevailing party is attempting to enforce the award against the assets of the losing party.\footnote{354} 1) The ground of challenge; for a challenge tend to fall two broad categories; A) jurisdictional B) procedural. The jurisdictional challenge made at the beginning of the arbitration, rather than after the award is rendered. A party who intends to challenge jurisdiction of the award, it’s better to test the jurisdictional question at the beginning of the arbitration, this challenge is to be non-participate to the arbitration.

To challenge jurisdiction of arbitrators it may base on a claim a party that the tribunal does exceed its power. So, the jurisdiction of the tribunal depends on the agreement. Procedural challenges; in accordance with article 34 of model law, the national court may challenge the award under specific challenges. If incapacity a party to be invalid or the parties have not given proper notice of appointments of arbitrators, it determines that the subject-matter has to be within the scope of the arbitration agreement. Also, the arbitral tribunal must be constituted in accordance with the agreement of arbitration. In jurisdiction of national court the public policy and in general, corruption, fraud, or lack of integrity in the process could be considered a violation of public policy, requiring the award to be annulled. In model law jurisdiction fraud or corruption would probably be considered a proper ground for challenging an award if it violates public policy. So, if there was evident partiality or corruption in the arbitrator’s or arbitrators were guilty of misconduct or behavior by which the right of any party has been prejudiced there are factual reasons for challenging of award. To challenge award time limits depends on law application, the result of the challenging to aside award, if it becomes final the jurisdiction of the court shall revive. So, in the end, in accordance with the Uniform Arbitration Act article s 23(c) in the United States, if the award was vacated on grounds of corruption, fraud, or arbitrator misconduct or partiality, the rehearing must be before a new arbitrator.\footnote{355}

\footnote{354} Supra Note,117, p.204.  
In accordance with the article 34 (2) of model law arbitral award is on grounds of invalidity of the arbitration agreement, because at first, the parties should choose a law to govern the arbitration agreement, if no choice by the parties, it should apply its own law to determine the agreement validity. \(^{356}\) Basically, if the agreement is invalid under the law of the seat of arbitration an award is not valid so that according to the New York convention the award could not be enforced. Thus, to set aside an award may deal with the subject-matters which not to be arbitrability, such as family matters, patent regulation, criminal law, and bankruptcy, it provides by article 34 (2) of model law which the losing party apply to set aside of award. The losing party would probably be able to have the award set aside by the court in that jurisdiction. The award also challenges in all jurisdiction if an award can be enforced in more than one state depending on the challenging of the issue which not arbitrability.

Articles 34 to 36 of the model law deal with the setting aside of the award in relating of recognition and enforcement respectively. The grounds have been taken from article V of the 1958 New York convention. In setting aside an award which was made, it shall be during time limit, within three months of receipt of the award. Of course a party is not precluded from seeking court control by way of defence in enforcement proceeding. \(^{357}\) Recourse means resort to a court and organ of the judicial system of a state. The grounds for setting aside as well as refusal of recognition and enforcement are almost identical. There are two practical differences; Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance depending on the state in question, the state of setting aside or the state of enforcement are valid on the state of enforcement but the grounds for setting aside have a different impact. The setting aside of the award at the place of origin prevents enforcement globally. \(^{358}\) Whilst model law was a model act recommended to States and their legislative bodies, the UNCITRAL arbitration rules were more contractual rules that became effective by virtue of an agreement between the parties. \(^{359}\) In analysis of model law, it should say that model law is second step in the rule of arbitration, it has been agreed by the States to use for dispute settlements.

\(^{356}\) Supra Note,117, p.71.
\(^{357}\) Article 36 of model law
\(^{358}\) Supra Note,201,p.36.
\(^{359}\) Ibid,p.36.
The article 36(1) of the model law is derived from the article V of the New York convention said that lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of appointment of an arbitrator or of the arbitral proceeding or in inability of a party to present case are causes of setting aside of award, therefore, it deals with matters. The European Convention on International Commercial Arbitration (Geneva, 1961 setting aside Article IX and Article V of the New York 1958) does not refuse the enforcement the award.

3.66 Cost of arbitral tribunal hearing

Whether the losing party will automatically bear all costs of the arbitration as well as the legal fees of the prevailing party, or whether each party will bear its own costs and fees. As already stated that, it depends on the parties and decision of the arbitral tribunal to do so, both of the parties may allocate the cost for arbitration because it emphasizes in article 42 of the UNCITRAL 2010. Generally sum of fees should be borne by the losing party. In Ad hoc arbitrations in which fees may be discussed, all parties should participate in discussions with all arbitrations about their fees. Normally the parties are expected to pay some initial fees and costs in advance, but the participants may be allocated against the respondent in the final award. International instruments such as ECAFE Rules article VII.7, the IBRD Convention article 61 (2), the European Rules article 43 state that the costs of the arbitration shall be fixed in the award, and it shall be, in every case, payable the costs to the arbitrators, and be borne by the unsuccessful party. It permits the arbitrators in their decision to the apportion the costs between the parties. The laws of many countries require that the fees of legal representations of both parties be borne by the unsuccessful party.

Each of claimant and respondent are often asked by the tribunal to pay a certain amount up front to set up the arbitration. The costs usually vary split equally between the claimant and respondent from the outset. To request re-imbursement of costs from each party in reserving its right at the end of the proceedings the likelihood that the investor will recuperate these costs very low. To give the cost many tribunals ultimately decide that the costs of the arbitration should be shared equally. A number of state covers its costs, particularly where the investor has brought a frivolous state,
obliging the investor to pay for the entire cost of the arbitration, a greater proportion of the costs, and even part of the state’s legal fees. According to the ICC UNCITRAL Arbitration rules, to pay the fees of arbitrators will be at the request of a party, the ICC through the UNCITRAL committee will give a statement as to the fee of arbitration on a consultative basis, so that in correspondence of UNCITRAL arbitration the appointing authority shall give consent because it is necessary to determine of fees.

3.67 Methods of assessing fees

The method of assessing fee depends on the assessment of procedure of each arbitral tribunal as it differs between the arbitral tribunals. The ICC arbitral uses the method of the AD Valorem to assessing of fee; it works to know (a) the total amount in dispute (b) the percentage figure to be applied. The ICC Rules contain a “scale of administrative costs and fees” in its procedure the methods of fees payable are different. For each successive slice of the sum in dispute, minimum and maximum percentages are given to establish a “range”. ICC Arbitration Rules, Appendix III, article 11 (2) provides that the fees of the arbitrators within the overall range, taking into account the diligence of the arbitrators, time spent the rapidity of the proceeding and the complexity of the dispute. Thus, one of the methods of assessing of fee in arbitration is the time spent, so that it is said, in this method time spent working on the case is considered, this rate covers not only work done at the hearing of the arbitration, also all works done outside the hearing. This method used in the UNCITRAL Arbitration rules in the articles 38 (a) and 39. (1), which the fees shall be “reasonable in amount” and shall be stated separately as to each arbitrator in the award.

The third way of fees assessing or payable to the arbitrator is the fixing method, on this basis the sum agreed in intended to cover all the work done by the arbitrators on the case, including time spent at hearing. The ICSID convention is considered for fees to choose reimbursement on the “mixed rate” of assessing fees, but it seems agreed of the parties play major role. The legal relationship between the parties and the arbitrators for payment of fees seem security for payment. The UNCITRAL rules article 41 provides that the arbitral tribunal shall arrange for the parties to make
sufficient deposit in respect of its fees and expenses. It sounds a bank account should be opened for receipt of the deposit made by the parties.\textsuperscript{360} This bank account is usually opened in the name of the arbitral tribunal, with the sole arbitrator or the presiding arbitrator, if an administrative person has been appointed, operation of the account should be one of that person’s responsibilities.

\textsuperscript{360} Supra Note,97,p.232.