Chapter 2

Position of International Arbitration
CHAPTER- 2

POSITION OF INTERNATIONAL ARBITRATION

2.1 INTRODUCTION

Generally the international trade law has been established for everyone or the corporation focus on doing trade under good faith, convention and principle rules so that there should be procedures for the easy trade around the world. People intend to obtain benefits by each contract in international trade, they can make the contract to the feature trade beneficiary, and for the trade contract good faith is an important step. Trade is a mutual relationship between merchants based on the international principle rules and international customs. These international principles and customs or usages procedures are to progress the international trade to support the international life standards in world trade. These principles can make easier ways for countries otherwise base on lack of those, may arise some problems. To refer the cases to an arbitration mechanism resolution, it shall be considered that in making arbitration agreement to the arbitration organizations, merchants may find that hard to believe to the international trade transactions.

Today, international trade is governed by the individuals or head of governments to guide the exporting and importing of the goods in developing economy. Generally to arbitrate international cases, arbitration process exists in a different situation. It is a fact that the law of the seat of arbitration and the place of enforcement still play significant roles in international arbitration reference. Fundamentally, the international arbitration administrates the arbitration process by the arbitrators to do so. While non-professional skills that are desirable for all international arbitrators, which include: trustworthiness, common sense, ability to make independent judgment, perception, ability to identify, isolate issue, self-control, capacity for lateral thinking, responsiveness, flexibility, and exposure to an advisory of culture. In addition, these are physical fitness, throughout the arbitral reference. According to articles 24(1) (c) of England arbitration, to remove an arbitrator ‘that is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity’. Normally, all appointing authority, arbitration institution or national courts appoint arbitrators in taking account of special stipulation or qualifications of arbitrators based on the arbitration agreement.
The special qualifications required for the appointment of the arbitrator is a fundamental term of arbitrator’s contract. To deliberate violation by the arbitrator on the qualification required may affect the capacity of the arbitrator to act in the particular reference or amount to a breach of the arbitrator’s contract. In stance the French law provides that ‘arbitrators accept their mission’. However the UNCITRAL neither in the model law nor its arbitration rules, written requires of arbitrators to evidence the acceptance of their appointment in a formal manner. They all have accepted their mandates largely on the same terms though the provisions as to levels of remuneration may differ. All requirements to availability, due process, confidentiality limited party-communication, disclosure and ethical considerations are applicable to the members of the arbitral tribunal. In addition, the question examined in a sub-section, aforesaid above, whether each arbitrator owes to the legal or contractual work to the other arbitrators in making up the arbitral tribunal? The duties of the arbitrators include suffering legal or pecuniary loss emanating from the dilatory action (or inaction) of the offering arbitrator. The disputing parties may not even have remedial action against arbitrators except where the conduct or activities of the arbitrators are such a nature as to meet the very high standard required. It is true that each arbitrator must personally accept and perform his mandate because they are bound by a common goal, both individual and collective responsibility. They are not bound to each other in contract, there is no any evidence of intention to be bound in contract as between the arbitrators, so that their relationship can be constructed as a loose association without any legal obligations binding them in contract. International institutions for making decision do not itself decide to the dispute between the parties. International organizations have regionalized some administrative economic activities and also most of the arbitration institutions have general jurisdiction regarding the nature of the disputes thus parties that can make use of its arbitration rules but they shall observe the principle of those institutions. The internal organization of these arbitration institutions generally follows the same format. The arbitration institutions regularity revises their rules as their practice develops.

92 Ibid, p.67.
93 Ibid,pp.70-71
94 Ibid, p.72.
2.2 Reasons to choose for arbitration

The arbitrators are usually chosen by the parties for their special knowledge in the field where the dispute lies, so that speeds up the process.\textsuperscript{95} Arbitration is used in disputes for resolution of international trade and commercial disputes; it is particularly suitable for resolution. In general, it is assumed that arbitration has the following benefits: 1) confidentiality and privacy. 2) Informality of the proceeding. 3) Lower costs 4) efficiency 5) technical specialism 6) therefore a final award enforce at the national courts. The reasons given to enforce shall be over common hearing of the domestic courts. The parties are keen to both domestic and international arbitrations to achieve confidentiality which cannot readily be cheaper than litigation. Also, it is a speedy resolution of the dispute that will be quicker than the regular courts based on the agreement of parties and choosing the arbitrators. International arbitral’ awards are easier than national results to recognize and enforce in the other territory while the international judgment may not be possible. Similarly, it is easier to achieve neutrality in an international arbitration instead of litigation in a particular country. Particularly, as would usually be, if the chosen forum of the country in which the defendant resides or does business by a domestic contract no-one would choose arbitration in preference to litigation because they thought that the arbitrators would be more certainly neutral between the parties. Although, there (national courts) are no doubts, where foreigners can sue to the local courts in completing confidence which will be completely neutral. There is undoubtedly needed to be very optimistic to believe that this is going to solve disputes. Normally, foreigner of all international commercial contracts would often prefer excellent reasons for choosing arbitration rather than litigation, as to guarantee neutrality of the dispute resolver.\textsuperscript{96}

Differently, the international rules and domestic rules choose to the arbitration process by appointing arbitrators. Usually the domestic rules are governing policy of the country which is made under international contracts. The arbitration process is related to the international principles which depend on the parties. However, the parties shall consider recognizing and enforcing the result in future under the domestic courts. The international procedure is with the intent of each country for the dispute settlement which the public policy of the countries may not be concerned. The arbitration is a

\textsuperscript{95} Supra Note,76,P.15.
mechanism of the dispute settlement which it chooses as an opportunity to choose a “neutral” forum and a “neutral” tribunal. It helps to the parties to choose uniformity language and rules to the dispute settlement, to commence proceeding in a foreign court, employ lawyers, embark upon the time-consuming and expensive task of translating the contract, the correspondence between the parties and other relevant documents into the language of that court. 97 The process of arbitration to dispute of the international settlement is a very flexible. It is completely in accordance with rules of the arbitration. Confidentiality of the process arbitration is one of the advantages which the parties would go towards the arbitration. Also, it has to consider that enforceability of awards normally agreed between all countries under international conventions. The confidentiality of arbitration, developments in the law and practice of arbitration over recent years have been such that the old certainties no longer exist and a fresh look has to be taken.98

2.3 Transparency of arbitration

First of all the transparency for existing arbitration depends on the parties where both parties consented to solve the dispute thereon. To take into an account, a balance between a) the public interest in transparency in treaty-based investor-state arbitration and b) the disputing parties’ interest in a fair and efficient resolution of their dispute, notwithstanding in accordance with the following principles; i) the protection of confidential and sensitive information; ii) the protection of the integrity of the arbitral process; iii) the manageability of the arbitral proceedings. 99 As a duty all disputing parties have the obligation to send the notice of arbitration to the registry and then the registry should publish promptly the names of the disputing parties, as well as information regarding the economic sector and the treaty when/where the claim arises. The majority views are considered to publish the notice of arbitration and then there is a response to the arbitral tribunal in order to allow the parties to seek to settle the dispute amicably before the information relating to the dispute is made public.

According to the article 3 of the UNCITRAL rules the transparency is treaty-based investor-state arbitration. To the publication of documents consensus has reached on this issue, the prevailing view of the delegations is that four main categories of documents should be made available to the public: 1) the notice of arbitration and the

98 Ibid, p.23.
response thereto; ii) the memorial of the parties; iii) the witness statements and the expert reports; iv) submission by the third parties and non-disputing state parties; v) decisions and orders of the arbitral tribunal. The award of the investor-state arbitration should be published in public. The transparency of the hearing is under the publication thereon, however, it should be after consultation with both the parties.

2.4 Jurisdiction of arbitration

It stipulates that the basis of hearing by the arbitration tribunal must have a jurisdiction to find a fact of the case which has referred. Most of international rules emphasize that a jurisdiction of arbitral tribunal is to decide in relating all procedures, as it provides that in article 16 of 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. The purpose of arbitration clause which is part of a contract forms shall be treated as an independent agreement to the other terms of the contract. One point which a decision shall not entail ipso jure the validity of the arbitration clause”. There are essentially two elements to this rule: first, those arbitral tribunals can rule upon its own jurisdiction: and secondly, that the arbitration clause is separate and independent from the terms of the contract containing the transaction between the parties. The validity of arbitration clause that are part of “non-existence” contracts, this non-existence cannot mean “never existed”, but must mean “ceased to exist” if the contract never existed at all, then there never was an agreement therefore the tribunal can have no valid existence, authority or jurisdiction.

If the award made without jurisdiction when there was no arbitration agreement it might be recognized and enforced into both of national laws and the international conventions governing arbitration. According to the New York convention article V (1) (a) recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected to it, or, failing any indication thereon, under the law of the country where the award was made”. Accordingly, the jurisdiction depends on facts which are closely connected with the merits of the dispute that it is almost impossible to determine the one without determining the other as these points are clearly spelled out in the ICSID Rules article 41 Para (3), (4) and (5).

100 Ibid, p.292.
101 Supra Note, 97, P.255.
Article 41 (3) of ICSID convention states: “upon the formal raising of an objection relating to the dispute, and raising the issue of jurisdiction the proceeding on the merits shall be suspended. Also the president of the tribunal shall after consultation with its other members fix the time of hearing. Para (4) of article aforesaid provides; the tribunal shall decide whether or not the further procedures related to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the tribunal overrules the objection or joins to the merits, it shall fix one more time-limits for further procedures. Para art, (5) stipulates that if “the tribunal decides that the dispute is not within the jurisdiction of the center or not within its own competence, it shall render an award to that effect”.

2.5 Jurisdictions of courts

The majority of international instruments require that a court should view the exercise of arbitration agreement; it has no jurisdiction to entertain the action. The Geneva Protocol states “a court shall refer the parties on the application of either of them to the decision of the arbitrators”. A similar provision is contained in article II (3) of the UN Convection. At first, national court initial to recognize and enforce the foreign award declared under the application of a party. Subsequently, if it (national court) found that the arbitral tribunal had no jurisdiction to render the award may refuse to recognize and set aside the award. The jurisdiction of national courts shall be presented by the respondent of his statement of defense, it depends on the courts seized, this plea as one of procedures or substances.

2.6 Internality of arbitration

A number of international instruments limit the scope of its application to arbitration agreements concluded by the parties who have got their place of residence or seat in different countries. The ECAFE rules require in article I (1) (c) that the parties should be residents of different countries. In accordance with the article 1 of UNIDROIT Draft; the parties in relation to the subject of the scope of application of the uniform law provides that the nationality of the parties shall not be taken into consideration while the meaning of international belongs to the different nationality.
2.7 International trade problems and arbitration

The process of the arbitration previously is the greatest historical method and mechanism to dispute settlement under especial procedure, so the greatest historical impetus for arbitration international trade is the fear of parties to litigate in foreign lands. And also the recognition and enforcement of award inside the lands may be so difficult because it is a problem of international trade to manage and it may be not able to verify by national laws. Thus, the arbitration way is the greatest to dispute settlement, so the fear of unfair treatment is heightened when states are parties to disputes or when national interests are involved. Hence, in these circumstances arbitration is a logical alternative. On other hand, the contracting parties make an arbitration agreement to the settlement potentially future disputes or dispute which arises from the agreement of the parties in dispute. Arbitration is a method of private dispute resolution. As already noted, an arbitration process is in private mechanism based on especial contract agreed between the parties including all private intents and ideas, so it needs an institutional infrastructure to be effective.

2.8 Arbitration related to the private international law

The elaborate (details) of international principles developed in private international arbitrations. According to all international principles or rules related to option and authority of the parties to dispute settlement, they determine any rules or laws to solve the problems between two merchants from different states; it may see the choosing of the rules by principle is private right of the parties which was recognized in international customs and usages for the parties. The national and international developments relating to arbitrations over the years have encouraged the international community to adopt various measures with the objective of introducing a degree of uniformity in this area of law.

Adopting the international principle or rules have resulted in solving the problems and conventions have written to the disputes settlement for instance, the Geneva Protocol, on Arbitration clauses of 1923 and the Geneva Convention on the Execution of

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103 Ibid, p.730.
foreign Awards in 1927. Obviously, all around the world, the group countries or some parts of the United Nations and international community have adopted that international rules already established and they have joined to the international convention which were for harmonizing the international principles that can be called international conventions or regional convention. It would say that for instance, the ECAFE (new ESCAP) took an interest in proper arbitration facilities in Asia, London, Geneva, for ambitions, both the Singapore and the Manila conferences of the ECAFE recommended the development of arbitration associations and facilities in the region and the conclusion of inter-state arbitration agreements. The 1996 New Delhi Conference agreed that an ECAFE Center for the Promotion of Commercial Arbitration be established in Bangkok.\(^{105}\) The Asian-African Legal Consultative committee has set up arbitration centers in Kuala Lumpur, Cairo and Lagos and Hong Kong. It was considered as an important center, thus the Hong Kong conference has developed. The European convention in the Recognition and Execution of Arbitration Awards 1926, and in the Americas the inter-American Convention on International Commercial Arbitration 1975, was also significant. The New York United Nations convention on the Recognition and enforcement of foreign Arbitral Awards 1958, ultimately the formulation of which UNCITRAL rules are another step of the evolution of international commercial arbitrations.

Consequently, the other international institutions to arbitration include; the Geneva Convention on commercial Arbitration 1961 (the proposed model law on international commercial Arbitration) will be a further development. The World Bank made its contributions to the growing international concern with arbitration with the convention on the settlement of investment disputes between States and Nationals of the states in 1965.\(^{106}\) Other conventions which they are concerned to the international private law include Montevideo of 1889, the convention of Caracas in 1912, the convention of Havana in 1921, the APO, the GTCAEI, the MTFTCAEI, the LOSC, the Benelx Agreement and the ICAO. All of the conventions made to develop the arbitration rules to the resolution of international dispute settlements and to harmonize international private rules for that purpose.

\(^{105}\) Ibid, P.170-171.

\(^{106}\) Ibid,p.171.
2.9 Subject matter

The disputes to the various international arbitration instruments are intended to apply are characterization of the broad terms from the point of view of the nature of their-subject matter. The subject matter determines whether the case will arbitrate under the international instruments or it will be the appointment of the judicial process. Based on the international instruments, as it has stipulated that in the article 3 of the UNIDROIT, article 1 of Geneva protocol, article II of the United Nations Convention, article 1 of the OAS Draft Uniform convention also article 1 and 20 OAS Draft Uniform law, particularly, the subject matters should be regarded as falling within the scope of “international trade”; such differences could, on occasion, lead to uncertainly as to the arbitrability of a particular dispute.

2.10 Critical analyses of international arbitration process

The arbitration process is not very cheap or cheaper for resolving disputes than litigation. The parties have to pay fee for full process of arbitration unlike the salary of a judge. It may be necessary to pay the administrative fees and expenses of an arbitral institution. Another perceived drawback of the arbitral process lies, in fact that, in general, it is not possible to bring multi-party disputes together. Problematic of conflict of arbitration awards to the public policy, there is no system of precedent in arbitration, no rule which means that an award on a particular issue, or a particular set of facts, in the case CME v Czech Republic undisputed fact produced conflicting awards from arbitral tribunal in London and Stockholm, as well as giving rise to litigation in the Czech Republic, the united states and Sweden.107

It concluded that the parties have to submit their international dispute to the arbitral tribunal. It must consider which no international court deals with international commercial dispute. Hoverer, the international court of justice is available to settle the conflicts between governments and accordingly the European court of justice in Luxembourg may deal with dispute between private parties and private sectors by the community law which have established a statutory framework to facilitate the arbitral process, but the commercial transactions disputes are outside the component of it, because there is no jurisdiction to do so. For the claimant, this court will be “foreign” in every sense, the claimant generally will not be able to be represented at the national

107 Supra Note, 97, p.25.
courts easily. Thus, the claimant finds that the language of the court is not to be corresponded with the contract, the documents and evidence have to be translated, misunderstanding to which that may arise. The court is unaccustomed to the international commercial transactions, its laws and practices are not adequate to deal with them. If one of the parties to the contract is a state, the private party will be reluctant to submit to the national court of the state party. Generally, the parties, usually, to dispute of international commercial settlement (Although one of the states is a party) will choose the international arbitration mechanism with all its especial procedures.

2.11 International arbitration agreement

The international arbitration agreement concluded by the parties to a commercial transaction whose places of business are in different states, if a party has more than one place of business which has the closest relationship to the contract and its performance. Arbitration agreement provides that the countries for solution of dispute settlements by arbitration, the arbitration agreement, and separate trade contract providing for determination to solve the dispute. Agreement clause can make arbitration for the parties and also it may provide for determination of all future litigation by arbitration process (\textit{clauseula compromissoria}). The first important international arbitration agreement was the Geneva Protocol on arbitration clauses (international trade), signed in 1923. According to the article 1 of the Geneva Protocol, requirement of arbitration agreement and arbitration clause deal with litigation, it provides that “in matters of trade and other matters in which settlements are permissible. Therefore, it is obvious that subject to Commercial law and its exceptions to the arbitration. The public law cannot be subject to the arbitration, in fact the interests of the private parties are involved, and the neutral field of activity for arbitration wherever the parties have the power to dispose the subject matter. This would be including the entire field of civil law. Arbitration agreement has covered in civil law in dispute with the preparation and conduct of arbitration proceedings to administrate the award. It (arbitration agreement) is an undertaking of the parties’ person or legal persons or public law which have arisen in international relationship, which to be contractual, although it depends on the subject matter which could be disposed by agreement of the parties under the applicable law.

\footnote{Ibid.p.26.}
It shall consider that in the national law of countries, the rules of arbitration and conventions have not been allowed in referring the subject-matter to other international process like France. Recently, under United Nations Act, the contracting state may make arbitration agreement, accordingly, article II section I provides 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”. However, arbitration agreement is made by the parties but they must respect to the rules of the place which the parties took place, in fact laws of the arbitration place are emphasized to the arbitration.

The arbitral tribunal shall conduct independently from the terms of the trade contract as the arbitration agreement specifies the provision of the hearing. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. It may be determined by the parties to apply for interim measure during arbitration proceeding, it shall not be deemed compatible with the agreement to arbitrate or waiver of the right. The aim could be achieved by the drawing up of unification model law applicable to disputes arising from international trade. It would contain certain basic norms with regard to a matter and its effect. The principles for the establishment of the arbitral tribunal, the possibility of choosing a foreign arbitrator, the finality of arbitral awards and the possibility of choice of arbitration are according to the rules of law (applicable law) and the arbitration to equity.

“Fabem &Co.V.Mareb Yeman Insurance co. Ltd.2 Hoyd’s Rep.738, in 1997, the defendants had sent a telex to the plaintiffs which were expressed to be an ‘offer’ for sale of sugar with price to be advised later by separate telex. The telex contained an arbitration clause. The plaintiffs accepted the offer by telex. Cress Well J. referred to the decision of the court of Appeal in Zambia Steel &Building Supplies Ltd v. Clark & Eaton Ltd [1986]2 lord’s Rep.225 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”.

Ralph Gibson L.J. Shared that sentiment. His Lordship expended on the approach saying: “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. On that basis, provided that the terms of agreement to submit to arbitration are contained in a document or documents, prove 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, or by evidence of oral acceptance, or indeed any other evidence which satisfied that court that the written term constitutes or from part of an agreement between the parties”. 111

2.12 Definition of International Arbitration

There is a major exception to the rule that a commercial arbitrator should decide according to the applicable law. Sometimes, merchants insert the clauses to the arbitration agreements which authorize arbitrators to resolve disputes \textit{ex aequo et bono} or as \textit{amicable compositeurs}. Strictly speaking, amicable settlement does not determinate but the conclusion is a new contract to settle subject-matter. So, the international conventions have most effect over the international commercial arbitration. In fact, international conventions have been created to resolve the problems in trade field, thus, there are major conventions which have been implemented. The convention on the Recognition and Enforcement of foreign Arbitral Awards (commonly known as the New York convention) adopted by the United Nations conference on international commercial Arbitration in 1958 at its 24\textsuperscript{th} meeting and implemented in Australia by part II of the International Arbitration Act 1974. The UNCITRAL Model law on international commercial Arbitration adopted by un-compasion on international trade law on 21 June 1985 and implemented Australia by part III of international arbitration Act 1974.

Although, the New York convention does not actually use the term ‘international’ but applies its provision to ‘arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought’ and to ‘arbitral awards’ not considered as enforcement, it provides by article 1(1) of

International arbitration. Section 3 of the International Arbitration Act provides that a ‘foreign award’ means ‘an arbitral award made’ in pursuance of arbitration agreement, being an arbitral award in relation to which the convention applies.\textsuperscript{112} The UNCITRAL model law gives more details about ‘international’ arbitration, article 1(1) state that, this law applies to international commercial arbitration between States in case of commercial dispute in force. Under the article 1 (3) of New York convention arbitration is international if, at the time of the conclusion of the agreement, the parties have their places of business in different states. Where the parties have their places of business in the same state, will yet be international, if they or arbitral tribunal designated the place where a substantial part of the commercial obligations have to be performed or the place with which the subject matter of the dispute is most closely connected is outside such state. Finally, even if all of the above criteria remain unmet, the arbitration will be international if ‘the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.’\textsuperscript{113}

\textbf{2.13 Validity of arbitration agreement}

Arbitration is a creature of consent; the consent should be freely, knowingly, and competently given. The requirement of validity of arbitration firstly shall be in writing, and the written agreement be signed by both the parties.\textsuperscript{114} International arbitration agreement is enforceable under the New York convention. The enforceability of the final award under the New York Convention depend on the written agreement which must be in some circumstances, the dispute must be “in respect of a defined legal relationship” and the subject matter must be capable of being settled by arbitration but if the agreement is null and void, inoperative or incapable of being performed, the enforceability is impossible.

\textbf{2.14 No validity of arbitration agreement}

In accordance with several acts the invalidity of arbitration agreement considered to be not enforcing and recognizing. As well as article 34 (2) (a) (1) of the model law provides that the ground for annulling an award; invalidity of arbitration agreement.

\textsuperscript{112} Supra Note, 102, p.732.
\textsuperscript{113} Ibid, p.732.
\textsuperscript{114} Article 11 (1) and (2) of New York convention 1958.
In addition, article V (1) of the New York Convention, article 1502 (1) of French NCCP state 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”, and SLPIL article 190 (2) (B) provides “if the arbitral tribunal wrongly accepted or declined jurisdiction”. The denial of opportunity to be heard article 34(2) (a) (ii) of the model law and provision is closely modeled on article V (1) (b) of the New York convention because it is directed towards serious procedural unfairness.

2.15 The validity of international arbitration agreement

There are two basic categories of the validity of international arbitration agreements. First, there can be challenges that parallel to those which are available under generally applicable contract law to consent the validity of any contract. In particular, these grounds include unconscionability or duress, fraudulent inducement or fraud, illegality, impossibility, or changed circumstances, and waiver. Second, in some jurisdictions, special rules of invalidity apply to some categories of disputes (treating agreement) to arbitrate differently from other type of contracts these rules are frequently referred to under the doctrine of “non-arbitrability”. In result, if the international arbitration agreement was not valid under the unconscionability(it means limits) and duress or other provision, these preclude for enforcement of the arbitration awards.

2.16 Enforceability of agreement

If the court finds that the agreement is null and void, inoperable or incapable of being performed, it does not refer to arbitration. Matters seized above are very important points to recognize and enforce of award. In accordance with article II (3) of New York Convention, at the request of one of the parties, the agreement under the control on the court of Contracting State refers to arbitration. The enforceability of the award is impossible if there was lack of actual consent, and if the national court finds that award rendered within the meaning of said article (article II of the New York convention) fraud, duress, misrepresentation, undue influence, or waiver the enforcement of award is not possible. The lack of legal capacity of one of the parties; the ineffectiveness of international arbitral awards on the basis that the arbitration

\[\text{Supra Note, 7, p.340.}\]
agreement was not binding on the parties but the provision of applicable law plays important role between the parties. Inoperability an arbitration agreement occurs by *res judicata*, because the subject matter of the parties has previously been decided by other legal forum. Incapable of being performed of arbitration agreement depends on some conditions, but inoperability or nullity and other forms are in consist, incapable to the arbitration agreement, so that could be incapable of being performed. The language of contract was condition, or a specific arbitrator could not attend to the arbitration. The place of arbitration was no longer available, these could render the arbitration agreement incapable of being performed if the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place. In accordance with the New York convention, all formalities shall be required, such as the signatory of agreement in writing. The signature by an agency but the agent must act within the scope of his or her authority. There must be proof that the agent had actual authority to act for the principal.

2.17 The writing Requirements of agreement

The requirement of agreement depends on the place of arbitration which the parties have selected, in fact, the enforceability, under the New York convention which provided that to a validity of agreement under the place of the arbitral tribunal. In accordance with the article 7 of Model law the agreement shall be in writing and no signature requirement. It provides in the UNCITRAL Working Group wanted to clarify that the term “writing” included “modern means of communication that might not be considered in some countries, the meeting in writing is required. In accordance with article 7 of New York Convention the parties may use Electronic communication to make an agreement then the agreement is valid by writing of agreement contained an exchange of “letter or telegrams”. It allows to change on Electronic commerce communications, although most courts have rather broadly accepted newer modes of communication by making the definition of “writing” with both its convention on electronic commerce and its model law on Electronic commerce UNCITRAL in attempting to create an internationally accepted definition of “writing” which includes electronic commerce to the most modern international practices as well as model laws’ concept of writing.

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2.18 Written pleading in International Arbitration

Both the parties shall submit the statement of claim and defense in accordance with arbitration agreement. Because of the article 4 and 5 of ICC Arbitration rules, articles 18, 19, 23 of the UNCITRAL rules provide: to refer “document or order evidence he will submit”, the UNCITRAL Rules do not impose strict time-limits. Article 23 states; the periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it appears that an extension is justified”. In contrary the LCIA Rules article 15 provides: “statement of defense”, and “statement of reply” follows each other within certain time limits and they are to be accompanied by copies of “all essential documents on which the party concerned relies and by any relevant samples or exhibits”. Also article 17 (1) of the LCIA Rules provides; statement of claim and defense, and that the arbitral tribunal may “decide whether the parties shall present any written statement in addition”.

The ICSID rules article 31 (1), (2), (3) provide that a memorial should contain a statement of the relevant facts, a statement of law and a submission of the counter-memorial. Replier or the rejoinder should respond to the statements and add submission of facts and statements of law. The jurisdiction of the arbitral tribunal determines within time limit for submission of the statements of claim or defense, sometimes serve merely as targets to make sure that the parties start their preparatory work without delay.

2.19 Inadequacy of the domestic laws

The parties can choose provisions of the arbitration agreement, law of applicable, and the system of law to arbitrate, which they cannot apply to domestic law. In fact, all the procedures of the arbitration are based on the selection of the parties who want dispute settlement by the arbitration process. However, perhaps in the domestic law, mandatory of the rules provide the problem for the arbitration process, in a position which lack permanent provisions, mandatory laws are aggravated by national law to the arbitral procedure widely. Different rules are a source of international law in concern of arbitration which both the parties are confronted to the foreign law and they probably are unfamiliar with provision of procedures.

118 Supra Note, 97, P.291
2.20 Concept of commercial

Include goods and service, any trade transaction or exchange of goods, distribution agreement; representation, factoring, construction of works; investment engineering, licensing, insurance, carriage of goods, all forms of industrial banking, exploitation agreement, business co-operation, passengers by road, air, rail and sea and, consulting. However, it is usually given wide interpretation which cover matters arising all relationships of a commercial nature if the parties have written a contract but it involves which interests of the parties, they shall preclude from denying. It would be sufficient that the parties have their principal places of business in different states. It probably provides the subject-matter related to more than one state. The places of business have the closet relationship with the arbitration agreement. In principle, the place of residence should have the same significance as the place of business.

2.21 Concept of International commercial arbitration agreement

In accordance with the section 2 of the arbitration and conciliation act 1996 of India; “international commercial arbitration if the contractual relationship, it considers or not that the law of India may be able to recognize and enforce foreign award where at least one of the parties is a national or habitually resident in any country other than India; or a body corporate which is incorporated in any country other than India; or a company or an association or a body of individuals whose control management and control is exercised in any country other than India; or the Government of foreign country”. Where one of the parties is foreigner, the arbitration agreement will be considered international arbitration agreement. To be an international arbitration agreement, it is necessary that a party shall be a foreigner.

The New York convention will apply to the arbitration agreement if it has a foreign element or flavor involving international trade and commerce even though such an agreement does not lead to a foreign award but the enforcement and recognition of the agreement will of course be subject to certain limitations. A commercial arbitration agreement will be international in charter in the following situations: a) if one of the parties has business located abroad; or b) the agreement has to be performed abroad; c) the subject-matter of the transactions is located abroad or; D) one of the parties to the transactions is a foreigner.²¹⁹

²¹⁹ Supra Note.8,p.16.
2.22 Arbitration agreement covered under the New York convention

The arbitration agreement may be concerning to the existing difference dispute settlements in future. Article II of New York convention was drafted in haste which resulted in omission of a proper definition of arbitration agreement covered under the New York convention. It means that the agreement shall be in writing, and to assure that international commercial arbitration will not be frustrated by court litigation on the same merits as covered by the arbitration agreement.\textsuperscript{120} It is very important to be valid under the law of the applicable because of incapacity of parties and invalidity of agreement, may refuse final award by the court of seat of arbitration. (Where the arbitral took place)

2.23 Transnational commercial law

Different society and merchants of international trade law do many valuable trades to have a trade relationship, it is usual around the world trade and in marketing, because no country is the same to the others. Fundamentally, structure of each society is different to the others, as well as it may include culture, public policy and rules of trade, it also makes difficult situation to establish arbitral tribunal and the wholly different economic system of the socialist approach to the law of sales and there is a risk that over eagerness to achieve unification may give rise to the confusion on either side.\textsuperscript{121} The concept of international commercial arbitration is not specifically defined in any of the international instruments. The basic elements of the concept, however, are reflected in the initial or preliminary articles of some international arbitration instruments, so those provisions which define the scope of application of such instruments.\textsuperscript{122}

2.24 Jurisdictional requirements of international arbitration

First of all, the New York convention imposes some of obligations on contracting states to recognize and enforce the arbitration award then the model law provides parallel treatment of international arbitration agreement. However, the New York convention has not given a definition to arbitration agreement. Five jurisdictional

\textsuperscript{120} Ibid, p.17.
\textsuperscript{121} Supra Note, 95, p.73, Para 1.
requirements of the New York convention warrant attention. First article II (1) and II (2) limit the convention’s coverage to “arbitration agreement(s) and arbitral clauses” as distinguished from other types of agreement. Second, where contracting states have adopted a reservation of this effect, the convention is generally applicable only to differences arising out of “commercial” relationships. Third, again pursuant to the article II (1), the parties’ agreement must provide for arbitration of differences which have arisen or which may arise, in respect of a defined legal relationship whether contractual or not.” Fourth, the convention is applicable to many national courts only on the basis of reciprocity. Finally, the convention arguably applies only to agreements concerning “foreign” or non-domestic” awards or, alternatively to international arbitration agreements. These jurisdictional requirements in the New York convention: a) requirements for an “arbitration agreement” (or “arbitral award”); b) commercial relationship; C) international connection.123

2.25 The meaning of conflict laws

The conflict of laws referred to a private international law, it may extend to the other field of international law because the conflict of law is concerned to the domestic law. The rules of countries are not a wholly separate of law branch.124 The unification of rules in international matters deal with numerous international principles and conventions which the countries adopted and considerable uniformity and implements such an international convention, it would do by amending its laws and those amended laws would embody the conflict of law in field. The conflict of law arises where the judgment is opposed to the natural justice, so to present a case equal opportunity which it shall give to the parties, where the judgment rendered in contrary to the natural justice, because the justice principally is based on the law. In servicing summons, the condition of the parties shall be equal, and the judgment shall not be in contrary to a natural justice. The conflict of laws may arise in recognizing and enforcing the award where the winner party applied to do so. The award might be in contrary to the public policy of a country where a party has applied to recognize and enforce award, the execution of foreign judgments in territory of countries may conflict with the public policy.

123 Supra Note, 117, p.104.
2.26 Jurisdictional rules at common law and civil law

Under the *Kompetenz-kompetenz* doctrine as it developed the concept of the jurisdiction in common law, the tribunal itself has the power to rule on its own jurisdiction. In a case in common law; the universal doctrine recognized by christopher Brown V. Genossenschaft Osterreichischer Waldbesitzer [1954] IQ.B. 8, is given effect to in section 30 of the new Act. It states that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:

1) Whether there is a valid arbitration agreement;

2) What matter has been submitted to arbitration in accordance with the arbitration agreement

If the arbitral tribunal proceeds to determine its own substantive jurisdiction and this is not objected by the parties, they are deemed under section 73 of arbitration Act 1996 as having waived their right to object and hence may not rely on section 67 to challenge the award. In having to waive by the parties from their right in the arbitration process about jurisdiction of the arbitral tribunal, it has not written into the UNCITRAL arbitration rule and model law. Because it shall consider at period of time of the making the arbitration agreement, in fact, it is governed by the article 34 of model law. The jurisdiction of the arbitral tribunal in the UNCITARL arbitration rules is by tribunal; in accordance to the article 21, the power of the arbitral tribunal to the jurisdiction is given by the parties with the arbitration agreement. It is not separate arbitration agreement and arbitral tribunal shall have a consideration to its own jurisdiction.

2.27 Institutional Arbitration

Advantage of institutional Arbitration is that its performance of important administrative functions is considered advantageous; because it makes sure the arbitrators are appointed in a timely way that the arbitration moves along in a reasonable manner, and that fees and expenses are paid in advance. Moreover, the arbitration rules of the institution are time-tested and are usually quite effective to deal with most situations that arise. It may be more effectively an award rendered under the auspices of a well-known institution may have more credibility in the international community and the courts. The Ad Hoc arbitration process is paying less
about time and money, it is possible for the parties to appoint law applicable base on the international arbitration rules. In ad hoc arbitration, both the parties are claimants against each other, because each of them has the burden of proof in which it is against the other party. So it shall consider existing disadvantage of Ad hoc arbitration in circumstance if either of parties engages in deliberate obstruction of the process. In that situation, without an administering institution, the parties may have to seek the assistance of the court to move the arbitration forward.

2.28 Ad Hoc arbitration

It usually depends on the agreement of the parties because it concerns to the rules of institutions related to the arbitration. It was normally selected by the parties to find a solution to the disputes settlement, at first, the parties tried to appoint arbitrators then unless the arbitrators cannot find a solution to disputes between the parties, the appointing authority may designate arbitrators. To select ad hoc arbitration may raise some advantages and also in selecting institutional process, the advantages of institution are specifically because institution appoints the arbitrators, only based on the request of the parties. Institutions are supervised by a professional staffs which with specific procedural rules and reliable of the staff, it involves riskless and this reduces the risk of procedural break down. The institutional process may be constructive on issue related to the appointment of arbitrators, the resolution of challenges to arbitration, to appoint the seat of arbitration, fixing the fees of arbitrators, and do so. The governing size and sophistication of the international arbitration bar and the efficacy of international legislative framework for commercial arbitration have partially reduced the relative advantage of institutional arbitration. In contrary, the ad hoc arbitration got a process more flexible, less expensive and more confidential than institutional process; its process is unusual mechanism to dispute. Generally in absence normal process, the circumstances of Ad Hoc mechanism argued for disputing settlement. International arbitral institutions are consultative in particular rely on efficient process.

The rules of Ad Hoc arbitration are not clear to be law applicable to appoint, the law applicable is flexible, and it relies on the arbitration agreement and applicable law appointed by the parties. The model law provides that any contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority can be
an arbitration institution, such as the LCIA or the SIAC, or some professional body. The Secretary of Permanent Court of Arbitration has a role to appoint the appointing authority for choosing or it will normally choose an arbitration institution appropriate for the case or might even act as the appointing authority itself. The parties can also adopt the IBA rules on taking evidence in International Commercial Arbitration to regulate the procedure in the arbitration or to the supplement the specific procedural arrangements they have agreed.\textsuperscript{125}

The proceedings are conducted by the arbitrators as per the agreement between the parties or with concurrence of the parties; it can be domestic, international or foreign arbitration.\textsuperscript{126} To recognize and enforce the international arbitration award in India recognized and enforced with the New York convention 1958, but in domestic procedure, it is opposite of it, because the national court, according to the 1961 Act, intervene to the arbitration award and as well any person interested in enforcing award may apply in writing to any court having jurisdiction over the subject matter of the award. The case of Ad Hoc: At 8 July 2003 –Ad Hoc Award-UNCITRAL Model law a case occurred between E, a BVI Company, and T, and Irish Company, entered into a contract whereby E purchased 10,000 ton of crude oil from T. the contract was dawn up in both English and Russian. E transferred money to T in advance of the delivery of the oil; however the oil was never delivered. T repaid less than half of the money given in advance. The 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”. In case of un-reaching agreement in defendant’s Arbitration Court, No choice of law clause was present in the contract.

\subsection*{2.29 Harmonization and Standardization business dispute}

International business dispute to resolve disputes it uses private and inter-governmental organizations to resolve business dispute. Many international institutions are available to dispute between the businessmen. Some of the international institutions include International chamber of commerce in Paris (ICC), the London Chamber of International Arbitration (LCIA) or the World Bank’s International center for the settlement of Investment Disputes.


In 1986, the UNCITRAL established based on the working group on international payments, so that a model of law on international electronic transfer of funds could be developed, also for standardization and harmonization of international credit transfer was issued in 1992. The World Trade Organization’s (WTO) initiatives and more specifically the provision of General Agreement on Trade in Services (GATS) also promote standardization and liberalization in terms of cross-border capital movements.  

In the 19th century, the colonial system could be seen as a form of centrally imposed economic integration, regionalism is capable of promoting legal standardization in several ways: first; it creates an autonomous legal order for member state, which is sanctioned and legitimated by proper regional institutional organs, and, secondly; regional blocs themselves become international actors, which start to actively participate in the international order signing agreement between themselves and with other international actors such as international organization and states.

2.30 The procedure of arbitration

The international arbitration process depends on the rules and law govern upon the arbitration agreement, but the procedure of the arbitration may govern under the national law of any states where the arbitral tribunal takes place an arbitration which comes into existence. So arbitration that deals with dispute between the parties, should be “tailor-made” to fit the facts of that dispute; procedures suit able to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. In accordance with the section 3 (1) (b) of the England Arbitration the base of the arbitration procedure sets down behind international arbitration process. It is “tailor made and flexible for the parties as well tribunal. So, this would be a retrograde step depriving the arbitral process of flexibility.

2.31 Different procedures of the arbitration

The procedure of the arbitration related to the philosophy of the any institution to dispute settlements depends on the rule of an institution. Each institution may differ from the other to the procedure rule of supervision or other shapes of the composition. In some institutions, the appointing authority has a power to appoint the arbitrators

\[127\] http://www.gats.eu.int

\[128\] Supra Note,97, P.72
but this differs in the UNCITRAL procedure to appoint because the parties shall appoint the arbitrators and if they have not appointed the arbitrators, the appointing authority may appoint the arbitrators, it differs to the others. Thus, it shall see in some institutions how the appointment is to; in the NAFTA the secretary has been empowered to appoint the arbitrators, in the ICSID generally the chairman of the Administrative Council of ICSID has a power to appoint the arbitrators. While in the UNCITRAL when no appointing authority is designated in an agreement, article 6 of the UNCITRAL rules provided that the secretary –General of the permanent court of arbitration at The Hague may be requested to designate the appointing authority. Although the parties have to appoint the arbitrators within 60 days of receipt of a party’s request. Differently, within the UNCITRAL procedure, firstly, the parties have a right to appoint the arbitrators then the appointing authority as it states in the article 6(2) the period of time which is possible to appoint the arbitrators is thirty days but the request shall be with a party after that unless the parties have not reached agreement on the choice of a sole arbitrator. But in the other institutions the procedure of the appointment is by the institutions directly and the parties have no authority to appoint the arbitrators. It also differs where an award made by some of institutions the award is directly recognizable and enforceable while in the UNCITRAL for the recognition and enforcement need to request the parties. This states in the article 54 of the ICSID convention “as if they were a final judgment of award of the state where enforcement is sought”. Other awards, whether under UNCITRAL rules or under the rules of an arbitral institution, is generally entitle to enforcement under the New York convention”.

2.32 Types of Arbitral tribunal
The tribunals use in multilateral treaties, a single arbitrator (Convention on the International Hydrographic Organization 1967 article 17). A tribunal of the members, composed of one arbitrator selected by each side and one neutral member (Article 38, of International convention for the protection of New Varieties on Plants, 1961) the tribunal of five members, composed of one arbitrator selected by each side and neutral members (Article 22 the Geneva General Act for the pacific settlement of International Disputes) a tribunal of five members, composed of two arbitrators
selected by each side and only one neutral member. Also it provides by article 22, agreement on Safeguards under the Non-Proliferation Treaty, Brussels 1973. With respect to disputes related to the interpretation or application of a contract relating to seabed mining not only between states parties but when the international Sea-Bed Authority its mining Enterprise, a state enterprise or a national or judicial person is a party to the dispute.

By growing international tribunal, business has been also affected on the international arbitration commercial institutions, vary in cost and quality of administration, many companies prefer to work with the older, better-establishes, even if the cost may be somewhat higher. Some of institutional arbitral include:

2.32.1 ICC Arbitration institutions

The ICC arbitration court is not exactly court to disputes because it is international Court of arbitration as it is one of the better-known and most prestigious arbitral institutions. In the ICC arbitration court arbitral award is scrutinized by the court of arbitration, the court could review the award then the award will submit to the parties. So the court does not have the power to change the award substantively, if the court finds a misinterpretation, it is not possible at the very cutset of the arbitration, the parties are asked to complete and sign a document called the “terms of reference”, which lists a summary of the claims and relief sought, all the parties, the place of arbitration the rules and sometimes other information pertaining to discovery or scheduling.

A characteristic of the ICC arbitration is its universality. The head quarter of the ICC is located in Paris, the arbitrators need not meet there, the seat of arbitration may be practically anywhere in the world. Awards rendered by the ICC arbitrators are final. There is no appeal on substantive questions of law or fact in the ICC arbitration. The ICC court of Arbitration will never substitute its judgment for that of the arbitrators on matters of substance, which finally notified the ward to the parties. However, the arbitrators organize hearing, submission of Proof, and the presentation of arguments is left largely to the discretion of the arbitrators as a consequence ICC arbitral procedure


130 Supra Note,117, P.10
is flexible.\textsuperscript{131} The ICC approach to arbitration, therefore, can be understood only if one analyzes the identity and roles of the ICC and its National Committees, the Court of Arbitration, the secretariat of the court, and the arbitrators chosen for each case.\textsuperscript{132} In case No: 6162, fact was that 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, as the arbitrators neither designated by the arbitration clause nor by a 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.

2.32.2 The American Arbitration Associations (AAA)

It is a greatest International Center for Dispute Resolution (ICDR). It has reached cooperative Agreement with sixty-six institution in at least forty six countries.

2.32.3 The London court of international Arbitration (LCIA)

The LCIA is not a “court” in the judicial sense it rather responsible for supervising body of the arbitration institution. It also has responsibility of appointing tribunals, determining challenges to arbitrators, and controlling costs.\textsuperscript{133}

2.32.4 Other institutional arbitrations

A numerous institutions are inter alia available for dispute settlements to determine the procedures of hearing for the parties. They include; 1) the European court of Arbitration, 2) the German Institution of Arbitration (DIS), 3) the Netherlands Arbitration Institution (NAI), 4) the Vienna International Arbitration in the Hague (PCA); the PCA is an intergovernmental organization that provides disputes resolution services to states and handles some international commercial Arbitration between private parties, 5) The China Institutional Economic Trade Arbitration Commission (CIETAC).

\textsuperscript{131} Supra Note, 129, p.236.
\textsuperscript{132} Ibid,P.239.
\textsuperscript{133} Supra Nate,117, p.12.
2.33 ICSID Arbitration

State or state-owned entities are generally immune from suits by individuals or companies. If the state or state entities engages in a commercial deal, and particularly, it enters into an arbitration agreement, normally it will be considered to have waived immunity for contracting states that agree to arbitration under the ICSID Rules of Arbitration. Resulting award is not appeal to a court, and national laws are not applicable to the process.

3.34 Law of applicable in the ICSID convention

In accordance with article 42(1) of ICSID convention which provides that “the arbitral tribunal shall decide a dispute in accordance with such rules of law 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 on international law as may be applicable. Aron Broches, who was as General Counsel of the World Bank explained the provision of the law applicable: the tribunal will first look at the law on the host state and that law will in the first instance may be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the host state’s law, but may result in not applying it where that law, or action taken under that law, violates international law. In that sense...international law is hierarchically superior to national law under article 42 (1).

2.35 The law applicable in international trade

In international trade, exchange of goods for money is very important in the mind of the traders, in fact, the aim of the trade is export goods and import money. So, in international trade, some rules should be governed, therefore, the parties in international relation differ from nationalities in arising of the problems. However, case to case the provisions differ but they need to have unified rules to do so. On other hand, between the parties, challenges may arise, to solve the problem which the international rules or principles need to apply.

The arbitrator shall decide as amiable compositeur (ex aequo et bono) if the agreement of the parties conferred this mandate upon him. Given generally inferior
stature of national law in the new law, one could have expected that the arbitrators, as a general rule, would be empowered to decide *ex aequo et bono* and only exceptionally (when the parties so provided specifically) would they follow the strict rules of law...therefore, absent as *amiables compositeurs*, the arbitrator are bound to decide following some rules, although not necessarily those of national law.\textsuperscript{134} The arbitration is optional to the parties, thus, a trend which the arbitrators should apply the conflict rule is with agreement of arbitration which they deem “appropriate”. The subsequent trend was incorporated in the European convention on international commercial Arbitration.\textsuperscript{135} The parties shall be free to determine the law of applicable, accordingly, failing any indication by the parties as to the application law, the arbitrators shall apply the proper law under the conflict that the rule of arbitrators deem applicable. In all situations, the arbitral tribunal shall take account of the terms of the contract and trade usages. As it states in the article 13 (3) of ICC arbitration rules; the parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to rule of conflict which they deem appropriate. And also the UNCITRAL arbitration rule of 1976, article 33 (1) provides; the arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute. Failing “such designation by the parties the conflict of law rules which it considers applicable”. So the arbitral tribunals have not right to apply the application of law in absence of application of law the arbitral tribunal shall apply to the “proper law”, the law with the “most significant relationship”, the “proper law” of the contract, the methods of localization or of the presentation *caractéristique* (characteristic). The arbitral tribunal may apply the substantive law, it deemed “appropriate” or “applicable” without reference to any particular conflict rules\textsuperscript{136}. As it found in the ICSID, 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 tribunal, however, does have the discretion to choose to proceed through the choice of law process if it feels bound or inclined to do so.

\textsuperscript{134} Supra Note, 129, P.131

\textsuperscript{135} The Geneva Convention of 1961

\textsuperscript{136} Idid.p.133
The importance of this choice of law flexibility lies in the fact that arbitral tribunal may apply rules other than those of domestic law. It is this sense between the law and rules of law, differently, it means the law the national law which has power in territory of the states, but rather “rules of law” is designated by the arbitrator and the arbitrators have the discretion to designate of the “rules of law”. A law necessarily is a national law while the designation of “rules of law” offers greater flexibility. If the parties have not chosen the law applicable to govern the arbitration process the law of the country which the arbitral tribunal took place would be the law of the arbitration. But the parties do not make an express choice of the place of arbitration, the choice will have to be made for them, either by the arbitral tribunal itself or by a designated arbitral tribunal institution.

The article 16 (1) of UNCITRAL rules provides “unless the parties have agreed upon the place where the arbitration is to be held, such regard to the circumstances of the arbitration”. And also the article 14 (1) of ICC rules provides; “the place of arbitration shall be fixed by the court unless agreed upon by the parties”. But it would be illogical to hold that the *Lex arbitri*, the law of the place of arbitration, was necessarily the law applicable to the issues in dispute. And also section 48 of the Swedish 1999 arbitration provides that rule. For the purpose, the key point is simply that the procedural law of an international arbitration is not necessarily governed by the Lex Loci arbitri but may be regulated by another system of rules chosen or designed by the parties or, in the absence of that appointment, it is by the arbitrators. The only exception is the particular case of arbitration between investors and states under the ICSID Convention which is almost entirely insulated from the place of arbitration. So the article 2 of Geneva Protocol of 1923 states: the will of the parties is recognized by the considerable degree of autonomy which is given to the parties as to the way in whose territory the arbitration takes place-the Lex arbitri-is increasingly likely to be supportive of the arbitral process. Article V.I (d) of the New York convention provides; the law of the country where the arbitration takes place” and ‘the law of country where the award is made’. Article 1 (2) of the model law provides; “if the place of arbitration is in the territory of this state”. This does not mean that the “seat “of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time

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137 Ibid., pp. 133-134
138 Supra Note, 97, p.79
139 Ibid. p.83
to time, unless of course the parties agree to change it. In accordance with the article 16 of LCIA, if an arbitral tribunal visits another country must, of course, respect the law of that country. It should respect to any provision of the local law that governs. On other hand, the award made under the place of arbitration should not be in contrary of the public policy of that country and national interests. In ICC case no:6162, the main contract contained on arbitration clause providing for arbitration in Geneva under the ICC arbitration rules, then it provided that “Egyptian laws will be applicable”. The respondent submitted that neither the arbitrators were designated by the arbitration clause nor by a separate agreement, the arbitration clause was void under article 502 (3) of the Egyptian Law of Civil and Commercial Procedures. Under the matter of Egyptian law, the tribunal decided that the law form and validity of the arbitration agreement had not been chosen by the parties.

2.36 Dispositive motions in arbitration process

The dispositive provision in International Arbitration depends on the parties but the parties confer to the arbitral tribunal to do so. Accordingly, the LCIA Rules article 19 (1) provides that “any party which expresses a desire to that effect has the right to be heard orally before the arbitral tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration”. And also in accordance with the American Arbitration Association Commercial Rules and the ICDR, Arbitration Rules provide that at the hearing, the arbitrator has the discretion to “direct of which could dispose of all or part of the case”. It also provides in the JAMD international Arbitration Rules article 20 (3) provides that “parties participating in a complex commercial case could view the dispositive motion as an important cost-saving device”, and may want to create in the Arbitration clause a procedure for the filing and determining of such motions.

2.37 Confidentiality of Arbitration

The confidentiality is normally treated as one of the advantages of arbitration process. It imposed to the arbitrators to administrate, so a confidentiality clause may at least provide some disincentive to parties to talk freely about the process or results of arbitration. Before starting to arbitration process, it implied that the arbitration shall

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140 Ibid. p.84
141 Supra Note,116, p.53
keep the all information related to the arbitration process. As it provided in confidential, available in the American Arbitration Association Drafting Dispute Resolution clauses, as: Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration here under without the prior written consent of both parties.

2.38 Confidentiality in national arbitration legislation

It provides in some national jurisdiction to be one of the provisions of the arbitration conditions as it states in article 41 of Netherlands arbitration Act; “an arbitration agreement, unless otherwise agreed by the parties is deemed to provide that the parties shall not publish, disclose, or communicate any information related to arbitral proceedings under the agreement or to an award made in those proceedings”. As much Spanish Arbitration Act article 24 (2) provides that; the arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain the confidentiality to information coming to their knowledge in the course the arbitral proceedings. It is widely viewed that confidentiality is one of the advantages and helpful features of arbitration.

In article 43 of the Swiss International Arbitration Rules; ‘unless the expressly agree in writing to the country, the parties undertake as a general principle to keep confidential all awards and order as well as all materials submitted by another party in the framework of the arbitral procure may be required of a party by a legal duty, to protect or pursue legal right or to enforce or challenge an award illegal proceeding before a judicial authority’. As the articles provide that unless the parties agreed to keep the confidentiality, it is to ‘disclose’, and it shall be under the agreement of the parties do so.

2.39 The process of the claim by private person against sovereign State

According to some of regional conventions (E.g. NAFTA Convention Article 1118) the international agreement is unprincipled that a private person can claim against sovereign state under special rules (regional conventions principles). There are procedural rules that prevent abuses of the ISDS claim. First, the disputing parties must attempt to settle the claim through consultation or negotiation. But the unequal of the power between the private person and sovereign state is a very important on
way of the hearing, some advantage has been given to sovereign states to give an opportunity to bring the action (it set outs into the article 1120 (1) of NAFTA) or to response to the private person’s action after six month elapsed the events given rise to claim, unfairly it will be a guarantee for being the winner to the hearing, tantamount opportunity is necessary for the both parties in the hearing. So this means that at least six months period for consultation and/or negotiation is guaranteed. While the period of the time given to the private person to claim in accordance to the article 1119 of NAFTA; is ninety days before the claim is submitted. It is a frivolous claim for the private person because the full opportunity is possible for the sovereign states although it may consider by this rule to save dignity of the sovereign states but in the international cases hearing of the arbitration is bilateral between the dispute parties and law applicable shall be equal between both of them. But unfortunately the period of the time for the counterclaim is silent while ninety days provide for submitting statement of claim, this prior notification will give the defending state some degree of predictability and time to prepare for the defense. As it discusses in the several arbitration Acts the parties shall be given full opportunity of presenting his case, (Article15 (1) UNCITRAL arbitration rules) as it states in the NAFTA rule arbitration negotiation has given to the sovereign states is unequally.

According to the article 1116 (2) of NAFTA, there exists a certain period of statute of limitation. In NAFTA, an inventor may not bring an ISDS claim if more than three years have elapsed from the date of the alleged breach or change. It can be notice to the private claims under statute limitation period of the times; therefore, investors may not take action on a longstanding grade against a host state under action ‘from the closet’ so to speak. Claims are required to be brought with ‘good faith’ and very importantly, a transparency that allows the claim to be considered on its formal merits. In accordance with the article 25 of NAFTA, if an investment company that is registered in host state, by itself, may not make an ISDS claim. Operationally, the claim for the hearing against a sovereign state is impossible. So the company shall claim the rules of the host state, but questionably it may arise that the company in the host state under which the rule could claim, to answer to this, the rules which the company has already registered. Obviously, it may be a foreign company that would claim in the host state as a claimant of the hearing shall claim under the rule of the host state. Once ISDS proceedings have started, they must proceed to the exclusion of any other remedies again, upping, the ante for participants to only bring claim for
which they authentically want an actual adjudication. No ‘form shopping between
domestic courts and arbitration proceeding is permitted to the complaining investor.

To claim against a sovereign state by the private person the arbitral tribunal may
exclude the private person on any remedies by final award to close the claim.

2.40 Applicable law in the WTO

The DSU does not define the law applicable in WTO dispute settlement in a similar
way to the article 38 (1) ICJ Statute, article 37 of the 1907 Convention on the
Permanent court of Arbitration, article 42 (1) ICSID convention, article 21(1) ICC
statute, article 293 (1), or article 31 statute African Court of justice and Human
Rights.\textsuperscript{143} So the applicable law depends on the agreement, because in accordance to
the article 1.1 DSU…the DSU limits the jurisdiction to claim which arise under the
WTO covered agreement only. There is no explicit provision identifying the scope of
applicable law. So before submitting, the parties shall appoint the law of applicability
in that the law applicable is a principle of the hearing, if the parties have not
appointed the law applicable, naturally, the crux of the issue is whether the applicable
law extends to other rules of general international law, other than the customary
principles of treaty interpretation referred to article 3.2 DSU, and also other treaty
law. It supports in expression of article 1.1 of the DSU states; “the rules and
procedures of this understanding shall apply to disputes brought pursuant to the
consultation and dispute settlement provision of the agreement”. Sub-title provides;
“the rules and procedures of this understanding shall also apply to consultations and
the settlement of disputes between Members Concerning their rights and obligations
under the provision or in combination with any other covered agreement”. The
international law might apply to be a rule for disputing matter so the narrow
interpretation of article 3.2 DSU proposes that only the customary principles of
interpretation of public international law also apply in WTO dispute settlement.\textsuperscript{144}

And also in the other word the article 7.2 of DSU states the “covered agreement”
under the international law in the WTO but it does not involve the other customary
international law, general principles, or treaty law. As a result the dispute settlement
in WTO depends on the covered agreement and to be a member of the WTO.

\textsuperscript{142} Davey, William J, and John Jackson. “The Investor-State Dispute Settlement Paradigm.” The Future

\textsuperscript{143} Van Damme, Isabelle. “The WTO Dispute Settlement System.” Treaty Interpretation by the WTO

\textsuperscript{144} Ibid, p.14.
A case has happened in WTO on 22 Dec in 2002, between USA and Chile\textsuperscript{145}, when submitted a paper to the DSB, they drew attention to occasions where “the relevant WTO text does not address an issue, leading to concerns over whether an adjudicative body might, “fill the gap” and consequently add to or diminish rights and obligations under the relevant agreement instead of clarifying those rights and obligation and to situations 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”.

The WTO continues to rely on other rules of international law in their submissions and pleadings before panels and the Appellate Body…the relationship between WTO law, other rules and principles on international law, or as a litigation strategy. It might arise to the corresponding, differently in envisaging circumstances in WTO, but the members of WTO should appoint the law which will not be conflicting to the WTO rules. Thus, if the members appoint the law and principles for WTO, it may be applicable to the dispute settlement between the members. In failing the law applicable by the parties in WTO to the dispute settlement the law shall apply by the conflict of laws rule. But in the WTO to appoint the law applicable should follow the example of other international courts and tribunals to which such a clause applies. In general international law and other sub-systems of international law fill the gap in the DSU, in event of a conflict between a WTO rule and another principle or rule of international law, without WTO law ‘may dis-apply WTO rule in particular respects’. In conflict between WTO’s rules and law applied, it is possible in accordance with article XX GATT of 1994 to interpret the conflict way. Obviously, it is a good technique for dispute settlement in the WTO. Many communicators aim to integrate WTO law with the broader corpus of international law, but define the relationship through different modes.

The interpretation of the rules which are applied in a WTO shall do under the panels and Appellate Body, but much of the disagreement between these different views on the applicable law finds its origin in the distinction between general international law and different sub-systems of international law. General international law is customary international law, binding on all states. Sub-systems of international law are mostly treaty-based though local or particular custom is not excluded. Customary principles

on treaty formation, interpretation, application and the principles are on state responsibility. These secondary norms of customary international law are about how international law should be created, applied, interpreted, and enforced. \textsuperscript{146}

To interpret the rules by the panels and Appellate Body is with primary norms and secondary norms which it does not conflict with a WTO rules. But the DSU and the other WTO agreements are also silent on the general application of different sub-systems of international law as a defense for a violation of the covered agreements. It must be that the general international law does not automatically bring with it the power law of a contract tribunal to enforce all these rights and obligations.\textsuperscript{147} The panels examine the jurisdiction of the cases which apply to a WTO, in a case between EC and USA the panel has been asked to decide whether it has jurisdiction to apply two bilateral treaties signed by the disputants in 1979 and 1992.

The applicable law in WTO dispute settlement is touched upon in several provisions…the DSU does not define the applicable law in a similar way to article 38 (1) ICJ statute, article 37 of the 1907 convention on the permanent court of arbitration, article 42 (1) ICSID convention, article 21 (1) ICC statute, or article 293 (1) UNCLOS. But the DSU is not silent, in fact, article 3 (4) DSU states that ‘the WTO covered agreement apply’. It may apply international law or international principles and the customary of international law adopted by the developed and developing countries. Some DSU negotiators also assert that they only intended to make the customary principles of treaty interpretation applicable in WTO dispute settlement…no other customary international law or general principle of international law. A more far-reaching view is that, in the absence of an explicit clause on the applicable law, the WTO dispute settlement system should follow, as a default position, the example of other international courts and tribunal to which such a clause applies. The practice in general international law and other sub-systems of international law fills the gap in the DSU.

Appellate Body’s jurisprudence is gradually becoming accepted as ensuring the effectiveness of the DSU and the other covered agreements. But to argue that general international law applies in WTO dispute settlement does not answer the question of

\textsuperscript{146} Ibid, pp. 15 and 18.

\textsuperscript{147} Ibid, p. 20.
when it applies. Interpretation of rules to the dispute settlement is according to a customary rule and public international law. So the decision to cover the agreement is by the Appellate Body and panels. The policy WTO depends on the decision of the Appellate Body and panels to interpret of WTO rules. One of the most significant fields arising from the result of the Uruguay Round has been established of a sophisticated dispute settlement mechanism under the framework of the WTO. The dispute settlement machinery provides for security and predictability in the trading system, it preserves the rights and obligation of the members as stated in the WTO Code. The dispute settlement framework in the WTO is under DSU (the Understanding). The understanding is intended to be a comprehensive framework for conflict resolution in the field of international trade under the auspices of the WTO. Further, the understanding establishes a single integrated structure for conflict resolution in relation to the various trade agreements under the Uruguay Round. A dispute settlement Body (DSB) has been established to administer the rules and procedures under the understanding.

2.41 Unification of the international trade law

2.41.1 Agents of international convergence and Harmonization

The role of the United Nations convention to the harmonization of the law for the international case is a very important because it has a significant duty to unify its members. Thus, the UNCITRAL was created in 1966 and has operated from Vienna since 1969. It has been particularly active in the area of the international sale of goods and prepared 1980 convention. The UNCITRAL model Arbitration law was also mentioned. The UNCITRAL operates in many other areas generally through conventions, Model law, and legal guides in the area of arbitration, and also rules or notes. The UNCITRAL is directly run by the United Nations and operates under the general Assembly. 1) The UNCITRAL conventions on International Sale of Goods; 2) the limitation periods in the international sale of goods; 3) on international Bills of Exchange and international promissory Notes; 4) on the Carriage of Goods by Sea; 5) on Independent Guarantees and stand by Letter of Credit; 6) the convention on Receivable Financing is the Latest. Those are model laws on international commercial

Arbitration, cross-border Insolvency, Electronic commerce on the Procurement of goods, international Credit transfers and there are legal guides on international counter trade transactions, Electronic Funds Transfers, Drawing up International contracts for the construction of Industrial Works. There are finally also Notes, like those on Organizing Arbitration Proceedings on an international scale, the International Chamber of Commerce in Paris (ICC) has been operative for years in the area of international trade: the Uniform Customs and Practice for documentary Credits (UCP) have been for in existence for Letter of credit since 1933. Since 1956, there have also been uniform Rules for collection (URC). For guarantees, the ICC complied two sets of uniform rules the first being the Uniform Rules for contract Guarantees of 1978 (URCG) and the second the Uniform Rules for Demand Guarantees of 1992(URDG).  

In 1966 the United Nations decided to take an interest in the progressive harmonization of the law of international trade. It generally, states that the UNCITRAL and also model law both are the main aims of the United Nations for harmonization and unification of international trade law. The organizations which have been most important in constructing international contract and trade law have UNCITRAL, UNIDROIT and oldest organization of the three, the Hague conference are mainly European States. The method of harmonization has prepared draft conventions which have only numbers of States. The UNCITRAL has become the leading international agency for the harmonization of private commercial law. So the conventions on contracts for international Sales of goods 1980 beings it is most successful convention. The UNCITRAL is the most representative of the three organizations working in the field of private law harmonization. UNIDROIT is created in 1926; it has been a key player in efforts to harmonize private law. Its original preferred tool of harmonization was the production of draft conventions, such as relating to a uniform law on the international sale of goods. Rather than flexible principles, which it says can be amended in much the same way that the ICC amends its own rules.


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2.41.2 General comments on the unification of law of international trade

International trade law is under *Lex Mercatoria* merchants have done trade with their places, in fact, international trade has already been done in ancient places like Italian City-States or China before 19th the century. During the late nineteen century and early twentieth century’s mercantile community began to develop more international and bureaucratic structures to deal with the complexities of doing business in a world. The most important of these is the ICC, which has been one of the leading organizations in the Unification of international commercial law. The ICC has employed two kinds of strategy, an interest group strategy and a private ordering strategy. It has got several duties to do, its roles in the unification as stated that, it is going to unify international commercial law by two organs which inside itself. The two organs already entitled group strategy and private ordering; first as an influential interest group, it has pushed governments and international organizations to hold international meetings of states for the purpose of developing model law in convention form. For instance, during the 1920s the ICC kept the issue of the unification of the law of financial instruments before governments. Its 1927 adoption at its fourth congress, a set of uniform rules for negotiable instruments was crucial in stimulating international action by states and the League of Nations on the issue. Second, ICC part is private ordering strategy has been or recording its member’s customary practices and releasing them in the form of model rules and agreement.151

2.41.3 Methods of unification of law

The unification of law depends on the systems of law and interpretation. Thus, the two common law and civil law to unify law may differ. But in international law, especially, in international trade the countries in the both systems under the conventions and protocols form of unify law and the procedure of unification governs the States by adoption of the conventions. So, common law jurisdictions, tend to take a more discursive approach to its construction and application, and civil law jurisdiction prefers a more succinct and pithy approach to its application. But some international conventions do exhort contracting states to adopt an international approach. Nonetheless, harmonization proponents have never been so active. International intergovernmental organizations such as the UNIDROIT and the UNCITRAL have been proposing new harmonized rules on a host of activities, ranging from banking to the carriage of goods.

151 Ibid, p.70.
Generally, the UNCITRAL has also issued specific principles and sufficient international subject to harmonize with a universal unit of conventions probably the Special Drawing Right (SDR) of the International Monetary Fund. It shall consider that the UNCITRAL especially, regarding to the international protocols and international conventions to unify the international rules to trade or to dispute between the parties. So it is studying the nature and effect of contract clauses stipulating liquidated damage and penalties. The convention on international Multimodal transport of Goods was promoted by the UNCTAD and adopted by the United Nations in Geneva in May was in 1980. Also, the ICC rules of conciliation and Arbitration in 1988, the ICC court of Arbitration are the most popular arbitral tribunal for the settlement of disputes arising from international commercial contracts but it has jurisdiction only if the parties have agreed on ICC arbitration. The ICSID makes available facilities to which contracting states and foreign investors who are nationals of other contracting states have access on a voluntary basis for the settlement of investment disputes between them in accordance with rules laid down in the convention. The ICSID itself does not act as conciliator or arbitrator, but maintains panels of specially qualified persons from which conciliators or arbitrators can be selected by the parties, and provides the necessary facilities for the conduct of the proceedings… a state and a foreign investor are required to carry out their agreement.\(^{152}\)

### 2.4.2 Arbitration in international transports

International transport is one of the subjects of the international trade law which may arouse some problem between the parties in this field. The Hamburg rules states that the parties are allowed to submit the case to the arbitration proceeding. The article 22 (3) states; as for arbitration offer on the claimant similar options-arbitral proceeding may be commenced in a place designated for that purpose in the contract or in a state within whose territory is situated:

i) The principle place of business or in the absence there of ,the habitual residence of the defendant:

ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

iii) The port of leading or the port of discharge.

\(^{152}\) Supra Note,39. P.683.
Article 22 provides that the arbitration must apply the Hamburg rules in solving disputes, and any contractual term which purports this and any of the options made available to the claimant under the rules shall be null and void to that extent. Although the international arbitration rules are free process to be appointed by the parties, but some of the cases are not allowed to apply to the arbitration process because they depend on the contract between the parties.

2.43 Arbitration for dispute settlement in Carriage of Goods

According to Hamburg Rules, which make specific provision for arbitration; article 22(3) offers on the claimant options arbitral proceeding may be commenced in a place designated for that purpose in the contract or in a state within whose territory is situated:

i) The principle place of business or in the absence there of the habitual residence of the defendant; or

ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

iii) The port of loading or the port of discharge.\textsuperscript{153}

According to the article 22, any dispute shall have to resolve by Hamburg rules, but the parties may apply to applicable law in some places which noted, so to dispute of the carriage Goods it depends on the parties and the law which are agreed by the parties. The parties can also use the Hamburg rule to dispute the case of international carriage of Goods.

2.44 Investment arbitration

The majority of arbitrations so far conducted in relation to foreign investment to have been conducted either ad hoc or under the rules of the ICC.\textsuperscript{154} The arbitration is a mechanism to the dispute settlement in the investment; it is a strategy, the view was stated that particular formulation of the dispute settlement provision of the investment treaty gave rise to a right in the foreign investor to invoke arbitration against the host

\textsuperscript{153} Supra Note.111.P.359.
state unilaterally. This view was to result in the hitherto dormant arbitral institution, the International Center for the Settlement of Investment Dispute as well as other arbitral institutions, attracting a large number of investment arbitration.\textsuperscript{155}

The special convention related to the investment disputes is the Washington (ICSID) convention as a mechanism to dispute between States and nationals of other states. Thus the disputes settlements are based on the bilateral and multilateral treaties. The methods of hearing may differ from other mechanism. In fact, the disputing parties have to give the case to the secretariat but the parties shall determine a mechanism of hearing to be arbitration. The convention relates to the contracting States to other parties and the dispute shall arise directly out of an investment. The provision mostly depends on the consents of the parties and their acceptances. So, it cannot change its position once because it has entered into an agreement with an investor in which it consents to arbitrate. According to article 25 (I) of convention, the contracting state must designate to the centre that the constituent subdivision or agency is subject to its jurisdiction. Usually, the convention established to a delocalization of investment dispute and mechanism. The grounds for annulment of the ICSID convention includes; 1) the tribunal was not properly constituted;2) the tribunal manifestly exceeded its powers;3) there was corruption on the part of a member of the tribunal;4) there was a serious departure from a fundamental rule of procedure;5) the award did not state the reasons on which it is based.

As known that the award is confidential, it depends on the parties to public award to recognize and enforce the award in the ICSID Convention process. According to article 54 (1), it required to trade as though it were a final judgment of a court in a state (contracting State). Execution of the award is subject to the local rules of the enforcing with the jurisdiction. It relates to a monetary award, in the case of non-monetary award. However, there is automatic recognition binding on the procedure of States but the enforcement would be subject to the New York convention, law applicable or treaties. Additional facility Rules on arbitration require that arbitration proceeding be held in States which are the parties of the New York Convention. The award made comply with Additional Facility Rules Vacate under the laws of the Seat of arbitration.

2.44.1 Bilateral Investment Treaties

BITs provide mutual protection for qualifying investors. Bilateral treaties only are between two countries but each of country may be a party to thirty or forty BITs, each with a different country. The consultation and negotiation are important to dispute settlement but the arbitration only is not mechanism to settle it, because it may include using the non-binding mechanisms such as mediation or conciliation. Thus, it provides that the consultation period is triggered by a letter from the investor to the State. Thus, it may consider which the investor is required at the first try to resolve its dispute in the courts of the host country. Generally if the dispute had not resolved by local courts within a specific period of time it could refer to arbitration process.

2.44.2 The BIT arbitration process

The BITs may be seen as the specialized successors of friendship, Commerce and navigation (FCN) treaties. The ICSID arbitration is the exclusive means of investor-state dispute resolution. This would appear to be the case for a minority of such treaties. The ICSID arbitration as an exclusive forum appears in the UK practice is adopted in some of older French treaties present in some recent Latin American and Swiss treaties. The most common arrangement, however, is a combination of the ICSID an ad hoc arbitration, usually under the UNCITRAL Rules. In some treaties, the ICSID and the UNCITRAL arbitration are on an equal footing. The UNCITRAL arbitration is a Fall-back option available unless the investor and state concerned are able to agree on the ICSID arbitration.\textsuperscript{156} To submit the case to the agreement of arbitration mechanisms some provision are required A) to the creative ipso facto consent to arbitration without need for subsequent agreement between the investor and the host state. B) Such consent to an agreement in writing for the purpose of article II of the New York convention. C) Lay down a mechanism for the appointment of arbitrators. These provisions are to make an international obligation, owed from each contracting state to the other out of the obligation to a bid by the consent to the international arbitration contained in the relevant treaty, if this obligation is breach in a states’ dealing with an investor none of those characteristic provision would suggest that the procedural regime of the ICC, the UNCTRAL, the IACAC or other ad hoc arbitrations under certain BITs should differ from non-treaty proceedings. The ICSID

\textsuperscript{156} Supra Note,152, p.247.
arbitration aside under BITs is generally not one of international law arbitration may be initiated on the terms of the BIT concerned under its provisions…relevant international law rules apply.\(^{157}\)

All the treaties have been subjected to the States in which participated thereon. Typically BIT provisions are on investor-state proceeding with the provisions in relation to arbitration between the contracting states. In general a problem arose with arbitrating in a third state under treaty is that unless it has so agreed, third State is not bound to observe the two states’ arrangements in that treaty; *pacta tertiis nec nocent nes prosunt*. Such arrangement is based on a rule of general international law to arbitration of problem under the provision of BIT treaty. All the procedures are depending on the arrangement of treaty, but subject of treaty also is very important for arbitration as well the place of arbitration should be agreed by the contracting states.

### 2.44.3 Multilateral Investment Treaties

The multilateral Investment treaties also provides for international arbitration disputes. However, the Multilateral Treaties are basically for international trade relationship. The Contracting States which participated to the treaties are free to appoint a forum of arbitration or institution as Energy Charter treaty which its duty relates to a level playing field of rules so the fundamental aim of the Energy is strengthen the rule of law on energy issues by creating of all participating governments, there by mitigating risks associated with energy-related investments and trade.\(^ {158}\) The Energy Charter Treaty has got three optional procedures like ;1) an ICSID arbitration, or they do not meet the jurisdictional requirements, Additional Facility Rules;2) an arbitration under the UNCITRAL Rules;3) an arbitration under the agencies of the arbitration institution of the Stockholm Chamber of Commerce.

### 2.44.4 Multilateral investment agreements

At first, the multilateral agreement made between more than two states which agreed to the provisions of treaties. These treaties topically are related to the contracting States. Additional facility is high light at the ICSID convention, the UNCITRAL, and Stockholm Chamber arbitration, the North American Free Trade Agreement (NAFTA) contains even more elaborate provision, detailing arbitration under the

\(^{157}\) Ibid, p.248.
\(^{158}\) http://www.encharter.org/index.phd.
ICSID convention. The ICSID Additional Facility Rules, and the UNCITRAL Rules also are multilateral treaties which have got different provisions of the BITs and they depend on each other, proceeding under the UNCITRAL Rules, has considered that suitability of the law on arbitral procedure as a relevant consideration to decide where the seat of the arbitration would be or the other tribunals have subsequently adopted the same methodology.  

2.44.5 Role of Arbitration in Multilateral Treaties

Recently the dispute settlements of multilateral treaties in relying on conciliation but after unsuccessful negotiations, it might be recourse to arbitration mechanism, if the parties do not accept the conciliation commission’s report, the arbitral tribunal has often been empowered to deal with legal and non-legal, political or technical, disputes. International arbitration may resemble commercial arbitration. The parties are legally bound to carry out their arbitration agreement and take all the steps necessary to enable the arbitration process toward the final decision for settling the dispute. In accordance with article 5 of the American Treaty of Pacific Settlement of 1948, any “undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith”. And also articles 6 and 8 of Act said the tribunal may proceed even if the parties fail to agree on the compromise; that any question of arbitability of a dispute shall be referred to the International court of Justice. The appointment of arbitrator is appointed by the president of court, if a party has failed to designate. It provides that the tribunal may not refuse to give a decision on the ground of the silence or obscurity of the law to be applied.

2.45 Treaty based Rights and Contract-Based Rights

The fundamental differences between arbitration treaties based on an agreement by States and the private entities which have obligated to be under the contract made. The investor will typically enter into a contract with the state or a state agency, which will govern the parties’ contract rights and obligations. If the parties are also subject to the provisions of an investment treaty the investor’s contract rights will be different from the treaty-based rights, in addition the contract rights which generally being much more specific.  

159 Supra Note.152, pp.251-253.
160 Supra Note.116, p.244.
2.46 Conventions in the international arbitration process

2.46.1 Bilateral treaty

As noted, the international conventions are basically intentions of the contracting states, so international conventions have served to link national systems of law on a network of law, the Bilateral treaties are friendship in commerce and navigation. The states concerned that would grant favorable trading conditions to each other, therefore agreement for disputes settlement might be resolved by arbitration mechanism process. In some of BITs treaties the parties would be agreed to submit dispute arisen to the arbitration process where a dispute actually arises and the private investor accepts this offer to arbitrate, if an “agreement to arbitrate” is formed.\(^\text{161}\) The sample of this is the North American Free Trade Agreement (NAFTA) which was finalized, followed in 1994 by the Energy Charter Treaty. Thus, the role of national court and agreement of the parties play an important role to the authorities for interpretation and enforcement of the final awards.

2.46.2 International treaty

Especially, the international treaty was made in 1889.\(^\text{162}\) It was the Montevideo Convention, which made between certain Latin American states. It was in relation on Rights and Duties of States which was established to make the norms of States under international law. Seventh Latin American States participated therein. The convention provided that all the States shall be equal sovereign units consisting of a permanent population, their territorial boundaries, a government, an ability of government to enter with other states. The member should recognize the territorial boundaries, foreign affairs of another state and all disputes should be settled peacefully. The convention provided that the recognition and enforcement of final awards of arbitration agreements.

2.46.2.1 The Geneva Protocol of 1923

It was the first modern convention to the internationality of the arbitration agreement and enforceability of the award of the arbitration process. The first and main objective clauses were enforceable internationally; parties would be obliged to resolve their dispute by arbitration. Second objective was arbitration awards made would be enforced in the territory of the state in which they were made.\(^\text{163}\)

\(^{161}\) Supra Note, 7, p.66.  
\(^{162}\) www.britanica.com.  
\(^{163}\) Supra Note, 97, p.67.
2.46.2.2 The Geneva Convention of 1927

It was on the execution of foreign arbitral awards, the purpose of this convention was to widen the scope of the Geneva Protocol by providing for recognition and enforcement of protocol awards within the territory of contracting states. Each party seeking enforcement had to prove the conditions necessary for enforcement. The successful party was often obliged to seek a declaration in the courts of the country where the arbitration took place to the effect that the award was enforceable in that country. \(^{164}\)

2.46.2.3 The New York Convention of 1958

The convention on recognition and enforcement of arbitration of 1958 is called New York convention. The scope of convention only governs matters concerning the recognition and enforcement of foreign arbitral agreement and foreign awards. It is one of the important international conventions affected upon the contracting states and relating to the international commercial arbitration is the New York. This convention provides improvement upon the Geneva Convention of 1927. Basically, the convention is a plan to recognize and enforce the foreign awards of the tribunal from the other states by the winning party or where the winning party would like to enforce the award. It replaces the Geneva Convention of 1927 between states that were parties to both of Conventions, so if any of the states would apply for the convention, it shall be a member of the convention. The New York convention adopted the techniques of recognition and enforcement because in accordance with the article II (3), the convention requires the courts of contracting states to refuse to allow a dispute that is subject to an arbitration agreement which be litigated before its courts. The convention may interpret with the national laws. It is only important convention to be effected for the recognition and enforcement of foreign arbitral awards to interpret under the national laws.

2.46.2.4 The European Convention of 1961

This convention is under the aegis of Trade Development committee of the UN Economic Commission for the European countries. It applies to international arbitration to settle trade dispute between parties from different states, whether the European countries or not. \(^{165}\) Article II (2) of the convention allows a state on becoming a party to

\(^{164}\) Ibid, p.68.
\(^{165}\) Ibid,p.70.
the convention such condition stated in its declaration. The European Convention 1961, failed to meet its objectives, first, its approach was theoretical rather than practical it did not deal with the recognition and enforcement of awards.  

2.46.2.5 The Washington Convention

The Convention of Washington provides for the resolution of dispute between a state and a private party; it stipulates that if a dispute arises where there has been no express choice of law by the parties the arbitral tribunal will apply the law of the contracting state and “such rules of international law as my be a applicable. It is important to be aware that it may exist at an issue in various situations in broad terms most commercial disputes are arbitrable under the law of the most counties.

2.47 Place of international arbitration

The Lex Mercatoria delocalized the seat of arbitration, it uses a loosely organized system of transnational legal principles, rules, and standards which derived from the usage, customs, practice of international commerce, general principle of law, transnational rules, a method of decision making, customary commercial law. Transnational substantive rules of law or trade usages and the method of their application exist in the international economic transactions. A set of substantive rules developed to regulate international trade under the business community, which are derived “not only from international commercial dealings, standard clauses, international conventional and arbitral tribunal awards” but also from various sets of legal rules issued by the International Chamber of Commerce (ICC) or other international organizations. The lex mercatoria is similar to general principle of international law, as well as it may apply between two States. Therefore, the States may apply the UNIDROIT principles, as well as general principles of international law. If a contract made between the private company and a State to govern upon the contract the Lex Mercatoria governed, however, the State may insist on its domestic law to apply for contract to the dispute arose while it is related to the agreement made on. The parties try to deal with potential changes in the law by including a

166 Ibid, p.69.  
167 Ibid, p.103.
stabilizations clause, which provides that the State will not amend the contract by legislation without the consent of the other party. In international arbitration, rules’ place of arbitration should be appointed elsewhere without changing the legal suits of the arbitration. It insists on the various Acts which include; accordingly, article 20 of model law, LCIA Rules article 16(2); SCC Rules article 20(2); LCC Rules article 18(2); ICDR Rules article 13(2). And also articles 13 and 14 of CE Uniform law, article 15 (1) of the OAS Draft Uniform law, the ECAFE rules article IV .2.

2.48 Failure of parties

In accordance with numerous Acts, failure of parties to select seat of arbitration, the seat will be appointed by the arbitrators. It provides that in the London Court of International Arbitration (LCIA), in absent arbitration agreement, the seat of arbitral tribunal shall be in London, unless the court decides otherwise after hearing the parties. According to the International Center for Dispute Resolution (ICDR) article 13 (1), the World Intellectual Property Organization article 39 (a); International Chamber of Commerce (LCC) Rules article 18 (1), the arbitral institution of the Stockholm Chamber of Commerce (SCC) Rules, all the Acts provide that in absence of selection of seat for determination, the arbitrators determine seat of arbitration.

The failure of determining the law applicable to govern contract by appointing parties that determined by the tribunal which provided in numerous rules that, if the parties have agreed to determine the law applicable, it will be determined by the conflict of laws which are applicable. The ICDR Rules article 28 (1), WIPO Rules article 59 (a), ICC Rules article 21 (1), LCIA Rules article 22 (3), SCC Rules article 22 (1) all provide that if the parties failed to determine the law applicable the arbitral tribunal shall apply the law or rules of law which it considered to be most appropriate. It permits to the arbitral tribunal to choose rules of law which may be applied in the *Lex Mercateria* or principle of law. The tribunal shall choose the law that most closely connected with the proceedings of law one of parties which is more appropriate. They might also determine that an unrelated law was most appropriate because it was “highly developed and sophisticated and suitable for the contract or dispute”.  

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\text{Supra Note, 116, p.81.}
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2.49 The process of the arbitration in international Cartels

International trade is free process between the merchants with the different legal system but the merchants will arrange to make an agreement to have relationship which agreement made. In some of situations the problem may arise with the international relation which the agreement on binding to the parties, in all legal systems permit the parties to make contract to delegate the power to make a binding decision in certain instances to private arbitrators.169 The parties are free to appoint the arbitrators to the composition of arbitral tribunal because the majority of legal systems do not require the arbitration procedure to be public or to be in the form of a trial.

The parties have power to determine arbitrator, the arbitration procedure and the composition of arbitral tribunal from applying the substantive law of the State. As a result, private arbitration is ideal method for settling differences arising within the Cartel. The organization international cartels have the power to transfer control over the areas. They would do to solve international problems within cartel by amiable compoteure procedure, no national law shall apply legal systems of states limit the contract of parties and they have no choice to have freedom. The role of conflict law is important because this is limited in international cartels, but the parties rather choose the private procedure to solve the problem. Therefore, they would prefer that to utilize the concept of arbitration which gives larger freedom of independent action, from the conflict law of the courts or freedom from any substantial change or amendment of law where the agreement and conflict were made.

Today international cartels are developed but at the beginning of the development of cartels; the arbitration process was much, useless after a long time the international cartel had been faced. So, afterwards the international cartels have been made with an agreement to the solution of the problems, thus, such agreement came to help to the merchants in force by some procedure for the merchants. The procedure is based on the agreement of the parties to the solution of the problem arose with equitable methods which came to the agreement then, thus international cartels are following for the favorable attitude toward arbitration as the world economy and a world market developed. As known, today institutional arbitration tribunal, particularly those developed in associations, having established procedure and permanent list of persons available for participation in the arbitration tribunals. They proved to be much more

169 Supra Note, 78, P.374.
helpful to the cartels than the isolated arbitration tribunals established by the two merchants. Though, the institutional arbitration tribunal able to develop the systems and an excellent instrument to achieve definite commercial objectives, including price fixing as well as establishing sales quotas, production quotas, order conditions of sale. Institution arbitration tribunals are powerful enough to act against public interest. 170

To the benefit of the private arbitration procedure which chose, it usually alleged to be better than regular court (public court). In fact, the private arbitration plays an important role in an agreement that determines a case by arbitration which is the faster process. It is flexible to do by short time, so that it saves a lot of time to the parties to reach favorable results. Thus, the arbitration process is less expensive for the cartels, as well the cartels have a right to determine the procedure of hearing, the problem with the regular courts. According to Gorge Erler the cartels give the chance lead to; post theme legal victories entirely uninteresting to the economy’. As a result; “arbitration is now encouraged to be easy, expeditious and inexpensive method of setting dispute”. 171 The especial expert knowledge of the member of the tribunal is usually one of the reasons for the superiority of arbitration. Judges of the regular court cannot be able to understand complicated social and economic contract arbitration because most cases using from litigation act and amended but the arbitrators are expertise of case in electing the parties. Judges are not expertise in all cases; they may have got experiences with cases which are able to solve problems, the arbitration can be easy procedure for the solution. In contrast, the arbitrators are not able to understand the complicated social and economic condition of today’s world merely on basis of his own experiences; it should say that, in fact, judges are not able to solve international trade problems.

F.Eisemann stated that a result of increasing confiscation of customs of trade “by fixing condition of sale and delivery through and for the trade”, a new legal situation has developed. This situation around the world today is most “litigations very especial economic factual situations and technical details are to be considered”, these consideration have less to do with legal rules with which the judge is well acquainted than trade practices and other factors familiar with the experts coming from the same

170 Ibid, p.375.
field of business to the case.\textsuperscript{172} The quality of the judicial process by the regular court is less rather than the arbitration. It shall consider that the arbitration process given a lot opportunity to the parties to choose the full items, as they know the arbitrators whom they have trusted to them. The parties made agreement in writing and submitted to the tribunal which appointed. So it usually has advantage unlike the regular court to be a simple way. In contrary, the arbitration process the parties have a right to challenge the award made by the arbitrators while the awards are binding on the parties in regular court.

Private arbitration is absolutely essential in international trade; therefore, if one of the parties finds himself which is foreign in the national courts, it certainty refers the case to the international commercial mechanism to dispute. It is not necessary to state in detail all the disadvantages, but this is not all: the decisions of regular courts in relating to the international trade are without great practical value. They are not helpful anymore, whenever execution of decisions becomes necessary outside the country in which they have been rendered. A look into comparative law proves that most countries permit an enforcement of judgments of regular foreign courts only on the basis of bilateral agreements relating to the recognition and execution of foreign judgment. Even today, in this field, bilateral treaties are an exception and not the rule and as long as there is no specific agreement. For instance, German judgments will not be executed and enforced in France and vice versa. We do not see the end of this condition, even though these two countries are closely related, and have not two different legal systems, they have very extensive trade relations. Even bilateral agreement exists, their practical application is so often subject to many difficulties and is, therefore, not too helpful. It would be an error to argue that international bilateral treaties which are on the enforcement of regular judgments really much more important than the enforcement of awards. Since arbitration even in international field would become unnecessary if the enforcement of a regular judgment was secure.

For many reasons there is not the slightest chance that the enforcement of a regular judgment outside the country of the forum will become possible either by change of litigation or by international agreement just now in spite of many statements of the opposite. Frankly, governments are especially zealous in the protection of their sovereignty, and due to the philosophical conflicts between the Eastern and the Western

\textsuperscript{172} Ibid, p.377.
nations, the chances to improve the recognition and execution of regular judgments is very small indeed. A judgment of a regular court is considered again and again, and with a certain justification, basically the expression, of a foreign sovereignty. However, we find quite a different approach by governments with regard to commercial arbitration which by definition deals with a limited field.\(^{173}\) Contract in international trade may be interpreted in a different way, and sometimes the regular courts may unconsciously prefer their own legal order on the basis of the so-called “homeward trend”. For this reason, international commercial arbitration is preferred, as the arbitration tribunals are not so much exposed to this temptation.\(^{174}\) International trade has practically developed an independent legal system which has more or less separated itself from the legal system of the countries as well as from the conflict of law.

International trade shows that the interest is very less in the legal rules including an international legal system. Since arbitration is becoming more and more powerful, it decides cases on entirely different tests than the regular court of the countries involved. One of the most essential advantages of the arbitration procedure is the relatively short time needed for the completion of a case. This is essentially true in institutional arbitration that provides the opportunity for one or two appeals. It is obvious that such opportunities for appeal necessarily lead to substantial prolongation of the arbitration procedure.\(^{175}\) In the area of cost, expenses of arbitration is less and the parties will pay less expensive costs in obtaining good result from their case on pay attention of consideration of fairness and have a good international relation, because of arbitration is usually truthful way in international relation to settle problems. The parties need to have a trade connection in the world trade. If some problems arise, the parties are keen to keep peace and security or trade policy to solve the case. The regular court may be prolongation hearing; despite arbitration process is peaceful and truthful to manage the disputes. Proceeding by the regular court should be subject to even more skepticism.\(^{176}\)

Although the expenses of regular court are important in the commercial matter for the merchants because, commercial matter is complex method around the world it needs skill to do by merchants to arrange all trade process. It needs to have a legal system of

\(^{173}\) Ibid, p.378.
\(^{175}\) Ibid,p.378-79.
hearing the trade problems. Thus, the skill of who we want to hear is very important, as already noted, the regular courts have no enough experiences to hearing of the trade fields. Although, usually around the world all traders use the procedure of regular court but international work of the merchants need to make ensure to save time and money where the problem had arisen. The parties may make an agreement to dispute. Because of this cause the arbitration is confidential to do so. The arbitrators have been elected by the parties and not as judge to proceed and hear like regular courts. Arbitrators are representatives or agents of the parties in the international trade law which appointed, they attempt for the interest of parties in preparing the final award, their bias of each arbitrator is often quite obvious. In a case, a Prussian judge rightly pointed out years ago that an arbitrator appointed by one of the parties ‘necessarily has to deal with the entire affair on the basis of the views and aims of his party’.  

Any person on the list presumed to be acceptable if the parties do not designate some persons from the list within a certain period of time, under Rule 12 the secretary of the court of arbitration may appoints one or two and several of the persons to be member of the arbitration tribunal. 

2.50 Arbitration clause in international cartels

The arbitration clauses found in cartel agreement, generally provide that all controversies directly or indirectly arising out of the cartel agreement, will be resolved by arbitration. As known, the international cartels are trader with different field of the trade type, they may choose an arbitral tribunal to submit that case if arising a problem. Particularly, to appear to the hearing, they send a representative with the documents to the arbitral tribunal and in final award issued in favor of the international cartels which have submitted the documents. Therefore, this is whether the controversy is between either of the cartel agencies or its members or between several of cartels.

The jurisdiction of the cartel arbitration tribunal may even go beyond this point, if the members of cartel provide that the jurisdiction of the tribunal by contracts with third parties. It considers that who is a third party to examine jurisdiction of the arbitral tribunal, then this jurisdiction depends on the rule which the international cartels have

177 Supra Note,78,p. 380.
179 Supra Note, 78, p.380.
chosen, so that, by request of the cartel, it shall examine because trade is very sensitive. The arbitration clauses often are very explicit in delineating the circumstances of arbitration. Jurisdiction of the international cartels is not under the authority of domestic court or international court like ICC or United Nation principle. In fact, arbitration clauses are free to be exist by parties. Ehlers states: the special contract (jurisdiction of arbitrators) explicitly stated that the parties intended the arbitration contract to be an independent agreement. This separate arbitration agreement did not depend on the validity and/or invalidity of some or all the provisions of main contract. Such an arbitration agreement continued to exist in its own right after the termination of the main contract, until all questions or disputes with respect to liquidation were settled.

The base of the arbitration is agreement, so that validity or invalidity of the main contract is ineffectual. According to the section IV article 16 (1), an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. If the agreement is not valid everything which is depending it and is avoid and null. In model law case, in 1925, a contract concluded by Grasselli Chemical Company, Farben fabriken Bayer, Grasselli Dyestuff Corporation, and Farbwerken Hoechst AG concluded March 3, 1925; if the parties here 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, 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. A provision in the contract between the British Imperial Chemical Industries and E.I. du pont de Nemours and of July 1, 1929 reads:

Should any difference or dispute arise between the parties here touching this agreement, or any clause, matter, or thing relating here to, or as to the rights, duties, or liabilities of either of the parties here to, the same shall be referred to the president for the time being of E.I. du pont de Nemours Q Company and the president for the time being of Imperial Chemical Industries, Limited, who shall arbitrate, and their award shall be final.

180 Ibid. p.387.
181 Ibid. p.389.
International cartels exist in different situations from the common field of the marketing, because international cartels are mixture with different nationalities. Cartels support variation forms from the other field of the trade, though clauses of cartels to arbitrate the problems may vary, it obviously highlights that international cartels are governing third parties so that the third parties participate to the hearing of the arbitration. Originally most courts referred to concept the proposition that arbitration tribunal had authority to determine the validity of the arbitration clause upon which the tribunal was based itself. The arbitration agreement may provide for a very broad scope of authority of the arbitral tribunal. An analysis of arbitration clauses condition national and international cartels shows that arbitration tribunals have one or more of the following functions:

1) They must interpret the basic cartel agreement, this interpretation must be flexible enough to adapt to change conditions so that the purpose of the cartel is maintained.

The cartels are merchants with the different rules but to use the international arbitration rules, no need to interpret the arbitration agreement.

2) The arbitration tribunal may be authorized to establish general rules and regulations binding on the management of the cartel and its agencies. Thus it establishes cartel policy. The policy of the cartels is base of the activities.

Third party may subject themselves to the jurisdiction of the cartel arbitration tribunal expressly or implicitly. In fact, many times there is a specific provision in the cartels agreement obligating the members to secure such a clause in their contracts with outsiders, which the third party may be a supplier or customer to the arbitration hearing. The arbitration tribunal often abandons a purely judicial role and becomes for all practical purposes an administrative agency of the cartel. It deems that the agreement between the cartel’s members is very important.

2.51 Enforcement of the award in the cartels

The cartel is concerned with enforcing the award without resorting to the course of the particular nation-state. While these courts generally do not review the merits of an

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182 Supra Note,78, p.388.
award, there is always a danger of an investigation into possible violations of public policy or of violation of the basic principle of fair procedure. Therefore, the organizers of cartels try to guarantee voluntary compliance by other means. Enforcement through moral suasion; in a substantial number of cases are automatically enforced. Enforcement through the power of the cartel; in addition, to automatic enforcement and moral suasion, the power of the cartel association itself usually can compel all parties to a dispute to bid by an arbitration award. \(^{184}\) As we know, enforcement of the award into the cartels depends on the power of the cartels while the other rules of the arbitration enforce an award regarded to the principles which came to enforce. Section 36 (1), of 1950 and section 66 arbitration Act 1996 provides; the successful plaintiff can choose from the following options, if the wishes to enforce a foreign award in this country:

a) Bring an action at common law on the award or apply for summary enforcement of the award. An application can be made expert by affidavit unless the court decides otherwise, in which case, it shall have to be made by originating summons.

b) Apply to enforce the award under part II of the Arbitration Act 1996 where the award is made under the Geneva Convention for the Execution of foreign Award 1927;

c) Apply to enforce the award under Part III of the arbitration Act 1996 where the award is made under the New York Convention of 1958 on the Recognition and Enforcement of Awards;

d) Enforce under the Administration of Just Act 1920, the foreign Judgment (Reciprocal Enforcement) Act 1933 and the civil Jurisdiction and judgment Act 1982.

The validity of the arbitration agreement is to be treated as distinction to separate from the underling contract. This is a notion not present in the old regime (namely. The 1950, 1975 and 1979 Acts) section 7 provides that the enforce ability of the arbitration agreement is not dependent on the validity or legality of the contract of which the arbitration agreement forms a part.\(^{185}\)

\(^{184}\) Ibid.p.398.
\(^{185}\) Supra note, 111, p.410.
2.52 Foreign Arbitral Awards

According to the article 1 (2) of New York Convention the term “arbitral awards” includes not only awards made by arbitrators appointed for each case, but those made by permanent arbitral bodies to which the parties have submitted. To apply the New York convention for recognition and enforcement as to the international disputes settlement, arbitral awards, though made in the state where enforcement is sought under the arbitration law of State involve a foreign or International element.\(^\text{186}\) The arbitral tribunal has been appointed in international arbitration process made in any foreign state (country where the award made).

2.53 Confidentiality of the award

The confidentiality imposes to the administrators or the arbitrators. It is usually related to information obtained during the arbitration so relatively, it provides in some rules as it states in the ICC, in which the ICC has also made available abstracts of awards, without revealing names of the parties.\(^\text{187}\) The WIPO arbitration rules permit the publication of final result of arbitration process to aggregate statistical as long as the parties and/or the particular circumstances of the arbitration are not identifiable.\(^\text{188}\)

2.54 Instruments of recognition and enforcement

The instruments of recognition and enforcement of international investment arbitration vary but the base of the instruments is the same to recognize and enforce. They include;

2.54.1 Geneva Protocol

Two objectives are to be an objection of Geneva Protocol 1923. 1) it sought to make arbitration agreement and arbitration clauses in particular, enforceable internationally; 2) it sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made. Article 1 of Protocol provides that each contracting states recognize the validity of an agreement, whether the subject to the jurisdiction of different contracting g states, any differences that

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\(^{186}\) Supra Note,8, p.44.  
\(^{187}\) ICC Rules, article 22 (3).  
\(^{188}\) Supra Note, 116, p.200.
may arise in connection with the contract related to commercial matters, to any other matter capable of settlement by arbitration, and whether or not the parties are subject to the jurisdiction of a country in which arbitration was to take place. Article 2 also provides that deals with the arbitral tribunal procedure and provided for the procedure, including the constitution of the arbitral tribunal, and the law of the country in whose territory the arbitration takes place. The object of the Geneva Protocol deals with the awards which made in the territory of the contracting states. Generally, according to the Geneva Protocol 1923, only domestic awards could be enforced by courts of the members’ states.

2.54.2 Geneva Convention 1927

Second convention related to the arbitration is international convention on the Execution of Foreign Arbitral Awards 1927 with 24 members, by making possibility to enforce an award in a contracting state as well as where the award was rendered. However, the Contracting states to enforce and on binding of the foreign award which has rendered with the procedure of the rules of their territories. In fact, at this point, arbitration award in other contracting state pursuant to an agreement covered by the Geneva Protocol.

2.54.3 New York Convention

Third convention related to the arbitration to recognize and enforce arbitral awards is New York convention 1958. It provides that to apply to the convention to recognize and enforce arbitral award made in the territory of contracting states and between the persons subject to the jurisdiction of one of the contracting states. The effect of an arbitration agreement on the national court proceeding is with the request of one of the parties to the court which the matter refers to arbitration process then it is an award to recognize and enforce unless the court finds that the agreement to be null and avoid, inoperative or incapable of being performed. A party, who has applied for setting aside or suspension of the award to a Competent Authority, before whom the award is relied upon by the other party claiming enforcement of the same, the former party may be required by the authority to give suitable security if it feels inclined, to accede to his request for adjourning the decision on the question of enforcement of the
In accordance with the article VII; the convention does not affect the validity of multilateral or bilateral agreements confirming the recognition and enforcement of arbitral award entered into by the contracting states.

2.55 The foreign Awards act 1961

It provides that to approving a mechanism for speedy referral of dispute enforcement of resultant foreign arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards is sought. It involves the provision for mandatory stay of legal proceedings in respect of matters to be referred to arbitration under the agreement between the parties. It provides that in article 4; the foreign awards are binding on parties and enforceable under the Act of 1961. This act provides that an enforcement of the foreign award possible by any legal proceedings in India, the procedure or filing of foreign awards in court, condition for enforcement of foreign awards the manner and method of giving evidence of the award for purposes of proving the same, saving provision of enforcement.

2.56 Grounds for Refusal of Enforcement

2.56.1 The Geneva Convention 1937

According to the article 1 (2) the claimant requires to prove following conditions to obtain recognition or enforcement of the award a) the award has been made in pursuance of submission to arbitration which is valid under the law applicable there to; B) that the subject-matter of the award is capable of settlement by arbitration under law of the country in which the award is sought to be relied upon; C) that the award has been made by the Arbitral tribunal provided for the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure; D) that the award has become final in the country; E) that the recognition or enforcement of the award is not country to the public policy or to the principles of the law of the country in which it is sought to be relied upon. Also article 2 provides A) that the award has been annulled in the country in which it was made; B) that party against whom it is sought to use the award was not given notice of the arbitration proceeding in sufficient time to enable him to

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189 Supra Note.8, p.5.
present his case; or that being under a legal incapacity, he was not properly represented; C) that the award does not deal with differences contemplated by or falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. To refuse the award with the Geneva Convention article 3 provides that if the award is invalid or annulled it may be refused by the competent tribunal.

### 2.56.2 The New York convention

In accordance with article V on Convention Recognition and enforcement of the award may be refused, A) at the request of the party against whom it is invoked, if the award under the law applicable to them (the parties), under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; B) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case, or; C) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration; provided that if the decision on matters submitted to arbitration can be separated from these not so submitted that part of the award which contains decision on matters submitted to arbitration may be recognized or enforced; D) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, failing such agreement, was not in accordance with the law of the country where the arbitration took place; E) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; 2) arbitral tribunal award may also be refused if; A) the different subject matter is not capable to be settled by arbitration under the law of the country or; B) the award would be contrary to the public policy of that country.

### 2.56.3 Section 7 of 1996 Indian Act and Iranian Law

This act provides some provisions of refusal of arbitral award if; 1) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing
any indication there on, under the law of the country where the award was made; 2) the party was not given proper notice of the appointment to the arbitrator in the arbitration proceeding, or otherwise the party was unable to present his case; or 3) the award deals with question not referred or contains decisions on matters beyond the scope of the agreement; provided that if the decisions on matter submitted to arbitration can be separated from those not submitted, that part of the award which contains decision on matters submitted may be enforced.

The UNCITRAL rules are conceived for tribunal to deal with one particular arbitration in international commercial relations. Iran used to these Rules by Ad hoc arbitration to formed to create tribunal pursuant to the Algiers Declarations 1981. It is clear that the broad base and inherent elasticity of the UNCITRAL Rules are features which have proved invaluable in laying a firm foundation for the development of these Rules. Iran only applied the UNCITRAL Rules in the Iran-US claims Tribunal.

2.57 Set aside in India and Iran

In accordance with the Indian arbitration act if the award of tribunal in international arbitration in conflict with “the public policy of India” a ground which covers, inter alia, fraud and corruption. To nominate of arbitrators, law applicable and final award to issue the recognition and enforcement are the same as to the international rules. Article 51(d) of constitution of India puts it as a Directive Principle of State Policy that the state should settlement of international dispute by arbitration.190

Under Iranian law rules, the parties may agree to choose a foreign law as the governing law of a contract subject to mandatory provisions of Iranian law. In the absence of a treaty, to the extent that foreign courts reciprocate the enforcement of foreign judgments by Iranian courts, foreign final judgments which are not against public policy in Iran are enforceable.

Iran is a member of the 1958 New York Convention relating to enforcement of foreign arbitral awards (the Convention). Convention awards are accordingly enforced in Iran. In the case where the award is rendered in a country which is not signatory to the Convention, enforcement requires compliance with procedures set out under the Iranian Code of Civil Procedure.

It might be possible to provide for international arbitration (e.g. Under UNCITRAL or ICC rules) between two Iranian companies, although there are conflicting provisions in this regard and the law in this area remains unsettled. In accordance with Article 454 of Iranian Code of Civil Procedure “all persons who have the capacity to file law suits may, pursuant to their own agreement…refer their disputes to one or several arbitrators”.

2.58 post award proceeding

The award may turn out to have errors or be incomplete, most institutional rules provide that a tribunal may take steps to correct typographical or clerical errors, or errors of computation, it is in accordance with WIPO Rules article 66; LCIA Rules article 27, ICC Rules article 35 (1), LCDR Rules article 30, UNCITRAL Rules article 38, Model law article 33(I) (b). Notwithstanding the arbitral tribunal may make an additional award with respect to claims presented to the tribunal but not covered by the award, in accordance with rules said the tribunal has not generally permitted however to correct any substantive error, such as misinterpretation of a document or of witness testimony. It is according to article 33 (1) (a) of model law which provides; “to correct errors in computation, any clerical or typographical errors or any errors of similar nature”. Some rules may also permit arbitrators to “interpret” the award in order to clarify ambiguities or inconsistencies.\(^{191}\) (WIPO Rules article 30; UNCITRAL Rules article 37), the time limit for all post award proceeding permitted under the various rules which be requested to the arbitral by each party within thirty days and completed within Sixty days of a party’s receipt of the award. Any correction or interpretations made by the tribunal are considered to be part of the final award, when a party moves to confirm an award, if the other party can show that the award so ambiguous then the court may decide to remand the award to the arbitrators for clarification.\(^{192}\)

2.58.1 Judicial Review

The judicial review depends on the type of law applicable. It differs, laws to laws because in proceeding of some procedure it may be unacceptable, if it is related to the English rules. It may be necessary to judicial review by the national court of the

\(^{191}\) Supra Note,116,p.201.
enforcing place, however, if the arbitration law applicable to the proceedings is English law, and if the parties are sure they do not want judicial review on question of law, then perhaps there will be no appeal of questions of law. As it provided in English arbitration rule article 69 (1); “unless otherwise agreed by the parties, a party to arbitral proceeding may appeal to the court on question of law arising out of an award made in the proceedings”.

2.58.2 set aside an arbitral award

In accordance with the article 34 (2) of model law arbitral award on grounds of invalidity of the arbitration agreement because, at first, the parties should determine a law to govern the arbitration agreement, if no choice by the parties, it should apply its own law to determine the agreement validity. 193 Basically, if the agreement is invalid under the law of the seat of arbitration an award is not valid. Therefore, this is in accordance with the New York convention impossible to be enforced. The set aside of award may deal with the subject-matters in which they cannot be arbitrability such as family matters, patent regulation, criminal law, and bankruptcy, it provides in article 34 (2) of model law, the losing party apply to set aside award. The losing party would probably be able to have the award set aside by the court with its own jurisdiction. The award also challenges in all jurisdiction if an award can be enforced in more than one State depending on the challenge of the issue which is not arbitrability.

2.59 Public policy and mandatory law

The tribunal does not need to apply the mandatory law of the seat of the arbitration to make a decision. It will not be necessary in international arbitration to know, in all situations, where execution of an award is likely to be sought. The public policy is changing with regard to the regulatory rules under the governing of the governments, thus, the courts in both the United States and European countries expect arbitrators to take into account not just the law chosen by the parties, but also the law governing competition. In the Ingmar case involved a commercial agent agreement between an English agent and a US. Principal 1986 the question was whether the indemnity (a payment to the agent upon termination) required under the provisions of the European

Community Directive Relating to Self-Employed Commercial Agents. The contract made for the law applicable might be California law which determined. The California law provides that no indemnity was required. The ECJ held that a foreign principal “whose commercial agent carries on his activity within the community, cannot evade the provisions of the Directive Relating to Self-Employed commercial Agents by the simple expedient of a choice-of-law clause”. If the agent is in a member State, the parties cannot contract out the European Community’s commercial agent directive by choosing the substantive law of a nonmember state to govern the contract.

2.59.1 Concept of international public policy

The international concept of public policy is different from the domestic concept and the matters concern to the domestic concept do not necessarily pertain to international concept thus it means that the number of matter considered to fall under public policy in international cases is smaller than that in domestic cases.\(^{194}\) The distinction between domestic public policy and international public policy under the New York convention made either expressly or implicitly provides that by art. V (2) (b) of convention sought to recognize and enforce in country which the award will apply to recognize, it may refuse in case of the contrary to the public policy. As it provides that in Indian Act 1961 article 7(1) (b) (ii) the recognition and enforcement of the foreign award would be contrary to public policy.

2.59.2 Consensuses on Arbitration in Developed Countries

To the Developed countries the general consensus to the dispute settlement of commercial matters are regarding the applicable substantive law and policy, all of the participants to arbitration process have to reach a common understanding as to the basic standards that should govern transactions of Various types. The consensus is by customs and usages of the various trades and of transnational business associations to harmonize and unify economic law both on a universal and on a regional level.

Generally the advantages accepted the arbitral process is superior to the national courts in commercial transactions, it coupled with confidence in the ability of the corps of arbitrators to understand and use the acceptable business standards to make

\(^{194}\) Supra Note.8,p.110.
modern arbitration desirable and effective in transactions occurring in the Western industrialized world. In East-West countries the arbitral process must reflect the actual intentions of parties, rather than consisting of rules, procedures, and persons that reflect the disposition, and only the requirements by one of the parties. Thus, the seat of arbitration must be in the socialist contracting party.

In opinion of western businessmen and investors, arbitration undoubtedly has numerous advantages: this is one advantage in the arbitration process to be a mechanism of dispute settlement in the western countries in a particular area looms very large. The ever present the application of the national procedural and substantive law by domestic courts of the “developing” partner will be unfair-through bias, inexperience, or policy-to the “developed” partner. 195 In the developed countries (partner), the selection of his/her law becomes a more attractive alternative. It has been assumed in Western developed countries that arbitration, based on the free and substantive rules choose the place, time and procedural desirable. To promote the processing of arbitration in developing countries it may be possible with joining of the multilateral conventions, as both regional and national levels are perusing to move away from holding arbitration in major developing countries, like European countries, in the developing countries perceived in coping with a system of arbitration but it favors to developed countries.

In accordance with the ICSID provisions seem the foster view that in developing countries part of general consensus which supports the freedom of parties not only to choose arbitration as a dispute resolution process but it selects substantive rules which if the parties would be independent at any national legal system and the rules of international or regional law,196 it provides in the UNCITRAL Arbitration rules article 22 and article 42 (1) of ICSID, which the UNCITRAL rules provides that “autonomy of wills” principle, and ICSID provides that “the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute” and “the law determined by the conflict of laws rules which it considers applicable”. So, it might be the parties have not appointed the arbitrators in this situation the arbitral tribunal shall decide on. In many developing countries, the national legal system has been infused with elements that are inspired by the principles of the new international Economic

196 Ibid, P.289.
order. Internationalized rules would be applied by arbitrators, not on an Ad Hoc of a general substantive consensus between Western developed Countries and developing countries.