RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

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CERTIFICATE

This is to certify that the research work entitled "Recognition and Enforcement of Arbitral Award in International Commercial Arbitration" is the work done by Parminder Kaur Sahota under my guidance and supervision for the partial fulfilment of the requirement of B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature and Name of Supervisor

Designation

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DECLARATION

I declare that the dissertation entitled "Recognition and Enforcement of Arbitral Award in International Commercial Arbitration" is the outcome of my own work conducted under the supervision of Prof. Charu Shrivastava, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature; Name of Student

Date

CONTENT

LIST OF ABBREVATIONS

- AAA - American Arbitration Association, New York (Established 1926)
- ACICA - Australian Centre for International Commercial Arbitration, Sydney (Established 1985)
- ADR - alternative dispute resolution
- ADRLJ - Arbitration and Dispute Resolution Law Journal, published by Sweet & Maxwell
- BIT- bilateral investment treaty
- CA- Court of Appeal
- Disp Res Intl - Dispute Resolution International, published by the IBA
- Disp Res J - Dispute Resolution Journal, published by the AAA
- Geneva Convention - Geneva Convention for the Execution of Foreign Arbitral Awards, signed 26 September 1927
- Geneva Protocol- Geneva Protocol on Arbitration Clauses of 1923, signed 24 September 1923
- ICC - International Chamber of Commerce, Paris (Established 1919)
- ICC- Court International Court of Arbitration of the ICC, Paris (Established 1923)
- ICC Rules - ICC Rules of Arbitration, rev ised in and in force 2012
- ICCA - International Council for Commercial Arbitration, The Hague (Established 2014)
- ICDR- International Centre for Dispute Resolution, London (Established 1996) ICDR Rules
- ICDR- International Dispute Resolution Procedures, revised and in force 2014
- ICJ - International Court of Justice, The Hague (Established 1945)
- ICLQ- International and Comparative Law Quarterly, published by Cambridge University Press
- ICSID - International Centre for the Settlement of Investment Disputes, Washington DC (Established 1965)
- Model Law- Model Law on International Commercial Arbitration, adopted 21 June 1985

- Montevideo Convention- Treaty concerning the Union of South American States in respect of Procedural Law, signed 11 January 1889
- SCC Rules - SCC Arbitration Rules, revised and in force 2010
- Swiss Rules- Swiss Rules of International Arbitration, revised and in force 2012
- UNCITRAL - United Nations Commission on International Trade Law, Vienna (Established 1996)
- UNCITRAL Model Law - See Model Law; revised Model Law
- UNCITRAL Notes - UNCITRAL Notes on Organizing Arbitral Proceedings
- UNCITRAL Rules- UNCITRAL Arbitration Rules.

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CHAPTER 1 - INTRODUCTION

Arbitration is world's most adopted method for resolving dispute between the parties at international level that includes the dispute between individuals, corporations and states. The increased globalisation of world trade and investment is the major consequence for the international commercial arbitration, which result in the harmonised arbitration practices by the international arbitration practitioners.

Arbitration is very simple method for resolving dispute globally. The parties between whom the dispute arises are known as Disputants. They mutually agree to submit or take their dispute to a person on whose judgment they can trust. The person before whom disputants puts the case for the decision, this person in a word is an 'Arbitrator'. The arbitrator is mutually chosen by the parties and he listens to the parties, considers the facts and arguments, and passes his decision which is not bias to any of the party. The decision made by him is final and binding upon the parties because they themselves agreed to it.

It is an independent method for resolving dispute from the coercive power of the state. In the arbitration process there is no involvement of the court of law. It is very simple and effective method of obtaining a decision which is final and binding from the dispute or number of disputes which took place between the individual, corporation or states.

Many rules and conventions are present which led to harmonised practice of arbitration. Such practices are administered by various institutions such as international chamber of commerce (ICC),[1] international centre for settlement of investment disputes (ICSID), London court of international arbitration (LCIA), international centre for dispute resolution (ICDR), The American Arbitration Association (AAA) are the forums where the rules are exercised. The United Nation Commission on International Trade Law (UNCITRAL) Model Law which influence the arbitration at the national level. The national arbitration is framed on the basis of the Model law which is universally adopted by the World.

In arbitration, the arbitrator makes the decision which is binding upon the parties. The award is voluntarily implemented by the parties, if, it is refused by the party then the enforcement of such award is done by the court of law of the respective state party. Such award enforceable

[1] International chamber of commerce Rules 1998, Article 1(1): Chambers of commerce adopted their own arbitration rules for the resolution of dispute between the members as an alternative to the court proceedings. ICC in Paris was established in 1923, its international court of arbitration provide for the resolution of business dispute of international character.

by the court of law is with the help of National Laws and New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) 1958.

The International Commercial Arbitration came into existence when the national arbitration in some way transcend the national boundaries, where the commercial transaction takes place between the individuals of different states, or corporation or states. It also termed as 'transnational'.[2]

The arbitral proceeding is way far different from the proceedings of the court, lack of the formality as there is no gowns, no judge or judges etc. In the arbitral proceeding takes place in different countries between parties, counsel and arbitrators of many different nationalities come up to settle their matters peacefully, negotiations are made and what mutually benefit them prevails. The arbitral proceedings more emphasised on the party autonomy. The party autonomy suggests them to create their own private universe. But for resolving the dispute between the parties by the private process of international arbitration, therefore, it is supported by the national laws and the international treaties so that it works effectively. The entire proceedings depend on the consent of the parties as to choose the arbitrator (who they themselves want to arbitrate), place of arbitration, national laws to be applicable and the method of resolving the dispute.

Even in the simple international arbitration, may require at least four different national laws system, may be derived from the international conventions or treaty or from the UNCITRAL Model Law. These different national laws came into existence at the international recognition and enforcement of the agreement to arbitrate, then comes *lex arbitri*- governs the arbitration proceeding, the law or rules that the tribunal applied to the substantive matter and last the law governs the recognition and enforcement of the award.

The law that governs the arbitral proceeding is always the national law of the place of arbitration and it is not necessary that it may govern the substantive matters in dispute. The applicable law is the governing law or the proper law that governs the substantive matter in dispute. *Illustration,* The dispute arose between the parties and mutually submits it to the arbitration on the basis of the arbitration clause in the contract. The arbitral tribunal sitting in the London is so governed by the English law as the place of arbitration. Apply the law of the

[2] The substantive law of an international commercial contract is the constitution of the various system or rules of law.

Canada as the substantive or the applicable law of the contract.[3] The national law chosen by the parties for the formation of the contract is generally the law designated as the applicable or substantive law. This is not compulsory that parties have to follow the applicable or substantive law, they may choose some other law or the tribunal may choose other law on their behalf that law can be public international law or international trade law or any other law that can be suitable to resolve the dispute. If such liberty is permitted by the agreement and the law governing the arbitral proceeding. On fair and equitable basis the dispute is determined by the arbitral tribunal. The parties usually choose the place of international arbitration in a neutral country, is not a country of residence or of parties business. The law governs the arbitral proceeding is different from the law that governs the recognition and enforcement of the arbitral award.

Conventions and rules followed universally by states:

5 **The Geneva Protocol of 1923**
6 **The Geneva Convention of 1927**
7 **The New York Convention of 1958**
8 **The International Centre for Settlement of Investment Disputes Convention of 1965**
9 **The UNCITRAL Arbitration Rules adopted in 1976 and revised in 2010.**
10 **The UNCITRAL Model Law adopted in 1985 and revised in 2006**

"Every arbitration is a national arbitration, since it must be held at a given place and is accordingly subject to the national law of that place."

From the above statement it can be concluded that the above statement is true in a narrow sense. As for instance, the international commercial arbitration took place in India, therefore the seat of arbitration will be in India and the provision of the domestic law will apply to the arbitration proceedings and award is passed. In practical way, national and international

[3] The six leading chambers of commerce in Switzerland adopted an updated version of the Swiss Rules in june 2002
Article 1(1) of the Swiss Rules states: that it will govern the conduct of the arbitration and together with any mandatory rules of Swiss law.
Article 33(1) provides that the arbitral tribunal shall decide the matter in compliance with the rules of law agreed by the parties.
Article 33(2) provides that the arbitral tribunal may decide according to equity.

arbitration are purely distinct from each other. For this various reasons are stated which are practical and legally applied for such distinction. The following are the reasons:-

Firstly, the seat or place of the arbitration where the arbitration proceedings take place and the law that regulate such proceedings is the law of the seat of arbitration or in other words *lexarbitri*. Whereas, in the international arbitration the parties or the arbitral tribunal themselves choose the seat of arbitration. They generally have no connection with it. The reason behind this that seat of arbitration is neutral to both the parties. To avoid any concession or preference to either of the parties, do prefer to choose an independent or neutral state to be their seat of arbitration.

Secondly, in the international commercial arbitration the parties involved are investor-state, states, corporation, state entities, etc. while in the domestic arbitration the Parties involve are the private individuals. The interests of the individuals are with respect to the consumer protection, the dealings are within the national boundaries and the domestic law of the state is applicable. In international commercial arbitration the term itself denotes that the business dealing across the national boundaries the financial interest of the parties is involved.

Thirdly, in domestic arbitration, the dispute arises between the customer and agent. Where the sum involved is comparatively less than that of international arbitration because of high sum involve in the business dealings. The domestic arbitration disputes involve the matter such as of faulty motor bike, loss due to late delivery, holiday package not up to mark.

Fourthly, for international commercial arbitration states want to follow different legal regime as that from the national arbitration. The international arbitration that take place in the territory of that state, the law that govern such arbitration should be purely different from the domestic, recognise the consideration that will apply to that international arbitration. For such recognitions, various arbitration centres in different countries that follow this system is Singapore, France and Switzerland. These countries have adopted the approach same as that of the Model Law, the specific law for the International Commercial Arbitration as unified code for the domestic law.

Fifth, but not the last, for the international transaction the states are permitted to enter into the agreement to arbitrate. This is usually followed by some state not in whole.

"The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend

beyond national borders, when for example a contract is concluded between two nationals of the same state for performance in another country, or when it is concluded between a state and a subsidiary of a foreign company doing business in that state."[4]

The meaning of 'commercial'

It is necessary to refer to the term 'commercial' as character of arbitrations to which the most of discussion is devoted. In some countries the contracts are distinguished on the basis that they are 'commercial' or not. This distinction was important because there are some countries that still determine the dispute on the basis of commercial contracts and submit them to the arbitration. The contract between two merchant will be permissible for the arbitration.

The first international instrument on the arbitration was the Geneva Protocol, 1923. In Article 1 of the protocol distinguished between the commercial matter and other subject matters that are capable of settlement by the arbitration. This distinction also carried with it the implication of the 'commercial matters' that it is necessary to be settle by the arbitration method under the law of the concerned state. While it may not permit the other non commercial matters to be resolved in the same manner as that of the commercial matter.

Further the emphasis was made by the Geneva Protocol with respect to the each contracting state to limit the obligation as to the contract that only considers the commercial matters that fall under their national laws. This is somewhat like reservation of the commercial matters. It remains as effective as it was included in the Geneva Protocol and also the legacy carries to the New York Convention. The commercial reservation is also embodied in the Convention.

The Model Law considered defining the word 'commercial',[5] or rather we say a attempt to do so. It is stated as follows:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or

[4] H. Dumpty,Lewis Carroll's Alice through the Looking Glass (1871).
[5]Neither the Geneva Protocol nor the New York Convention had define the term 'commercial'.

concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[6]

Key elements of an international commercial arbitration

- **The agreement to arbitrate**

  An agreement to arbitrate is the foundation stone for the international commercial arbitration. The requirement for the arbitral proceeding is a valid arbitration clause in the agreement or the valid agreement between the parties, who seeks the arbitral proceedings to take place. Usually in the agreement between the parties, the arbitration clause makes it a crystal clear that if any dispute arises between the parties then such dispute will be referred to the arbitration. The submission agreement is the agreement formed when the dispute once arises. Another type of agreement is made under international instrument (as Bilateral Investment treaty) entered between states. In this type of agreement dispute might arise between state and its investor or investor state.

- **The need for a dispute**

  For arbitral proceedings to take place there must be some sort of dispute between the parties, to which they want to initiate the arbitral proceedings. If there is no dispute between the parties then there nothing to resolve. Therefore no arbitration clause or agreement can be invoke. There is a distinction between the existing and future disputes. According to the New York Convention, the national law of the each contracting state recognises the validity of the agreement by which they can undertake the arbitral proceedings for resolving their differences which have arisen or which may arise in future.

  Just mere existence of the dispute is not sufficient. According to the wording of New York Convention, is 'capable of settlement by arbitration'; if there exists a dispute between the parties such dispute is capable of settlement by

[6] Art. 1(1), states that the Model Law applies to 'international commercial arbitration'. The Model Law includes the term 'investment' in the definition of the term 'commercial'. In practice it is a separate regime for investment disputes has tended to develop, specifically a state or state entity is concerned.

the arbitration. The national laws play a vital role for determining that whether such dispute will be settle by the court of law or by arbitral tribunal.[7]

It is very important to determine whether disputes that may arise or have arisen are 'arbitrable' or not.

- **The commencement of an arbitration**

To commence the arbitration, the initial step is to inform the opposing party by a formal notice of the same. And such notice should be sent or delivered to the party. The UNCITRAL Rules provide that parties to the disputant matter should be communicated about the arbitration.[8]

According to the Article 3 of the UNCITRAL Rules, the notice of arbitration should include: a reference to the arbitration agreement or the contract that include arbitration clause, description of the claim, amount involved or if there is any statement of relief. It can also include the proposal for the appointment of arbitrator or of the tribunal.[9]

Institutional arbitration, the notice is to be given to the appropriate institution by a 'request for arbitration'. Further, the institution notifies to the opposing party or parties.

"A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the 'Request') to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and the respondent of the receipt of the Request and the date of such receipt".[10]

[7] When there exists a valid agreement to arbitrate, the scope of arbitration is enlarged. The issues of non signatories, consolidation of arbitrations, and third-party involvement.

[8] In Article 3(1) and (2), that:

1. The party or parties initiating recourse to arbitration (hereinafter called the 'claimant') shall communicate to the other party or parties (hereinafter called the 'respondent') a notice of arbitration.
2. Arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

[9] Article 4 of the UNCITRAL Rules.

[10] Article 4(1) of the ICC Rules and with respect to this similar rules are provided in other countries such as Article 1 of the LCIA Rules, Article 3 of the Rules of the Singapore International Arbitration Centre (SIAC), Article 2 of the Rules of the Stockholm Chamber of Commerce (SCC), and the rules of other arbitral institutions.

- **The arbitral proceedings**

  The proceedings of the arbitral tribunal are different from those of the court. There are no rules that govern the conduct of the arbitration but in the court of law, litigators follow the rules for their conduct. International arbitration is governed by the provision of the lex-arbitri and rules chosen by the parties: UNCITRAL Rules[11] or ICC Rules.

  The arbitration is a flexible method of resolving dispute between the parties. In an international arbitration the parties are free to make their own procedure which is suitable for resolving dispute. It is the platform that gives a complete opportunity to the parties to negotiate openly upon the disputed matter. The procedure that is followed can be altered by the parties or by the tribunal to meet the law and facts of the matter disputed.

- **The decision of the tribunal**

  During the arbitral proceedings, a settlement may happen between the parties and for such settlement the rules of arbitration made the provision regarding this. It is stated as:

  "*If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the*

[11] Article 17(1)–(3) of the UNCITRAL Rules states:

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting his case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."[12]

The arbitral tribunal came into picture only when the parties themselves fail to resolve their dispute. Therefore, the arbitral tribunal plays the role of resolving their dispute, make decision and gave the award in written form. The tribunal does not have the same powers as that of the courts but has similar functions entrusted by the parties to reach the binding decision.

The arbitral tribunal has power to make decision that is binding upon the parties which make it different from other dispute resolution method, like mediation and conciliation that result in negotiated settlement. If the arbitral tribunal fails to act judicially, then such proceedings are annulled or enforcement of the award made by it and such requirement is not followed by the parties in mediation and conciliation.

The procedure to be followed in order to arrive at a binding decision is flexible, adaptable to the circumstances of each particular case.

It is important to know how the tribunal make its decision. The sole arbitrator plays a vital role; his task is of decision making. He has consider every aspect of the parties, reliability of witness, opinions, impression of honesty, facts then all will be reviewed and reconsidered when the hearing is over. Everything is depending on the decision of the sole arbitrator. It is not sure that decision that is made is desirable one or not. When the tribunal is consist of more than one sole arbitrator that is of three arbitrators, this can both be easier and difficult. Easier in the sense, that the opinion of three persons are involved rather than it depend on one alone. The detailed revision of the hearing, the opinion of each arbitrator is to considered, facts of the case to be reviewed with respect to the relevant law, etc. The other result can be instead one common opinion their can emerge three different. Then the sole arbitrator has to take steps to reconcile the different opinion.

[12] UNCITRAL Rules, Article 36(1).

Two different views are received that whether in the international arbitration the dissenting opinions are of any benefit.

First, beneficial for some- the argument is based on the point that it grants a fundamental right to each arbitrator freedom of expression and demonstrating.

Second, others- the award with dissenting opinions are as good dissenting judgment which may undermine the authority of the tribunal and provide the platform to challenge it.

In the commercial arbitration the dissenting opinions doesn't have that much impact as it is not publicly available but in investment arbitration it is vice versa. The issue of dissenting opinion arises when the party lost the whole or part of the matter and the appointed arbitrator of the party raise doubts as to the neutrality. Normally, the party's arbitrator usually has some connection as to protect his party and so was it expected from him to do.

- **The enforcement of the award**

  Arbitral tribunal's function is said to be accomplished when it made the final award and done for it was established. The result of the arbitral proceeding is the award itself which however led to the public legal consequences that are very important and lasting. Such award is made by the tribunal on the basis of hearing from the parties. The award made by the tribunal is binding upon the parties and if such award is not voluntarily implement by them, then, it can be enforced by the court of the place of arbitration or internationally (under the New York Convention, 1958).

  The parties when contracting entered into an agreement for the dispute matter to take it to arbitral tribunal. Such an agreement to arbitrate or arbitration clause is not made to be part of such proceedings but also to carry or accept the award made by the tribunal.

  "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."[13]

[13] International Chamber of Commerce Rules, Article 34 (6).

When the disputant agree to arbitrate through the agreement, therefore, they gave implied consent to carry the award. And such steps are considered to be the precautionary measures under the universally adopted rules of arbitration.

Sometimes the losing party carried out the award without any legal compulsion. But in some cases parties don't voluntarily carried out such binding award, therefore it is necessary to carry out the enforcement by a court of law. The question arise which court of law to seek enforcement of arbitral award? The answer of this question is relied upon the winning party. To seek enforcement of the arbitral award the party has to obtain the courts judgment. And such proceedings can be commencing in a country where the losing party has a business or residence or has assets.

To have an effecting working system of international commercial arbitration, the different national systems of law should interlink with each other. For instance, if in the London, the courts will enforce an arbitration agreement or an arbitral award made in Canada. For the recognition and enforcement of the arbitration agreement or arbitral award there must be an international treaties or conventions to which those countries are party, example – the New York Convention.

CHAPTER 2 - BRIEF HISTORY

From the last 4-5 decades the international commercial arbitration has seen tremendous growth which led to best and preferred method for resolving dispute throughout the world. The method is very old as adopted by ancient people for involving third party to resolve the dispute between two. The existence of this method was way long back before the establishment of the laws and court systems.

In the ancient times, the dispute or difference occurs between two people they mutually turn up to the most respected or elder person in their tribe or so. Who will settle their difference as neutral party to the disputed matter?

In china, the arbitration is traced back to 2100 BC because of the Confucianism[14] they preferred mediation. It was said that in Egypt before 20th Century the 80% of the disputes are settled by the way of arbitration rather than litigation. The most elder and respected person was appointed to settle such on the basis of his integrity, intelligence, wisdom. The three-tiered structure was followed by the India which is same as the arbitration until britishers came to India.

Many other countries also adopted the arbitration method for resolving their disputes outside the national boundaries such as Greece- resolution of maritime dispute with traders of other states. During the Middle Ages, European also preferred arbitration for resolution of their civil disputes.

Some was against the idea of arbitration as it was affecting the national judicial system. In 1609, the arbitration agreement is “countermand able by the law and its own nature” thus statement was given by the Sir Edward Coke (England). And the similar remark was also found in the United States jurisprudence almost after 2000years from the Sir Edward Coke’s statement. This was later patronized by the Supreme Court of the USA held as a “mere amicable tribunal”.

The historical weakness was lack of the legal recognition to the arbitration agreement which led to the inability to enforce such agreements. BLBenson the US commentator stated his view on the judicial aspect of arbitration that the dispute settled by the arbitrator could be

[14] Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, International Commercial Arbitration: an Asia-Pacific perspective,

appealed to an American Court and essential be treated as though it had never been investigated before.

Modern era, Alabama Claims Arbitration was the first international commercial arbitration. The first ever commercial arbitration took place after the American Civil War. The situation that led to this arbitration was that Britain allowed the battle ship Alabama to enter into the service which violates the international law of neutrality obligation between the states. This results in the damages to the naval forces and for such damages US was unable to receive compensation from the Britain. The Treaty of Washington 1871 was the instrument through which the dispute was resolved by arbitral tribunal, passed the award stating Britain has to pay compensation to US for the damages suffered by them.

In the early 20th century the growth of the international commercial arbitration was started as that was the period when the seeds were sewn and in present we are enjoying the result. At the birth of globalisation and the international are the milestones for the growth of the international commercial arbitration. Further additions were made to the growth with respect to the arbitral tribunal, national and international instruments on the arbitration. In 1892 the London Court of International Arbitration was established, also known as the London Chamber of Arbitration. This chamber has to report the lacks in the law through the Law Quarterly Review.

"It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife."[15]

The above stated lines are by the author E Manson in 'The city of London Chamber of Arbitration'. In such a good manner he described the how law should be. The process of resolving the dispute or making decision should not be delayed as it is well said phrase 'Justice delayed is Justice denied'. It should not be that expensive that a poor person cannot afford it and lacks the justice. There should be no ambiguity in understanding the law. The language and the procedure of the law should be simple so that it is understood by the layman. Law is to make peace between the parties and not to strife. The reasons such as rigid and lengthy procedure, time taking are factors that led to the lack of justice. Due to which the main motive of the law to deliver justice is not fulfilled.

[15] E Manson, 'The City of London Chamber of Arbitration', Law Quaterly Review (1893) 9 pg. 86

So the ideal system of law should be as stated by the E Manson. That it should be fast, cheap, simple and peacemaking.

After the LCIA, the Chartered Institute of Arbitration was established in 1915. In February 1916, published the first edition of the Institute's Journal Arbitration. The report formed by the institution for the interest of the public and for their own benefit with respect to the members of the profession who rendered services for the purpose of arbitrators in commercial matters.

In 1919, International Chamber of Commerce was established by the Merchants of Peace. The Merchants of Peace is the group of international businessmen, the foster growth in the international commercial and to achieve world peace realised urgent need to adopt an effective method for resolution of business disputes. This chamber started working in the year 1921 and administers the international business disputes. Before the establishment of ICC court in 1923, the chamber dealt with 15 cases of international business dispute. The main motive of ICC Court is to foster the trade by establishing a proper framework for dispute resolution.

In early 1920s, strong need for the better legal recognition of arbitration because of its growing popularity. International businessmen preferred the arbitration system to resolve their dispute. This was the main reason for this system to gain popularity at such a initial stage. In one of the ICC Congress in Rome (1923) adopted the resolution-

In this resolution it was desirable to negotiate the international convention on the commercial matter without any further delay. The two motive of these conventions to be, first effective arbitration clause in the international commercial agreement and, second if the parties agree to refer the matter to the arbitration, if either party brought an action in any country shall be stayed by the court, only if the party is satisfied and willing to carry the arbitration.

In 1923, the Geneva Protocol on Arbitration Clause was adopted by the League of Nations. This was the first international treaty with respect to commercial arbitration. It further provided for the recognition and enforcement of arbitration agreement and arbitral awards. This convention only facilitates the enforcement of an arbitral award made in the jurisdiction but not those made outside the jurisdiction (foreign arbitral award). The awards made outside the jurisdiction are subject to the enforcement of the law of the state in whch it was sought.

Further it was followed by the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards which was much wider then the Geneva Protocol. This convention was the improved version of the Geneva Protocol, the scope of the recognition and enforcement of arbitral awards of the contracting states was extended. The weakness of the Geneva Convention and Geneva Protocol was that neither USSR nor US were parties to it. The enforcement of arbitral awards was not limited to the own state courts but also the enforcement of foreign awards was assisted. There were many drawbacks to let it work effectively. Two powerful nations of the world were not parties to it, which makes other countries insecure. Further more additions were made to it as there is ambiguity in the provisions of the convention, not practically effective, due to this New York Convention take over these treaties.

Abu Dhabi oil case is the best example of arbitration before Pre-World War 2 period. In 1939, Sheikh of Abu Dhabi granted the oil concession to a foreign private company. The geographical limits of the company's oil extraction rights dispute arose between them. Further the arbitration proceedings initated. Under the arbitration agreement the two arbitrators are appointed and chose lord asquith their sole arbitrator. Reason was they could not agree upon the decision or outcome of the case, the decision passed was the contorversial to the law that was applicable to the dispute. The contract was made, signed and performed in Abu Dhabi therefore the law of the Abu Dhabi would be applicable to the disputed matter. The Lord Asquith (sole arbitrator) concluded that:

"Administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[16]

Further the Lord Asquith determined that subsoil falls in the territorial belt as it is included in the agreement under geoghraphical limits. The principles of modern law of nature are applicable that include good sense and common practice. The rights that are granted in concession agreement is regarding subsoil in the territorial belt not outside of the belt. The award made by the Lord Asquith was not acceptable in the world. The international commercial arbitration on the globalised basis did not accept it as it is more of the western perspective.

[16] Petroleum Dev Ltd. V Sheikh of Abu Dhabi (1952) 1 ICLQ 247.

2.1 - Development in International Arbitration

The universal system to govern the law of the arbitration has been through the international convention, the effective way of resolving the dispute. More recent update in this is the existence of the UNCITRAL Model Law. The international instrument helps in forming uniformity among the national laws of various countries. It helps forming a network of laws that are connected through the one, different wordings with same meaning, common objective of enforcing the international agreement and resultant awards.

The Montevideo Convention was the first convention of the modern time, which was established in 1889. It was a regional convention. It provided for the recognition and enforcement of the agreement among the American States. After this the first international convention that governs the arbitration law was the Geneva Protocol 1923, it was the initiative of the ICC and under the protection of the League of Nations.

(i). Geneva Protocol of 1923

The Geneva Protocol 1923 had two objectives that are:

(i) This is the primary objective of the convention as to ensure that arbitration clauses in the agreement were enforceable internationally. It imposes the obligation under the clause resolve the matter through the arbitration method rather than by the lengthy procedures of the court. It also empowers the domestic courts to refuse to entertain the proceeding that are brought before the court in breach of the arbitration clause or agreement.

(ii) This is the secondary objective of the Protocol was to ensure that arbitration awards made with respect to the agreement are enforceable at the place of the arbitration.

The Geneva Protocol is not in force but a spent force. These two objectives of the protocol are carried forward as the objectives of the New York Convention and the Model law for the enforcement of the agreement and the awards.

(ii). Geneva Convention of 1927

The Geneva Convention 1927 was advanced version of the Geneva Protocol by providing for the recognition and enforcement of award made within the territory of any of the contracting states just not merely within the territory in which it was made. In any case, a party looking for requirement of a award under the 1927 Geneva Convention needed to demonstrate the

conditions fundamental for implementation. This prompted to what got to be distinctly known as the issue of 'twofold exequatur': to demonstrate that the award had turned out to be last in its nation of inception, the fruitful party was frequently obliged to look for an affirmation (an exequatur) in the courts of the nation in which the intervention occurred such that the award was enforceable in that nation before it could simply ahead and uphold the award (a moment exequatur) in the courts of the place of authorization.

(iii). New York Convention of 1958

The New York Convention is one of the foundations of international commercial arbitration. It is undeniable fact; For sure, it is essentially in view of the New York Convention that universal intervention has turned into the set up technique for settling worldwide question. The significant exchanging countries of the world host get to be gatherings to the New York Convention. At the season of composing, the Convention has more than 145 signatories, including Latin American states, for example, Argentina, Colombia, Mexico, and Venezuela, and Arab states, for example, Saudi Arabia, Egypt, Kuwait, and Dubai.

The New York Convention gives a less complex and more compelling strategy for getting acknowledgment and requirement of remote arbitral awards than was accessible under the 1927 Geneva Convention. The title of the New York Convention proposes that it is concerned just with the acknowledgment and requirement of outside arbitral awards. This is misdirecting. The Convention is likewise worried with assertion assertions', as is clear, for example, in Article II—and in reality in different Articles, for example, Articles IV and V.

Keeping in mind the end goal to authorize discretion assertions, the New York Convention embraces the method found in the 1923 Geneva Protocol. The courts of contracting states are required to decline to permit a question that is liable to mediation consent to be disputed before them if a protest to such case is raised by any gathering to the intervention assertion.

Courts of various nations have contrasted (and keep on differing) in their understanding of the New York Convention. This is frequently so for nearby, absolutely political, reasons, and along these lines the Convention itself, which was made for an easier, less 'globalized', world, demonstrates its age.

(iv). Conventions after 1958

The New York Convention represents a important role in the shaping of modern method of dispute resolution i.e., international arbitration. No other convention has the impact as that of the New York Convention 1958. There are other treaties and conventions which may enable recognition and enforcement of arbitral awards.

(v). Bilateral investment treaties

With regards to global settlements and traditions, a short specify must be made of BITs. Truly, states working with each other frequently went into 'arrangements of companionship, business, and route'. Keeping in mind the end goal to empower exchange and speculation, the states concerned would allow each other positive exchanging conditions and concur that any debate would be settled by discretion. Such bargains have now offered approach to respective venture settlements or BITs as they are all the more ordinarily known.

The "work of art" consent to parley has as of now been depicted as one that is made between the gatherings themselves, either by methods for an assertion statement in their agreement or by a consequent accommodation to discretion. The position is distinctive in a BIT: the state party that is looking for remote interest as a result makes a 'standing offer' to mediate any question that may emerge later on amongst itself and a qualifying outside speculator of the other state gathering to the arrangement. Just when a debate really emerges and the private speculator acknowledges this 'standing offer' is'consent to referee' framed. The idea of a 'standing offer' to referee with any individual who fits the required definition is unique in relation to the customary model, in which the gatherings are known to each other when they make consent to mediate. The procedure has along these lines been portrayed as 'intervention without privity'. However, once the 'standing offer' has been acknowledged, a compelling consent to referee, to which both the state or state substance and the financial specialist are gatherings, appears.

(vi). Model Law

The Model Law started with a proposition to change the New York Convention. This prompted to a report from UNCITRAL such that harmonization of the assertion laws of the diverse nations of the world could be accomplished all the more adequately by a model or uniform law. The last content of the Model Law was embraced by determination of UNCITRAL, at its session in Vienna in June 1985, as a law to represent worldwide business

mediation. A proposal of the General Assembly of the United Nations recognizing the Model Law to Member States was received in December 1985.

The Model Law has been a noteworthy achievement. The content experiences the arbitral procedure from start to finish, in a basic and promptly justifiable frame. It is a content that many states have embraced, either the way things are or with minor changes, as their own law of intervention. Up until now, more than sixty states have embraced enactment in view of the Model Law, with a few, for example, England, modernizing their laws on intervention without receiving the Model Law, while being mindful so as to take after its organization and to have close respect to its provisions.

It might be said that if the New York Convention put global discretion on the world stage, it was the Model Law that made it a star, with appearances in states over the world. All things considered, the Model Law, which was instituted in 1985, has been surpassed by the quick moving universe of global mediation in no less than two regards: in the first place, the prerequisite for an assertion consent to be in composing; and besides, the provisions representing the force of an arbitral tribunal to request between time measures of help.

To address these worries, UNCITRAL built up a working gathering in 2000 to consider revisions to the Model Law. This working gathering delivered proposition that were embraced as revisions to the Model Law and endorsed by the United Nations in December 2006.

As said before in this section, the 'written work prerequisite' is presently characterized in wide terms in the Revised Model Law, and there is likewise an "alternative" permitting states to receive this wide meaning of 'in composing' or to apportion out and out with the necessity for writing.

The UNCITRAL working gathering tended to a further disputable issue: regardless of whether an arbitral tribunal ought to have the ability to issue break measures on the utilization of one gathering, without the antagonistic party monitoring the application. Such ex parte applications are a typical component of suit under the watchful eye of the courts. In the event that a gathering is told, for example, that there is to be an application to counteract transfer of its advantages, those benefits may well have "vanished" before the application is listened. However, are ex parte applications, made behind the back of a gathering, predictable with the hidden premise of mediation, with its accentuation on treating the gatherings with

equity? The working gathering chose to permit such applications, yet just on entirely restricted conditions.

CHAPTER 3 - SEAT OF ARBITRATION

The jurisdiction of the arbitration is where the legal arbitration will take place that is known as the seat of the arbitration. Seat of arbitration is different from the meetings that are held or the physical hearings that are part of the proceedings. It is not mandatory that meetings or hearings to be held at the place of arbitration.

The jurisdiction lies in the seat of arbitration. By which the legal attachment is established for arbitration. The words place of arbitration is used interchangeable with seat of arbitration. There are number arbitration instruments and these used term place over the seat but in actual more commonly used term is seat.[17]

According to the lexarbitri, the arbitral proceedings are conducted, even though the physical hearings or meetings of such proceedings are held elsewhere. That doesn't have any effect on the law governing the arbitration. Further discussion, will discuss the difference between the seat and venue. That will clear the doubts related to the seat of arbitration and the venue of hearings.

The seat of the arbitration is said to be the legal centre of arbitral proceedings by which the jurisdiction of the matter is decided. It is not necessary that if the seat of arbitration is London then the venue of hearings or meeting would be same. There is a difference between two locations. The physical hearing and meetings of the arbitration can take place at a location that is convenient for the parties.

The arbitration proceedings not only comprising of meetings and physical hearings but there is lot more to do, from the commencing of arbitration, appointment of arbitrators, the arbitrators to render decision.

The laws and rules that are applied to arbitral proceedings permit to have hearings and meetings to held at a location other than the seat of arbitration. In *Angela Raguz v Rebecca Sullivan,*[18]the Supreme court of New South Wales, Australia, the case was related to the seat of the arbitration and venue of hearing to which commentators stated that Article 20 of the Model Law make sense regarding the distinction between two location. In the case seat of arbitration was in Geneva and the hearing was held at Sydney, the venue for Olympics that year. They held that the legislature is concerned with legal place not the physical place. The

[17] Example, as in SIAC Rules, Swiss Rules, ACICA Rules the term 'seat' is used more commonly.
[18] (2000) 50 NSWLR 236.

physical place of the arbitration doesn't change the legal seat or place of the arbitration that will remain the same.[19]

Regulation for International Commercial Arbitration

Arbitration Rules and Arbitral Procedural

Lexarbitri is the latin phrase that means the law that governs arbitration. The lexarbitri when the parties to the dispute decide to choose a country as their place of the arbitration, the it is implied that they agree to the laws of that country that will govern the arbitration. If there comes the question to determine the law that governs the arbitration on basis that paries had changed the seat or arbitration. Then the court held that if parties mutually agree to it, then they have accepted the law of the country to which they agree to be seat of arbitration.[20]

- **Diverging view**
- **Traditional View**

This view is based on the legal theories which are accepted in western cultures from the period of 1600s. The birth of the nation state, that is considered widely from the Peace of Westphalia. In 1648, the Peace of Westphalia comprising of two peace treaties that were signed to put to an end the religious conflict of Europe that was continue from decades. The concept of sovereignty came into existence, after signing the treaties the Europe was divided into various nations having supreme power on its territory. The sovereign ruler has complete power on its territory and the each and every state was obliged to respect the independency and integrity of the other state under the principles of sovereign state. Jurisdiction is the main and important factor of the state sovereignty, which gave complete power to amend, alter and terminate any legal obligation or relationship may affect the property and people of that state. Sovereignty gave a complete pack of to the authoritative of the state to act on behalf of the state.

The concept of sovereignty is where state has supreme authority to regulate the every aspect which falls in the boundaries of that state. The state authorities in the sovereign state not only regulate the activities of the private individual but also the corporate sector. The jurisdictional or traditional view that followed is particularly meant that the parties to the international commercial arbitration must have a legal seat of arbitration. This view particularly deals with

[19] (2000) 50 NSWLR 236. Paras- 97-102.
[20] PT Garuda Indonesia v Birgen Air (2002) 1 SLR 393.

the legal jurisdiction of the commercial arbitration. The determination of the jurisdiction is very important and such determination is made by the seat of arbitration. On this basis the legality and legitimacy of the arbitral proceeding is considered and satisfies that the resulted award from these proceeding is valid.

Inevitably, the law that permits the arbitration to take place is the lex arbitri i.e, the law of the seat that governs the international commercial arbitration, without the law of the seat the commencement of arbitral proceeding is not legal. If the arbitration proceedings took place without the proper law of the seat such proceedings are not legal in eyes of law.

The jurisdiction plays a vital role in commencing legal arbitration proceeding. As the parties have right to chose the seat of arbitration and the law of that place will govern the proceeding of the arbitration.

According to the Francis Mann, he gave the statement that the term international arbitration doesn't exist in reality because arbitration is governed and attached to the national law system. This statement of the Francis Mann was issued in the early development of the international arbitration. For explaining his statement he wrote down two quotes:

1. "It would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them to except as a result of the freedoms granted by him.
2. Is not every activity occurring on the territory of a state necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted."[21]

As per the traditional view, like any other contract the arbitration agreement will come into effect if it has been given recognition by the domestic law of any State. Considering this view the statement of Francis Mann appear to be reasonable and logical. The base of the arbitration which gave effect to this method is the law of the nation in which such parties agree for the proceedings to be held there. The legal recognition to the arbitration agreement is given by the seat of the arbitration i.e., the domestic law of that state. In the sovereign state the

[21] R Goode,'The Role of the Lex Loci Arbitri in International Commercial Arbitration', (2001): Francis Mann statements are reflected in the commentaries in this book.

authorities regulate the entire legal system and applicability of law on the individual, property and companies. According to this the resulted arbitral award from the proceeding gain the legal recognition from the respective State. The makers of the law have entire control on the regulation of the arbitration proceeding in their state, therefore the lex arbitri limit and regulates the proceeding.

It cannot be said that the Arbitration can stand alone as a separate and independent system for resolving the dispute and rendering justice to the parties. The arbitration emerges from the existed system of delivering justice that is the court system of nation. This system is governed by the law of the state and the working of this system is consistent to the present judicial system of the State.

Delocalised View

Whereas this view put light upon the link between the place of the arbitration and arbitration proceeding. The delocalised or authoritative origination of assertion is that no connection requires exist between the seat of arbitration and mediation procedures occurring in that locale Arbitration procedures are said to pick up their authenticity and presence from the gatherings contract. The principal result of this is intervention procedures occurring and presence from the gatherings contract. The primary outcome of this is mediation procedures ought to be free from any impedance from nearby courts and national laws at the seat of discretion. The main local courts that can authorization courts that need to give the arbitral award. It is just these that is required before state-supported instruments can be sent to uphold and execute the award. Prior to a award is upheld, it exists essentially as an augmentation of the gatherings contract.

In 1983, Jan Paulson composed an article entitled Delocalisation of global Commercial Arbitration: When and why it makes a difference. It has turned out to be a standout amongst the most referred to articles in the level headed discussions on delocalisation. the article was a resistance of a progression of papers Paulson had composed previously which built up the possibility of de was back limited mediation. His prior papers had evoked a scope of reactions, including the depiction unsafe blasphemy. In resistance to this depiction, Paulson clarified:

What this investigate misses is that the delocalised award is not thought to be autonomous of any legitimate request. Or maybe, the fact of the matter is that a delocalised award might be acknowledged by the lawful request of an implementation ward in spite of the fact that it is free from the legitimate request of its nation of inception.

Paulson as needs be illuminated that delocalisation does not imply that intervention procedures exist all alone and outside any household legitimate request. Or maybe, they are joined to a household lawful request yet just to the ward [or jurisdictions] where requirement of the award is looked for. They are not connected to the lawful request of the seat of discretion and ought not to be subjected to its laws or courts.

The emphasis on the authorization locale appeared well and good, as around then the main truly orchestrated part of global discretion was requirement - because of the New York Convention. This was a period under the steady gaze of the model law and its selection into national lawful frameworks. Albeit today there is still no single brought together arrangement of universal mediation law, there is an impressively more noteworthy level of consistency. Ostensibly, there are fewer requirements for the delocalisation talk about today than there was back in the 1980s when worldwide assertion laws had not yet started to join.

The delocalisation proposal is very much shown as to required laws, which might be portrayed as an impetus for the improvement of the delocalisation hypothesis. Compulsory laws will be laws that have open arrangement attributes that contracting parties can't prohibit by assertion. they can apply at whatever point there is a solid connection between the truths of a case and the locale in which the compulsory laws exist, regardless of the possibility that that wards law is not normally the application law for the situation.

There would be no specific trouble with obligatory laws if each states compulsory laws were the same. Be that as it may, since they are not, clashes unavoidably emerge from the use of impossible to miss local compulsory laws. One such clash emerges where a specific compulsory law exists in lex arbitri however does not exist in the locale of the law representing the agreement. From point of view of the customary perspective of mediation [discussed above], it may be contended that a mandatory law of the seat ought to be connected by goodness of the basic actuality that discretion is a law of the seat. From a delocalised perspective, be that as it may, the insignificant certainty that mediation is situated in a given purview ought to not of itself be adequate for its required laws to apply. There

should must be solid accurate nexus between the conceivably appropriate law and the basic question itself.

After a whirlwind of scholarly action in mid 1980s the delocalisation level headed discussion was animated in mid-1990s by several cases. The best known are hilmarton OTV and chromalloy Egypt. Both of these cases included arbitral award that had been put aside by courts at the seat of assertion yet which were as yet implemented in different nations. They outline the specific fascination of a delocalised approach on the grounds that the purposes behind the award being set-aside at the seat of assertion were not considered relevant in the purviews where implementation was allowed.

In the principal case, Hilmarton looked for recuperation of commissions it guaranteed to have earned by securing business for OTV in Algeria. The seat of intervention was in Switzerland. The arbitral tribunal found the agreement unenforceable in light of the fact that it contradicted Algerian laws identifying with pay off and debasement. It as needs be rejected Hilmartons claims. Upon Hilmartons application, the swiss Federal incomparable court put aside the award, finding that the mediators, should not to have considered Algerian law. In any case, French courts-in any case perceived the award. The court de cassation questionably watched:

The award made in Switzerland was a worldwide award which was not integrated into the lawful arrangement of that state, implying that the award presence stayed built up regardless of its having been put aside and that its acknowledgment was not in opposition to universal open strategy.

CHAPTER 4 - RECOGNITION AND ENFORCEMENT OF NEW YORK CONVENTION AWARDS

The arbitral tribunal after hearing both the parties rendered its final and binding award. When the arbitration proceedings are finished as soon as the award is rendered by the arbitrator after that litigation process may be followed. If the party to the dispute is dissatisfied by the award and further challenge the award for setting aside. Second reason can be if such award is not implementing voluntarily by the party then the winning party may take the matter to the domestic court for its enforcement. Usually happens when the losing party is not satisfied with the award and want it to be set aside or tries to avoid such which is against. The link between the national courts and the autonomy of the arbitral award is balanced by the recognition and enforcement of the award. Michael Riesman observed, in relation to the enforcement of awards:

"Too much autonomy for the arbitrators creates a situation of moral hazard and the theory of moral hazard holds that they are more likely to occur in the absence of controls national courts will become increasingly reluctant to grant what amounts to preferred and fast-track enforcement of awards. But too much national judicial review will transfer real decision power from arbitral tribunal, selected by the parties in order to be non-national and neutral, to a national court whose neutrality as between the parties may prove to be considerably less than that of an international arbitral tribunal."

Viewed from a general perspective, the legal framework designed to steer a safe passage between these competing interests emphasises minimal judicial interference. Accordingly, domestic courts that are requested to enforce an award are given very narrow grounds on which to refuse such a request.

4.1 FINALITY OF AWARD

The arbitral award rendered by the arbitral tribunal is final and binding on the disputant parties. In various judgments of different courts of the world has given recognition to the arbitral tribunal's awards as final and binding unless that is contrary to any law governing such arbitration proceedings. This is generally the accepted position given for the finality of arbitral awards in international commercial arbitration. The decision that is rendered by the tribunal is final and binding and such award may not be set aside or appealed against[22]. The

[22] PT Asuranis Jasa Indonesia (persero) v Dexia Bank SA (2006) SGCA 41.

domestic courts have power to enforce and recognise such awards but cannot set aside unless such award is contrary to any national or international instrument. The court has given power but such powers are restricted in the case of arbitration process. There are some general exceptions for the losing party to set aside or appealed against the arbitral award. The ruling of the Supreme Court of US:-

"(i) to Appeal on a question of fact or law if permitted under the law of the seat of arbitration or, in rare instances, the arbitral procedural rules;

(ii) to apply to the courts at the seat of arbitration to set aside the award; or

(iii) to wait until a court enforcement action is commenced and then object to enforcement." [23]

In the international commercial arbitration it is very rare that the seat of the arbitration or the arbitration rules will permit the appeal from the international arbitral awards. This is merely because of the finality of the award rendered by the international tribunal. These measures are taken as to maintain the individuality of the arbitral tribunal, to which the parties agreed for settling the dispute. This is essential for maintaining the standards of the international arbitral tribunal for settling the international commercial arbitration. There is an exception to above stated statement which itself contain the right to appeal that is stated in the US Grain and Feed Trade Association Arbitration Rules.

English Arbitration Act 1996 is the most notable law that permits the appeal in the international arbitrations. According to the section 69(3) of the above stated act states that unless the parties otherwise agree, leave to appeal to a court on a question of law will be granted if the court is satisfied:-

a. That the determination of the question will substantially affect the rights of one or more of the parties,

b. That the question is one which the tribunal was asked to determine,

[23] Dallah Estate and tourism Holding Company v The Ministry of Religious Affairs (2009): strategy of resisting the enforcement rather than the challenging a award.

c. That, on the basis of the findings of fact in the award-
    i. The decision of the tribunal on the question is obviously wrong, or

    ii. The question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

d. That, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

It is apparent from the above stated provisions, that they give a limited scope for the appeal. These appeal provisions are generally more applicable in the domestic arbitration. In spite of all this, some rules or laws are framed in way to permit the domestic courts to appeal from the international commercial arbitration the basis of questions of law. The international arbitral award may set aside where such award is made in question of law or contrary to any law or policy. The domestic courts are permit to accept the appeal in cases where the award consists of question of law. Such award are not enforced by the domestic courts and led to the appeal. With respect to the investor-state relationship a great discussion took place with respect to whether the appeal should be allowed or not.

The judicial comity that gives mutual recognition to the judicial acts of the other nation likewise the domestic courts should respect the judgments passed by the foreign courts. Some of the countries didn't recognize the foreign judgments which led to re-litigation of the same matter. Such incident should be discouraged by the domestic courts and also give recognition to the foreign judgments. There should be judicial comity between the countries which increase the more commercial activities and other acts between the parties. These rules are not that flexible which sets out new trend of the rigid decision making. The flexibility lies in the arbitral proceedings not in the rules.

4.2 RECOGNITION OF AWARDS

The New York Convention on the recognition and enforcement of the arbitral awards, 1958, as the name of the convention suggests it recognises the arbitral award and enforce the same.

The enforcement of the award receives more attention than that of the recognition of the award. The recognition of the arbitral award means that the award should be binding upon the parties. The former cannot be underestimated because an award may be recognised without being enforced whereas if such award is being enforced it is necessary to be recognised. It is implied that the enforcing court cannot brought the enforcement action to take place without the recognition of the said award. Nonetheless its importance cannot be ignored.

The need arise for the recognition of an award without the enforcement is when the parties to the arbitration brought an action before the court on the same subject matter as dispute was determined in the arbitral proceedings. The winning party seeks for the courts formal recognition for the award to be binding on both the parties or it may seek to set aside the award or can make a counterclaim as it all depend on the party. The court will recognise the award by determine the facts and the law as by the arbitral tribunal and the approach will depend on the applicable domestic law of that court where the action is brought. Sometimes it appears to be difficult to determine the facts and law as it was done by the arbitral tribunal because of its procedural aspects.

The New York Convection under Article III provides that 'each Contracting State shall recognise arbitral awards as binding ...'.

As the international convention are providing base for framing the domestic law that maintain uniformity with the laws of the other countries. To make the arbitral award binding upon the parties it shall be recognised by the contracting state. The recognition of award is very important as for the further enforcement of the award. According to the above article of the New York Convention, the various domestic legislation also provide for specifically recognition of the award.

"Any foreign award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the person between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore."[24]

Whereas countries like Hong Kong and China go for the Agreement on Mutual Enforcement of Arbitral Awards, under which if any uncertainty arises as to the recognition of the award the application can be made to the either court of any country.

[24] Singapore Arbitration Act, Section 29(2).

4.3 ENFORCEMENT OF AWARD

The most commonly used method for challenging award is to set aside by the competent court. The competent court here refers to the court of seat of arbitration. The commonly used phrase "setting aside of an award" in the Asia-Pacific countries is part of model law nomenclature. Whereas different countries have given different names for this, US generally used the word vacate instead of the setting aside of award. Always exist the difference between the domestic law and international law. Usually the international instruments are embodied in the national laws for the effective working of the system. But in the ICSID convention the annulment procedure is not same as that of the domestic law procedure for setting aside of the award.

The discussion in this section will first deal with the issue of state control over awards at the seat of arbitration. It will then consider setting aside at the seat of arbitration, examine the problematic issue of courts setting aside awards made outside their territory, touch upon the period of time within which a setting aside application can be made, and examine briefly the consequences of challenging an award. The section will focus on the Model Law's setting aside provisions because most of the countries in the region have used this as the basics for their international arbitration legislation.

State with supervisory role:

An agreement to arbitrate, the parties are ensured that the state will render proper support for the effective and efficient working. The support of judicial system of the seat of arbitration is very important for agreement to arbitrate. That state court has in built power to supervise the arbitration proceeding so as to prevent them fom deviating fendamental principles of natural justice. Where the tribunal is seated in the jurisdiction of the domestic court such courts have jurisdiction to set aside the international award. This function of setting aside the international arbitral award is related to the supervisory role of the domestic courts. Article 34 of the Model Law contain the power by which the court can set aside the award and those grounds cannot be excluded from the contract because of utmost importance given to them. Instance, such approach is followed as:

"It was later concluded that contract was to exclude review. There would be no unfairness in holding to bargain and no suggestion of inequality of position. There existed the reason for the exclusion of review that is the anticipated inconvenience and expense of post award

litigation. The agreement not to resort to the court was plainly part of the exchange for the rights that obtained to participate in the arbitration." [25]

From the above statement, parties are not permitted by the law to exclude the review that is based on the grounds specified in the Article 34 of the Model Law.

There exists the fine line between the interest of the private and public. Such interest must be balanced, the private parties desire for flexibility in process, finality, binding and confidentiality of the arbitral award, whilst the public interest requires competent, fair and consistent determination. State exercised the degree of control over the award remain the controversial question always. As to what extent the state can exercise its control over the award is maid. Further the light is put up on the power of control by the state court. Red-determination and Hunter has given some strong arguments related to limiting the control of state court:

The demerits of having an arbitration system is that it offers an unrestrained right of appeal from arbitral award.

- ✓ On behalf of the parties to the arbitration the decision of the judges may take place the decision of a tribunal.
- ✓ Without the willingness of the party that agreed for the arbitration method for the dispute resolution is brought before the court and hearing is held to be in the public.
- ✓ The main objective of international commercial arbitration is to provide speedy resolution of dispute, which is defeated by allowing the appeal process. The motive behind to appeal against the decision to postpone the date on which such payment is due on the party.

The other major drawback is the lack of knowledge and understanding of the international arbitration system by the national courts that include the judges. Also the possibility for comprehend bias nature. The various which affect the independency of the arbitration system and the extent of control of the states try to exercise in the proceeding of the arbitration. Such extent of control is determined by the lex arbitri in the international commercial arbitration. For that Model Law plays a vital role. Article 34 of the Model law listed down the grounds through which the award can be set aside while the countries like Switzerland and France adopted the narrow grounds for setting aside the award. Countries like England have adopted

[25] Methanex Motunui Ltd v Spellman (2004) 3 NZLR 454.

wider grounds for setting aside the arbitral award and also have option to exercise the right to appeal from such award on the basis of domestic law. To challenge the ICSID award the procedure adopted is quite different. The challenge made to ICSID award is cannot be filed in the domestic court. The ICSID arbitral tribunal specifically formed the ad hoc committee to deal with particular challenge, that is made by the application for annulment and this application is submitted to the committee. They will further determine the challenge according the procedure**.**

4.4 SETTING ASIDE AWARD

1. At seat of arbitration

The arbitral award issued by arbitral tribunal can be set aside at the place where it was actually made. The courts have jurisdiction to set aside at the place of the arbitration if such action is brought before the court by the party. The Model Law provides for this under Article 34. For Instance, country A has adopted the Model Law, and country A is the seat of the arbitration. The arbitral tribunal rendered the award which is challenged in the court of the country A. it is very rare that a successful action is made for setting aside the award. The countries that are non-Model Law also followed the same procedure as of Model Law countries followed.

Paragraph 1 of Article 34 of the Model Law provides for:

"Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs 2 and 3 of the article."

The essence of this article is very clear. Whereas setting aside is the only option left with the losing party to have against the arbitral award and the application for setting aside the award must comply with the provision of the Article 32(2). The above stated provisions to be read in conjunction of Article 1(2) of the Model Law, and this apply to the seat of arbitration is in the territory of the state. For instance, the place of the arbitration is in the India. Then Article 1(2) prescribes that an Article 34 that the arbitration took place in the India and the award rendered by the tribunal. The application for setting aside the award to made before the domestic court of the India.

11 Foreign awards

At the seat of the arbitration most of the application are filed for the setting aside the award. The procedure for filing the application is mentioned above. In the region few courts are deviated from this.

An international arbitration held at the Geneva, Switzerland has awarded a company US $270 million award. This award was set aside by the Indonesia. In Hong Kong the enforcement of the award was soughed against one of the respondent, his contention was based on the reason that the award has been set aside by the court of Indonesia so it cannot be enforced and he resisted to it. It was held by the Hong Kong Court, the Indonesian court has set aside the award in their court and it is further stated that they did under own law it has nothing to do with enforcement of award in this country as the seat of the arbitration was in Switzerland.[26]

The foreign awards can be set aside on the basis if they are contrary to the law of the state in which it seeks for the enforcement. The award of the ICC can be challenge on the basis that the award made is not compliance with the proper law of the contract.[27]

The one of the other ground that is recognized by the Model Law is that it can refuse the enforcement of the award in the state, if such award is contrary to the public policy of the state in which it seeks for enforcement.[28]

India has domestic legislation on arbitration, Arbitration and Conciliation Act, 1996 that has its basis on the UNCITRAL Model Law. Held by the Supreme Court of India, the foreign award made by the LCIA can be set aside under the provision of Section 34 of the Arbitration and Conciliation Act. The section 34 of the Act is based on the provision of Article 34 of the UNCITRAL Model Law. The part-II of the domestic legislation (Arbitration and Conciliation Act, 1996) governs the International Commercial Arbitration and part-I deals with arbitration whose seat or place of arbitration is in India. The Section 34 applied by the court for setting aside the award falls in part-I that is for arbitration that took place in India. Globally, this step of the Supreme Court has been criticised on the basis that it had created new law which is not found in the present domestic legislation of India i.e., the Indian Arbitration and Conciliation Act, 1996.[29] As sometimes the court goes beyond what is expected from it to do. The interpretation of the

[26] karaha Bodas Co LLC Perusahaan pertambangan Minyak Dan Gas Bumi Negara (Pertimina) (2003) 4 HKC 488.
[27] Hitachi Ltd v Mitsui and Co and Rupali Polyester (2000).
[28] Luzon Hydro Corporation v Baybay and transfield Philippines (2007).
[29] Venture Global Enngineering v Satyam Computer Service (2008) 4 SCC 190.

law is done in such a way that it lost the purpose of that legislation and the intention of the legislators that drafted the law. There is many more reason which result in making wrong decisions.

When the courts set aside the foreign arbitral award in their state or outside the seat or place of the arbitration, this act of the court don't represent a good international arbitral practice. When the domestic court set aside such award therefore it affects the international practice of arbitration, if such award is not acceptable by the domestic courts. This type of decision is rare not frequently passed by the domestic court. In the Model Law various grounds are stated on which the domestic courts can refuse to enforce the foreign arbitral award.

Article 34(2) of the Model Law exclusively laid down the grounds to set aside the award by the courts. This Article provides for:

"An arbitral award may be set aside by the court specified in article 6 only if:

a) The party making an application furnishes proof that:
    i. A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which parties have subjected it; or failing any indication thereon, under the law of this time state; or
    ii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
    iii. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission arbitration, provided that, if the decisions on matters submitted to arbitration maybe set aside; or
    iv. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement of the parties unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law; or
b) The court finds that:

i. The subject- matter of the dispute is not capable of settlement by arbitration under the law of this State; or

ii. The award is in conflict with the public policy of this state."[30]

Important features stated in the above stated provision are:

The word "only" is used in the provision as to state that basis of the above said grounds on which the award can be set aside.

Further states that if one of the above stated ground is established by the party or parties the court may set aside the award.

The grounds stated in the (b) point are on the basis of the courts discretion. If the party or parties challenging the award may not raise these grounds then the court can take initiative to raise these grounds.

As the grounds for setting aside the arbitral award are mentioned in the Article 34 of the UNCITRAL Model Law are exclusive in nature. The courts in which the application is made for challenging the award, has to consider that whether the award falls in any ground that is mentioned in Article 34. They are not permit to see the merits like finding of the fact and law. The arbitral awards made by the arbitral tribunal in the international arbitration are not open for the appeal in the domestic or national courts. The application made before the court to set aside the award is not considered in the way as the appeal and be judged on the basis of grounds of fact and law. On the grounds of fact and law it cannot be struck down by the respective court.[31]

The US Supreme Court changed the position, held that the arbitral award passed in the international arbitration can be set aside on the ground if it disregard to the law. The US court contrasted the position from the above mentioned finding. This finding of the court appears to be in the domestic arbitral award.[32] Further the court in another case stated that this doctrine od disregard is no longer exists because no valid match with the law. It cannot be applied to

[30] UNCITRAL MODEL LAW, ARTICLE 34(2).
[31] Government of the Republic of the Philippins v Philippine International Air Terminal Co Inc (2007) 1SLR 278..
[32] Wilko v swan, 346 US 427

the foreign arbitral award and this doctrine is no where found in the Federal Arbitration Act of the US.[33] It appears very difficult to harmonize with the opinion of the court.

Whereas, the Chinese law is concerned, it has different position of law in determining various aspects of the law for setting aside the domestic and foreign arbitral award. For setting aside the foreign arbitral award which are issued in china or can say the seat of arbitration is in china have different set of procedural grounds. And in domestic arbitral award, the court has emence power to review the proceedings of the arbitration and can determine the challenge of setting aside the arbitral award on the basis of findings of fact and law and also review the procedure that is followed for making the award. The Article 34 of the UNCITRAL Model Law provided the grounds for setting aside the award are repeated in the Article V of the New York Convention on the Recognition and Enforcement of the Arbitral Award.

4.5 CONSEQUENCES OF CHALLENGE

A challenge to an award is made in the court and the applicable law of that state may

(1) Wholly or partly set aside the award;

(2) The parts of the award vary;

(3) The award remit to the arbitral tribunal for reconsideration;

(4) Refuse to set aside the award even one or more grounds are established.

When a challenge is made to set aside the award and such challenge proves to be unsuccessful then the court left with only one option to refuse the challenge made by the party or parties. At the seat of the arbitration if the challenge to award appears to be unsuccessful further it doesn't exclude the applicant from enforcement of the same award at the domestic court. This action at the place of the arbitration to refuse the enforcement of the award cannot resist the right of the applicant to enforce the award.

In ICSID Convention the annulment procedure of award is contrasted with the various options available for the court to resolve the issue of the action to set aside the award. Whereas a challenge is made to the ICSID award is to be heard by the arbitral tribunal not by the court and the arbitral tribunal that heard the action of setting aside the ICSID award is called the ad hoc committee. This tribunal or ad hoc committee, by its name suggested that it

[33] Hall Street Associates, LLC v Mattel Inc.

has limited power for dealing with the ICSID award i.e., to annulment of award as whole or part of it which satisfied the challenge. The ad hoc committee has no power to resubmit the award's part that vary or the award as whole, who's challenge has been successfully established, to the arbitral tribunal that made it but to the newly constituted arbitral tribunal for reconsidering it. This is made as to protect the interest of the both the parties. The part of the award or whole of it is consider by the new constituted tribunal, as they are not aware of the earlier meetings or hearing content of the party that happen earlier.

The New York Convention under Article V (1)(e) provided that the court that enforcing the award may refuse the enforcement on the basis that the seat or place of the arbitration has refuse the enforcement of this award.

The countries like US and France in various cases enforced the arbitral award that has been set aside or refused to enforce by the place of the arbitration. Various situation arises for the enforcement of the arbitral award as challenge is made by the party to set aside whilst the other party brought action before the court for its enforcement. The lossing party mostly opt for the challenging the award as to avoid the implementation of it. Article VI of the New York Convention gives the discretionary power to the court, in the situation where the action is pending for setting aside the award and enforcement of the same is made before the court of another country, to adjourn the enforcement proceedings.

It depends on the court whether the enforcement proceedings to be continue or adjourn them till the decision is made in the other country as to set aside the award or not. In same way where the court has made its decision for setting aside the award or not is to be, from such decision appeal may lies to the higher court as provided by many jurisdictions.

The Indian Arbitration and Conciliation Act provided for an appeal from a courts decision to the higher court on the basis of either ground to set aside or refused to set aside under section 37 of the Act.[34]

4.6 ENFORCEMENT OF NEW YORK CONVECTION AWARDS

The New York Convention on the Recognition and Enforcement of the Foreign Arbitral Award provided for the enforcement of the award that are made or result of the international commercial arbitration. In international commercial arbitration the enforcement of the award

[34] Phillippine Alternative Dispute Resolution Act, 2004, Section 46.

is very important element over the international litigation process. There are very rare occasions when the award made by the tribunal is not enforced against the losing party.

In domestic arbitration, the legal system or the domestic law itself provides for the enforcement of the award within the state. Usually these awards are against the assets or the property. The state government has control over everything of its state i.e., is both physically and legally with respect to the assets and property that appears to be in its territory. While enforcing the arbitral award made in the international commercial arbitration, the problem arises when the award is made in the one country and seeks enforcement in another country. The involvement of countries with respect to the international arbitration, issues arises in decision making with respect to the state sovereignty and the extraterritorial that are highly sensitive and make system complex. Therefore, the New York Convention is embodied with the solution to the various issues of the enforcement of the foreign arbitral award.

In international arbitration, the New York Convention plays a very effective role for resolving the dispute arise between the parties in the commercial dealing. As the New York Convention recognise and enforce the arbitral award similarly the recognition and enforcement of civil and commercial awards under the Hague Convention on Choice of Court Agreements 2005 yet it doesn't come into force. Only one state so far agree to it and i.e., Mexico and ratification by numerous countries is required whilst at time of New York Convention 144 states become parties to it. Under Article III of the New York Convention the compact of the enforcement of the arbitral award is made. The state signatories to the convention undertaken to recognise and enforce the award with the procedure laid down in the convention with the condition to be consider. Such enforcement of award must be in accordance with the rules and procedure of the state where it has to be executed.

The convention laid down simple procedure for the enforcement and it also provided for the limited grounds on which the courts may refuse o enforce the foreign award.

The attractiveness of the New York Convection is rooted in the simplicity of its procedures and the limited grounds afforded to national courts to refuse award enforcement.

"The genius of the United Nations Convection on the recognition and enforcement of foreign arbitral awards is to be found in the way in which it mobilises national courts as enforcement

agencies while simultaneously restricting their scope of national judicial supervision over international arbitration awards."[35]

According to the R. Briner and V. Hamilton, they stated that the success of the convention is on the basis of various factors, the foremost factor was that the conditions due to which this convention came into existence. The finality of the product came with lots of hard work and efforts of various eminent people like the jurists, scholars, business people or community and governments. This brings lots of the discussion by the specialists and was accordingly adjusted and the refined product as perfect text was framed, these discussions were held amongst interested consultative bodies, practitioners with expert knowledge in the respective field and the plenipotentiaries. The sense of realism was given to the New York Convention by the extraordinary combination of interest of different people to frame the text. The problems faced or experienced by the business world during the post war period were sensibly addressed. The New York Convention is more about dealing practical aspects for the recognition and enforcement of the arbitral award rather than providing for theoretical consideration. The convention adopts the exhaustive approach for providing a list of basic requirements for award enforcement. It base on the concept of the party autonomy, as the parties are free or decide the legal system for the arbitration proceeding, does not require the sanction of the states as to which law be applicable for the arbitration system. It was very important that the convention should effectively implemented and acceptable by the countries and should continue with legacy for longer period.

"[p]erhaps could lay claim to be the most effective instance of international commercial legislation in the entire history of commercial law."[36]

The observation made by the Lord Mustill's has increased the respect of the convention among the arbitrators and practitioners. The convention came into force, after half a century the convention came into existence gave treaty more respect and effectiveness that shows the convention will not abate. Respectively, it has become more effective after it has been practiced at the global level and appreciated by the every signatory. It also influence the domestic arbitration system, domestic legislation are framed considering the treaty for the enforcement of foreign awards at the domestic courts.

[35] The revolutionary nature of the Convection is nearly articulated by Michael Reisman.
[36] This quote has been made by the Lord Mustill's two decades ago, after this more than 50 countries became parties to the convention .

Recourse to the New York Convention is rarely available due to various reasons in spite presence of number of cases and academic literature exit on this. Many a times it happens in the international commercial arbitration that the matter resolve before the final award is made by the tribunal.[37] It depends on the parties as to resolve their disputes; the issues that led to the dispute are resolved by the parties before the award is made. In other situation, the award is made by the tribunal and is voluntarily implemented by the parties.[38]

Albert Jan Van Den Berg, the world's expert on the subject, calls for the change in the New York Convention. Even though from the various surveys the result or findings are positive but there is always a possibility of improvement. He considers that the New York convention provision has ambiguity and some are outdated. He further argued that the New York Convention required revision of the exiting provisions, addition and modification. He puts up the proposal for new convention that aims to build on the concept and structure as that of New York Convention i.e., "Convention on International Enforcement of Arbitration Agreements and Awards". Others responded to the proposal on the basis of the practical difficulties will arises on amending the present Convention or making a new convention/treaty.

In regard to the application of the Convention in the Asia-Pacific, the Price water house Survey noted that respondents cited China most often as the country where difficulties were likely to be encountered in enforcement and execution proceedings. India was also specifically cited as potentially problematic. Additionally, Bose, Yap and Jaliwala have observed.

[37] Before December 2009, the three year period in which ICC arbitration were withdrawn earlier before the making of the final award by the tribunal.

[38] Price water house Survey, well known survey company, reported that more than 76% cases in which the 84% of the respondent has honoured the award. An award debtor fails to comply with the award are only 3% according to the survey. As per the report the corporate counsel stated that non-prevailing party honoured the award more than 90%. For voluntary award implementation main reason during the survey was to be in respect of preserving the business relationship. Mostly corporation has difficulties to 11% in the cases regarding the non compliance to enforce the award. Difficulties arise with respect to the enforcement of the award and 70% of is about the lack of award debtor assets. And other difficulties arise as to enforcement of award in a country that is not party or signatory to the New York Convention.

The negligible endorsement by a nation of the New York Convention does not ensure its compelling and convenient execution. Regardless of the professional requirement dialect of the New York Convention, actually authorization of assertion award stays risky in numerous nations on the planet including a few Asian purviews. Defilement, domestic assurance, broken direction, numbness and systemic wastefulness make implementation procedures troublesome, tedious and some of the time unimaginable.

Bose, Yap and Jaliwala distinguish various critical issues implementing award under the New York Convention in China, India, Indonesia, Thailand and Vietnam however they additionally indicate change endeavours in these nations to defeat a few if the recognized issues.

Australia likewise has a to some degree one of a kind award authorization issue if implementation under the Convention is required in at least two of its inward states or domains. In such a circumstance, it might be important to document various parallel implementation procedures in the Supreme Courts of the significant inner states or domains. To beat this bother, Australia is relied upon to change its International Arbitration Act, which will engage its Federal Court to concede expansive authorization in one brought together request.

CHAPTER 5 – REFUSAL OF RECOGNITION AND ENFORCEMENT

The UNCITRAL Model Law governs the recognition and enforcement of the foreign arbitral award under the provision of Article 35 and 36. It also further laid down the grounds related to the refusal of enforcement of the award in the domestic court or at the seat of the arbitration itself. In the New York Convention the detailed grounds are mentioned in the Article V (1) and (2) and Article VI. Whereas the Article 34, 35 and 36 of the UNICTRAL Model Law overlap with the New York Convention Articles, as they are equally crucial and similar to each other.

i. Both New York Convention and UNCITRAL Model Law does not permit for any review on the merits of an arbitral award.
ii. Exhaustive grounds are mentioned in both i.e., the New York Convention and the Model Law. The recognition and enforcement of the award can be refused only on these grounds.
iii. Five different grounds are set in the New York Convention for the enforcement and recognition of the award, refused at the request of the party against whom it is invoked. The party that seeks recognition and enforcement of award does not have to give proof because it lies on the other party. The other grounds on which the enforcement can be refused are public policy of the place where enforcement of award is sought and others grounds that can be brought by the own motion of the enforcing court.
iv. Under the Article V(1) and (2) of the Convention, provides the word ‘may’ be refused, even if the grounds exist for the refusal of enforcement of award the court is not obliged to refuse the enforcement because of the language used in the provisions of the Convention. Instead of the ‘may’, ‘must’ has been used then the court will be obliged to do that. The language of the provision is not mandatory but is permissive.
v. The grounds that are mentioned in the New York Convention and Model law are to be construed narrowly. As the leading commentator restricted the scope of the ground narrow. The enforcing court should apply these grounds restrictively.

Most domestic courts have perceived these grounds. There has been endorsement in the United States, for instance, of the 'ace requirement inclinations of the Convention. However, not all courts take on this internationalist approach. Specialists of worldwide business assertion know, either from their own particular experience or from the

experience of others, of the challenges that may emerge in looking for implementation of a arbitral award under the New York Convention.

The 'public policy' ground is the key in the hand of the states. The 'public policy' ground, that empowers the state to play less fairly than the other states. This is not the only issue, there exist the other as some states did not ratified the convention or haven't yet brought into effect or is inadequately in effect. In particular, the 'public policy' exception enables some states to play the game less fairly than others. Nor is this the only problem. There are states that have ratified the Convention, but have either not brought it into effect or have brought it into effect inadequately. Still, there are countries that are suspicious about it as they are not familiar with the international commercial arbitration. There are likewise peculiarities of enactment, for example, the repealed law in India, expressing that where the administering law was that of India, the following arbitral award was considered to be a local arbitral award, despite the fact that the place of the arbitration was in other state.

Issues of this kind can't be overlooked; however they ought not to be overstated. The New York Convention has ended up being a profoundly viable global instrument for the implementation of agreements and, all the more significantly in the present setting, awards. The New York Convention is currently fairly dated, and it doesn't mean that it should be reliably by the majority of the states yet it has made the best single commitment to the internationalization of worldwide business arbitration. Despite the fact that the Model Law may in the long run have its spot, choices under the Convention will stay critical, since the Model Law's arrangements representing acknowledgment and requirement of award are taken specifically from the Convention.

5.1 Grounds for refusal

Under the provision of **Article V (1)** of the New York Convention states that the recognition and enforcement of an arbitral award "*may* be refused" if the opposing party proves that:

(a) The parties to the arbitration agreement … were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the

appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his [or her] case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

i. Ground for refusal of the award on the basis of incapacity or invalid arbitration agreement- Article V (1)(a)

(a) "The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"

The issues related to the capacity to enter into and validity of an arbitration agreement, which may raise specific difficulties in respect to the states and state agencies. A defence established for the enforcement based on the invalidity of the agreement is provided by the tribunal in one of the case, under the rules of the ICC the enforcement of the award was refused on the basis that they were nonexistent because the without referral of the dispute to arbitration, as it was given by the competent committee of the Council of State.[39]

[39] *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republic*. (1990) XV, YBCA 515.

The ICC award was rendered in Paris for the enforcement against the Pakistan Government, later held that the government was not party to the arbitration and refused enforcement.[40]

Reverse of the above stated defence was held by the Court reasoned that the formality required for the written arbitration agreement in the Australian Law not a issue in the New York Convention[41]

ii. <u>Ground for the refusal on the basis of no proper notice of appointment of arbitrator or of the proceedings or lack of the due process- Article V (1)(b)</u>

(b) "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"

Under the New York Convention and also in Model Law, this is the vital ground for refusal. As in arbitration, it is directed to ensure proper conduct, with grant of notice to the disputant, fair procedure and unbiased decision to be made.

Indicate as notice involves convention, however it is essential regardless. Nonetheless, the primary purpose of this arrangement of the Convention is coordinated at guaranteeing that the necessities of 'due process' are watched and that the gatherings are given a reasonable hearing. On the off chance that gatherings from various nations are to have trust in intervention as a technique for question determination, it is fundamental that the procedures ought to be directed in a way that is reasonable and which supposedly is reasonable. This is something that ought to be borne as a main priority, by gatherings and authorities alike, from the very start of the intervention.

The court of the gathering state will normally have its own particular idea of what constitutes a 'reasonable hearing'. In this sense, as was said in a main case in the United States, the New York Convention 'basically endorses the use of the gathering state's norms of due process'.(88) This does not mean, in any case, that the hearing must be led as though it were a hearing under the watchful eye of a national court in the discussion state. It is for the most part enough if the court is fulfilled that the hearing was directed

[40] *Dallah Real Estate v Ministry of Religious Affairs.* [2010] UKSC 46.
[41] *O Ltd (Hong Kong) v S GmbH (Austria).*

with due respect to any understanding between the gatherings, and as per the standards of uniformity of treatment and the privilege of each gathering to have a sensible—as opposed to thorough—chance to present its case.

The national court at the place of authorization accordingly has a constrained part. Its capacity is not to choose whether or not the award is right, in actuality and law; its capacity is just to choose whether there has been a reasonable hearing. Just a noteworthy and material mix-up over the span of the procedures ought to be adequate to lead the court to infer that there was a dissent of 'due process'.

With respect to the above explanation the reference to the cases been made, US Corporation has been told no need to submit the detailed invoices; the claim was rejected by Iran- USCT failure to submit the invoices. Court refused to enforce the arbitral award against the company. Different countries have different opinion in different circumstances, in same way, German court that the violation of due process and right to be heard when the award is based on the arguments which are not raise by parties and tribunal during the arbitration proceedings.

The wining party not pleaded the grounds that the tribunal found in its favour. The court held that the violation of the principle de la contradiction, tribunal fail to invite both the parties to express their views on the grounds, as essential for the fair hearing of the disputant.[42]

The court decided not to enforce the arbitral award as the enforcement will led to the grave injustice to the respondent. The respondent didn't get the chance to present his claim after the claimant had made his argument, the respondent was unable to attend it because of serious illness occurred.[43]

The losing party opposed the enforcement of the arbitral awards on the ground that tribunal has investigated on its own. The court reject the defence and further state that respondent has opportunity to ask for the disclosure of the evidence and right to comment on it but he declined the opportunity to do so. Here the party fails to take the advantage of

[42] Overseas Mining Investments v Society Commercial Caribbean, March 2010.
[43] Kanoria and ors v Guinness (2006) Arb LR 513.

the opportunity so the defence of due process cannot be accommodated.[44]

iii. Ground for refusal on the basis of jurisdictional issues- Article V (1)(c)

(c) *"The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced"*

This is very common issue with respect to the arbitration or can say a good defence with respect to the arbitration. This can be raised under two headings as first one no valid agreement to arbitrate and other one is the jurisdictional issues. The award is challenged on these grounds if the appropriate time lapse the right to raise issue will be lost.

In the above stated language of the provision referred to a situation that is ultra petita, in which tribunal acted on the matter that was not submitted or in the excess of its authority. Usually courts reject this defence raised in the application. Further rejection from US court, it was pleaded that the tribunal awarded the damages for the consequential loss as the contract excluded the damage. This was passed without the sufficient review of the law of contract which was done by the American Court, makes the standard review of the agreement and ordered the enforcement of the arbitral award.

The unsuccessful attempt to apply this ground, where the respondent puts an argument that the tribunal acted beyond its authority by providing a preclusive effect rather than holding evidentiary hearing to make its own findings. The court gave reason for this that the parties did not specify the procedure to be followed so it's on the discretion of the tribunal.

The other part that deals with the refusal of the enforcement of award, in that situation the court exceeds its authority in some way and not in other. The tribunal exceeds its authority partially and the part that submitted or made within the authority is saved and ordered the enforcement. The word 'may' is used for the enforcement of that part of the award is on the discretion of the court. Instance, action was brought before the Indian

[44] Minmetals Germany v Ferco Steel (1999) XXIV YBCA 739.

court, for examination of the award by the court as to determine whether the tribunal has exceeded its authority or not. The court held that the partially the award was enforced, to the matter that falls within the jurisdictional limits of the tribunal. The part that exceeds the authority or jurisdictional limit was refused enforcement.

iv. <u>Ground for the refusal on the composition of tribunal or procedure not compliance with the agreement to arbitrate or the prescribed law- Article V (1)(d)</u>

(d) "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"

The compositions of the arbitral tribunal or the procedure to be followed by the tribunal are very important factors for starting the proceedings. The Geneva Convention 1927, specifically provide that if the composition and procedure are not compliance with the law or with the agreement between the parties then the enforcement of the award can be refused. If the procedural law of the seat of the arbitration is not strictly followed then the award made out of it cannot be enforced accordingly. But New York Convention reverses the requirement; consider only the agreement between the parties to arbitrate is essentially follow for the commencement of the proceedings. In absence of the agreement the arbitration rules of the seat of the arbitration will considered for conducting the arbitration proceedings.

The case before the Supreme Court of Hong Kong (1994), argued before the court that the enforcement of an arbitral award made in China should be refused on the ground that the composition of the tribunal was non compliance with the agreement between the parties. The arbitrators who had been appointed were not on the Beijing list rather than was on the Shenzhen list of arbitrators.

<u>Kaplan J said:</u>

"Therefore, it is clear that the only ground upon which the enforcement can be refused are specified in… and that the burden of proof lies on the defendant. It is also clear that even a ground has been proved; the Court retains a discretionary power".

The judge allowed the enforcement of the award on the basis that parties knowingly participate in the arbitration proceedings that the arbitrators are not selected from the Beijing list but from the Shenzhen list of the arbitrators. Intentionally they participate in the proceeding and know cannot sought the profit from the error occurred. The doctrine of estoppels is considered for the other aspects of the Convention.

A successful defence on the ground before the US Court of Appeals, the parties had agreed that-

(a) "the two parties appointed two arbitrators and make an attempt to choose the third arbitrator, and

(b), the failure of the two parties appointed arbitrators as to agree upon a third arbitrator"[45]

The English Court would appoint one arbitrator and the appellant requested the Court to appoint a third arbitrator. In response to a request to refuse enforcement of the award rendered against it, the Court held that:

"The English court's appointment of the third arbitrator spoiled the arbitration process; the issue of appointment of the third arbitrator is more important matter. Article V (1) (d) of the New York Convention itself explains the importance of composition of the tribunal."

v. Ground for refusal to set aside the award or award suspended- Article (1) (e)

(e) "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"

This ground gave rise to the controversy than any of the above stated ground. This award also mentioned in both the New York Convention and same appears in the Model Law.

[45] Encyclopaedia Universalis SA (Luxembourg) v Encyclopaedia Britannica Inc. (US) (2005) XXX, YBCA 1136.

According to the Geneva Convention 1927, the reference to the word 'final' was used. This was understood as the court of the seat of the arbitration has to declare the award as 'final', as this gave rise to the problem of the double executor. Further it was intended that instead of the word 'final', the word 'binding' can resolve the problem. But some international rules and institutional rules of arbitration state that the award must be both final and binding upon the parties. The award is said to be binding upon the parties when it is not open for the appeal on merits of the award on an application to the court or through the rules of the arbitration.

There are other issues with respect to this ground for refusal that led to remarkable controversy. The language of provision that an award "*may* be refused" recognition and enforcement if it is set aside or suspended by a court at the seat of the arbitration is reasonable. Instance, an award has been set aside in New Zealand, not enforced in that country and it can be expected that the other countries also refused to enforce the award on the basis of international comity.

This is not really along these lines, notwithstanding. Courts in different nations may take the view (and undoubtedly, as will be described, in a few nations they have taken the view) that they will implement an award regardless of the possibility that it has been put aside by the courts of the seat of the assertion. This prompts to a circumstance in which an award that has been put aside as is unenforceable in its nation of starting point might be denied authorization under the New York Convention in one nation, however allowed implementation in another.

The issue emerges on the grounds that the New York Convention does not at all limit the grounds on which an award might be put aside or suspended by the court of the nation in which, or under the law of which, that arbitral award was made. This is a matter that is left to the household law of the nation concerned, and this local law may force on other nations necessities, that judges and attorneys somewhere else would not view as adequate to denounce the legitimacy of an award.

The recompense for nearby necessities that is made in the New York Convention has been portrayed by a previous secretary-general of the ICC Court as:

"an up to this point shake strong bulwark against the genuine internationalization of discretion, in light of the fact that in the arbitral award nation of starting point all methods for plan of action and all grounds of nullity appropriate to absolutely national award might be utilized to restrict acknowledgment abroad"

Another accomplished reporter has alluded to the 'an abomination of nearby particularities', which are fit for prompting to the putting aside of universal awards, and has recommended that 'such international standard invalidations' ought to be given impact and ought to be slighted internationally.

The court can always resist the enforcement of a foreign arbitral award. An award was rendered in the London (as the seat of the arbitration) and enforcement proceedings have to take place in US, further this award can be set aside or suspended by the Indian court because the parties to the dispute chosen the law of India to govern the substance of the matter. But above situation is exception as the Supreme Court of India held that the place of the arbitration is outside India the courts have no jurisdiction over the matter in respect of supportive or supervisory. [46]

The review of the five grounds of the Article V (1) of the New York Convention for the refusal of the recognition and enforcement of the foreign arbitral award and same also laid down in the UNCITRAL Model Law. These grounds are available for the party that resist the enforcement of the arbitral award. The burden of proof lies on the party that resist the enforcement.

Article V (2) provides:

Recognition and enforcement … may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

[46] Bharat Aluminium Co. v Kaiser Aluminum Technical Service, Inc, 6 September 2012

The recognition and enforcement of foreign arbitral award are very important for the implementation of the award in the respective state. The grounds of refusal of the arbitral award are of the utmost consideration. These grounds set in the New York Convention lays down the universal standards followed by the party states. Model Law also provide these grounds but not precisely same language. These grounds are applicable on every foreign award irrespective of the fact that in which country the award was made. In Model Law the six grounds out of seven of the New York Convention are set out, the grounds for setting aside the award by the enforcing court of the seat of the arbitration or where it is enforced by the party.

Laid down two grounds that are invoked by the court itself on its own discretion are:

i. Arbitrability- Article V (2)

(a) *"The subject matter of the difference is not capable of settlement by arbitration under the law of that country"*

Each country has different system of law and accordingly decides the subject matter of dispute is capable of resolved by the arbitration or not. The questions that arise before the matter referred and at time when the proceedings come to an end are:

"Is the subject matter of dispute is capable to be referred to the arbitration?"

"Would the subject matter of the dispute is capable of being settled by the arbitration under the law of the enforcing state?"

Generally, this issue relates to the law of the enforcing state under the New York Convention is governed by the public policy that changes from state to state with respect to their own laws.

The Supreme Court of Singapore ruled that:

"Whether a person is the alter ego of a company is an issue that does not have a public interest element, so is within the scope of submission to arbitration and is therefore arbitrable?"

The disputant had argued that the arbitrator could not hold that he was bound by the arbitration clause based on a finding of an alter ego, since the issue was not arbitrable under law that govern the law of the contract (Arizona law). The Court dismissed this argument, holding that governing law was not relevant, since the determination of the ground for refusal of enforcement under the law of the Singapore.

ii. Public policy

If an arbitral award is made by the tribunal at the Switzerland i.e., the seat of the arbitration and sought enforcement in the other country, and such award is contrary to the public policy of that country on this ground the court can refuse the enforcement. This ground can be brought by the court itself by its own motion. The right to refuse the enforcement of arbitral award is granted to the state while giving priority to its public policy. In some jurisdiction, it is the duty of the court, in which the enforcement action is brought, to examine that there is violation of the public policy.

Reference is made to 'public policy', it is must to recall the comment made almost two centuries ago by the English judge:

'It is never argued at all but where other points fail.'

Absolutely, the national courts in England are hesitant to pardon a award from requirement on grounds of open strategy. At one time, it was said that 'there is no case in which this special case has been connected by an English court'. For this situation, an English court declined to uphold a award offering impact to an agreement between a father and child that included the pirating of rugs out of Iran, in rupture of Iranian income laws and fare controls. The father and child had consented to present their question to intervention by the Beth Din, the Court of the Chief Rabbi in London, which connected Jewish law. As an issue of the appropriate Jewish law, the illicit motivation behind the agreement had no impact on the privileges of the gatherings, and the Beth Din continued to make a award upholding the agreement. In declining to authorize the award, in any case, the English court held that:

"The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by

procuring arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it."

In choices that have pulled in some basic commentary, the English courts dismisses the test to requirement, both at first case and in the Court of Appeal, in light of the fact that: the arbitral tribunal itself had considered the claims of remuneration and found that they had not been substantiated; "campaigning" was not, all things considered, an unlawful movement under the administering law picked by the gatherings; and the Court was confronted with global mediation grants that had been maintained by the Swiss Federal Tribunal, and accordingly needed to adjust people in general arrangement of demoralizing worldwide business debasement against the general population approach of supporting universal discretion grants.

In the New York Convention the term 'public policy' is referred to the 'public policy' of the enforcing state.

Courts have recognised that they apply their own public policy to the foreign awards, will give the international but not the domestic dimension. The Supreme Court of India (made the reference) said:

The issue is whether the wider concept in the municipal law or the narrow concept of public policy is applicable in the international law. Whereas, the court held that the narrow concept will prevail if it is contrary to public policy ground should be refused on the basis:

(i) fundamental policy of Indian law; or
(ii) the interests of India; or
(iii) Justice or morality.

iii. Other grounds

The grounds for the refusal of the enforcement of the award are listed in the Article V of the New York Convention and are exhaustive list of grounds. Courts even refused the enforcement on the basis of the grounds that are derived from other articles of the New York Convention. Moscow award's enforcement was refused by the US court on the ground of forum non conveniens, discretion with the court in the common law system but not known in the civil law system. This ground is not set in the Article V but in the Article III of the New

York Convention, that is subjected to the procedural rules of the enforcing court that also include the rule known as forum non conveniens.[47]

The court of appeal reversed the judgment, of the above rule of forum non conveniens, to the confirmation of the arbitral award by the lower court. "Figueiredo had acquired a award against the Peruvian government, which the last started paying out steadily, as per an along these lines sanctioned Peruvian statute that restrains the measure of cash that an office of the Peruvian government may pay every year to fulfil a judgment to 3 for every penny of the organization's yearly spending plan. The Second Circuit held that Peru was a more proper discussion for the implementation of the award than New York for various reasons, including the Peruvian top statute. So also to the court in Monde Re, the Court in Figueiredo held that Article III of the New York Convention and its proportionate Article IV of the Panama Convention, accommodating the use of domestic procedural law at the implementation arrange, take into account the use of gathering non conveniens. In any case, Judge Lynch, in a capable difference, opined that perceiving a discussion non conveniens protection would undermine the enforceability of award when all is said in done. For sure, the general thought of gathering non conveniens is contrary with the idea of global authorization of remote arbitral award, which takes as its beginning stage that the spots of mediation and main execution of the commitment are probably going to appear as something else, while the subsequent award can be implemented universally subject to constrained justification for refusal. Nearly by definition, there is probably going to be another purview with a nearer association with the hidden debate than the place of requirement. By the by, the general purpose of requirement under the New York Convention is to internationalize the authorization of award rendered somewhere else, not to oblige a gathering to uphold in the ward of inception."[48]

[47] Monegasque de Reassurance SAM (Monde Re) v NAK Naftogart of Ukraine and State of Ukraine, 311 F.3d 488
[48] Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru, 663 F.4d 384

CONCLUSION

International commercial arbitration has become the reality, practical method of resolving dispute at international level. Even though there are various issues that are affecting the method of international arbitration. Formations of contract between the parties that are the part of the global market include individuals, investors, and nation state or state agencies. The question that arose is with respect to the arbitration clause or the valid arbitration agreement. These are too legalistic issues and attract more attention of the parties and other aspect is that if they consider these issues then the contract will run smoothly between the parties. The important or more effective model clauses are:

(1) The International Court of Arbitration of the International Chamber of Commerce at Paris;
(2) The London Court of International Arbitration at London;
(3) The Commercial Arbitration Rules of the American Arbitration Association; and

From the discussions in all of these various forums, some common threads of consensus are beginning to emerge. There is a growing recognition that the multiplicity of arbitration rules and institutional arrangements, when carefully analyzed, differ very little in any essential qualities. Once such controversial issues as the place of arbitration and the designation of the arbitrator are settled, the remaining procedures for the conduct of the arbitration, with the few important exceptions noted below, are similar and follow common sense considerations of fairness and equity. There are six broad areas of agreement.

Proper Administration of Arbitrations

Even today many international commercial arbitrations proceedings are conducted without following any set procedure even without any administering authority. in this situation usually both the parties by mutual consent appoint an arbitrator for each side and then they appoint the third arbitrator but still there exist a drawback in this procedure which does not allow to continue with the process and the only drawback is the consent of the defendant which means when defendant does not want to proceed with the arbitration process he does not take the initiative to appoint the arbitrator. For every arbitration proceeding to be conducted there are various requirements that need to be fulfilled and without that it is not possible to conduct the adequate proceedings.

Sometimes appointment of arbitrator, proper procedure, appointment of administrating agency and the designation of the place for arbitration becomes force for delay and even more than that in some cases it acts as irreplaceable hurdles at the conducting of arbitration. The judgment given under administration proceeding is not considered binding until and unless it is not approved by the court of law. for the hearing to run effectively there are certain requirements that necessary to fulfil like: arrangement for meetings, transcripts, or interpreters; the filing of papers; filling vacancies created by the death and disability of the arbitrator but for the effective functioning of the arbitration proceeding it is required that there must be a proper set procedure that must be followed by the arbitration agencies.

Uniformity in Rules

As already demonstrated, there are many principles from which the parties can pick. Among the most broadly perceived are the Rules of the International Chamber of Commerce, the Rules of the United Nations Economic Commission for Asia and the Far East (ECAFE), the Arbitration Rules of the United Nations Economic Commission for Europe (ECE), and the Rules of Procedure of the Inter-American Commercial Arbitration Commission. Rules of technique are likewise accessible in large portions of the national establishments for intervention around the globe, including the different Foreign Trade Arbitration Commissions of the COMECON nations, the Japan Commercial Arbitration Association, the Indian Council of Arbitration, and the American Arbitration Association. There is a developing agreement that the best elements of these standards can be "homogenized" into one uniform set, since the distinctions are more in style than in fundamental standards. While the current guidelines would stay accessible for those gatherings who have turned out to be acclimated to them and select them by common inclination, generally perceived standards would kill a great part of the present disarray and discussion. Deal with the advancement of uniform guidelines is presently in progress under the joint aegis of UNCITRAL and the International Committee on Commercial Arbitration. The best elements of a wide determination of standards have gone into the early drafts, yet the fundamental edge work is that of the ECE and ECAFE models. At the mid-year meeting of the House of Delegates of the American Bar Association in February, 1974, an initial step was taken toward support of the improvement of uniform tenets. Taking after a suggestion of the Association's Section of International Law, the accompanying resolutions, cited here to some extent, were passed:

Be it settled that the American Bar Association perceives the requirement for incite advancement of a uniform arrangement of worldwide tenets of system to supplement the arbitration standards of the United Nations Economic Commission for Europe. Be it additionally settled that the American Bar Association promotes the endeavours of the American Arbitration Association to create said supplementary universal rules to be good with the standards of arbitral due process in this nation, with the understanding that no last activity endorsing the standards can be taken before the principles are submitted to the Association. The report of the December meeting of the International Law Section developed the resolutions as take after

The requirement for consistency is required by the way that American agents are presently confronted with a dumbfounding decision of untested discretion rules (ECE), obscure arbitral offices (outside exchange assertion commissions), new naming experts (remote assemblies of trade) and outside legitimate ideas of intervention methodology. An examination of the ECE Rules by global attorneys speaking to American business had uncovered a requirement for supplementation keeping in mind the end goal to give more prominent confirmations of an organized and compelling methodology. As needs be, the American Arbitration Association has taken proper activities to grow such supplementary standards as per customs of arbitral due process in this country. While there is expansive accord about the general arrangements of uniform assertion controls, various focuses in discussion, by and by, still must be settled. A portion of the systems over which conceivable contrasts remain are the accompanying:

(1) Legal advisors in this nation, both in the courts and in discretion, are acclimated to some type of prehearing disclosure. This custom is obscure in most different parts of the world, and it is the assessment of most legal counselors with wide worldwide experience that it would be troublesome and useless for the United States to demand this strategy in any arrangement of uniform principles.

(2) There is no current agreement as to which laws ought to be appropriate to the arbitral proceedings. Various expressions that have showed up in as of late arranged mediation conditions are "the pertinent law of the district of the discretion," "the procedural law of the area of the assertion,' "standards of contention of laws of the nation where the intervention is the seat," "the custom of world exchange," "material law of the nation where the discretion happens," "standards of the contention of laws," or "substantive contract law of the nation where the mediation happens."

(3) There is a question whether a party delegated authority ought to be "unbiased and autonomous." The general custom in Europe is so to consider a gathering selected mediator. Then again, in U.S. case law a qualification hosts been drawn amongst nonpartisan and get-together delegated mediators with respect to their fair-minded status. On the off chance that the guidelines require that he be "fair and free," it then takes after that he should uncover any money related or individual enthusiasm for the gathering that designated him and that the connection amongst him and "his" gathering over the span of the discretion procedures must stay at a careful distance. Any direct despite what might be expected could be justification for toppling the honor. It likewise takes after that each gathering must depend on the other party to take after the same moral set of principles toward "their" individual referees. Some global legal counselors in the United States lean toward that gathering selected judges not be required to be autonomous, especially in cases that scaffold varying societies, for example, East-West or U.S.- China question. Other experienced legal counselors are set up in worldwide cases to take after the more broad universal practice under which party-selected judges are relied upon to be free of the individuals who choose them.

(4) U.S. lawyers are acclimated to one side of round of questioning of witnesses. This custom is not for the most part took after outside of the United States. The typical practice is that inquiries coordinated to a contradicting witness are submitted first to the referee and after that he, in his judgment, and in his words, puts the question to the witness. Some U.S. universal legal advisors consider that the nonappearance of the privilege to round of questioning has not kept their customers from accepting a reasonable and unbiased hearing.

(5) In the United States we are acclimated to business grants without reasons or feelings. In most different parts of the world, grants in business intervention are by and large joined by reasons, and in a few nations the law requires that reasons be given if the award is to be enforceable. In light of drafts now being coursed, it appears to be likely that uniform universal tenets will require that reasons be given in the award, unless the gatherings commonly and explicitly proclaim that reasons should not be given.

(6) Proceedings shall normally be conducted on the basis of documents. However, if the parties so agree or should the arbitrator/s so decide, the arbitrator/s may also have oral hearings. Article 23 of the ECE Rules state: "Provided that the parties agree, the

arbitrators shall be entitled to render an award on documentary evidence without an oral hearing." Whether or not the rules should presume oral hearings (as do the ECE Rules) or the use of documents instead (as in the case of the ECAFE Rules), is still an open question

Here is an accord that, if there is a satisfactory arrangement of uniform tenets, such standards can be adjusted by assertion in specific points of interest, if wanted, to meet the extraordinary needs of the gatherings to an agreement or the exceptional circum positions and traditions of the business or of the two exchanging countries.

Uniformity in Rules to be Administered by Competent Institution

Uniform standards could be regulated by any skillful discretion office anyplace on the planet including those that have existing principles, for example, the ICC, IACAC, the AAA, FTAC, and so on. The current specific intervention foundations are especially very much fit the bill to attempt this assignment. Many councils of business, particularly those in nations that now appreciate notorieties as "nonpartisan countries," are likewise prepared for this pur posture and even now are frequently called upon to go about as designating organizations. In the Western Hemisphere, people or foundations in Sweden and Switzerland are the frequently called upon to go about as designating organizations and are the regularly chosen areas for universal discretions. Paris is additionally supported by many gatherings. In the Far East, no urban communities have yet built up the notoriety of Stockholm or Geneva for this reason, however there are many specific offices prepared to play out this errand if called upon to do as such, for example, the Indian Council of Arbitration, the Japanese Commercial Arbitration Association, and the Korean Arbitration Association. Unless there is understanding by the gatherings despite what might be expected, it is turning into an acknowledged practice that the discretion should occur in a nation other than that of both of the two included gatherings.

Developed Panels of Arbitrators

There is likewise a developing accord that boards of arbitrators ought to be chosen and made accessible by the different delegating and overseeing organizations destined to be assigned by the parties. Huge numbers of the arbitration organizations named above as of now have such boards. There is requirement for further advancement of these boards, and it would be

attractive for delegates of the different exchanging countries to take an interest in this choice and screening process.

The Arbitration Clause must be explicit for the Arbitration and is divided into three sequence steps:

(1) The written arbitration clause,

(2) The designation of the arbitrators and the conduct of the arbitration

(3) The enforcement of the arbitral award.

It has been said that the proper care should be taken in drafting of the arbitration clause or agreement. A list of the ingredients for drafting a good arbitration clause would include the following:

(a) An agreement to submit any dispute arising out of the contract to arbitration;

(b) Identification of the rules;

(c) The seat of the arbitration;

(d) The appointing arbitrators and administration of tribunal;

(e) The proper language to be used in the proceedings;

(f) Agreement on stating that how many arbitrators are to be appointed;

(g) Award shall be governed by the New York Convention 1958;

(h) The laws that will govern;

(i) Agreement that judgment upon the award may be entered in any court having jurisdiction thereof;

(j) Agreement on whether the arbitrators are authorized to decide exaequoet bono.

It looks so obvious that the in next few years will see rapid developments in international arbitration. It is important for the attorneys and businessmen interested in this aspect of international commerce and trade to keep up with the developments and their views to be known to the AAA, opinions are being collected to supply an "American voice" in the

international forums or institutions where the decisions are being made in respect of international commercial arbitration.

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