Chapter 5

Judicial Response
CHAPTER -5
JUDICIAL RESPONSE

5.1 Introduction

In legal study method, the scholars have to examine the principle goals to analyze laws applicable to study of titles. While studying to understanding of titles to reach to the principle goals are very important. This chapter provides brief examine to the summaries of cases under the UNCITRAL Arbitration Rules, the cases have been organized according to each article of the UNCITRAL, so that the cases of various countries applying article the same section and usually can be compared. The UNCITRAL Arbitration Rules can be guided by the precedents only in relation that article. The section on each article of the UNCITRAL Arbitration Rules begins with the text of that article and a brief summary of how the arbitral tribunal, WTO, courts and others applied it. For each article, cases are arranged by title and within each article and title each case summary provides information on the decision and where it is reported. Some of article or title has no case law, while some of articles have many cases.

5.2 Scope of Application

Case synopses

Fabem & co. V. Mareb Yemen Insurance co. Ltd.

2 Hoyd’s Rep.738

1997

Fact:

The defendants had sent a telex to the plaintiff which was expressed to be an ‘offer’ for sale of sugar with price to be advised later with separate telex. The telex contained an arbitration clause. The plaintiffs accepted the offer by telex. In accordance with the article 1 of the UNCITRAL 1976 arbitration rules the arbitration agreement is sufficient for reference to the arbitral tribunal. The requirement of the submission to the arbitral tribunal is arbitration agreement in writing signed by the parties. The contract of trade had been made between the parties in writing by the telex and offeror
had sent to the plaintiffs so it was an offer for transaction of sugar in commercial with arbitration agreement. Thus, the dispute had arisen but the plaintiffs accepted the offer and the contract was contained an arbitration agreement. In result, the plaintiffs should refer the case to the arbitral tribunal and the decision of Appeal in Zambia provided that the assent by one party is sufficient for reference to the arbitral tribunal not to the national courts.

A brief description:

“It seems to me that the phrase ‘an agreement in writing’ may have two meaning at least. The first is that the terms agreed between the parties are set out in writing”. 423

On that basis, provided that the terms of agreement to submit to arbitration are contained in a document or documents, proof that those terms were agreed by the parties to be binding upon them may be given outside those documents. Such proof must be given by evidence of conduct, from which the court is persuaded that inference of agreement must be drawn, by evidence of oral acceptance, indeed any other evidence which satisfied that court that the written term constitute or from part of an agreement between the parties. Article 1 of UNCITRAL provides, “where the parties to a contract have agreed in writing” so the requirement for writing was included to increase the chances of an award under the Rules being enforceable, as the New York Convention and various domestic laws contain a similar requirement.424

In accordance with the 7 of model law Para 2 the arbitration agreement shall be in writing, Para 2 of article 7 of model law particularly broadly accept many different forms of communications in satisfaction of the writing requirement, 425 if it is contained in a document signed by the parties with many different forms of communication, it is a satisfaction of the writing agreement alleged by one party and not denied by another. The UNCITRAL model law and article 1 based on scope of application, the international commercial arbitration make by the agreement, if the parties expressly agreed to refer the dispute to the arbitration mechanism the agreement force between them. The courts have been forced to clarify when the rules looking to the nature of contract. Therefore, the nature of the writing contract is governed between the parties. In this case aforesaid above the assent of the parties

423 Supra Note, 111,p.420.
424 Supra Note,236,p.171.
425 Supra Note,342,p.37.
expressly stipulated to refer the case to the arbitration. Accordingly, article II section I provide that each counteracting member state recognizes the final arbitration award with: “a written agreement by virtue of which the parties promise to submit to an arbitration procedure all or particular litigation which develops between them.”

Arbitration is a creature of consent, so that the requirement of validity of arbitration firstly shall be in writing. The enforceability of the final award depend on the written agreement, as well as article 34 (2) (a) (1) of the model law provides that the ground for annulling an award; invalidity of arbitration agreement. article 1502 (1) of French NCCP states that “if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired”, in result of this expressions the agreement of the parties base on assent play important role to recognize and enforce the writing agreement and it is a validity of award. In the light of the writing requirement such as an option is primarily limited to countries which do not require any strict form for arbitration agreement.

**Held:**

Referred to the decision of the court of Appeal in Zambia Steel &Building Supplies Ltd v. Clark & Eaton Ltd, where O’connor 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”. The arbitration clause in Fabem must therefore necessarily constitute a valid arbitration agreement.

**Case synopsis**

Gusset (Company X v. company Y) France company and English Company


To be cited as 1992/37 McGill L.J.510

1992

The contractual foundation of international or national arbitration has approved to be a milestone or source of both flexibility and limitation. The jurisdiction and scope of arbitral tribunal’s powers can be settled by agreement of the parties. The agreement of

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427 Supra Note,125,p.145
428 Supra Note,111, p.420.
429 Supra Note,97,p.164.
the parties submit to the tribunal is necessary and it is different to reach when they are
in conflict. Under this reason which an agreement to solve a dispute by arbitration
amounts, French law has treated arbitration as an exception. Under article 6 of code
civil “arbitration clause is null and void unless otherwise provided by law”. French
law has, for some times, contained well developed principle for dealing with problems
related to the validity of an arbitration clause. The case was conferred upon
agreement of arbitration to arbitrate contained in contracts with an international
instrument and dimension there much discussed “autonomies”.

**Fact:**

Mr. X, the controlling shareholder of companies consisting of the French group X and
English group Y entered into agreement to develop their interest in the Luxury hotel
and leisure industries in France. Basically, agreement was made behind the idea
which was that X group and Y group were to transfer their shareholdings in various
French companies active in this business to company XB, which was controlled by X
group supervisor Mr. X. The contract was made in dividing three conditions precedent
clauses: Seventy five per cent of the capital of company XB, was then to be
transferred to a holding company. In fact, the basic idea to hold in the following
manner: 50.1 per cent to be held by X group and 49.9 per cent to be by Y group
companies. The remaining 25 per cent of capital company XB was to be public and
the company was to be quoted. Two companies XC and XD whose shares were to be
transferred to company XB, both of which were controlled by Mr. X (X group). The
contract contained the procurement of exchange control authorization from the French
Treasury for company Y’s investment and also a French governing law clause an
arbitration clause providing for arbitration in Paris and ICC Rule and it was with
appointment arbitrators either one or three. The clause provided that the arbitrators
were to have the power of an “amiable compositeur”. Article 13 (4) of ICC Rules of
Arbitration permits to decide an arbitration award by an arbitrator and arbitrate the
subject matters by arbitration as amiable compositeur if the parties agree to give
arbitrator such powers.

430 “La clause compromissoire st nule si nest dispute autrement par la loi”
431 Gravel, Serge, Peterson, Patricia, French law and arbitration clauses- Distinguishing scope from
510,p.511
Hearing:

The contract never comes into force as the condition relating to exchange control authorization was not performed. Few months later, after arising the contract company, Y withdrew from the transaction. Mr. X (X group) together with companies XB, XC and XD, commenced arbitration proceeding against company Y. They claimed damage in quasi-delict for losses suffered from Y group as a result of company Y’s withdrawal from the joint venture. The jurisdiction of the arbitral tribunal and arbitrators was challenged by company Y. All claimants argued that their involvement in the transactions contemplated by the contract was that they should be treated like parties to the contract. In relation to mean the term “autonomie”, the award made by French tribunal which the arbitrators appointed under the Rules of Arbitration of the International Chamber Commerce raised to the jurisdiction of arbitration issues. The two such jurisdictions were: first; related to the extension of an arbitration clause to entities within a group of companies which had not signed the relevant contract. Secondly, it concerned the application of the arbitration clause to claims framed in quasi-delict arising out of an agreement which had never entered into force.

Held:

The tribunal rejected this argument with regarded to companies XC and XD base on its view; this was merely a case of a shareholder freely disposing of his shares. The arbitrators did, however, consider that the situation of company XB, jurisdiction treating it as a party to the contract. They found that company XB had been at the heart of hearing and negotiation, and it also found that various asset would be transferred to XB. The tribunal held that the company XB as a third party beneficiary under the contract and it (company XB) could avail itself of the arbitration clause. Relating on second challenge to jurisdiction of tribunal; it held that it had jurisdiction to consider the plaintiffs’ claims even though they were quasi-delictual. The tribunal advanced two reasons: first, it had jurisdiction to consider all delicts and quasi-delicts committed in the context of the conclusion or to perform of a contract containing an arbitration clause. Second, company Y’s behavior had prevented its performance. Therefore, relating to performance, a matter coming within the scope of the clause. The third claim of clamant was in quasi-delict, it was examined by tribunal under
French law. Ultimately the tribunal rendered award reliance damage to Mr.X and to company XB but the amount was significantly less than what was claimed by the claimants.

Case synopsis

Consultant v Egyptian Local Authority No: ICC 6162
Published XVII year Book Commercial Arbitration 153.160-62
1992

Fact:
The main contract contained an arbitration clause providing for arbitration in Geneva under the ICC Arbitration Rules. It also provided that “Egyptian laws will be applicable”. The respondent submitted the respondent submitted the case to arbitrators, while the arbitrators did not designated the arbitration clause and arbitration separate agreement, the arbitration clause was void under Article 502 (3) of the Egyptian law of Civil Commercial Procedures. As a matter of Egyptian law …the tribunal decided that the law of Switzerland, as the law of the place of arbitration was the law applicable to the form and validity of the arbitration agreement-and the law that had not been chosen by the both parties.

Accordingly, it is possible the arbitration agreement clause be in the form of an arbitration clause in a contract because it states in article 7 of the UNCITRAL model law. In this case, the main contract was contained an arbitration agreement by the parties to submit to arbitration which may dispute arise between them but the law applicable should be Egyptian law if dispute arise but the parties failed to determine the law of the proceeding. According to article 28 of the UNCITRAL, model law failing to the designation by the parties, the arbitral tribunal shall apply the law determined by the conflict laws rules, it is necessary for arbitration process to deal with any law application. Article 33 of the UNCITRAL 1976 and revised of the UNCITRAL arbitration rules 2010 by article 35 provided that failing the designation of law applicable, the arbitral tribunal shall apply the law to be appropriate. It is found

in the ICSID which the tribunal shall decide a dispute in accordance with such rules as may be agreed by the parties. In the absence of such agreement the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of law) and such rules of international law as may be applicable”. The arbitral tribunal may select directly the applicable substantive rules, the arbitral tribunal, however, does have the discretion to choose to proceed through the choice of law process to do.

Held:
Tribunal should exercise jurisdiction over the dispute; it held that all respondents are bound by the arbitration agreement contained by the contract of sales and pursuant to the terms of the ICSID, if the first respondent breached the sale’s contract though the second respondent should be responsible for any breach of the contract of sale.

Case synopsis
Arab African Energy Corp Ltd .Voli produkten Netherlands BV Rep.41
1983

Summery under case:
The arbitration clause agreement may be international even both the parties are from the same nationality and the agreement may governed by the national law.

Case synopsis
Rainbow Warrior, France & New Zealand
Arbitration Tribunal no: 82LL.R500
1990
Fact:
Two agents were from different national France and New Zealand; national France who was convicted of destroying a ship docked in New Zealand and was removed by France on the premise that they required necessarily emergency medical treatment. Because of destroying of ship, a civilian Vessel that was docked in New Zealand was destroyed by a team of France agents. The agents were transferred to the capital city of a France on the basis of necessary medical attention. The contract was between two agents and each of the contractors shall conduct based on the terms of contract the agent of New Zealand needed medical treatment in France. This dispute was brought to the arbitral tribunal in which New Zealand demanded the amount of compensation for sinking the Vessel and asked for that France had breached its obligation. In addition, New Zealand demanded that France ordered in return its agents to the facility for the remainder of their sentences.

This case shall define the scope of the arbitration jurisdiction by issue broadly to use the arbitration’s provisions to remove their agreement obstacles to good relations. The arbitration is a mechanism which is in hands of the parties to determine necessary issues and how arbitrators conducted. The 1899 and 1907 Hague Conventions considered rules which have provided the procedural framework for arbitration mechanism and it has provided by the International Law Commission for the parties to agree the arrangements and exercise to control of the their dispute. The agreement of the parties and dispute of settlement also provided by UNCITRAL arbitration rules in relation to define the important issues in arbitration based on the agreement because it (arbitration agreement) establishes the scope of arbitrator’s jurisdiction. The dispute was to determine the place of the arbitration.

Held:
New Zealand asked the Secretary-General for compensation and responsibility was admitted. The secretary-General was not considered to decide compensation, it was due and this responsibility was accepted by the respondent, nor whether New Zealand justified, both states were more concerned to settle of dispute with finding justifiable solution to the dispute, and the Secretary-General had to deal with issues of settling the dispute, and held that the parties shall focus on the issues and certain exclusion.
Case synopsis

Fletamentos Marítimos SA v. Effjohn International BV

2 Lloyd’s Rep. 302

It has happened in common law system England Court of Apple

1997

Fact:

Under a joint venture agreement made between Marflet and Effjohn, pursuant to that arbitration dispute were referred to arbitration. The agreement made base on the cooperation of parties. The agreements were referred to the arbitration by the parties, it was argued for discovery of good conduct of arbitrators. Malfelt challenged the right of arbitrators to appoint a third arbitrator, and challenged the entitlement to appoint an umpire to be present to the hearing. The Applicant applied to remove the arbitrator under section of 23(1) of the 1950 arbitration Act of England. The application to the Court of Apple of the parties were included; for discovery of the fact base on the their application was dismissed the arbitral tribunal and they argued that in arbitral hearing “misconduct by the arbitrators in that the umpire was guilty of misconduct in the manner and extent of his participant of the proceedings”, in addition they claimed arbitration had misunderstood the application of parties and failed to issue fair and to give justifiable reasons for its actions, and also one of the arbitrator was biased. According to the section 23(1) of 1950 arbitration Act of England, “Where an arbitrator or umpire has misconducted Removal of himself or the proceedings, the High Court may remove him”. And “Where the award has been improperly procured, the High Court may set the award aside.

The removable of the arbitrators or umpire and set aside of award if has been improperly are depend on the application of the parties to remove an arbitrator or umpire who has miconducted and claim to the High Court the arbitral tribunal failed to give them fair hearing. Both the application for removing the arbitrators or umpire and set aside the award where the arbitral failed to give reason for actions should apply to Commercial Court. Article 23 of UNCITRAL arbitration rules provide that if

the arbitrator misconducted he/she will removed by itself and the final award is improper if the award is not based on proper procedure the national court and the İn accordance with the article 36 (1) (b) (of the UNCITRAL model law if under the law of the country where the award was made, it focused to the law of the country on procedural of the proper aspect to make final award for recognize and enforce when one party contends that an award is improper and should not be recognized due to a procedural defect in article 23 (1) of 1950 Act so that the court may refuse to recognize or enforce an award. The good faith of the arbitral tribunal is essential for arbitration because the arbitration mechanism is corresponded with consent of the parties. Generally the important point into the arbitration is that national courts have never power and not permitted to intervene into the arbitration proceeding and supervise arbitration.

Basically the position is that the Court has never had some general power to supervise arbitration and review interlocutory decision. The power which it does have comes from the Arbitration Acts [three Acts pre-dating the 1996 Act]. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under section 22 applies to awards. As the Judge relied on section 22 (which speaks of matters rather than awards) as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well-established authorities. The jurisdiction of the arbitrators challenged and underlined by section 8(2) of the arbitration Act of England which state that “Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference [that is a reference to the appointment of an umpire] be deemed to include a provision that if the arbitrators have delivered to any party to the in writing stating that they cannot agree the umpire may forth with enter on the reference in lieu of the arbitrators.”

Held:

High court set aside the award. The Commercial Court held that it is not the policy of the law to require a party to arbitration process to complain about the procedural

434 Supra Note,111, p.428.
unfairness, which fell short of misconduct to continue in the arbitral process and to challenge the final award when he could have had power to remit his right before the substantive hearing. The umpire was entitled to sit with the arbitrators and they had made with their minds on to make a decision with participation both sensible and desirable. It could be said that the umpire had violated the line. The umpire had intervened more than other umpires. The Court of Appeal endorsed the judgment. The power to remit under section 22 (1) of the Arbitration Act 1950 could apply interlocutory rulings. On the facts, the umpire was entitled to sit with the arbitrators and retire with them. 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.

**Cases synopsis**

Hassaneh Insurance Co of Israel v Mew

2Lloyd’s Rep 243 V.Start J.Mew, Q.B.Comm.CT.

1993

The English High Court decision (Mason CJ accepted Colman Js’ statement)

**Fact:**

The parties made various agreements by several reinsurance contracts from 1979 to 1984. In Arbitration process, the defendant commenced arbitration claiming to recover of the contracts under the some policies when disputes arose. The award was rendered, though the defendant was believed that the broker breached his duty and applied for negligence of broker, the defendant wanted to disclose to the broker interim award, and the defendant disclosed the documents for future use. The plaintiff was agreed with award and reasons as it concern to the placing of broker, subsequently they agreed to the disclosure of the whole of the reasons in which have given by defendant and other documents. However, the defendant leaved to disclose and the duty of confidence was lifted. The duty of confidentiality was subject matter to the award made be between the Hassaneh Insurance Co. of Israel and Mew even though the award indentified and was potential to be public document for the purposes under supervision the court for enforcement, Subsequent the defendant was reinsured.

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436 Section 22 now replaced by sections 67(3),68(3),69(7) of the new Act.
437 Supra Note,111,P.428.
Held:

The confidentiality of award is subject to the arbitration and disclosure of award is permitted with its reasons necessarily for the protection of right of the parties vis a vis a third party. The arbitration award may submit with the arbitrarily of subject matter at request of a party into the courts for enforcement of the award. 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.\footnote{Supra Note,241, p.116.} It was a good reason to leave the disclosing of award, if it was necessary for defendant to do. For the establishment of causes he based the causes against the broker then all documents such as pleadings, witness statements disclosed and transcripts were subject to a duty of arbitration confidentiality. These documents were merely used to give rise to issue the final award which defined the rights and obligations of the parties. It was also held that the qualification of duty of confidentiality is the reasonable for the protection of both parties’ rights against third party. It may exist to facilitate subsequent proceedings. The court recognized the existence of duty of confidentially as an undoubted privacy of the hearing in an international commercial arbitration. In this situation, the case provides the arbitration process is private mechanism, and institutional arbitration rules reflect the concept of the privacy of arbitrations.

5.3 Representation and assistance

Case Synopsis

EC-Sardines\footnote{https://www.wto.org/English/tratop_e/dispu_e/cases_e/ds/231_e.htm.}

(European Communities-Trade Description of Sardines)

WT/DS231/AB/R

26 Sep 2002
Parties and third parties to settle a dispute, which have a legal right to participate in panel and Appellate Body proceeding, and, on the other hand, private individuals and organizations which are not Members of the WTO which therefore, do not have a legal right to participate in dispute settlement proceeding. The participation by private individuals and organizations are dependent upon our permitting such participation if we find it useful to do.\textsuperscript{440}

**Fact:**

The Claimant of the hearing was Peru and the Respondent was European Communities on 29 May 2002 based on the panel report and the agreement of Agriculture and Food (sardines). On March 2001, by requesting Peru to consulite with the EC concerning Regulation (EEC) 2136/89 which, according to Peru application, prevents Peruvian exporters to use the trade description “sardine” for their products. Peru submitted in accordance with the Codex Aliment Arius standards, the species “sardinops sagax sagax” are listed among those species which can be traded as “sardines”. It considered that the Regulation (EEC) established unjustified barrier to trade while it was in breach of article 2 and 12 of the TBT Agreement and article XI.1 of GATT 1994 Peru argued that the above Regulation is inconsistent with the principle of non-discrimination, and in breach of article I and III of GATT 1994. In accordance with request of Peru the DSB established a panel to determine the composition of panel. The report of panel was circulated to members and concluded that the European Communities Regulation was inconsistent with article 2.4 of the TBT Agreement. The EC notified its decision to the panel of the Appellate Body, certain issues of law covered in and legal interpretations developed by the panel. The Appellate Body, according to EC notification, was circulated and found that the condition attached to the withdrawal of the notice was permissible, and the panel of European Communities commenced by the Notice of Appeal. The Appellate Body also found that the amicus curiae briefs submitted were admissible while their contents did not assist base on the decision of appeal. Upheld the Panel’s finding\textsuperscript{441} that the article 2.4 of the TBT Agreement applies to measures that have not “caused to exist and that article (2.4 of the TBT Agreement) applies to existing technical regulation.

\textsuperscript{440} Supra Note,272,p.189.  
\textsuperscript{441} Paragraph 7.60 of the panel.
In accordance with the article 2.4 of TBT Agreement, the panel found that Codex Stan is a ‘relevant international standard’. And Codex Stan 94 was not used “as a basis for” the EC Regulation, the Panel found that the burden of proof rested with the EC to demonstrate that Codex Stan 94 is an “ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued’ by the European Communities through the Regulation of European Communities. As required by article 11 of the DSU the Panel rejected the claim of the European Communities because the Panel did not conduct “an objective assessment of the facts of the case”. The Panel also found it unnecessary to complete the analysis in accordance with article 2 (1) and (2) of TBT Agreement, and article III: 4 of the GATT. EC stated that at the DSB meeting it was working towards implementing the recommendations of the DSB in a manner consistent with its obligation according to WTO Rules and TBT Agreement (article 2.4). To end of proceeding of Panel’s Report, the EC was willing to pursuant article of 21.3 of the DSU, in order to reach a reasonable consult to achieve agreement on the reasonable period of time needed for fulfillment of the Rules of DSB and its recommendations.

**Held:**

The Appellate Body upheld that under the finding of Panel, that the Regulation of European Communities is inconsistent with article 2.4 of the TBT Agreement. It also recommended that the DSB request to the European Communities to bring the EC Regulation and found in its report and Panel’s Report, the Regulation of EC modified by its Report. Because of above the Regulation is inconsistent with article 2.4 of the TBT Agreement, in to conformity of European Communities’ obligations according to TBT Agreement.

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442 Ibid, 7.70.
443 Paragraph 7.112 of the panel.
Case synopsis:

India- US Agreement on Textiles and Clothing
WT/D33/A/R issued in April 1997

A brief description:

The agreement on textiles and clothing was being subjected to especially negotiation rules designed to regulated trade in cotton products. The base of source to develop world trade in textiles and clothing has been governed by the Multi-fiber agreement, through bilateral or unilateral agreement actions and established quotes on import of textiles and clothing from competitive developing countries. The mechanism of WTO (GATT 1994) integrates itself with disputes of the textiles sector in the Agreement on Textiles and Clothing (ATC), which was negotiated during the Uruguay Round. The agreement of textiles has been on the major objectives in the Uruguay Round for India. It concluded to export of textiles account for about 36 per cent of total export from India and represent the largest net foreign exchange earner for the country. India has granted access for textile products under the MOUs signed with the US. The market access was included the calibrating to remove of quantitative restrictions and tariff reeducations over a 10 year period. Market access is a key issue for India in multilateral trade negotiations.444

Fact:

India is getting more marginalized in the global scheme of trade patterns in textile and clothing sector. The exchange rate devaluation in 1991 and depreciation of the Indian Rupees has played a role in increased import of textiles to India. The agreements with USA were relating to removal of QRS and reduction in bound. India has been losing competitiveness in textile and clothing globally.445 Textile and clothing Agreement article 2.4-6 and 8 were violated by US. India was complaint on 30 December 1994 under ACT of WTO. Briefly, on 30 December 1994, India requested to the transitional safeguard measure imposed by United States. Under Indian request the

safeguard was inconsistent with aforesaid articles. Subsequently, Indian requested the establishment of a panel, on March 1996, but the Dispute Settlement Board deferred to establish of a panel, under second request of India, panel established on April 1996.

Panel report:
The panel established with its composition on June 1996. Canada, the EC, Turkey, Norway and Pakistan reserved their third party rights. The report of panel was on 6 January 1997. It was found that the safeguard measure imposed by USA violated the provisions of the ACT. Panel found that USA failed to meet the causation and serious damage requirements therein when imposing its transitional safeguard measure. It failed to examine the data relevant to the “woven wool shirts and blouses industry” as opposed to the “woven shirts and blouses industry in general”. Panel considered that under article 6.3 each of the items listed such as industry impact factors to be a mandatory list. Under aforesaid article “some consideration and a relevant and adequate explanation have to be provided of how the factors as a whole support the conclusion that the termination is consistent with the requirements of the ATC. On February 1997, the intention of India was notified to appeal certain issues of law and legal interpretation developed by the panel. Therefore, it was up to India to put forward evidence and Legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under article 2-6 of Indian ATC. India did so in this case, and, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim.

Appellate Body Report:
The Appellate Body did not consider the Panel’s decision on the Textiles Monitoring Body, because the comment of panel was that the Textiles Monitoring has power to make legal finding or conclusion which the Appellate Body may modify it. The Appellate Body considered that the basic aim of dispute settlement in the WTO is to settle disputes, it meet to encourage either Appellate Body or panel to make law by existing provision of the WTO agreement.

446 Supra Note,379, p .95.
Held:

The decision of panel on these issues of law and legal interpretations were appealed against. Finally, the Appellate Report and Panel’s Report were adopted by the DSB on 23 May 1997. The US announced that the measure as noted was withdrawn on November 1996, before the panel had considered its decision and did its work. Therefore no implementation issues arose between USA and India.

5.4 Application of arbitrators

Case synopsis

Commonwealth Coating Corp. V. Continental Casualty Co

No: 393 U.S.145

Published by the Supreme Court of USA

1968

Section 10 of Federal Arbitration Act 1925 set forth the award to be set aside “where there was evidence partiality…in the arbitrator”. In accordance with section 8 of American Arbitration Association (AAA) the result are shown if there is s conflict between party selected arbitration rules, such as those of the American Arbitration Association and the increasing state statute that control arbitration. All arbitral and judicial systems must deal, in some way, with the identity of the person selected as arbitrator, particular the neutral arbitrators. On the other hand, the arbitrator has completely free rein to decide the law as well as the facts and is not subject to appellate review. The issue before the court was whether it would grant a motion by one party to set aside the arbitration award made against it. 447

Fact:

A contract was between a painting subcontractor and the prime contractor after that dispute was arisen. Each party selected an arbitrator and two selected appointed a third arbitrator as a president of arbitral tribunal. The legal action was brought by the subcontractor against the surety on the prime’s payment bond in the U.S Court

(District Court Puerto Rico). The subcontractor appealed to U.S Supreme court, the appeal was controlled by the Federal Arbitration Act, 9 U.S.C enacted by the congress in 1925. This Act encourages arbitration in the act of conflicting state decisions that had dealt with enforcement of arbitration awards.\textsuperscript{448} The subcontractor challenged the award and gave the reason for challenging the award related to the discovery after the award.

\textbf{Held:}

The arbitrators ruled for the prime contractor. The third arbitrator did not disclose to the parties his experiences in filed. The district court set aside the award of arbitrators.\textsuperscript{449} The subcontractor lost in the District court. The U.S Federal Court of Appeal affirmed the decision of District Court. The petition of subcontractor was granted by the Supreme Court. 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.\textsuperscript{450}

\textbf{Case synopsis:}

Libyan Nationalization v. Western oil companies (BP Libya, Texaco and TOPCO/CALSIATIC, LIAMCO. 1959

\textbf{A brief description:}

Generally, the alternation of contract shall be by mutual consent of the parties and any amendment to clauses of contract shall not affect the right of party without its consent. To understanding the contract analysis of the international law and the Libyan law and National law of Libya was included both Islamic Law and the Libyan Civil Code. In accordance with 148 of Civil Code ‘A contract must be performed in accordance with its contents and in compliance with requirements f good faith’. And

\textsuperscript{448} www.ascelibrary.org. Zakir Husain, college of Engineering&Technology-,2015.ASCE.
\textsuperscript{449} Supra Note,447.
\textsuperscript{450} Supra Note,201,p.381.
in accordance with the principles of international law, it is unquestionable that the maxim *pacta sunt servanda* is a general principle of law.

**Fact:**

Thereafter, oil was discovered in Libya in 1959 Western oil companies negotiated concession contract with the government base on Petroleum Law of 1955, adopted during the reign of King Idris. Subsequently a military coup led by Colonel Muammar Qaddafi changed the political position and overthrew the monarchy and established a Socialist People’s Arab Republic. The government of Libyan fulfilled the Nationalization of all interests and properties of the Western oil companies, including subsidiaries of British Petroleum (BP Libya), Texaco, standard Oil of California, 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. In agreement between the Libyan Government and Western oil companies the negotiation was contained concession agreements with an elaborate arbitration clause, providing for each party to appoint one arbitrator and the two arbitrators appoint sole arbitrator (This is a general rule to appoint of arbitrators) but if one party failed to appoint an arbitrator the President of the International Court of Justice appoint an arbitrator and sole arbitrator. Contractual parties also negotiated about the following provision on the applicable law; “This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles by then and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunal.”

**Hearing:**

BP, TOPCO/CALASIATIC, and LIAMCO each initiated an arbitration claiming base on the previous negotiation which the Libyan government breach of its concession agreement. In each case Libyan refused to name an arbitrator or participate in the arbitration and the President of the World Court appointed a Sole Arbitrator. Thus each case was on the basis of submission to the sole arbitrator by the Claimants.

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451 Supra Note, 272, P. 497.
alone. The award of each case was rendered in deferent date by different arbitrator and also all awards differed from one another on a number of the points. In case of PB award, dated I Aug 1974, the TOPCO/CALASIATIC award, dated 19 Jan 1977, the LIAMCO Award, dated 12 Apr 1977.

**Held:**

In general the award was rendered no compensation tendered or paid in any instance. The reasons given by Libyan government had to do with failure by the British government to protect some islands in the Persian Gulf from seizure by Iran and supported by the United States for Israel. In each case, different arbitrators rendered the award the actions of the Libyan government constituted breach of its obligation to the claimants under the concession agreements.

### 5.5 Disclosure by and challenge of arbitrators

**Case synopses:**

Science Computer Corporation and the Government of the Islamic Republic of Iran

10 Iran-U.S. CI. Trib.Rep.333 at 342
1979-1981

**Fact:**

Since 1945 Iran was joined the Found. Under the Found regulations, Iran had right to maintain and adopt its exchange controls, as permitted by article XIV of the Found Agreement. The system of exchange control regulation of Iran required control bank approval of transaction involving foreign exchange. Subsequently, central bank, (Bank Markazi), issued significant circular that effectively established a dual exchange system by distinguishing between “commercial and non-commercial market and transactions”. These two types of markets had special characteristics, the commercial market, which was founded with foreign exchange earned from oil and oil-related activities, thus the Circular remained unaffected. Then the central bank approval continued to be required for commercial market transactions involving

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452 Ibid,p.497.
454 Bank Markazi Circular 994/Para 2 (14 Jan,1974), quoted in Iran Foreign Exchange Memorandum, supra note 1517, at S3378.
commercial exchange. In 1978, however, central Bank of Iran issued a series of Circulars that effectively eliminated the non-commercial market, as it was one of the major distinctions characterized the dual exchange system. On 14 November 1978, central bank issued a specific Circular and an attached to it a list, specifying to what circumstances banks would be allowed to sell foreign currency exchange in different types of cases. The Circular to sale of foreign exchange as payment for services was that: Sale of foreign exchange for services by virtue of concluded Agreement between domestic and foreign firms including salary of experts, foreign engineers and specialists, royalties as well as technical allowance, fee and remuneration for preparing charts and maps, the cost for supervision and installations of facilities, cost of technical documents and information. In addition, Item 14 of the List similarly prohibited the sale of commercial foreign exchange for purposes other than those mentioned in the List approval by central bank. As a result Central Bank, (Bank Markazi), refusal (without explanation) to approve the transfer of foreign currency during period of time of 1978 to 1981, coupled with an apparent unwillingness on the many Iranian Banks to assist Americans to transfer of their funds. These circumstances prohibited many U.S claimants from transferring U.S. dollars out of Iran starting in 1978. The claimants argued that it was entitled to specific amounts owing according to a royalty agreement with a corporation controlled by Iranian Government. This agreement provided that for payment in U.S dollar at the applicant’s bank in U.S. in defence, the respondents alleged that the agreement violated Iran’s foreign exchange regulation, in fact, it provided for payment in U.S dollars, while that payment was valid to prohibited pursuant to Iran’s foreign exchange retractions by central bank of Iran.

Held:

The tribunal was called to decide, in those cases where approval was withheld, whether the 14 November 1978 and 1979 Circular requiring approval of Central Bank of the sale or transfer of all foreign exchange breached Iran’s obligation under the Fund Agreement or Article VII of the Treaty of Amity. The tribunal found that the issues to be irrelevant or focused such as whether the claimant made a sufficient

455 Circular NA5/2090, Issued By Bank Markazi, on May 1979.
demand for transfer of funds. Thus the tribunal granted the claim base on the fact that respondent failed to prove that the dollar payment provision was legally prohibited the date the agreement was signed. Further, the tribunal held that restrictions provisions by Iranian Government were not in effect on the date the contract was entered into, and that later enactment of new restrictions did not make contract null and void. The tribunal also provided that “although the respondent might have been prevented from transferring to the payment of its debt in U.S. dollars, the existence and he amount of the debt cannot seriously be disputed. As a result of the Declarations of Algiers and of the establishment of a Security Account U.S. dollars, the delayed payment can and must be paid out of the Security Account”.

5.6 The jurisdiction of the arbitral tribunal

Case synopsis

Boss Group Ltd v. Boss France SA
4 ALL E.R 970
1996

Published in England

The case was concerned both questions; One, matters relating to a contract and other with the place of performance of the obligation in question. Two, obligations were in the case, one to supply to the defendants and other one not to supply to anyone else. Article 5 (1) of Brussels Convention has a term “the place of performance of obligation in question”. It is difficulty point into the case because the court provided the place of obligation the defendant to supply the products for distribution in France. Article 5 of Brussels Conventions provides; A person domiciled in a contracting states may, in another contracting state, be used:

1) In matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries his work, or if the employee does not habitually carry out his work in any one country, the employer may also be used in the court for the place here the business which engaged the employee was or is now situated.

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456 Award No:221-651-1 (April/16,1986 )at p.5-6-riprinted in 10 Iran- US CTR 269,273.
457 Supra Note,322,p.322-25.
2) In matters relating to maintenance, in the courts for the place where the maintenance credit is domiciled or habitually resident or, if the matter is ancillary to proceeding concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain these proceedings, unless that jurisdiction is based solely on the nationality of one of parties.

**Fact:**

The dispute was based on non-contractual obligation to be distributed of products between the parties. The jurisdiction of the English court challenged by the defendant because the place of performance was in France but the plaintiff sought a declaration in England that no contract of distribution ship of its products in France ever existed between plaintiff 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.

In accordance with the Lugano Convention article 5 (1) as stated the plaintiff should bring the action at the place of the defendant’s domicile. So, the definition of contract should be clear and the concept of contract must be given an autonomous because any obligation does not arise under the contract’s terms. The parties should have good faith but the duty of good faith is non-contractual, the good faith should be in relating to the matters of contract. Consequently, according to article above, the plaintiff shall not deny the relationship based on the contract. In accordance with article 23 the UNCITRAL arbitration rules, arbitral tribunal shall have respect to the arbitration agreement and its clauses have which made by the parties, because the clauses are forms part of contract and it is independent of the other terms of contract base on relationship of the parties. According to article 16 of model law an arbitration clauses are which forms part of agreement has made shall be treated as independent part of contract. Accordingly, this is known as the Doctrine of Separability, though a consequence of this Doctrine a decision by arbitral tribunal that the contract is null and void shall not entail the validity of the arbitration agreement and its clause. Base on the article 21 (1)-(4) Swiss Rules and article 24 ACICA Rules the relationship of the parties base on contract is out of scope of arbitration clause and the object of arbitration agreement.
Held:

The judges have considered, at first, instance dismissed the plaintiff action on the basis of article 5(1) which could not be invoked by a plaintiff who denied the existence of any contractual relationship with the defendant. The respondents are unable to bring themselves to the place said in article 5(1) of Brussels Convention as the place of obligations because it is inconsistence with jurisdiction of European countries. It gives jurisdiction to the defendants’ domicile courts to be applied.

Kleinwort Benson v.Glasgow city Council
4 ALL E.R.641
1997

Fact:

The parties’ swap agreement was between the applicant (city of Glasgow council and respondents who was Kleinwort Benson Ltd (“Kleinwort”). They entered into seven interest rate swap agreements, on various dates from 1983 to 1987. Kleinwort Benson Ltd made payments to city Glasgow Council and Glasgow made payments to Kleinwort. In 1991, Kleinwort commenced proceedings based on the claim of a restitution of the sums paid to Glasgow. It was the first action applied to the High Court. On 16 October 1991 Glasgow claimed that the English High Court had no jurisdiction over the claim of Kleinwort and applied to Scottish Courts which had jurisdiction.

A brief description:

According to English laws the limitation period of time applicable to claim beneficial jurisdiction is six years, while in Scottish, it is five years. The English laws was more beneficial jurisdiction for Kleinwort because the England jurisdiction could recover about sixth than Scotland, Kleinwort actuated the appeal to the jurisdiction of England laws. It was an anxiety for Kleinwort to pursuant the proceeding in England. Scottish law section 32 (2) (c) provides that in relation the limitation, Act 1980 is the advantage to the Kleinwort which there is no precisely equivalent provision in Scotland the Scottish law section 6 (4) of the prescription and limitation of Scotland Act 1973 provide that “where in the case of any action for which a period of
limitation is prescribed by this Act…. (c). the action is for relief from consequences of mistake…. The period of limitation shall not begin to turn until the plaintiff has discovered… the mistake or …could with responsible diligence have discovered it”. But Kleinwort argued that the mistake of law rule should be abrogated. The section 16 and 17 of the civil jurisdiction and judgments Act 1982, incorporates the Brussels Convention on jurisdiction and judgments if 1968, (two Acts are compatible with it). Schedules 4 and 5 of Act provide for the location of jurisdiction within the UK and section 1 concerned with General Provision. Article 5 (1) of Brussels Conventions concerned with special jurisdiction provide as follows; article 2; subject to the provisions of title II persons domiciled a part of the United Kingdom shall be used in the courts of that part. Article 5 provides that; “a person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be used: 1) in matters relating to a contract, in the courts for the place of performance of the obligation in question. Glasgow was domiciled in Scotland, then in this case article 2 aforesaid has used in the Scottish courts and English High court had no jurisdiction over Kleinwort’s claim. Kleinwort then appealed to the European Court of Justice based on the article 5(1) and (3) in 1996 case returned to the court of Appeal.

**Held:**

The High court held that none of the provisions relied on by Kleinwort applied granted the declaration to Glasgow. The House courts held that an interest swap agreement to which a local authority was a party was ultra vires the local authority and so void *ab ignitum*. Then base on the article 5(1) and (3) Kleinwort appealed to the court of Appeal, the European Court of Justice sought as to the interpretation of the corresponding provisions of the Brussels Conventions, it was held the court had no jurisdiction to deal with the question referred by the court of Appeal, it concluded that the Brussels conventions derived from the national law and it was not direct by applicable. The court of the contracting state was free to decide to the interpretation for the purposes of the application of the national law, finally, in 1996, the Court of Appeal held that the claim fell with Article 5(1) and base on it, the English High Court had jurisdiction.
Case synopsis

International Civil Aviation Organization v. Tripal Systems Pty.Ltd.

Quebec Superior Court

9 September 1994

Published in French:[1994] R.J.Q.2560; CLOUT.

Fact:

By 1994 ICAO and T (two disputing parties called above) entered in to an agreement for the construction of an airport in Vietnam. The agreement contained an arbitration clause refereeing disputes to arbitration in Quebec pursuant to the UNCITRAL arbitration rules. The agreement also provided that ICAO did not waive any immunity which it enjoyed. After the tribunal had been appointed, ICAO challenged the tribunal’s jurisdiction to hear the dispute on the basis of its immunity from suit. The tribunal rendered a unanimous decision dismissing the challenge on the basis that it was premature. The tribunal decides that the issues raised by ICAO were mixed questions of fact and law applicable and that all evidences to be heard before it could render a decision. ICAO then applied to the Quebec Superior Court to declare that the arbitral tribunal had no jurisdiction and it enjoyed immunity from judicial process to render a decision.

Held:

The decision by Quebec Superior Court was that the tribunal’s decision was not an award on its jurisdiction nor was it a final decision for the purpose of enforcement or setting aside. It provided that pursuant to Model Law article 5 as adopted in Quebec, (article 5: in matter governed by this law, no court shall intervene except where so provided in this law) o the national court had no jurisdiction to intervene the private agreement and this stage. The court held that the arbitral tribunal had jurisdiction to determine its own jurisdiction and render the decision and that it was proper to do in this case.
Case synopsis:

WTO disputes “United States and Canada-Continued of obligation in the EC-Hormones dispute”.

WT/DS320 and WT/DS321

27-28 September and 2-3 October 2006 in Geneva

Fact:

The complaint was European Communities on 8 November 2004. Under the request of The EC for the consultations with US asserting, the US should have removed its retaliatory measure since the European Communities has removed the measures found that to be inconsistent in the CE-Hormones disputes. The European Communities intends to rise in the consultations not limited to failure by the US to remove the retaliatory. The unilateral determinations by US that the non-legislation is continued WTO violation. The continued use by US, in the current circumstances, violated of GATT 1994 Article 1 and 2, the DSU Article 21 and 23.2 (a) and (c). On November 2004 Canada joint to the consultations and pursuant Australia and Mexico requested to join on November 2004. United States accepted of Canada to join and informed the DSB on 16 December. The EC requested to establishment of panel on 13 January 2005 and it established by the DSB by 17 Feb 2005. By the establishment of panel Australia, Canada, Mexico and Chinese, Taipei reserved their third party rights. Pursuant to the request of those countries, Brazil and Norway, India, New Zealand reserved their third party rights.

The panel established on 6 January 2005 and first its meeting was on 12-15 September 2005 and open for observation public. The first report of panel has issued to be final to the parties in the course of October 2006, but due to scientific experts and difficulties in scheduling to the second open hearing and consulate of experts. The panel established that it would issue its final report to the parties in the course of June 2007. Subsequent the chairmen of the panel informed to the DSB that it is impossible to issue final report due to taking longer than expected date.
Panel Report:

On 31 March 2008, the panel report was concluded that with respect to the claims of the EC request, circulated to its members and made following procedural: 1) by seeking, the measure at issue that is suspension of obligations subsequent measure. The redress of a violation of obligation covered agreement and the rules and procedure of the DSU, the United States has breached Article 23.1 of DSU. 2) The United States has breached Article 23.2 (a) of the DSU. The panel by making a determination to affect that a violation had occurred without having recourse to dispute settlement under rules and procedure of the DSU. In addition, in concerning Article 23.1 read together with Article 22.8 and 3.7 of DSU panel concluded that to the extent that the measure found to be inconsistent with SPS Agreement in the EC-Hormones dispute has not been removed by EC, so United States has not breached Article 22.8 of the DSU. The EC has not breached Article 23.1 and Article 3.7 of the DSU but it has breached Article 22.8 of the DSU. The panel report recommended that to the United States to bring its measure into conformity with its obligations under the DSU. The panel suggested that to implement its findings under Article 23, the United States should have recourse to the rules and procedures of the DSU without delay. The request of the European Communities notified to the Appellate Body to review certain issues of panel report and certain legal interpretations developed by the panel on 29 May 2008. The United States notified its decision to appeal to the Appellate Body certain issues of law covered in the panel report on 10 June 2008.

Appellate Body:

The Appellate Body’s chairman informed the DSB that in the light of the numerous issues have risen in the appeals. The Appellate Body was not able to circulate its report within 60 days. The Report of Appellate Body was on 16 October 2008. The Appellate Body found that; 1) the panel did not err in stating that proceeding under Article 21.5 of the DSU. The proceedings are open to not only the original complainant. 2) Appellate upheld the panel’s finding that “it has jurisdiction to consider the compatibility if the EC implementing measure with the SPS Agreement as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU”. The Appellate Body found that the measure to e inconsistent with the SPS Agreement, in the European Communities-Hormones
dispute has removed. It upheld the panel’s finding that as a result of a breach of Article 22.8 the European Communities has not breached Article 23.1 and 3.7 of the DSU. 3) Appellate Body reversed finding of panel that “by maintain its suspension of concession even after the notification”. The United States is seeking redress of a violation with respect within the meaning of Article 23.1 of the DSU; panel’s finding that United Sates made a determination within meaning of Article 23.2 (a), but the United Sates failed to make any such determination consistent with the findings.

The Appellate Body found that the panel infringed the European Communities due process rights and panel failed to comply with its duties under Article 11 of the DSU. The Appellate Body revered the panel’s finding base on the a raised assessment as required by Article 5.1 of the SPS Agreement by the European Communities’ import ban relating to oestradiol-17B. The Appellate Body is unable to complete the analysis the finding as to the consistency or inconsistency of the import ban relation with Article 5.1 of the SPS Agreement. It reversed the panel’s finding that the provision of import ban relating to testosterone, progesterone, trenbolone, acetate, Zeranol, and MGA did not meet the requirements of Article of Article 5.7 of the SPS Agreement.458

Held:

The DSB adopted the Appellate Body report and the panel report and it modified by the Appellate Body report at its meeting on 14 November 2008.

Case synopses;

Grasselli Chemical Company, Farben fabriken Bayer, Grasselli Dyestuff Corporation, and Farbwerken Hoechst AG

March 3, 1925

Fact:

The state of the contract was that the parties are not allow to agree about the agreement at any time upon the interpretation contract’s word, contract’s clause,

contract’s provision, or restriction of the agreement and also the effect thereof, the
time of performance of any agreement or upon anything relating to this contract, then
the disagreement shall be referred to a board of arbitrators.

In accordance with the article 16 (1) the model law; the arbitral tribunal may rule on
its own jurisdiction, including any objections with respect to the existence or validity
of the arbitration agreement. For that purpose, an arbitration clause which forms part
of a contract shall be treated as an agreement independent of the other terms of the
contract. A decision by the arbitral tribunal that the contract is null and avoid shall not
entail ipso jure the invalidity of the arbitration clause. This article delineates the
jurisdiction of the arbitral tribunal to rule on its own scope and its own component on
the existence and validity of the arbitration agreement itself. It states that the
arbitration agreement is a rule base on the contents of the parties and the arbitral
tribunal does not have jurisdiction rule on the arbitration agreement.

**Held:**

The case above set outs the court routinely held arbitration clauses to be separate of
the main contract between the parties and severability case law has focused on the
contract and arbitration agreement which it is a part. According to article 6 of model
law the authority is granted to the arbitral tribunal to the preliminary question for its
jurisdiction.

**5.7 Written statements**

**Case Synopsis**

Hulley Enterprises Ltd v. the Russian Federation (PCA) (Cyprus case)

Case No; AA 226-Final Award

Article 10 (1) of the Energy Charter Treaty (ECT) provides; ‘Each Contracting Party
shall observe any obligations it has entered into with an Investor or an Investment of
an Investor of any other Contracting Party”. This type of provision of protection is
“umbrella clause” or an “observance of undertaking” clause to protect the obligation
of Treaty with respect to an investment.
Fact:

In 1993 Yukos was incorporated as a joint stock company. By 2002, Yukos integrated group become the largest oil company in Russia. In 1990s pursuant to the law-tax region program that established to quick and faster economic program development, Yukos group which was included subsidies Oil Company. Hulley Enterprise Limited (Cyprus), Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) were allowed to exempt from the Federal Corporate Profit to pay the tax to its budget. In 2002 the Closed Administrative Territorial Unites revoked those exemptions. Ultimately, tax benefits in other low-tax regimes were significantly reduced and finally the existing tax investment agreements were terminated. By July 2003 the Russian Federation commenced a series of criminal investigation against Yukos management. The federation got a charge out including embezzlement, fraud, forgery, money laundry, tax evasion, crowning in the arrestment and also conviction of several key Yukos officers. The federation initiated other measure against Yukos and its subsidies associated companies. The measures were including massive tax reassessments, VAT charges, fines, asset Freezes, and on 19 December 2004, the bankruptcy of Yukos and finally, on 21 December 2007 the struck off the Russian register of legal entities.

On 2 November 2004, Yukos group, Hulley Enterprises Limited (Cyprus, Yukos Universal Limited and Veteran Petroleum Limited (Cyprus) delivered to the president of Russia notifications of claim. Their notifications were included allegation of violation of obligation under the Energy Charter Treaty (ECT). Finally they failed to settle their disputes amicable Claimants initiated arbitration proceeding against Respondent pursuant to the ECT and UNCITRAL Arbitration Rules of 1976. Claimants sought damages in excess of US$ 114 billion. They alleged that Respondent failed to treat their investment in Yukos in fair and equitable manner in breach of article 10 (1) of the ECT, and expropriated claimants’ investment in breach of Article 13(1) of the ECT.

Held:

The Tribunal rendered award on 30 November 2009 on jurisdiction and admissibility in the arbitration proceedings submitted by claimants. Three cases numbers were submitted to the tribunal (AA226-Hulley, AA227-Yukos Universal Limited, and
It considered that “tribunal had jurisdiction over the Russian Federation base on claimants’ alleged “unclean hands” theory and Article 21 of the ECT to the merits phase. Tribunal also rendered that in accordance with article 21 of ECT dismisses the objections to jurisdiction, pertaining to Respondent’s contentions in relation “unclean hands” and “illegal and bad faith conduct”, according to article 26 (3) (b) (i) of ECT dismisses the renewed objections to admissibility or jurisdiction. Tribunal decided that the present dispute is admissible and within the jurisdiction of Tribunal, in relation to breach of its obligations base on article 13 (1) of the ECT, declares the Respondent has breached its obligations.

Tribunal orders Respondent to pay to claimant Hulley Enterprises Limited damages in amount of US$ 39,971,834,360 and to pay in amount of EUR 3,388,197 to Hulley Enterprises Limited as reimbursement for the costs of the arbitration proceeding, also to pay the amount of US$ 47,946,190 to claimant of a cost of its legal representation and assistance. Finally, the tribunal determined that in order Respondent shall pay the amount to claimant Hulley Enterprises Limited within 180 days of the issuance of final award, so if within limit period of time Respondent fails to pay in full the amounts set forth above, post-award interest on any outstanding amount compounded annually. Post award interest shall be determined as the yield on 10-year U.S treasury bonds, and then the dates of compounding yearly thereafter. 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, so by this sample, his defective statement and it shall say that it logical reasons for arbitration process.

The statement of claim was unable to respond, the tribunal ordered the claimant to respond to these objections and when the 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 respondent also annex all documents to the statement of defense, so it will not prejudice the respondent’s right to provide additional or substitute documents at a later stage in proceedings.

459 A. Mistelis Loukas, International Arbitration Case law, final award, 1993, School of International arbitration, p.5.
460 Ibid.p.6.
461 Supra Note,236,p.197.
5.8 Experts appointed by the arbitral tribunal

Case synopsis:

Starrett Housing Corp.v the Government of the Islamic Republic of Iran

Award No.314-21-1 para.264.

Initially where the subject matter of a specialist or technical nature arise, the hearing of arbitration under the international commercial tribunal needs expert assistance in reaching suitable decisions or conclusions. It is basically important that an arbitral tribunal cannot delegate to the experts the duty of deciding the case. The arbitral tribunal may need quality surveyor to assist in evaluating claims for measured work under civil engineering contract; or accountants, to assist in determining the value to be put on a company’s balance sheet.\(^{462}\)

Fact:

The contract was between Starrett Housing Corporation and Bank Omran, Iranian development bank to develop the one of the project in Tehran is called Zomorod residential housing. Basically, the agreement was for the purchase by Starrett of certain tracts of land from the Bank.\(^{463}\) The construction was obligated by Starrett of approximately 6000 apartment units on those tracts. Indirectly, Starrett owned 79.75% of the Shah Goli Apartment Company under the laws of Iran. It was established to carry out the project; Starrett also indirectly owned all construction, a Company incorporated by Iranian laws which was entitled to manage for comprising 11.75% Fee of proceeds through the sale of all apartments of Zomorod project.

Hearing:

The claimant was Starrett and claimed i) compensation for the expropriation of the effective use, control and benefits of the project, ii) Equitable remuneration “in consideration of all work performed” on the project prior to the expropriation in terms

\(^{462}\) Supra Note,97, Para 6- no;91,P.309.

\(^{463}\) Iran-US Claims Tribunal Cases;Starrett Housing Corporation,Starrett Systems,Inc.,Starrett Housing International,v.the Government of the Islamic Republic of Iran, Bank Oman,ank Mellat Case No.24,p.1
of the force majeure provision of Basic project Agreement entered into between Shah Goli and Bank Omran, iii) recovery of all costs and loans, in accordance with the terms of both the Basic Project Agreement and a guarantee allegedly given to the Starrett by Bank Omran, owing to the fact that “the acts of the Government of Iran constituted expropriation hard rendered Starrett’s further performance impossible”. The claimant contended that the property interests had been unlawful taken by the Government of Iran. It also contended that had deprived from the interest of their property and of the effective use, benefits and control upon the property by various actions authoring.  

iii )the collapse of the banking system iv) changes in the control of bank Omran, v) the Freezing Shah Goli’s bank accounts, vi) harassment of Starrett personnel by armed Revolutionary Gards vii) various official measures by the Islamic Republic of Iran. The official measures included the appointment a temporary of Shah Goli by the ministry of Housing on 4 July 1979, called the “Bill for appointing Temporary Manager or manager for the supervision of manufacturing, Industrial, Commercial, Agricultural and Service Companies, either private or public. The applicable law in Iran-US case was the treaty of Amity, Economic Relation, and Consular Rights between United States of American and Iran, signed on August 1955 and entered into force 16 June 1957. In accordance with article IV, paragraph 2, of the treaty which was the applicable law, to make “adequate provision…at or prior to the time of taking for the determination and payment. 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.

Held:

The tribunal accepted that Starrett and its subsidiaries had made a number of loans of Shah Goli construction. The tribunal was rendered the award base on the expert’s help to assist on issues of valuation. It made an initial decision that the claimant’s property had been taken by Iran, before appointing an expert to assist the tribunal on issues of decision. In the Iran-USA claim tribunal has adopted the approach of the appointment of expert by the parties, as a accepted the 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 expert may be heard at a hearing at which the parties must be given the opportunity to be present and to interrogate the expert.\(^{465}\) The arbitral tribunal accepted the report appointed by the parties as those applied to other forms of evidence in the same arbitration.\(^ {466}\)

### 5.9 Application law, Amiable Compositeur

**Case synopses**

CME v Czech Republic B.V Hoogoorddreef

9,1101 BA Amesterdam Zuid-Oost. The Netherlands, Issued in Stockholm, Sweden

2001-on September 2003

In accordance with article 1(a) of treaty the parties’ assets qualify and entitled to the protection and benefits of the treaty. In accordance with the article 31 (1) and 32 of Vienna Convention on the law of treaty the parties should be interpreted in the good faith with the common and ordinary meaning of the treaty’s terms which have given to the treaty in their context and its purpose. In accordance with article 33 (1) of UNCITRAL the arbitral tribunal shall apply the law designated by the parties, in this case the law applicable was UNCITRAL rules. So the final award conflict to the national law and enforcing of award was conflicting to recognize in London and Stockholm as well as to litigation in the Czech Republic Sweden and the United States. In this case except Czech Republic civil law other laws were foreign law. According to the article 29 of the UNCITREAL rules the arbitral tribunal may inquire of the parties if they have any witnesses to be heard declare the hearing closed. At the hearing of Stockholm the parties presented to the following witnesses were examined. The law application was legal instruments Czech Republic-Netherlands BIT. The claimant hereinafter CME and the respondent hereinafter called the Czech Republic which is a sovereign government by its ministry of finance. CME claimed with the action that the respondent to be in breach of the agreement on encourage and reciprocal protection of investments treaty.

\(^{465}\) Supra Note,199, p.254.

\(^{466}\) http://www. Trans-lex.org.ID;232100-law research.
Fact:
In 1989 relationship was made following the Velvet Revolution, the once again the Democratic Czechoslovakia closed a bilateral investment treaty. In 1991 again Democratic Czechoslovakia concluded one bilateral investment treaty with the USA and with the Netherlands, in the same year new media law was passed in order to grant broadcasting licenses. In 1993 US national Ronald Steven Lauder invested in Czech private TV through his German company which was succeeded by the “the Dutch Company Central European Media(CME). The action started infants of the Czech courts and international tribunal, including UNCITRAL arbitration rules between CME v. Czech Republic and Lauder V. Czech Republic, after his business partner, Czech Citizen Vladimir Zelezny effectively deprived. ME broke deal between Lauder’s and Zelezny’s companies. CME and Lauder respectively sought damages for the alleged interference of the Czech Media Council.. On the 19 August 199, Ronald Lauder majority owner of CME started the UNCITRAL arbitration against the Czech Republic under USA-Cz treaty (London arbitration) and on 22 February 2000, CME instated parallel UNCITRAL proceeding against the Czech Republic under the Netherland treaty base on Stockholm arbitration. The claims were; 1) Lauder and CME sought similar relief in the London and Stockholm arbitrations receptivity; Czech Republic has violated the provision of the investment treaty,2) the obligation of fair of investment treaty Article 11(2) (a) of US-Cz treaty,3) the obligation of treatment of investment treaty in accordance with Rules of international law article 11(2) (a) of US-Cz treaty and article 3(5) Netherland-Czech treaty.

Held:
The international tribunals handed down two contradictor arbitral awards; one dismissed the claim by lauder, and other awarded CME damages. The London tribunal in conclusion held that “none of action or in actions of the Media Council cased a direct or indirect damage to Mr. Lauder’s investment. The action which actually cased the claimant to lose part of his investment was the termination by CME 21 of its contractual relationship in 1999. The Stockholm tribunal decided that the Czech Republic breached all the Articles as sought by the CME. The arbitral tribunal analyzed article 33 of the UNCITRAL Arbitration rules based on the two action: 1) article 8(6) of the treaty the tribunal is bound by provision of said article of treaty and
should take into account the relevant law in force to the dispute of contracting parties concerned. Tribunal held if there is any conflict between the national law and international law, the tribunal is bound to apply international law because it sets out by the article 8(6) of treaty. It is again emphasis with the tribunal that; it is not the role of the arbitral tribunal to pass a decision upon any national law and the legal protection granted to the foreign investor under the Czech civil law and court system. At the end of the hearing came to make decision that the treaty had grant to the discretion tribunal based on the UNCITRAL Rules. Arbitral tribunal declared that the tribunal is not bound to apply national law which has not been argued and granted by the parties.

**Case synopsis:**

E (BVI Company) v. T (Irish Company)  
Ad Hoc Award-UNCITRAL Model law  
At 8 July 2003

An agreement was not annulled when the parties failed to consider whether the arbitration upon which they agreed was international. Delivery of goods was under contract and substantial of obligations of agreement was commercial relationship.

**Fact:**

E, a BVI Company, and T, Irish Company, entered into a contract whereby E purchased 10,000 tons of crude oil from T. in this case base on parties’ assent the contract was dawn up in both English and Russian. The contract was based on two languages E was offered and E transferred money to T in advance of the delivery of the oil; T was sealer which obtains the money from E, however the oil was never delivered. T repaid less than half of the money which had been advanced to it. The contract contained an arbitration clause in the contract stated “all disputes or differences, which arise out of this Contract or in connection with it, will be settled by negotiations”. 
Held:
The tribunal rendered the award in the case of un-reaching agreement in defendant’s Arbitration Court based on the article 35(1) the UNCITRAL arbitration rules revised 2010 which provides that “the arbitral tribunal shall apply the rules of law designed by the parties as applicable to the substance of the disputes. In accordance with aforesaid article 35 (2) in all cases, the arbitral tribunal shall decide in accordance the terms of contract, but in this case; no choice of law clause was present in the contract.

Case synopses

USA v. Chile TN/DS/W/28
Report of DSB of the World Trade Organization
Dispute Settlement Body Special Session 02-7057
December 22, 2002

In some case the interpretative or legal reasoning applied by WTO adjudicative bodies such as panels, the Appellate body and arbitrators that could have benefitted from additional member review. It is ensured to member during proceeding for reports had full opportunity to the findings of the adjudicative bodies will contribute to resolving the disputes. The WTO dispute settlement system is almost unique in that adoption of panel and Appellate Body report is quasi-automatic under the reserve consensus rule. However, it is proposed that there should be mechanisms that would enhance the parties’ flexibility to resolve the dispute and Members’ control over the adoption process.467

Fact:
The following communication has been received from the permanent Missions of Chile and the United States in DSB of the WTO in 2002. The negotiations were on improvements and clarifications of the dispute settlement understanding on improving flexibility and member control in dispute settlement. Discussions were by DSB to date on the DSU that the member re-emphasized that the dispute settlement system of

WTO should be the prompt to resolve the disputes between parties. Basically, the members have emphasized that the procedures facilitate resolution of dispute and the need for flexibility in the system to allow parties to resolve all disputes in an immediate manner, because it is important to retain the flexibility the resolution that already exists in the system and identified that there are areas that could benefit from the flexibility.

**Held:**

Currently it is appropriate for panel or Appellate body to fill gaps of article 3.2 DSU to encourage “to make” law by clarifying circumstances of the WTO agreement outside the context to resolving a particular dispute, in US-Chile, the DSU of WTO provides sufficient assurance that members of panels have the appropriate expertise to appreciate the issues presented. Members can also enhance their ability to resolve dispute at any time in the process of the dispute settlement. Instead relevant agreement, parties applied to clarify those rights and obligation in which ‘legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation”, but the members of WTO should appoint the law which that will not to be in conflicting to the WTO rules. Dispute settlement reports were a take it or leave it proposition, where members must accept or reject the reports in their entirely, without modification. It was belief of the United States that these negotiations offered an opportunity to change this and to introduce greater member control and input into the dispute settlement system.\(^{469}\)

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\(^{468}\) Supra Note,143, P.13.

\(^{469}\) https://books.google.co.in/books?id.
Case synopsis

Ingmar GB Ltd. v. Eaton Leonard Technology Inc.

Published by the European Court of Justice (ECJ), C-381/98, ECR I-9305.

2000

Fact:

A contract was made between Ingmar v. Eaton based on the United States law especially California law. Since 1989 Ingmar had been the commercial agent in the United Kingdom of Eaton Leonard Technologies Inc., a company established in California. The commercial agents are entitled to an indemnity in the event of breach of their relations with the undertaking which they represent in the community, irrespective of the law by which the two parties intended the contract to be governed.

Generally in case of dispute the law of California to be law applicable and it was governed over the case. The agent was no right for indemnity or compensation after termination of the contract. In 1996, the contract was terminated by Eaton without commission being paid to commercial agent (Ingmar), as the commission was undertake. Basically the law of the place of establishing normally governs upon the companies. The claimant was Ingmar (commercial agent), sought to the indemnity or compensation of termination of contract between those two undertaking to the High Court of Justice of England and Wales. Normally, Ingmar brought legal proceedings seeking indemnity for damage suffered as a result of the termination of its contract with defendant. Subsequently, the claimant (Ingmar) applied against the judgment of High Court to the court of Appeals of England and Wales, whether those Articles must be applied where the commercial agent carried on his activity in a member State and circumstances of the contract stipulates that it is agreed law of country.

 Those contracting parties agreed that to choose the system of law in which of being governed, the central tent of private International law but freedom can be removed by mandatory rules or order public. According to article 19 of Council Directive mandatory natures of the right to indemnity or compensation is confirmed by the fact that the parties may not derogate to the indemnity of commercial Agents. The provisions of Directive act are related to the indemnity or compensation. In general Directive Act principle is designed to protect and support commercial Agents where
the contract is termination. So these circumstances provide to apply the Directive regime. The regulations Rule provides “the parties do not apply where the parties have agreed that the agency contract is to be governed by the law of another State”. English law also provides; the law application will given effect as chosen by the parties, unless is public policy reason. In accordance with the provision of the of articles 17 and 18 the Council Directive specify the circumstances in which the commercial agent is entitled, on termination of contract and to indemnity for the damages suffered as result of termination of contract. At the time of contract, in which was governed by the law of California.

The provisions apply where the case is closely connected with European community rules, particularly, irrespective of law, where the commercial agent is a member state, the parties appointed law of California to govern upon the contract but according to the law of European community the commercial agent cannot make contract out of European community’s commercial agent directive by choosing the substantive law of a nonmember state to govern the contract.

**Held:**

ECJ held that a foreign principle “whose commercial agents carries on his activity within the community, cannot evade the provision of the Directive Relating of Self-Employed Commercial Agents by the simple expedient of a choice of law clause. Although article 17 and 18 of Directive Act is stipulated to protect the rights of commercial agent after termination of agency contract this act must be applied, the principle is established in a non-member of country. High court held that the commercial Agent Regulation 1993 did not apply from the time of contract in which was governed by California law. It provides that no indemnity was required. Jurisdiction of the ECJ was Directive Act, if it had not existed, the court of Appeal could have not been able to judge the differently than the High Court.
Case synopsis

Mitsubishi Motors Corporation v Soler-Chrysler-Plymouth Inc
473 US 414 at 629

It is published by the US Supreme Court.

A Brief description

The public policy basically is important for all countries because many final award refusing to enforce concern on fraud or the breach of natural justice. If the final decisions disregard to law may be set aside. The decisions are in deliberate conflict with public policy may be liable to refuse and set aside. It the case aforesaid the argument was refused that anti-trust law was inappropriate to the pervasive public interest in enforcing. Generally, error laws do not conflict with public policy.

Fact:

Petitioner was a Japanese corporation that manufacture automobiles (Mitsubishi Motors Corporation), is the product of a joint venture between CISA (Chrysler International, S.A which is a Swiss corporation) and Japanese corporation made contract, aimed the distributing through dealers outside the continental USA by automobiles manufactured by Japanese corporation. Respondent-cross-petitioner, a Puerto Rico corporation entered into distribution and sales agreement with Swiss corporation CISA. The agreement of parties (sales agreement) contained a clause providing for arbitration mechanism by the Japanese Commercial Arbitration Association for the breach of agreement or all disputes arising out of article of the sale agreement. Thereafter, to work out disputes arising from a slackening of the sale of new products of the petitioner and failed, the Japanese corporation withheld shipment of automobiles to its contractual partner (respondent), which refused responsibility for them.

471 www.Findlaw,for Legal Professionals,2015 Gartner Critical Capabilities U S Supreme Court.
Hearing:

The petitioner brought an action in Federal District Court under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Awards, seeking an issue to force arbitration of the dispute according to the arbitration clause. The respondent filed a respond and counterclaims, asserting, causes of action under the Sharman Act and other statutes.

Held:

The Federal District Court ordered that arbitration of most raised in the complaint and counterclaims, including the federal antitrust issues. There is no merit to the contention of respondent because it falls within the class for whose benefits the statutes specified in the counterclaims were passed, but the arbitration agreement clause in order does not mention these statues. There is no any warranty in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory. Concerns of international comity respect for the capacities of foreign and transactional tribunals, and sensitivity to the need of the international system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a country result would be forthcoming in a domestic context.

Case synopsis

The Shamil Bank of Bahrain EC v BeximcoPharmaceuticals Ltd EWCA Civ19; it published in the Supreme Court of judicative court of Appeal(civil division) applied from Royal Court of Justice Queen’s bench division in England. 2004

Fact:

It was in favour of the claimant the Shamil Bank of Bahrain E.C against Beximco Pharmaceuticals Ltd, the agreement was in 2004 for appointing law application, they agreed English law to be applicable law for any dispute arises, and agreed to be

472 Ibid, holding on the Federal District Court of US.
governed by the English law, when dispute had arisen the Shamil Bank of Bahrain applied the principles of the glorious Shari’a. It was agreed by the parties the law of applicable should be English law not public international law or lex mercatoria, etc.

Frankly speaking, the parties provided that the law of applicable to be governed by English law, it is compulsory for both the parties to pursue the terms of agreements were made, according to the rule of interpretation the courts may interpret the terms of contract has made to ascertain whether there is an implied selection by the parties or not. But the courts interpret and look to the nature and terms of contract or circumstances surrounding the case and contract. The courts reference to specific provisions of contract and legal regime or the use of standard forms to ascertain the intention’s parties. According to the article 3 of agreement of the parties the law applicable is English law it stipulated that by article’s clause 1. To interpret terms of the agreements allow by article 3(2) to the parties and make expression even after the contract has been concluded.

The law application is selected by the parties or the tribunals in case the parties disagree or failing such designation by the parties the law applicable selects by the arbitral tribunal to be appropriate it is provided in the section IV article 35 the UNCITRAL arbitration rules. In addition, Para (3) said article provide that “in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract,” it is a substance for proceeding as it provided in this case. The article expressly provides the parties and arbitral tribunal hide under the agreement of the parties. These provisions express the importance of clarity the terms of the contract and the circumstances of the case. The article 28 (1) of model law provides the rules of law shall choose by the parties and the arbitral tribunal shall decide in accordance with such rules of law.

Court was held the case to be governed under the English law because the article 3 (1) states the courts may look into the terms of contract if there is no expression to select the applicable law. The court was considered without reference to shari’a principles the English law is governance for the contract and The shari’a law could not be used in the resolution of disputes arising from the contract the English law is applicable to this dispute settlement. According to article 3 (2) of English law the court my looks into the contract to ascertain implied selection by the parties.
Held:

for appointing law applicable: that a clause which provided that the agreements were to be governed by English law, “subject to the principles of the glorious sharia” could not be used to import shari’a law in the resolution of disputes arising from the contracts. Thus under the English law article 3 (1) were held to be governed, without reference to shari’a principles…it cannot be common rules for all contract but in some cases it may applicable to dispute settlement.

Case synopsis

Bank of Credit and Commerce Hong Kong (in liquidation) V Sonali Bank

1, Lloyd’s Rep. 227

1995

If the parties hereto shall at any time be unable to agree upon the interpretation of any word, clause, provision, covenant, agreement or restriction in this contract, or the effect thereof, or the manner or the time of performance of any agreement herein, or upon anything relating to this contract, then the disagreement shall be referred to a board of arbitrators. 473

Fact:

The claimant requested to the defendant called S to issue a credit letter, the S was Bangladeshi Bank, the defendant issued a credit letter for payment in favour of the Hong Kong seller. They agreed that the credit letter should be affected through the claimant’s branch (BCC) in Hong Kong, the payment was including beneficiary for claimant and it is a beneficiary’s document for claimant. After making the requisite payment, the Bank of Credit and Commerce claimed to be reimbursed by defendant called S but S refused to pay the reimburse.

In this dispute the law application was very important, the court shall ascertain the applicable law whether the law of Hong Kong was applicable or not. If the performance characteristic of the Issuing Bank based on the contract, was Hong Kong

473 Supra Note,78,P.387-388.
law, governed by Hong Kong law. In accordance with Rome convention article 4 if no express choice of law the contract governed with which country the contract most closely connected. The law of place of business where is situated or under the terms of the contract the performance is to be effected.

Held:
The court held that as the performance characteristic of the contract was that the payment was to be made and be tendered in Hong Kong, in a particular directly relevant country the letter of credit was governed by Hong Kong and its law should apply.

Mexico- Taxes on soft Drinks and other Beverages

WT/DS 308 /AB/R

It is published on the Panel Report of WTO

7 October 2005

Fact:
The request of the United States was on 16 March 2004 with concerning tax measures imposed by Mexico to the import soft drink and other beverages. The United States complained to the DSB based on the imposed tax measures to soft drink and other. Those tax measures included: 1) a 20 percent tax on soft drink and other beverages that use any sweetener other than cane sugar: 2) a 20 percent tax on the commissioning, mediation, agency, representation, brokerage, consignment, and distribution of soft drink and other beverages that use any sweetener other than cane sugar. The complainant was considered that all taxes are inconsistent with Article III of GATT 1994.

In the time of complaining on 26 March 2004, Canada participates as a third party for consultation. On 14 May 2004, the DSB was informed by Mexico that Mexico had accepted the Canada as to join to the panel proceeding requested by United States on 10 June 2004 and time of establishment of panel by deferring of the DSB was on 22 June 2004. On the second meeting five third parties in clued European communities,
Japan, Canada, Pakistan, and China had joined and reserved their third party rights. It enhanced when Guatemala had joined and reserved its third party right. Subsequently, Pakistan informed to refuse to participate as a third party in the panel proceeding.

**Held:**

On 1 February 2005 the chairman of panel informed to complete the work of panel by the end of May 2005 that then panel informed to report and expected to the complete its work in August. The Appellate Body refuse to take the provisions in the North American free Trade Agreement (NAFTA) granting exclusive jurisdiction to a NAFTA tribunal over a matter that could be taken to a WTO dispute settlement Panel would deprive that panel of jurisdiction. At the dispute settlement, the Appellate Body appoints all procedures or law applicability and language of the board. Article 11 DSU provides; language used in the Appellate Body is to describe the function of panels. The provisions relating to the WTO Appellate Body shall apply at the end of appointment. On 7 October 2005 panel found; 1) taxes include the soft drink and distributions imposed on imported soft drinks and syrups are inconsistent with Article III clause 2 of GATT 1994. 2) second taxes as imposed on imported sweeteners are inconsistent with Article III clause 4 of GATT 1994. And also the measures inconsistent to the taxes are not justified under Article XX (d) of GATT 1994.

**5.10 Public policy**

Fritz S Cherk v. Alberto Culver Co.

41 L.Ed.2d.270 and 281

It published by U.S Supreme Court 1974

**Fact:**

The negotiation was between an American manufactures, in Illinois State, a German citizen, three enterprises owned by him and organized under the law of Germany and Liechtenstein, the agreement was in order to expand the American manufacture’s overseas operations, which the negotiation was in United States, England, and
Germany, singed in Austria, and Switzerland, this negotiation was multilateral and it contained statement warranties were undertaken by the German citizen and his enterprises that the trademarks were unencumbered and clause providing that “any controversy or claim shall arise out of this agreement or the breach thereof”, would be referred to arbitration before the International Chamber of Commerce in Paris,(Franc), they also agreed that the Illinois laws would be the applicable law over the agreement and its interpretation and performance.

**Hearing:**

Base on the negotiation the trademarks were warranty by German citizen, after contract, discovered that the trademarks were subject to substantial encumbrances, American manufacture (was respondent in supreme court) offered to rescind the contract, but the German citizen and his enterprises refused, the American manufacture brought suit in District Court for damages and some of other relief, containing that petitioner’s fraudulent representation concerning trademark rights violated article 10 (b) of the Securities Exchange Act 1943 and Rules 10 (b) (5) promulgated there under. The German citizen with its enterprises moved to dismiss the action to stay alternatively the action pending arbitration, the District Court refused the motion to dismiss because it was sought by respondent (American manufacture) that the preliminary enjoined.

**Held:**

The District court held that the proceeding of arbitration clause was unenforceable and the Court of Appeals affirmed the award. The Appeal Court promulgated the arbitration clause is to be respected and enforced by federal courts in accordance with the explicit statements of American Arbitration Act that arbitration agreement such as is here involved, “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at or in equity for the revocation of any contract”. The court ruled that the federal Securities Act could not apply and ruled that the contract involving more than two countries, each with its own laws and conflict-of-laws rules are necessarily subject to uncertainty. The Supreme Court reserved the award of the court of Appeal, found that the international subject was there and the arbitration agreement was

enforceable and remanded the case to lower courts (The cause of that remanding was internationality of dispute arising). So, 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. The Supreme Court found that the U.S adopted and ratified the New York Convention 1958 and its articles which at this point, the article II (1) of NYC provides “each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”, this also provides strong evidence of congressional policy to enforce international arbitration agreements. It further found that the arbitration agreement of the various parties to arbitrate any dispute arising out of their international commercial transaction was to be respected and enforced by the federal courts in accordance with the explicit provisions of the federal Arbitration Act.

5.11 Recognition and enforcement of award

Case synopses;

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd
39 NSWLR 160 at 165(CA)
1996

Fact:

The parties have agreed to refer any dispute or different dispute yet arisen to the arbitration at the time of making commercial contract and it is should be out of the main agreement they agreed that their agreement should not be construed narrowly. The parties are intended that any dispute should be resolved before different tribunals.

This case provides the subject matter should be capable to refer to the arbitration; it is determination in pursuance of the arbitration agreement should be capable of

475 Supra Note,8,p.110.
settlement by arbitration proceeding, because it is emphasizing by the section 7 of the international Arbitration Act 1974 which on application of the parties to the agreement the court refer the parties to arbitration but it involves determination the subject matter. The arbitration agreement of the parties should be interpret by the court to refer the subject matter to the arbitration and the capability of the subject matter to refer to the arbitration. The New York Convention provides if the arbitrator’s decision which made while it is not within the meaning of this convention may refuse to recognize and enforce because the arbitrator’s decision would be in contrary of public policy.

**Held:**

In accordance with the Trade Practices Act 1974 in English law national courts should facilitate agreement for the private resolution of all forms of dispute. The power of the courts to stay for the purpose of referring to arbitration process where the dispute was arbitral under arbitration agreement, but the agreement of the parties on ground of subject matters to arbitrate has limited. In English law disputes concerning to some of subject matters has limited arbitability by legislative provision. In concerning to the arbitability of subject matter to arbitrate by express provision of legislation Australia law like English law has limited disputes concerning to the commercial contract to arbitrate. The categories of disputes which have limited to arbitrate are on ground of public policy.


Prince Edward Island Supreme Court, Trial Division (Mac Donald C.J.TD.)

23 March,2001


Accordingly, the capacity of the parties in making an agreement is a 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/cause to refuse the application of the award for recognition and enforcement.\(^{477}\)

\(^{477}\) Supra Note,236,p.16.
Fact:
The application was by American to recognize and enforce of an award rendered in, and confirmed by the courts of, Minnesota against the Canadian franchisee and its principal who guaranteed performance of the agreement. The respondents resisted enforcement on several bases, including their lack of legal representation, misrepresentation by the franchisor, lack of financial resources to attend the arbitration, unconscionability.

Held:
The national court argued based on the capacity of the respondents to present their case, because of the location of hearing failed because the contract stated where the arbitration hearing would be held. The fact that the respondents could not attend was not the responsibility of the other party. The respondents had failed to prove that they lacked the financial ability to participate.\footnote{Supra Note,349, p.233.}