THE OPTIMIZATION OF COURT INVOLVEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

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# Table of Contents

**Introductory Chapter** ............................................................................................................................................. 9  
- The research problem: theoretical and practical importance of the study ........................................... 9  
- Research questions .................................................................................................................................................. 13  
- Objectives of the research ..................................................................................................................................... 14  
- Scope of the study and methodology .................................................................................................................. 15  
- Structure and Contribution of the research ........................................................................................................ 17  

**Chapter One: An Overview of Dispute Settlement Mechanisms in International Commercial Transactions** ................................................................................................................................. 21  
1.1 Introduction .......................................................................................................................................................... 21  
1.2 History and background of arbitration and ADR .......................................................................................... 22  
1.3 Arbitration .......................................................................................................................................................... 23  
1.3.1 Different types of arbitration ......................................................................................................................... 24  
1.4 Other mechanisms in dispute settlement .................................................................................................... 25  
1.5 Adversarial methods ......................................................................................................................................... 25  
1.6 Non-adversarial methods ................................................................................................................................. 27  
1.6.1 Negotiation ................................................................................................................................................... 28  
1.6.2 Mediation ..................................................................................................................................................... 29  
1.6.3 Conciliation ................................................................................................................................................. 30  
1.7 Expert determination (enquiry) ......................................................................................................................... 31  
1.8 Comparison between various dispute settlement mechanisms ....................................................................... 32  
1.8.1 Cost .............................................................................................................................................................. 32  
1.8.2 Speed of dispute resolution ......................................................................................................................... 33  
1.8.3 Confidentiality and privacy .......................................................................................................................... 35  
1.8.4 Flexibility ..................................................................................................................................................... 36  
1.8.5 Perceived fairness ....................................................................................................................................... 37  
1.8.6 Effectiveness ................................................................................................................................................. 38  
1.9 Impact on continuing business relations ...................................................................................................... 39  
1.10 Conclusion ....................................................................................................................................................... 40  

**Chapter Two: Court Involvement Prior to Establishment of Arbitral Tribunal** ......................................................... 42
2.1 Introduction ......................................................................................................................... 42
2.2 Various stages of court involvement .................................................................................. 44
2.3 Separability and competence-competence ....................................................................... 47
2.4 Injunctions involving arbitration ...................................................................................... 53
2.4.1 Anti-arbitration injunctions ............................................................................................ 54
2.4.2 Should national courts grant anti-arbitration injunctions? ........................................... 60
2.5 Anti-suit injunctions ........................................................................................................... 64
2.6 Pro-arbitration orders ......................................................................................................... 67
2.6.1 When should courts compel parties to arbitrate? .......................................................... 68
2.6.2 To what extent can courts compel third parties to participate in arbitration? .......... 72
2.7 Gateway problem in international commercial arbitration .............................................. 74
2.8 Conclusion .......................................................................................................................... 79

Chapter Three: Court Involvement at the Commencement of the Arbitration Process .... 83
3.1 Introduction ......................................................................................................................... 83
3.2 Establishment of the arbitral tribunal ................................................................................. 86
3.2.1 Party autonomy for constituting the tribunal ................................................................. 88
3.2.2 Various techniques to appoint the tribunal ................................................................. 91
3.2.3 Who has jurisdiction to interfere .................................................................................. 98
3.3 Challenges of arbitrators ................................................................................................... 100
3.3.1 Impartiality and independence of arbitrators ............................................................... 101
3.3.2 Grounds for challenging arbitrators ............................................................................ 104
3.3.3 Procedures for challenge: Who has jurisdiction, the court or the arbitral tribunal? .... 112
3.4 Consolidation ..................................................................................................................... 117
3.4.1 Grounds for consolidation and joinder/intervention in international arbitration ...... 118
3.4.2 Theoretical debates on extension doctrines ................................................................. 124
3.4.3 International arbitral proceedings and issues of multiparty cases ............................... 136
3.4.4 Towards a transnational approach to consolidation .................................................... 144
3.5 Conclusion .......................................................................................................................... 148

Chapter Four: National Courts and their Complementary Roles in Granting Interim
Measures .................................................................................................................................. 154
4.1 Introduction ......................................................................................................................... 154
4.2 Arbitrators’ ability to order interim measures ................................................................. 156
4.3 Limitation on arbitral tribunal power to order provisional measures ................................................................. 164
  4.3.1 Party autonomy .................................................................................................................................................. 164
  4.3.2 Lack of power to order provisional measures prior to establishment .............................................................. 165
  4.3.3 Limitation on subject matter of the dispute ........................................................................................................ 166
  4.3.4 No ex parte application ....................................................................................................................................... 168
  4.3.5 Lack of power of enforcement ........................................................................................................................... 171

4.4 Exercise of tribunal's authority to order provisional relief ...................................................................................... 175
  4.4.1 Increased willingness in the arbitral tribunal ........................................................................................................ 176
  4.4.2 Governing law and arbitrators-ordered interim measures ................................................................................... 177

4.5 Preliminary conditions to order provisional measures .............................................................................................. 180
  4.5.1 Irreparable or serious injury .................................................................................................................................. 181
  4.5.2 Urgency ................................................................................................................................................................. 182
  4.5.3 No pre-judgment of the merit ............................................................................................................................... 183
  4.5.4 Probability of success on merit ............................................................................................................................ 184
  4.5.5 Jurisdiction ............................................................................................................................................................ 186
  4.5.6 Security .................................................................................................................................................................... 186

4.6 Types of interim measures ......................................................................................................................................... 187
  4.6.1 Preserving the status quo ........................................................................................................................................ 187
  4.6.2 Measures aimed at relief in respect to parallel proceedings .................................................................................. 189
  4.6.3 Requiring specific performance of contract ........................................................................................................ 190
  4.6.4 Orders requiring security for legal cost .................................................................................................................. 191
  4.6.5 Orders for interim payment ...................................................................................................................................... 192

4.7 Rationale for concurrent judicial jurisdiction to grant provisional measures in aid of arbitration ................................... 193
  4.7.1 Introduction ............................................................................................................................................................ 194
  4.7.2 Authority of national courts in granting provisional relief ...................................................................................... 195
  4.7.3 Future directions: Proper application of Article II(3) to court-ordered provisional measures .................................. 200

4.8 Conclusion ................................................................................................................................................................. 201

Chapter Five: Court Involvement in the Recognition and Enforcement of Foreign Arbitral Award .............................................. 206

5.1 Introduction ............................................................................................................................................................... 206

5.2 The role of the New York Convention and national legislation in facilitating recognition and enforcement of foreign arbitral awards .............................................................................................................. 208
5.3 Impediments to recognition and enforcement of foreign arbitral awards ............ 213

5.4 Potential situations of court involvement in recognition and enforcement of arbitral awards ................................................................................................................. 213

5.5 Grounds for non-recognition or enforcement of an arbitral award .................. 219

5.5.1 International public policy ............................................................................. 220

5.5.2 International arbitrability .............................................................................. 227

5.6 Conclusion ....................................................................................................... 231

Conclusion .............................................................................................................. 234

Bibliography .......................................................................................................... 241

Books ...................................................................................................................... 241

Journal articles, reports & book chapters .............................................................. 246

Table of Cases ........................................................................................................ 262

Table of Statutes .................................................................................................... 276

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Abstract

Despite all the advantages of international arbitration, it has never been considered as an entirely independent and complete dispute settlement system and as such has been traditionally assisted by national courts. Nevertheless, the optimum model for courts’ involvements in international arbitration is not clear. More importantly, given the latest development in the theory and practice of international arbitration, the necessity and nature of such involvement is under question. Accordingly, this thesis aims to determine the optimum scenario of court involvement in international arbitration in order to enhance its efficiency by providing a fairly harmonised (transnational) approach regarding court involvement in the various stages of international arbitration.

Taking efficiency consideration as the main guidance and indicator in modern legal scholarship, the thesis will develop normative discourse regarding harmonization of court involvement in international arbitration based on the comparative and analytical study of two major jurisdictions, the United Kingdom and the United States, and will suggest different solutions which can minimize the need for court’s involvements through their substitution by other mechanisms such as party autonomy as well as the expansion of the competence and the authorities of arbitral tribunals.

To achieve the desired result, this thesis will analyse and respond to the following fundamental questions: (a) Why, where and when can national courts become involved in arbitration cases? (b) Is there any potential conflict between national courts’ competence and the historical facts regarding independence of international arbitration? (c) What are the potential solutions to harmonize court involvement in international arbitration at each stage? (d) To what extent can it be argued that national courts should waive part of their authority in favour of international arbitration in order to enhance the efficiency of international arbitration? (e) What are the potential avenues that need to be explored in order to harmonize court involvement in international arbitration?

After examining the abovementioned questions, the thesis concludes that courts’ involvement in international arbitration may occur in 4 different stages, namely, before the establishment of arbitral tribunal, at the commencement of arbitration process, during the arbitration and finally at the time of recognition and enforcement of foreign arbitral award. It also suggests that prior to establishment of arbitral tribunal, recognition of a concurrent jurisdiction for the court of the place of arbitration can significantly remove the potential obstacles in front of the conclusion of the tribunal. Moreover, and given the extended role of party autonomy in selecting substantive and procedural law, arbitrating parties can minimize the possibility of recourse to national courts at the commencement of the tribunal and during the process by submitting their claims arbitration institutions which can offer most of the services offered by national courts and as such will remove the need for national courts intervention. Finally, the thesis proposes that although recognition and enforcement of arbitral award may inevitably require the involvement of local courts, development of a transnational notion of public policy and arbitrability based on efficiency will lead to a sort of universal approach in the enforcement of international awards regardless of the place of business or the nationality of the party-debtor in arbitration.
In the name of Allah, the beneficient, the merciful

Dedication

This thesis is dedicated to my beloved parents.

Anything good that has happened in my life has been because of their love and support, either morally or financially.

And also to my sister, my uncle Ali and a special person in my life who have always supported and encouraged me.
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Introductory Chapter

• The research problem: theoretical and practical importance of the study

In modern times, globalization and the increasing growth of international business in addition to the swift and considerable changes happening in international transactions have made it necessary to create a dispute settlement mechanism capable of responding to the needs and requirements of international transactions. In addressing the need for a proper dispute settlement mechanism for international business, attempts have been made to develop a new discourse for global transactions which aims to minimize the likelihood of disputes emerging among the professional market players. At the same time, market practitioners have strived to create alternative dispute resolution (ADR) that is capable and efficient enough to respond to the actual needs within the global market.

Negotiation, mediation, conciliation and international commercial arbitration are the most prominent examples of these alternative dispute settlement mechanisms. However, given the considerable advantages of international arbitration, including cost; speed of resolution; confidentiality/privacy; flexibility; perceived fairness; effectiveness; and the impact on continuing business relations, market practitioners have shown a preference for using it as the main facility to resolve their disputes.

Arbitration, given its consensual nature which gives significant autonomy and power to the parties to control the arbitration, as well as having binding nature, has become more promising than other ADR mechanisms. It also allows parties to benefit from a neutral, unbiased forum that is based on fairness.

In spite of the aforementioned advantages, international arbitration is associated with a series of shortcomings –above all, a lack of autonomous enforcement mechanism. Hence, the

2 Deborah R Hensler, ‘Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system’ (2003) 108 Penn St L Rev 165.
enforcement of foreign arbitral awards must be sought from a national court when the final arbitral award is not voluntarily enforced by the losing party. This creates a considerable ground for the involvement of national courts in arbitration because, typically, a national judge who is expected to recognize the *res judicata* effect of an arbitral award needs to ensure the fairness of the proceedings leading to the award and determine that the award is free from procedural irregularities and that the recognition of the award does not endanger public policy in the place of enforcement.

There are other instances which may require the involvement of national courts in arbitration proceedings. Before exploring these instances and in order to have a better understanding of the potential grounds for the involvement of national courts in international arbitration, the following four features of international arbitration should be taken into account.

First and foremost, international arbitration is independent in the sense that it exists in a separate and autonomous domain from national laws and jurisdictions. In other words, arbitration does not, as some have argued, function within a contractual structure or through opting out of the competence of national courts to audit a dispute, or even a combination of these two things. However, utilizing this consensual method of resolving mutual disputes requires a contractual basis; this indicates mutual consent to adopt this method instead of litigation.

Secondly, by opting for arbitration, parties have stipulated expressly their positive intention to pursue an alternative dispute resolution system. This is the same regardless of the express choice of a national law by the parties to govern the substantive issues of the contract or of the arbitration. More specifically, this choice means that the parties have intentionally and expressly abandoned national courts to settle their disputes. They may do so primarily because in

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the absence of a transnational commercial court with global jurisdiction, recourse to national courts is likely to enhance concerns regarding courts’ impartiality and independence.\textsuperscript{6}

Thirdly, except in rare circumstances, the arbitral tribunal is responsible for determining and resolving all relevant issues in the dispute between the parties. That is to say, the agreement to arbitrate can survive even where the validity of the container agreement may be challenged. Additionally, as the principle of competence-competence states, the arbitral tribunal is authorized, if not obliged, to make a decision on its own jurisdiction.\textsuperscript{7} These two principles are central to the scholarly debates on the harmonization of court involvement in international arbitration.\textsuperscript{8}

Finally, and despite the autonomous nature of arbitration, no system of dispute resolution can exist in a vacuum. In other words, despite the claims of total independence, international arbitration interacts with national jurisdiction without prejudice to its autonomy to prove its existence, defend its legitimacy and, above all, to get support and help where necessary to enhance its effectiveness. Assistance of the national courts, as we shall see, may appear at various times and in various forms.

With these four characteristics in mind, this thesis will consider the likely circumstances where national courts may get involved in international arbitration. Initially, however, it is necessary to set out an analytical framework to assess these circumstances and to develop an argument regarding the contribution of the courts as well as to express why a specific intervention is relevant/irrelevant, desirable/undesirable or disruptive/constructive.

The potential grounds for court involvement in international arbitration may be either the result of the application of the national laws or party autonomy. As a result, national courts may become involved in arbitration for two reasons: first and foremost because national laws are permissive, and secondly due to the fact that they are invited or encouraged to do so.

In spite of these potential grounds for court involvement in international arbitration, there is no benchmark to evaluate whether national approaches regarding court involvement are destructive or constructive. Empirical studies in the past have shown that the concurrent application of national laws in a case will ultimately undermine the efficiency of international arbitration and threaten its status as an independent means of dispute settlement. Its simultaneous application may also undermine the efficiency of international arbitration by prolonging the duration of each case.

A number of solutions, including harmonization of arbitration rules and the arbitration process, have been proposed to resolve this problem. The UNCITRAL Model Law,\(^9\) for instance, aims to determine the grounds for court involvement at different stages of international arbitration and to some extent harmonize such involvement in order to remove unnecessary and irrelevant interventions of national laws and courts which hinder the arbitration process and ultimately makes it unsatisfactory for global transactions.

Also, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) strived to establish a new practice for the recognition and enforcement of foreign arbitral award in national courts.\(^11\) After the ratification of this convention in over 130 countries, it has now obtained an undeniable role in the harmonization of disparate approaches and as such in mitigating and managing the role of national laws at the time of recognition and enforcement of the foreign arbitral award. However, even the NYC is not completely successful in the harmonization of court involvement at the time of enforcement of the foreign arbitral award.\(^12\)

Being permissive and leaving important issues such as arbitrability and public policy to the determination of national courts, in practice, has considerably diverted the convention from its underlying objective, particularly in jurisdictions which offer broad interpretation of these two concepts. This means that issues of court involvement in international arbitration have not been

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\(^10\) The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly to promote the progressive harmonization and unification of international trade law.
\(^12\) ibid Article II(3).
settled completely and many questions still remain unresolved. Despite quite a considerable amount of literature on this topic, there has not yet been a systematic analysis on the necessity of selecting and pursuing one single transnational approach for court involvement before, during and after conducting an arbitration case.

- **Research questions**

The need to harmonize court involvement in international arbitration is of great importance nowadays due to the fact that international business practitioners often select international arbitration as their main dispute settlement mechanism. This is mainly due to the confidentiality and neutrality of the arbitration process. Additionally, international arbitration is cheaper and faster than litigation. Above all, arbitration is normally formed by the parties’ autonomy. Therefore, enforcement of the arbitral award, in most cases, is relatively easier than international litigation.

Moreover, international arbitration, at least for the enforcement of the arbitral award, inevitably requires the presence of national courts. Thus, in order create a balance between the need to strengthen the independence of international arbitration on the one hand, and utilize the power of national courts to promote international arbitration on the other, the matter of court involvement must be harmonized. Accordingly, the thesis will analyse and respond to the following fundamental questions: (a) Why, where and when can national courts become involved in arbitration cases? (b) Is there any potential conflict between national courts’ competence and the historical facts regarding independence of international arbitration? (c) What are the potential solutions to harmonize court involvement in international arbitration at each stage? (d) To what extent can it be argued that national courts should waive part of their authority in favour of international arbitration in order to enhance the efficiency of international arbitration? (e) What are the potential avenues to harmonize court involvement in international arbitration at each stage of the arbitration process?

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• Objectives of the research

The aim of this research is to determine the optimum level of court involvement in international arbitration in order to enhance its efficiency by providing a fairly harmonised (transnational) approach regarding court involvement in arbitration. It has been argued that the independence of international arbitration requires the minimization of the grounds for court involvement. However, as discussed above, there is a kind of inevitable interaction between national courts and international arbitration which sometimes requires involvement of national courts in arbitration proceedings. That said, this thesis will argue that any such interaction should take into consideration two significant points. First, that any interaction should protect the independence of international arbitration. Second, interactions between arbitration and courts should be justified on the basis of a cost-benefit (economic) analysis of law.\textsuperscript{14}

Such jurisprudential questions were considered to be issues of state sovereignty and as such it was very difficult to discuss them normatively. In other words, there has been no benchmark to evaluate whether national approaches regarding court involvement are destructive or constructive. However, it seems that \textit{efficiency} considerations (cost-benefit analysis) can be aptly chosen as the benchmark to evaluate usefulness and functionality of one approach vis-à-vis the others.\textsuperscript{15} This is mainly because such an approach in analysing the law would lead to solutions which are based on pure rationality. Therefore, territorial cultural, historical, social and political values or expectations would not endanger the viability of purported solutions for each stage of international arbitration. It follows that the cost-benefit analysis\textsuperscript{16} is of great importance because it facilitates normative debates on the necessity of harmonization of court involvement, minimization of involvement grounds and empowerment of international arbitration vis-à-vis national courts. Therefore, such analysis can be used as an indicator or benchmark to determine the most efficient approach. There is no doubt that the most efficient solution is always the best choice.

Moreover, a cost-benefit analysis, as will be explored later in the thesis, will insulate the final outcome from nationalistic (biased) solutions and paves the way to develop a transnational discourse to deal with all issues of court involvement in international arbitration. This basically means that what will be proposed as a transnational normative approach must, from one side, minimize costs of its implementation, and from the other side, enhance the willingness among the members of the global business community as well as states to fulfil this normative approach for the future.

- Scope of the study and methodology

Notwithstanding the fact that this thesis aims to develop a normative discourse regarding harmonization of court involvement in international arbitration, such an analysis should not be based on an abstract and hypothetical framework. Accordingly, this thesis will follow a comparative approach that will utilize efficiency considerations that are based on cost-benefit analysis of the law. Accordingly, this thesis undertakes a comparative analytical study of two major jurisdictions: the United Kingdom and the United States. These jurisdictions have been chosen for a number of reasons. First and foremost, they are among the most developed jurisdictions that underpin the independence of international arbitration as an alternative dispute settlement mechanism which in turn makes them the main global hubs of alternative dispute settlement.

Moreover, common law jurisdictions, in contrast with civil law, have always avoided abstraction and generalization in commercial law which in turn makes these two common law jurisdictions more favourable for the purpose of this study. It is submitted that commercial law, either substantive or procedural, in common law jurisdictions, has always focused on finding solutions based on purely commercial cases. Therefore, such jurisdictions have always taken a more pragmatic approach to problem solving and dealing with jurisprudential barriers.

Civil law jurisdictions, in contrast, have focused significantly on systemic thinking that does not pay great attention to other sources of law, such as case law. As a result, its solutions

often do not consider the particular requirements of day-to-day business and are normally based on the social, cultural and economic background of civil law countries. As such, civil law jurisdictions may not necessarily be suitable as the basis of a transnational approach.

More importantly, the analytical studies of legal transnationalization and particularly current discourse of modern *lex mercatoria* demonstrates that the methodological approach needed for the development of this new body of law is more or less similar to the common law approach and the logical analysis used in its construction.\(^\text{18}\) That said, the comparative approach adopted by this thesis will use a cost-benefit analysis (efficiency consideration) as an indicator to find the best approach to recommend for all jurisdictions. This is because a comparative study based on efficiency will lead to a more rational position regarding the advantages and disadvantages of court involvement in international arbitration as will be shown later in the thesis.

Furthermore, jurisdictional issues are not merely legal concerns, they also reflect issues of state sovereignty which normally have a political connotation. Therefore, following an analysis based on an efficiency consideration will enable the thesis to develop convincing arguments for the harmonization of court involvement in international arbitration. Such a methodological approach will insulate the thesis findings from bias and impracticality and should pave the way to the further development of a transnational approach for court involvement in the arbitration process.

Additionally, and given that international arbitration is the most desirable dispute settlement mechanism for market practitioners, efficiency considerations should underpin the promotion and independence of international arbitration vis-à-vis international litigation and national court intervention in the arbitration process. Also, efficiency consideration will be used to explain the need for national courts to waive part of their authority in favour of international arbitration – in case of interim measures – or to modify their precedents when they apply their authority in international arbitration in case of appointment and challenges to the arbitration tribunals. More importantly, the use of the comparative study of the abovementioned

\(^{18}\) ibid.
jurisdictions based on a cost benefit analysis will allow the thesis to acknowledge the facilitating role of national courts in international arbitration in the early stages of international arbitration where the aim is to overcome obstacles to the establishment of an arbitral tribunal, while strongly refuting any court initiation which may undermine the competence-competence or separability principle.¹⁹

• **Structure and Contribution of the research**

  It has been argued that in modern times, globalization and the increasing growth of international business in addition to the swift and considerable changes in international transactions have made it necessary to create a dispute settlement mechanism such as international commercial arbitration which is capable of responding to the needs and requirements of international transactions.²⁰

  Arbitration is a semi-judicial and more formal dispute resolution process whereby parties refer their dispute to an arbitrator, a qualified and independent third party, for determination. The rationale behind this dispute resolution process is that it is capable of diverting commercial disputes away from the legal system of a specific jurisdiction to a self-regulated system. Given the considerable advantages of international arbitration, including cost; speed of resolution; confidentiality/privacy; flexibility; perceived fairness; effectiveness; and the impact on continuing business relations, market practitioners have shown a preference for using it as the main facility to resolve their disputes.²¹

  Nonetheless, the efficiency and functionality of international arbitration has always been influenced by the potential intervention of national courts. Reading the New York Convention and UNCITRAL Model Law together reveals that national courts may get involved in the process of international arbitration in four separate stages: prior to establishment of arbitral tribunal; at the commencement of arbitration proceedings; during the arbitration process and finally at the time of recognition and enforcement of a foreign arbitral award. Moreover, the potential role of national courts and what is expected from them may vary depending on the

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¹⁹ See Chapter 2, Section 2.3, p.63  
²⁰ Jannadia (n 1) 41.  
²¹ Hensler (n 2) 165.
different stages of international arbitration. In other words, the competence, duty and functionality of national courts depend considerably on the status of arbitration proceedings. Hence, parties to the arbitration agreement may sometimes expect and welcome such court involvement or, in contrast, may consider it as interference that undermines the functionality of international arbitration.

The contribution of this thesis is to determine the optimum scenario of court involvement in international arbitration in order to enhance its efficiency by providing a fairly harmonised (transnational) approach regarding court involvement in the various stages of international arbitration. Taking efficiency consideration as the main guidance and indicator in modern legal scholarship, the thesis will develop normative discourse regarding harmonization of court involvement in international arbitration based on the comparative and analytical study of two major jurisdictions, the UK and the US, and will suggest a number of solutions which can minimize the need for court’s involvements by utilizing other mechanisms such as party autonomy as well as the expansion of the competence and the authorities of arbitral tribunals.

This thesis has been divided into five chapters. The first chapter will discuss the definition of arbitration and its particular features and compare it with other dispute settlement facilities, including litigation, negotiation, mediation, conciliation and expert determination, and elaborate on the advantages of international arbitration which make it the prime dispute settlement mechanism in international transactions.

The second chapter will analyse the likely occasions when national courts may get involved in international arbitrations. It continues to discuss court involvement prior to establishment of arbitral tribunal and argue that national courts should have a managed contribution at this stage. In this chapter, the thesis suggests that a transnational approach which is based on the ‘gateway issues’ discourse in United States can be used as a model for the harmonization of court involvement in this stage of the arbitration process.

Chapter three deals with the second instance where national courts may get involved in an arbitration is at the commencement of the proceeding when national courts may be asked to assist with three important issues: (a) appointment of the arbitrators and establishment of the panel; (b) challenge of the arbitration; and (c) consolidation of two or more arbitration
agreements. The thesis argues that promotion of arbitration institutions and increasing their authority to deal with the aforementioned issues can remove the need for court involvements at this stage. As a result, it will be argued that the best practice to insulate the independence of international arbitration from court involvement at this stage is to use institutional rather than ad hoc arbitration.

Chapter four will discuss the role of national courts during the arbitration process and analyse the auxiliary role of courts particularly in granting interim measures. It will also elaborate the intrinsic shortcomings of international arbitration in granting certain types of interim measures either prior to establishment of the arbitral tribunal or during the arbitration proceedings. Finally, it will analyse the possibility of increasing the authority of the arbitral tribunal in granting interim relief which may have third party impacts. This chapter shows that although arbitrators can grant some types of interim relief, they are not capable of granting interim measures which have third party effect. As a result, arbitration needs to be backed up with national courts if an interim measure of this type is needed during the proceeding. The thesis also suggests that in order to avoid conflicting injunctions, the only authorized court for granting of this type of interim measure should be exclusively given to the court of the place of arbitration.

Chapter five turns its attention to the role of national courts in the recognition and enforcement of the foreign arbitral award, and the role of international instruments in designing an international approach for the recognition and enforcement of a foreign arbitral award. It will argue that notwithstanding the significant role of international documents such as NYC, court involvement at this stage still requires more harmonization, particularly in terms of interpretation of some provisions of the NYC. As such, it suggests a transnational definition of the two notions of public policy and arbitrability incorporated in the NYC. The importance of this approach is to ensure similar interpretation of the aforementioned notions in the convention and should facilitate, at least in theory, the harmonization of court involvement in arbitration process.

Finally, in the concluding chapter, the thesis argues that safeguarding of the arbitration process and autonomy of international arbitration as well as adopting efficiency considerations which have already been discussed in the previous chapter will lead to practical solutions that
could minimize court involvement in the arbitration process. The thesis suggests that such a pragmatic approach is multifaceted since it removes all of the grounds for the involvement of the national courts at the commencement of the arbitration and reinforces the minimum and managed involvement of national courts prior to the establishment, during the arbitration process or at the time of the enforcement of foreign arbitral awards.
Chapter One: An Overview of Dispute Settlement Mechanisms in International Commercial Transactions

1.1 Introduction

Studying a current issue in any field of law requires having a clear idea about its history, the process of its evolution, the features that distinguish it from other similar legal issues and most importantly the definition of the major elements within the field of study. The main issue in question in this research is the harmonization of court involvement in the various stages of international arbitration and in order to do that we need to have a clear understanding of the concepts of Arbitration and ADR in general. The term international arbitration is vague and needs clarification. In modern legal literature, it is divided into three independent branches. The first deals with the controversies between States, the second one focuses on State contracts with private parties and the last one, namely commercial arbitration, aims to settle commercial disputes arising between two private entities.

This thesis will primarily study international commercial arbitration and the possibility of court involvement in its process. It will also consider investment arbitration arising from state contracts where they are relevant, most notably in some special cases of enforcement of the award. Accordingly, this chapter will discuss the definition of arbitration and other legal institutions from the perspective of dispute resolution and review the background of arbitration and ADR (alternative dispute resolution). From the available methods normally included under the term ADR, four mechanisms will be analysed: negotiation, mediation, conciliation and expert determination. Furthermore, all methods will be categorized as adversarial or non-adversarial methods according to the nature of these mechanisms. Adversarial methods including arbitration and litigation are also referred to as rights-based techniques whereas non-adversarial methods are sometimes called interest-based techniques.

This chapter goes on to compare arbitration with the aforementioned methods and elaborate on the advantages and disadvantages of each mechanism. Finally, it will analyse the

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22 For an overview of international arbitration see Nigel Blackaby and others, Redfern and Hunter on International Arbitration (Oxford University Press 2009) 1-83.
specificities that make international arbitration more attractive for global market practitioners aiming to settle legal disputes arising from or related to their legal transactions. The last two sections will show that, despite considerable tendency to utilize arbitration for the purpose of settling commercial disputes in the global market, arbitration is by no means complete and there are still some deficiencies which could undermine the efficiency of this effective form of dispute resolution. Principally, the chapter will touch on the role and possible interventions of national courts in international arbitration, which represent the main focus of this thesis.

1.2 History and background of arbitration and ADR

Globalization has transformed many aspects of the modern community by lessening the significance of political borders. The internet and other technologies have contributed considerably in facilitating trade and business across the globe. Countries, corporations and commercial entities are trying to meet their needs from the pool of producers in the international market by offering competitive prices and quality. This, along with attempts to enhance the free movement of goods and money through World Trade Organization agreements, has substantially increased the volume of trade and business between nations and countries with disparate commercial approaches. More importantly, this significant development has created an integrated network of commercial relationships in which the non-performance of a transaction not only damages the other party but may also lead to a set of defaults in the entire international market. Although this progress in globalisation and the extension of commerce and business across borders has succeeded in enhancing the efficiency of global trade, it has always been accompanied by the possibility of enhanced international disputes. Such disputes are normally the result of a breakdown in existing business relations or a clash of commercial interests between the involved parties. This perpetual development in international trade and business has contributed to the development of the dispute settlement mechanism. In other words, despite such complexities, dispute resolution adapts itself according to the demands of the merchant community by providing more innovative mechanisms which are able to settle complex disputes more effectively and within an appropriate time.
1.3 Arbitration

Arbitration is a semi-judicial and more formal dispute resolution process whereby parties refer their dispute to an arbitrator, a qualified and independent third party, for determination. The rationale behind this dispute resolution process is that it is capable of diverting commercial disputes away from the legal system of specific jurisdiction to a self-regulated system. It is aimed at “attracting business persons who wanted speedy, inexpensive dispute settlements but who were unwilling to abandon the benefits of legal counsel and the possibility of judicial review if disadvantaged in litigation”.23

The early forms of arbitration often existed without the blessing of, and perhaps oblivious to, the judicial mechanisms and national laws of the sovereign states in which they operated and which may have been relevant.24 In fact, arbitration was crafted specifically to facilitate the dispute resolution needs of a particular industry or community. In order to determine these disputes, arbitrators applied relevant established custom created out of the merchants’ own needs and views. The legal rules and standards according to which rights and obligations of the parties were determined often shunned the legal technicalities and substance of local law. This was an international commercial law applicable to these international transactions – the lex mercatoria of those times.25

Despite the emerging national arbitration laws and widespread use of business arbitration in the twentieth century, the state courts of many jurisdictions were unwilling to accept arbitration as an appropriate dispute resolution mechanism. In fact, states established tight controls over arbitration in both domestic and international matters. For example, English courts would refuse to hear a dispute that had been previously submitted to arbitration, and even imposed penalties for such a submission.26 Nowadays, it is totally different as arbitration is embraced as a viable alternative to litigation disputes.

23 Gaillard and Savage (n 6).
1.3.1 Different types of arbitration

Arbitration has traditionally been divided into three aspects based on the characteristics of the engaging parties and the merits of the dispute. In the first scenario, two states refer their dispute to arbitration where the disputes will be audited under the application of public international law. The second, called investment arbitration, occurs when a state and a foreign corporation agree to arbitrate potential or actual legal disputes arising or related to the direct investment of the foreign entity in the territory of that state. Since one of the involving parties in the dispute is a sovereign state which is normally a subject of public international law and the other a private entity, the investment arbitration is influenced by both public international law and private law. In other words, investment arbitration stands at the cutting edge of public international law and dispute resolution. Finally, the last situation pertains to arbitration being selected as a mechanism for resolving the commercial disputes between private persons.27

Arbitration of commercial disputes can be traced to the beginning of recorded human society. However, the modern understanding of commercial arbitration as a particular set of rules and doctrines is a product of this century.28 What has been discussed about the history of arbitration, to a large extent, is the history of commercial arbitration. Prior to being utilized in state-to-state or investment disputes, it was an appropriate mechanism for settling commercial disputes among market practitioners. The history of ICC records since 1919 is replete with thousands of cases of commercial arbitration. Therefore, this thesis will focus primarily on commercial arbitration, the three different fields of international arbitration, and the various roles that courts may play at the different stages. This is because in the first scenario which settles the disputes between states the enforcement mechanism depends entirely on the provisions of public international law and as such is beyond the ambit of this research. Regarding investment arbitration, it should be noted that although the investment treaties utilize the enforcement structure of the NYC and the ICSID Convention, the majority of cases are enforced by the specific enforcement mechanism of the ICISID Convention. Here, the municipal courts do not make any contribution to the enforcement of the awards according to Articles 53 and 54(1) of the

28 Shalakany (n 3) 430; T Sourdin, Alternative Dispute Resolution and the Courts (Federation Press 2004) 1-7.
ICSID Convention. Nevertheless, this thesis will consider the investment arbitration awards which utilize the enforcement mechanism of the commercial arbitration, namely the NY Convention.

1.4 Other mechanisms in dispute settlement

Beyond arbitration, as mentioned in Article 33 of the UN charter, there are other dispute resolution methods which may be utilized to resolve international disputes. This section will list all facilities under the terms adversarial a non-adversarial mechanisms. Arbitration and litigation are enumerated under adversarial methods whereas negotiation, mediation, conciliation and expert determination are found in the second category.

1.5 Adversarial methods

Litigation and arbitration are two legally adversarial mechanisms for settling disputes. Litigation is a legal process where parties claim their case against each other in state courts under a specific set of procedures called procedural law. The emergence and development of nationalism in the 17th century contributed greatly to placing litigation in the centre of the dispute settlement mechanism in continental Europe.29 In this method, each party brought together its argument reinforced by findings and facts. Litigation continues until all involved parties find a resolution or the trial concludes. In the event that a resolution is not reasonable, parties will move forward to trial looking for a court judgment. Once a decision has been made, displeased parties can file for an appeal which takes longer time than the initial trial. During the entire process, the guidance of a practiced lawyer is necessary. Since the costs of litigation are more or less dependent on the legal question being pursued, and the type and amount of damages each party is seeking, it may become considerably expensive. We shall see in more detail in section 3 that there is no truly international court for the resolution of transnational commercial disputes.30 Therefore, lawsuits take place before a domestic court and that is exactly why disputants are reluctant to litigate their commercial disputes. Hence, this thesis focuses only on the practical methods involved.

29 For further information see Jan Dalhuisen, Dalhuisen on Transnational Comparative Commercial, Financial Law and Trade Law, Vol 1 (Hart 2010).
As stated previously, the advancement in international transactions and the emergence of greater complexity in international business relations required more efficient dispute settlement mechanisms. Arbitration, therefore, appeared to be a real appropriate response to the specific demands of international commercial relations. It is a private method of adjudication whereby parties of a specific legal dispute decide to resolve their controversies outside of any judicial system. Parties are able to make a decision regarding the place of arbitration and its language. Additionally, they may select and appoint the arbitrators and the rules. Generally speaking, significant autonomy and power to control the arbitration process are given to the parties to enable them to tailor a specific tribunal for a particular legal dispute. In international commercial arbitration this is very important because parties are reluctant to be subject to the jurisdiction of the other party’s court system. Each party fears the other party’s ‘home court advantage’. A neutral forum will, therefore, be offered by arbitration where each side believes it will have a fair hearing.

In most examples, arbitration involves a final and binding determination; hence, there would be no chance of appeal after the final award, which is enforceable in a national court. Engaging parties to the arbitration usually choose one or three arbitrators. The rules of the arbitration, which are either the rules of a specific arbitral institution or any other rules, will also be determined by the parties. The parties may even tailor the rules themselves. Nevertheless, arbitration is not totally independent from national courts since it does not possess its own autonomous enforcement mechanism; the necessity for judicial scrutiny of the award becomes clear once the enforcement of the award is sought. A national judge, who is expected to recognize the res judicata effect of an arbitral award, can hardly overlook the issue of basic fairness of the proceedings leading to the award by making sure that it is free from procedural irregularities, and that the recognition of the awards would not endanger the public policy of the place where the enforcement is requested. As we shall see in the next chapter the provisions of the NY Convention on the recognition and enforcement of foreign arbitral awards

31 Blackaby and others (n 22) 31-36.
prevent municipal judges from recognizing/enforcing the foreign awards in certain circumstances. The enforcement stage is the cornerstone of public and private interests. Furthermore, courts may play other roles in the various stages of international arbitration though there is no benchmark to evaluate whether national approaches regarding court involvement are destructive or constructive. To do so, this thesis will focus on the two main hubs in the jurisdiction of international arbitrations: the UK and the US. Comparative studies of these two highlight the constructive achievements of each one and may provide a benchmark for the harmonization of court involvement in international arbitration that will lead us to a transnational approach. This would guarantee the finality of arbitral awards which in turn will protect it from the destructive intervention of national courts.

1.6 Non-adversarial methods

The growing cost of litigation and arbitration gave rise to an exploration into quicker and cheaper methods of dispute resolution. This cost was measured not only in lawyers’ fees and expenses but also in management and time of execution. Procedural delaying strategies, overcrowded court lists and the jury trial of civil cases also exacerbate the situation and may give rise to an award of considerably excessive damages being given against major corporations (and their insurers). These concerns raise the question of whether it would be better if the parties were to settle their differences in a less confrontational manner.

In response to these demands, market practitioners have developed non-adversarial mechanisms to settle commercial disputes. Since these methods are broadly speaking an alternative to adversarial mechanisms, they are also called ADR. There are many different forms of ADR. However, the broad distinction would seem to be between those methods such as mediation and conciliation in which an independent third party tries to bring the disputing parties to a compromise and those in which a binding decision is imposed upon the parties, without the formalities of litigation or arbitration. Among the various non-adversarial methods enumerated in Article 33(1) of the UN Charter on negotiation, mediation, conciliation and expert

34 Blackaby and others (n 22) 44.
determination are utilized more than the others in the area of dispute resolution. Therefore, only these methods will be discussed here.

1.6.1 Negotiation

Negotiation systems create a structure to encourage and facilitate direct dialogue between disputing parties without the intervention of a third party. This involves dealing directly with the person or organization that seems to have caused the problem. Disputing parties can initiate this themselves, or via a representative such as an adviser or a solicitor. It is the simplest and very often a good first step in settling legal disputes. They commence by informing the other side of the details of the complaint and suggestions of how it can be resolved. This is often the quickest way of settling commercial disputes, because the parties themselves are in the best position to know the strengths and weaknesses of their own cases. Therefore, they are in the best position to discuss and work out a compromise amongst themselves. Furthermore, there is no legal formality involved so they are able to save time in reaching a common solution. This is the ‘soft approach’ and preferred in Asian cultures because of its ability to maintain harmony and good relationships between people. More importantly, it is able to ‘save the face’ of the disputants, thereby maintaining the business relationship between them.

Whilst negotiation has proven to be the usual method of resolving domestic commercial disputes, it has been observed that there are a number of difficulties experienced by parties to international commercial disputes. First, for parties to negotiate successfully, they need to be detached and objective about the issues. In addition, it is essential that they are willing to communicate with each other and to compromise. However, given the negative feelings that parties to a dispute often feel towards each other, this is not always easy. Thus, negotiation as a means of resolving a dispute may not always be possible. Secondly, disputes in international commerce tend to involve parties belonging to different cultures. When an international commercial dispute arises, disputants experience more difficulty than parties face with a dispute within the same culture. This is because there is often no common basis for negotiation as parties from different cultures may think differently and have a different perception of right or wrong.

36 Wang (n 5) 189–211.
Different styles of negotiation due to different cultural influences may also make it much more difficult for parties to reach a compromise.

However, the other party does not need to agree to take part before being approached by the disputing part or their representative.\(^{37}\) Moreover, the process is not binding unless both sides can agree that the outcome of the negotiation be a legally-binding contract. This contract enables one party to take their opposing side to court if they do not uphold their side of the contract.

### 1.6.2 Mediation

Mediation is claimed to be located at the heart of ADR.\(^{38}\) Thus, in the case of failure of negotiation, the disputant turns to an independent third person in a situation which is often called ‘managed private negotiation’. Here the mediator strives to encourage each party to concentrate on their real interests, rather than on their contractual or legal entitlement.\(^{39}\) The mediator only facilitates communication and negotiation between the parties and has no power to impose a solution upon them. Furthermore, the mediator will also try to make sure each party understands the other’s point of view. To do so, he/she will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement.\(^{40}\)

The mediation process is consensual because it starts with parties in a dispute agreeing to have discussions aided by a mediator. It continues as long as parties wish it to, and ends when either party decides to discontinue or when they have reached a resolution. This method became popular in the 1990s because of its ability to resolve disputes ‘by consent’ rather than ‘by coercion’ as its objective is to reach a voluntary agreement between the parties rather than to determine their respective rights and liabilities.

Furthermore, it is stated that mediation should be confidential. Most of the time there is a provision in the governing mediation rules that prohibits any disclosure of what happened during

\(^{37}\) Bercovitch (n 35) 601.


\(^{40}\) Gaillard and Savage (n 6) para 16, 11; see also Richard Shoylenkov, ‘Mediation - Time to Discuss the Non-Legal Elements’ 2003 (2) OGEI 1.
the mediation at the next level of the dispute whether it was arbitration or litigation. There is the possibility that mediation can occur at any time in the dispute. The parties can request a mediator if they get to a point in the litigation, or arbitration where they want to settle and need some help. Mediators may also be used in the negotiation stage of a contract when an impasse has been reached but both parties want the deal to go through. Mediation is sometimes referred to as an interest-based procedure while arbitration (litigation) is referred to as a rights-based procedure because mediators try to understand and reconcile the interests of the parties.

Apart from the ability to choose the third party mediator, the involved parties may also establish procedures to be adopted by the mediator. This process is similar to arbitration where parties in dispute are able to choose a third party who would deal with settling the dispute and the way in which they would conduct the dispute resolution process. It is different, however, in the sense that the arbitration is adversarial in nature and the arbitrator actually makes a determination on the rights and liabilities of the parties whereas the mediator merely assists in the negotiation between them.

1.6.3 Conciliation

The two terms ‘mediation’ and ‘conciliation’ are often used interchangeably; therefore, it is hard to propose a clear definition which can distinguish these two mechanisms from each other. Historically, a conciliator was seen as someone who went a step further than the mediator, in speaking or making proposals for a fair settlement. The conciliator must do so in an independent and impartial manner. In practice, the two terms seem to have merged.

The conciliation process can be instigated by either party in the dispute. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute.

41 ibid; See also Moore (n 39).
43 Wang (n 5) 192.
44 Michael E Schneider, ‘Combining Arbitration with Conciliation or Mediation’ (International Commercial Arbitration Committee Newsletter, 1996) 31, 37.
Usually, only one conciliator is appointed to resolve the dispute between the parties however, a panel of conciliators is not prohibited. The conciliator(s) is appointed by the parties by mutual consent; in case of failure, the parties can enlist the support of any international or national institution for the appointment of a conciliator. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not the Presiding Conciliator. He is the third conciliator.

According to the UNCITRAL Conciliation Rules, a conciliator may disclose the substance of any factual information he or she obtains in order to encourage the other party to present an explanation which he considers appropriate. The conciliator may develop the terms of a possible settlement and submit them to the parties for their consideration. The conciliator is not able to issue any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. When they come to an agreement, it is signed by the parties and authenticated by the conciliator. In some jurisdictions such an agreement has been given the status of an arbitral award. The whole process comes to an end either when a settlement is achieved or when it appears that no settlement is possible.\(^4\) In 2002, UNCITRAL published its model law on International Commercial Conciliation which is intended as a guide for states that wish to implement legislation or conciliation.\(^5\)

### 1.7 Expert determination (enquiry)

Whilst the goal of mediation and conciliation is to bring about a settlement of the dispute, there are methods of alternative dispute resolution which produce an obligatory decision, such as expert determination.\(^4\) Assessment, valuation and certification are the traditional roles of expert determination. They are used when a specific issue in the dispute contains a highly technical question. In other words, an expert may be asked to value a house; to assess the price of shares in a private company; or to certify the sum payable for work done by a building contractor.

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\(^4\) Blackaby (n 22) 48-49.
The process of making a decision by an expert during the expert determination is to some extent similar to arbitration.\textsuperscript{49} The task of experts and arbitrators in what might be called ‘the dispute resolution business’ is quite similar but with some specific distinctions. The important differences are that arbitrators, unlike experts, are generally found to be immune from liability for negligence in carrying out their functions. Moreover, an arbitral award is directly enforceable both nationally and internationally under such treaties as the NY Convention whereas the decision of an expert is only binding contractually. Therefore, it will need to be enforced by legal proceedings if it is not carried out voluntarily.\textsuperscript{50}

1.8 Comparison between various dispute settlement mechanisms

It is necessary to take into consideration the essential relevant factors of interest to the disputants which will have a decisive impact on their decisions regarding the selection of an appropriate mechanism to resolve their dispute. Although it is almost impossible to consider all relevant factors, the most important ones are cost, speed of resolution, confidentiality/privacy, flexibility, perceived fairness, effectiveness, and impact on continuing business relations.

The following analysis is necessary to show why international arbitration is superior to other dispute settlement mechanisms.

1.8.1 Cost

There is a general belief that litigation is an extremely expensive facility for resolving commercial disputes, and therefore, arbitration and ADR are normally preferred.\textsuperscript{51} Having said that, each mechanism contains a relatively specific expense structure, and it is essential to study each mechanism individually.

It is believed that negotiation is the least expensive method of dispute settlement since it only requires the parties to meet and talk with each other over the issue of the conflict. No third party is needed, and therefore, additional cost would be covered by the parties. However, one

\textsuperscript{49} For further information see J Kendall, C Freedman and J Farrell, \textit{Expert determination} (4\textsuperscript{th} edn, Sweet and Maxwell 2008).
\textsuperscript{50} Blackaby (n 22).
\textsuperscript{51} Karl J Mackie, David Miles and William Marsh, \textit{Commercial Dispute Resolution} (Butterworths 1995).
may argue that negotiation is something more than a simple conversation between the disputants’ representatives. The international market is now talking about the art of negotiation. To that extent, hiring professional negotiators may increase the additional costs depending upon their respective fees.\textsuperscript{52} Mediation has a similar status. Compared to arbitration and litigation, it is relatively inexpensive and the mediator's fees, and who should bear the costs, are a matter for the mediator and the parties to negotiate.\textsuperscript{53} Moreover, since the parties are controlling the length of the proceedings, they are able to manage additional costs and expenses.

Costs of litigation are dramatically heavier than arbitration. These costs primarily contain the cost of the litigation infrastructure as well as the administration expenses, and on top of that the cost of publicizing the reports, precedents and the transcripts. The most important costs that the parties have to bear during the proceedings concern the managerial time to the company. In order to prepare for and conduct litigation or ADR, parties divert management time away from their true function of pursuing the company goals. Executive time not used for the purpose of producing goods or services is unproductive and thus costly to a company as a disputant.\textsuperscript{54}

Overall, in terms of cost, some forms of ADR may appear to be cheaper than litigation or arbitration in settling the international commercial disputes, but this is not necessarily always the case because it is effective only if it culminates in a workable agreement. If it fails, it will in fact increase expense to the parties because they will need to pay for the costs of litigation or arbitration in addition to the costs of ADR.\textsuperscript{55}

1.8.2 Speed of dispute resolution

The fact that the litigation process is too cumbersome to meet the requirements of international commercial transactions has been highlighted by the international business community. The emergence of a conflict or a dispute in commercial relationships is an obstacle which halts the ordinary course of business between the involved parties or in the development

\begin{itemize}
\item Hilary Astor and Christine M Chinkin, \textit{Dispute Resolution in Australia} (Lexis Law Butterworths 1992).
\end{itemize}
of mutual business relations. Hence, parties to an international commercial dispute strive to settle the issue quickly. However, courts in certain countries are not able to audit the dispute in the timeframe desired by the parties. This may be because they are overloaded with cases; there is a lack of a sufficient number of qualified judges; or the courts are unable to meet the strict formality and procedural requirements. The conflict of laws may be another problematic issue in litigation, and therefore, cause further time and money to be expended.

Perhaps the informal procedure in ADR and arbitration, in comparison with litigation, can cause a substantial decrease in the time of the proceedings. As previously mentioned, the international business community has found the procedural formality of litigation illogical and time-consuming. Hence, it is highly unlikely for an international commercial dispute to be conducted in a national court. Therefore, resolving disputes under ADR may be quicker than under litigation.

Negotiation will be the swiftest method in resolving the commercial dispute provided that the parties are concretely willing to compromise. This is primarily due to direct communication and dialogue between the disputants instead of referring the issue to the third party. Moreover, there is no need for a witness or expert, and no time is allocated for hearing the testimony or expert’s report. However, parties may harbour negative feelings towards each other, or be reluctant to talk at the chosen time. This may hamper a constructive approach to negotiation and eventually prolong the dispute resolution process. Furthermore, different cultural backgrounds imply different styles of negotiation which may cause additional friction between the parties when there is a dispute. Therefore, negotiation may not always be the quickest method for international commercial dispute resolution.

In terms of time, mediation also seems to be a quick process to deal with international commercial disputes compared to litigation. This is again the result of removing strict formality from the whole process. Additionally, since it is a consensual method and the parties can tailor the procedure, they are able to manage how mediation is to be conducted and how long it is to

56 For more information see Samuels and Smith (n 54).
57 Boulle (n 38) chapters 1, 2.
take. Finally, mediation enables the parties to minimise the loss in managerial time and money since the parties would normally make every attempt possible not to prolong the process.

Arbitration has a similar status with mediation and negotiation in comparison to litigation. The main reasons for this are the ability of the parties to draft or choose the arbitral procedural rules. Unlike the procedural rules of litigation, it is too complex; the general tendency for arbitration is to draft and choose less complex and confusing rules. Moreover, unlike judges who are competent in dealing with any dispute, an arbitrator is most likely to be an expert in one specific field.

1.8.3 Confidentiality and privacy

For a number of reasons, most disputants would rather keep their commercial disputes private and confidential. However, the public are generally informed of the existence and the progress of major court cases by the media. Negotiation, mediation and arbitration, are conducted privately, and the likelihood of media intrusion is extremely remote. Therefore, ADR and arbitration are considered to be more advantageous than litigation in providing more confidentiality for the parties.\(^{58}\)

However, there are many other ways in which the effect of the principle of confidentiality is diminished to the extent that it has never been strictly observed in practice. First, there has never been a general tradition of confidentiality. In many areas, arbitral awards are published, in most cases without disclosing the names of the parties.\(^{59,60}\) The disclosure of awards is universally considered to contribute to the predictability of results, and the codification of usages by a professional organization will very often be the result of the publication of such decisions.

Secondly, in the field of investment arbitration, ICSID awards, ad hoc awards regarding disputes arising out of state contracts, and awards made in important and well-known cases are

\(^{58}\) Wang (n 5).
\(^{59}\) For example, in France, the Droit Maritime Francaise review publishes numerous arbitral awards made in the shipping field.
\(^{60}\) Gaillard and Savage (n 6) para 386.
often published with commentaries, and will naturally serve as precedents.\textsuperscript{61} Likewise, extended measures have developed in favour of publishing awards in some jurisdictions.\textsuperscript{62} The Yearbook Commercial Arbitration, among a number of other publications, has also contributed to the ‘lifting of the veil’. Hence, it should be borne in mind that, regardless of the significance of confidentiality in ADR and arbitration, no one should ever magnify its strict worldwide application.

1.8.4 Flexibility

Litigation requires that courts must pursue strictly the procedural law of the territorial jurisdiction as well as proof of the facts and the manner of proceedings. These provisions are enacted to guarantee consideration of the substantial interests of the litigants that are generally confusing and time-consuming for lay persons. Therefore, courts are unable to consider the convenience of the disputant. In contrast, ADR and arbitration provide greater flexibility for disputants. As parties can negotiate whenever and wherever they wish using whichever negotiation style they prefer, no mandatory formalities make it more flexible for the disputants. Like the negotiation process, mediation also provides a high level of flexibility to the parties. Once again, there is no formal procedure to be followed. Parties are able to develop their arguments free from legal formalities. Procedures can be tailored to meet their respective needs and the particular situation.\textsuperscript{63} Additionally, they have control over the time and location of mediation in contrast with litigation that has to be conducted in the court. Furthermore, as mediation and negotiations are consensual facilities, and therefore not binding, parties can leave the proceedings any time they wish. It should be noted that the mediator has no power over the disputants except to encourage them to proceed with the talks until reaching the final agreement.

Arbitration also offers considerable flexibility to the parties of an international commercial dispute, albeit far less than for negotiation and mediation. The foremost advantage

\textsuperscript{61} ibid; Mark Cato, ‘Arbitrate Don’t Litigate’ (1997) Arbitration and Dispute Resolution Journal.
\textsuperscript{63} Fulton (n 52).
of arbitration is the ability of the parties to tailor the procedural rules of the arbitration according to the specific requirements of their case which is not normally achievable in litigation. Mediation and negotiation are not binding while arbitration, in contrast, provides considerable flexibility for the disputants and is a legally binding facility.  

1.8.5 Perceived fairness

There is no truly international court for the resolution of transnational commercial disputes. Therefore, lawsuits take place before a domestic court and that is exactly why disputants are reluctant to litigate their commercial disputes. Irrespective of disputants' unfamiliarity with the legal process in a specific country, it is a common belief that the court usually protects its own nationals. Therefore, disputants often perceive that the court is biased in favour of their opponent. This type of fear is especially highlighted when communist countries enter into an investment transaction. Courts in certain countries such as China and Vietnam are part of the state system and were set up to protect the interests of the state and its nationals. Thus, a lack of independence from the government may compound the fear of the foreign party of being unfairly treated. Although litigation in an independent country may lessen these concerns, unfamiliarity with a country’s legal system and language make it inefficient in practice.

ADR methods and arbitration seem to be fairer for the purpose of resolving disputes in international commerce since first of all they are consensual and parties are able to appoint arbitrators and the procedural law. Further, in mediation, although the parties are assisted by a mediator, the dispute is actually resolved by themselves. In addition, the interests and values of the parties are more likely to be taken into account in ADR. Therefore, due to the fact that disputants understand and have more control over the process of dispute resolution, ADR may appear to the parties to be capable of producing a fairer outcome when compared with litigation.  

64 For further discussion see Cato (n 61).
65 Pryles, Waincymer and Davies (n 30).
66 Wang (n 5).
1.8.6 Effectiveness

The question of effectiveness targets two matters, namely jurisdiction and enforcement. It has already been highlighted several times that there is no international court with universal jurisdiction. The courts’ jurisdiction depends on specific criteria contained within the law of the state, and therefore, they are likely to encounter situations where the national courts are not empowered to deal with a special case. Moreover, international commercial disputes usually contain foreign elements such as the nationality of the disputants, the place of performance, the currency of the transaction. National courts, therefore, are not normally trusted to conduct these disputes. Thus, an impasse may result, and the dispute resolution process may be unnecessarily delayed.67

In contrast, arbitration appears to have much greater effectiveness. This is primarily due to the number of regional and international conventions and laws which have been widely adopted for the recognition and enforcement of foreign arbitral awards. The most important one is the NY Convention. Secondly, unification and harmonization of arbitration rules across the globe have gradually reached a balance between the reciprocal considerations of states and the international business community. These two together provide international recognition of foreign arbitral awards and a more friendly approach towards international arbitration. As a result, an arbitral award has a greater international effectiveness than a domestic court's judgment because the convention allows for the recognition and enforcement of the arbitral award internationally rather than just within the confines of a sovereign state as is the case with litigation.

Nevertheless, such an approach is not completely effective since there are still countries which have not yet ratified the convention. Even among the member states of the NY Convention, disparate national interpretations or national public policy considerations sometimes undermine the efficiency of these unified provisions, particularly when there is court involvement in the arbitration process.68 Hence, the International Council for Commercial

67 Fulton (n 52).
Arbitration was impelled to create a set of guidelines in 2011 – a handbook for judges of national courts – to harmonize the implementation of the convention among member states. In spite of this, court involvement is still unregulated precisely when international arbitration may require the involvement of national courts as an auxiliary arm. This is a matter of jurisdiction and therefore countries have various, sometimes disparate, approaches toward it.

It was stated earlier that the aim of this research is to enhance the efficiency of international arbitration by means of providing a fairly harmonised (transnational) approach regarding court involvement at various stages of international arbitration. One of these stages is the enforcement process which commences after issuing the award. Various questions arise here such as which court, and to what extent, has the jurisdiction to interfere at this stage.

1.9 Impact on continuing business relations

Due to the fact that both litigation and arbitration are by nature adversarial dispute resolution mechanisms, they are likely to impact negatively on the continuing commercial relationship of the disputants. This is because the adversarial process, when used in resolving commercial disputes, is designed to discover on the balance of probabilities which party has a stronger case, thus identifying which party should be a winner. Parties in dispute cannot both be winners. This approach tends to emphasise the disputants' differences and to increase their negative feelings towards each other. In such a case the parties' business relationship is not likely to continue.

In contrast, disputants’ energies are not spent on substantiating a stronger position in front of a third party (judge or arbitrator), in mediation and negotiation, but rather focus on minimising the disparity and converging similarities. Facts and information are distributed and exchanged to clarify each party’s view-point and to lead to a compromise. Long-term considerations are also more likely to be dealt with in these mechanisms. Therefore, mediation and negotiation are believed to be superior methods of international commercial dispute resolution where there is a long-standing business relationship between the disputants which they

70 Wang (n 5).
wish to continue. However, litigation and arbitration may be more desirable when the parties no longer wish to continue their business relationship and seek to gain as much as possible from the dispute without having to compromise.

1.10 Conclusion

Due to the increasing growth of international business and the swift and considerable changes in international transactions, dispute settlement methods are required to be cheaper, quicker and more effective in international transactions. ADR is an appropriate response to meet these needs within the global market. Accordingly, the four most commonly used facilities in resolving commercial disputes, negotiation, mediation, conciliation and expert determination have been briefly introduced and discussed in this chapter.

In addition, cost, speed of resolution, confidentiality/privacy, flexibility, perceived fairness, effectiveness, and the impact on continuing business relations are important elements that direct commercial entities to choose specific methods for settling a commercial dispute. Having said that, it is stipulated that international arbitration holds the dominant position in the dispute resolution market since it encompasses the advantages of all other dispute resolution techniques: such as confidentiality and flexibility, as well as issuing a binding decision at the end of the proceedings. Moreover, the position of international arbitration among other facilities is fortified by the specific advantages of finality and appropriate enforcement mechanisms within international arbitral awards.

Despite the unquestionable role played by Arbitration in resolving disputes stemming from international transactions; the role of arbitration, its functionality and its independence as an alternative dispute settlement mechanism has been coming under increased threat in recent years due to national courts intervention in international arbitration proceedings. To understand this threat, the following four chapters will try to shed a light on the circumstances in which national courts can intervene in international arbitration and the justifications as well as the implication of such intervention. Moreover, in these chapters the main focus of this thesis, namely, the harmonisation of national courts involvement in international commercial arbitration will be addressed though the framework of UNCITRAL Model Law as well as the arbitration rules of the US and the UK. Additionally, in order to examine all possible circumstances in
which a national court intervention could occur; this thesis will divide the international arbitration process into four stages and argue the likelihood of court involvement at each stage separately.
Chapter Two: Court Involvement Prior to Establishment of Arbitral Tribunal

2.1 Introduction

It was clarified in chapter one that national courts may become involved in arbitration for various reasons, but first and foremost do so since national laws are permissive, and secondly, because parties invite or encourage them to do so.\(^{71}\) In other words, since the arbitration does not acquire its own autonomous enforcement mechanism, the necessity for judicial scrutiny of the award becomes apparent once the enforcement of the award is sought. It was also stated that there are other deficiencies in international arbitration which necessitate the courts getting involved in arbitrations. Nonetheless, the foremost question here is whether, having recognised the independence of international arbitration, there is any place for court involvement in this independent system called international arbitration. If so, then what is the nature of such involvement? Whether it is disruptive or constructive has been one of the main issues of debate between international scholars.\(^{72}\) More importantly, to what extent, if at all, is it possible to reach a convergence point between national approaches on this matter and harmonise them. Prior to talking about these issues, it is important to reconsider what has already been discussed in chapter one as well as in the two introductory notes.

As discussed earlier, international arbitration has four essential characteristics. First and foremost, it is autonomous in that it exists in a separate and autonomous domain from national laws and jurisdictions.\(^{73}\) In other words, arbitration does not, as some have argued, function within a contractual structure or through opting out of the competence of national courts to audit a dispute, or even a combination of these two things. Instead, as discussed earlier, arbitration, historically, has been an independent dispute settlement facility, alongside others, with its own precedent. Utilizing this consensual means for the purpose of resolving mutual disputes requires one pre-condition, namely, a contractual basis showing mutual consent to adopt this method instead of litigation. However, once formed, and subject


\(^{72}\) Lew (n 8) 489.

\(^{73}\) See generally Lew (n 4) 455-58.
to controls as discussed later, arbitration inhabits its own domain.

Secondly, by opting for arbitration, parties have stipulated expressly their positive intention in favour of an alternative dispute resolution system.\(^{74}\) This is the same regardless of the express choice of a national law by the parties to govern the substantive issues of the contract or of the arbitration. More specifically, this choice means that the parties have intentionally and expressly abandoned national courts to deliberate their disputes. They may do so for various reasons as discussed in chapter one, but primarily because in the absence of a transnational commercial court with global jurisdiction to audit any commercial dispute between market practitioners, recourse to national courts is likely to enhance concerns regarding courts’ impartiality and independence as well as the cost and expense in the circumstances of the case.

Thirdly, except in rare circumstances, the arbitral tribunal is responsible for determining and resolving all relevant issues in the dispute between the parties.\(^ {75}\) As we shall see in this chapter through the principle of separability, the agreement to arbitrate can survive even where the validity of the container agreement may be challenged.\(^ {76}\) Additionally, there is the principle of competence-competence states where the arbitral tribunal is authorized, if not obliged, to make a decision on its own jurisdiction.\(^ {77}\) These two principles, a long with their requirements and consequences, are central to the discussion in this chapter.

Fourthly, despite the autonomous nature of arbitration, it must be kept in mind that no system of dispute resolution can exist in a vacuum. In other words, while international arbitration claims its independence, it interacts with national jurisdiction without prejudice to its autonomy to prove its existence, defend its legitimacy, and above all to get support and help where necessary to enhance its effectiveness.\(^ {78}\) This assistance of the national courts may appear at various times and in various forms from the moment that a party decides to trigger

\(^ {74}\) See Horning (n 71) 156.
\(^ {75}\) cf Ferguson (n 9) 59.
\(^ {77}\) See ibid 243-44.
the arbitration mechanism until the recognition and enforcement of the arbitral award.\textsuperscript{79}

With these four characteristics in mind, this thesis will argue all likely forms that national courts may get involved in in international arbitration. Initially, however, it is necessary to set out analytically the circumstances in which courts may get involved in arbitration proceedings, to develop an argument regarding the contribution of the courts and to express why a specific intervention is relevant or irrelevant, desirable or undesirable, disruptive or constructive.

\textbf{2.2 Various stages of court involvement}

It is appropriate to highlight the relevant provisions of the New York Convention\textsuperscript{80} as well as the UNCITRAL Model Law to elaborate all possible circumstances where national courts may potentially become involved in arbitration. These two documents will function as a torch that directs us in analysing the matter of court involvement in international arbitration, and simultaneously prevents deviation from the right track. Article II of the Convention in its Section (1) states that each contracting state must ‘recognize an agreement in writing under which the parties undertake to submit to arbitration … concerning a subject matter capable of settlement by arbitration’.\textsuperscript{81} Section (3) of this Article states that, when dealing with a case containing a valid arbitration agreement, the courts in members states must ‘at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed’.\textsuperscript{82} Article III stipulates that when courts in all member states encounter a valid arbitration agreement they must ‘recognize arbitral awards as binding and enforce them in accordance with the rules of … the territory where the award is relied upon, under the conditions laid down in [the Convention]’.\textsuperscript{83} Finally and most importantly, Article V describes the circumstances which enable the court from which the enforcement of an award is requested to refuse recognition and/or enforcement of such an

\textsuperscript{79} See The New York Convention (n 11) art III. This requires all contracting states to recognise arbitral awards as binding.
\textsuperscript{81} ibid para 1.
\textsuperscript{82} ibid para 3.
\textsuperscript{83} ibid art III.
award. These circumstances are exhaustive and contain lack of notice for the arbitration; validity of the arbitration agreement itself, where the establishment of the arbitral tribunal was contrary to the previously agreed method by the parties or where the subject matter of the award was not intended by the parties to be determined by the arbitration. Accordingly, reading Articles II, III and V of the New York Convention, two essential principles of international arbitration can be concluded. First, court involvement is required as a support for the arbitral process, as an auxiliary hand, and for recognition and enforcement of arbitration agreements and awards but nothing else. To put it differently, the contribution of national courts in recognition and enforcement of foreign arbitral awards is a must, and therefore, inevitable. Second, the only courts that are authorized to get involved in the arbitration process are either the court of the seat arbitration or the place of enforcement.

Furthermore, the UNCITRAL Model Law (and its amendment) that has generally been recognised as the most appropriate roadmap for national jurisdictions to follow in modern arbitration law provides similar provisions to the New York Convention. However, there are considerable expansions in terms of the potential role of the courts. Its early provisions delineate its approach expressly. Article 5 states that ‘no court shall intervene except where so provided in this Law’. Immediately after that, Article 6 recognises only three areas where national courts can be involved in an arbitration proceeding within its jurisdiction. The first of these is the potential role of national courts in the establishment of an arbitral tribunal. Articles 11.3, 11.4, 13 and 14 confirm the possibility of recourse to national courts to ensure the proper appointment of a tribunal in case of the failure in the agreed appointment mechanism. The UNCITRAL Model Law has also recognised the

84 ibid art V.
89 UNCITRAL Model Law (n 87) art 5.
90 ibid art 6.
competence of the courts to deal with a challenge to the independence and impartiality of an arbitrator. Courts may also make a decision whether an arbitrator is still able to conduct his/her duties. Second, it allows a review of the issues of fundamental jurisdiction. According to Article 16.3, the court is authorised to review the jurisdictional decision of an arbitral tribunal based on the terms of the arbitration agreement. Third, as parties are allowed to challenge an award, Article 34 provides the exceptional grounds which permit the court to set aside or overturn an award when it is appropriate. Like the New York Convention, these are limited to whether the issues determined are under the ambit of the arbitration agreement or whether there has been any deviation of the parties’ intention in the conduct of the arbitration. However, there is no provision regarding the competence of a national court to review the tribunal’s material findings. Lastly, Articles 35 and 36 of the Model Law contain very similar provisions for the recognition and enforcement of foreign awards like those in the New York Convention.

This summary of the UNCITRAL Model Law, reveals three extra occasions when courts are most likely to become involved with the arbitration process: prior to the establishment of a tribunal; at the commencement of the arbitration; and during the arbitration process. This chapter will focus on the first of these, leaving the other two for later in the thesis.

Prior to the establishment of the arbitral tribunal, courts became involved where a party challenged the validity or existence of the arbitration agreement; where one party in spite of prior consent to arbitrate commercial disputes, and perhaps to deliberately avoid it, initiated litigation in court; and where one party needed urgent protection that could not wait for the appointment of the tribunal. The pertinent question here is what the proper approach should be for the courts to pursue. Should they uphold the arbitration agreement, or should the resisting party challenge the validity/existence of an arbitration agreement without substantive

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91 ibid art 11, paras 3-4; art 13, para 3; art 14.
92 ibid art 16, para 3.
93 ibid art 34.
94 See Lew (n 8) 490.
95 cf UNCITRAL Model Law (n 87) arts 35-36 with New York Convention (n 11) arts III, V.
determination of the arbitration agreement? Alternatively, should they get involved and address the matter prior to establishment of an arbitral tribunal. Despite the suggestion by some commentators that the courts are obliged to uphold the agreement to arbitrate,\(^96\) as we shall see in this chapter, it seems extremely unwise for the purpose of the harmonisation of court involvement at this stage to encourage national courts across the globe to uphold the agreement to arbitrate in favour of international arbitration. National laws are disparate as to the extent to which the courts can consider issues of validity or the existence of an arbitration agreement prior to the arbitral tribunal.\(^97\) More particularly, in the United States as we shall see in this chapter, courts’ involvement to determine the validity and/or existence of the arbitration agreement has been categorised as one of the ‘gateway issues’ which allows the interference of the courts to consider the merit of the arbitration agreement. In the third case, the court fills the gap until the tribunal is established to protect the status quo.

Before proceeding, it seems necessary to discuss two concepts, competence-competence and separability. These are essential concepts which later on will be used to develop a particular argument regarding court involvement prior to the establishment of the arbitral tribunal in terms of anti-arbitration and anti-suit injunctions as well as pro-arbitration orders and gateway issues in commercial arbitration in the United States.

### 2.3 Separability and competence-competence

The doctrines of competence-competence and separability are described as the axles of international commercial arbitration.\(^98\) Distinct, but very much related, these two doctrines serve to enhance the efficiency of international arbitration as an alternative means of resolving international commercial disputes, and to decrease the effect of delay tactics.\(^99\) Each of these principles has roots in the independent nature of the arbitration agreement even if the arbitration

\(^{96}\) See Lew (n 8) 495.

\(^{97}\) See Premium Nafta Prods Ltd v Fili Shipping Co [2007] UKHL 40, para 19.


agreement is incorporated in form of a clause in the main contract. Together, they serve to guarantee the functionality of international arbitration as an efficient alternative to litigation.

The concept of separability provides that certain defects in the container agreement underlying obligations do not have any impact on the arbitration agreement within it, unless those defects have arisen particularly from the arbitration agreement. This allows the tribunal to address and eventually audit a variety of contract defences without affecting its jurisdiction under the arbitration agreement. In other words, it claims that the validity of the arbitration clause is autonomous from the validity of the contract in which it is incorporated. As long as the validity of the arbitration agreement exists, and the arbitration agreement is broad enough to cover any dispute, whether contractual or non-contractual, arising from a particular commercial relation, an arbitrator will be authorised to assert that the contract does not hold the requirement to be valid, but still addresses the consequences of invalidity of the container contracts.

Having recognised the distinction between the arbitration agreement and the main contract, separability rescues many arbitration agreements from failing simply because they are contained in contracts the validity of which is challenged. Although it may seem quite odd to distinguish the conditions of validity for an arbitration agreement from the main contract, international scholars have outlined three grounds to justify the separability doctrine:

i. When parties agree to settle all disputes by means of arbitration and write their agreement widely phrased, they usually intend to resolve all disputes, including any challenge to the existence or validity of the contract before arbitration. This may be an implied term of the contract.

ii. Denying the separability doctrine simply culminates in undermining the efficiency of arbitration as an alternative means to dispute resolution. International arbitration as a form of international justice requires being independent from any intervention whatsoever which might impact on its autonomous character. Historically, it has

100 ibid.
always strived to prove itself as an autonomous facility with effective and sufficient grounds to audit any commercial dispute arising or related to a commercial transaction. As stated previously, separability is one of these grounds establishing the potentiality of international arbitration to deal with any commercial dispute. Needless to say, those who breach their contractual obligation do everything they can to hamper or even cripple the proceedings; one of their notorious techniques is denying the existence or validity of the arbitration agreement itself. In the absence of the separability doctrine, especially where there is no other facility to fill this shortcoming, if one of the parties challenges the validity of the arbitration agreement, the arbitrators cannot determine their jurisdiction, and therefore, the whole process will be rendered useless.\(^{103}\)

### iii.

As discussed earlier, according to the New York Convention and UNCITRAL Model Law, courts, in practice, usually review only arbitral awards and not the merits of disputes. This means that if we do not accept the separability doctrine, courts would be forced to review the merits of the cases. This clearly means that international arbitration, without separability will become a preliminary stage in litigation.

Competence-competence, on the other hand, soars where separability ends. This doctrine, as generally understood, recognises the authority of an arbitral tribunal to determine its own jurisdiction.\(^{104}\) Nevertheless, compared with separability, the competence-competence doctrine is more controversial, and there is no consensus amongst various jurisdictions over the exact contours of competence-competence.\(^{105}\) This is primarily because it is quite hard to understand how an arbitrator is entitled to make a decision on his or her own competence since any effort to do so assumes that ‘he or she already possesses competence under the very agreement which is doubted’.\(^{106}\) However, the doctrine has been justified on several grounds:\(^ {107}\)

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\(^{103}\) See Born (n 98).


i. It can be presumed that such competence derives from the parties’ intention once they agree to settle their dispute via arbitration. If it is presumed that the parties have conferred such jurisdictional power to the arbitrators to determine his or her own competence in the same way that he or she addresses the other legal issues of the case, the court should recognize and respect the contract of the parties so long as the arbitrator acts in good faith.108

ii. Competence-competence power is inherent in all judicial bodies and is essential to their ability to function. Under this view competence-competence is necessary for the mere functioning of the tribunal. Therefore, not only is it intrinsic for an arbitral tribunal, but also in the final analysis, no third party judiciary can conduct its audit unless it has determined its competence to deal with the case.109

Regardless of the various grounds for justifying the competence-competence doctrine, in terms of the content and contours of the doctrine, modern legal systems have recognised two effects, positive and negative, on its implementation,110 though there is no consensus among them to adhere to both effects of the doctrine.111 Moreover, as we shall see later, it seems extremely unwise to bar national courts from hearing a petition against the validity or existence of an arbitration agreement prior to the establishment of an arbitral tribunal.112 A positive dimension authorises arbitrators to determine their own jurisdiction at the outset of the arbitration process whereas the negative effect bars courts from determining the competence of arbitrators. In other words, while the positive effect, as a right and obligation for arbitrators,

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108 See Born (n 98).
112 ibid 16.
means that the arbitral tribunal should make a decision on its jurisdiction, and therefore, does not need any external authority to determine its competence, the negative effect, as a duty for judiciary power, requires courts to refrain from entertaining challenges to an arbitration agreement even if no arbitral tribunal has yet been formed. French scholars who recognised and developed the negative effect of competence-competence believe ‘the court should refrain from engaging into [sic] the examination of the arbitrators’ jurisdiction before the arbitrators themselves have had an opportunity to do so’. However, this negative effect in French law is subject to an important exception, namely where there is no plausible basis whatsoever for finding that a party has already bound itself to arbitrate its disputes, then the court is not able to compel it to do so. Thus, if a French court determines that an arbitration clause manifestly does not exist or is manifestly null, it may decline to refer the parties to arbitration. We shall use this concept in analysing the pro-arbitration order in the UK and the gateway issues of commercial arbitration later in this chapter.

In spite of their worldwide recognition, neither competence-competence nor separability are specifically mentioned anywhere in the text of the US Federal Arbitration Act (FAA). Although the separability doctrine was judicially created over forty years ago by the US Supreme Court, the development of any sort of ‘competence-competence’ doctrine proceeded more slowly, though recently it has begun to take an increasingly clear shape. English courts have also acknowledged the separability of the arbitration agreement while historically demonstrating particular reluctance to embrace sweeping formulations of any general principle of ‘autonomy’ or ‘independence’ of arbitrators to determine their competence. That reluctance

113 Gaillard and Banifatemi (n 110) 260.
114 Bermann (n 111) 17.
115 See, e.g. UNCITRAL Model Law (n 93), art 16(1) (both competence-competence and separability); English Arbitration Act of 1996, art 30(1) (competence-competence) and art 7 (separability); Swiss Federal Statute on Private International Law, art 186(1) and art 178(3) (separability); French Code of Civil Procedure, art 1466 (competence-competence).
116 See generally, 9 USC Arbitration Sections 1-307.
has been largely abandoned in recent legislative reform and judicial decisions which adopt an expansive view of the separability presumption.

The last preliminary issue that needs clarification at this point is that despite it often being said that the competence-competence principle is derived from, or dependent on, the separability presumption, as discussed above, it is conceptually wrong to explain the competence-competence doctrine by reference to the separability presumption. The separability presumption deals with the substantive validity of the arbitration agreement while the competence-competence doctrine addresses the tribunal’s power to consider and decide jurisdictional issues when the arbitration agreement is challenged. There are circumstances where the two principles intersect, but they are analytically distinct concepts.

Clearly, both concepts address the question ‘who decides – courts or arbitral tribunal?’ but they have different ways of doing so. As discussed previously, the question as to who decides may be raised in any of the four stages of an international arbitration, namely prior to establishment, at the commencement, during the proceeding, and at the time of recognition and enforcement. The main objective of this thesis is to find a precise answer to this question at any of the aforementioned stages. For the purposes of our discussion in this chapter, the issues that are likely to emerge in the first stage are more relevant to the separability and competence-competence doctrines though in other stages of an arbitration process other doctrines may come to the fore. The issues that are most likely to arise prior to the establishment of the tribunal are as follows: the invalidity of the container contract (for any reason other than those directly invalidate the arbitration clause); the challenge to the existence of the arbitration agreement between the parties; challenges to the validity of the arbitration (for example, not in writing) or materially invalid (for example, violation of mandatory law); a disputed issue which does not fall under the arbitration agreement. Although the dispute is within the scope of the parties’

118 The English Arbitration Act 1996 left this well-considered analysis intact whilst also providing a statutory resolution of sorts to the historic debate in England concerning the scope of the separability doctrine.
120 For more on the misunderstandings surrounding the functions of separability and competence-competence, see also Born (n 98) chapter 6.
121 See Bermann (n 111) 15.
agreement, mandatory law prohibits auditing the dispute by arbitration, using instruments such as competition (antitrust) laws or securities fraud; the absence of necessary prerequisites in arbitration (for instance, a time-limit on initiating arbitration). The significance of these issues is that, because of the greater number of each claim required to be fully litigated at stage one, the greater is the potential for disruption of the arbitration process or, in other words, the greater is the potential for an obstructing party to frustrate a genuine agreement to arbitrate.

Whereas separability sends only the first of the seven issues listed above to the arbitrators, competence-competence may send the other six issues to them as well. Based on the competence-competence doctrine, precisely its negative effect, even issues of the existence and the validity of the arbitration agreement may go initially to the arbitrators. Competence-competence thus addresses the ‘who decides’ question on a broader scale to resolve the policy tension between protecting arbitration from the most consequential aspects of the doctrine known as the negative effect of competence-competence.122

Having recognised and understood these two important instruments, it is now easier to proceed to analyse court involvement prior to the establishment of an arbitral tribunal. At this stage, the courts’ interference may appear in at least three forms, namely an anti-arbitration injunction; an anti-suit injunction; and a pro-arbitration order. This section will proceed by delineating all these matters in the UK and US jurisdictions and analysing them normatively with the aim of reaching a harmonised approach for all jurisdictions.

2.4 Injunctions involving arbitration

One of the common examples of court involvement in all stages of international arbitration, and particularly prior to establishment of the tribunal, is to grant injunctions that provide a number of practical and conceptual difficulties.123 Nevertheless, they could possibly have outstanding implications on the whole process of international arbitration proceedings.

122 ibid.
According to Judge Stephen Schwebel, it is ‘one of the gravest problems of contemporary international commercial arbitration’.\textsuperscript{124} Injunctions may be granted in various sizes or shapes, however, the concentration here will be on injunctions that may obstruct arbitration proceedings, i.e., anti-arbitration injunctions, and those that support and insist on arbitration proceedings, such as anti-suit injunctions and pro-arbitration injunctions. As we shall see further, these types of injunctions may negatively impact on the implementation or non-implementation of an arbitration agreement. However, a pro-arbitration injunction primarily aims to directly and positively enforce arbitration agreement, and therefore, requires independent argument which will be discussed in a separate section. Moreover, despite the current status of national jurisdictions, the functionality of such an injunction, whether disruptive or constructive will be evaluated.

2.4.1 Anti-arbitration injunctions

Anti-arbitration injunctions either prior to the establishment of the tribunal or even during the proceedings are utilized to prevent the establishment of the tribunal or obstruct the arbitration so that it can proceed on the right track. Normatively, the basic principle is that injunctions restraining the conduct of arbitration proceedings should only be issued when it is absolutely evident that these proceedings have been wrongly brought.\textsuperscript{125} Depending on jurisdictions, these injunctions may be granted against the disputants or the arbitrators if the court has the competence to do so.

Comparing common law countries and civil law countries in terms of anti-arbitration injunctions, an outright and clear distinction between these two jurisdictions can be highlighted. Generally speaking, common law countries are more willing to get involved in arbitration, and therefore, tend to permit judicial intervention whereas civil law countries, such as the French colonies, are reluctant to get involved in the parties’ agreed process.\textsuperscript{126} This is

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Stephen M Schwebel, ‘Anti-Suit Injunctions in International Arbitration – An Overview’ in Gaillard (n 123) 5-6.
\item \textsuperscript{125} cf David St John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (23rd edn, Sweet & Maxwell 2007) sections 7-052.
\item \textsuperscript{126} See Julian DM Lew, ‘Control of Jurisdiction by Injunctions Issued by National Courts’ in Albert Jan van den Berg (ed), International Arbitration: back to basics? (Kluwer 2007) 185, 201. Here, Lew explains that under the common law regimes of the United States and England, a court may only issue an anti-arbitration
\end{enumerate}
\end{footnotesize}
not surprising since common law systems generally accept parallel proceedings on a case by case basis by way of *forum non conveniens*. However, civil law systems adhere to the *lis alibi pendens* principle, meaning first come first served, and therefore, do not often get involved. Also, as discussed earlier, civil law countries following the French reading of competence-competence adhere to the negative effect of this doctrine, and therefore, aim to preclude national courts from any sort of involvement even prior to the establishment of the arbitral tribunal except where it is manifestly clear that the arbitration agreement is null or invalid.

Regarding the two jurisdictions being discussed in this thesis, it is well established that US courts have a general power to grant anti-arbitration injunctions.\(^{127}\) Though there is no outright procedure for the courts in this matter, there appear to be different approaches among US Courts of Appeal in dealing with the question.\(^{128}\) Nevertheless, it would appear that in each particular case the burden is to convince the court, albeit according to the circumstances of the case including the nature of the actions whether proper grounds to issue anti-arbitration (suit) exist or not.

Prior to issuing an anti-suit injunction, the following prerequisite has to be met: the court that is sought to grant the injunction must be competent to do so; same parties must participate in both proceedings; and finally, the subject matter of the injunction must deal with the court proceedings in the foreign jurisdiction.\(^{129}\) These threshold requirements are sometimes referred to as the ‘China Trade Test’.\(^{130}\) Despite the fact that these prerequisites should be satisfied, courts

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\(^{127}\) See *Kaepa, Inc v Achilles Corp* 76 F3d 624, 626 (5th Cir 1996).

\(^{128}\) Cf ibid 627.

\(^{129}\) See Lew (n 8) 505.

\(^{130}\) See *China Trade & Dev Corp v Yong* 837 F2d 33, 36-37 (2nd Cir 1987) During the discovery phase of the New York action, SsangYong filed an action in the district court of Pusan, Korea, seeking a declaratory judgment that it was not liable for China Trade’s loss. China Trade then filed a motion for a foreign anti-suit injunction, seeking to preclude the Korean action. *China Trade*’s scope was most recently tested in *KBC v Pertamina*. 
have different standards for granting an anti-suit injunction. Therefore, obtaining such an injunction depends primarily on the court from which the injunction is sought.\textsuperscript{131}

In England, on the other hand, courts invoke two statutory provisions to justify their power to grant injunctions in the arbitration context: Section 72(1) of the Arbitration Act 1996 and Section 37 of the Supreme Court Act 1981. Section 72(1) of the Arbitration Act provides that: ‘1. A person … who takes no part in [arbitration] proceedings may question … (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief’. Section 37 of the Supreme Court Act 1981 states that:

1. The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
2. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.\textsuperscript{132}

Historically, courts applied these provisions in various cases. In \textit{Welex AG v Rosa Maritime Ltd} (‘The Epsilon Rosa’) an anti-suit injunction was granted to restrain Welex from pursuing a lawsuit in Poland commenced in violation of an arbitration agreement.\textsuperscript{133} The Court of Appeal stated that, although the Arbitration Act did not confer outright right power to the High Court to issue the injunction, there was a general power to issue permanent anti-suit injunctions ‘in all cases in which it appears to the Court to be just and convenient to do so’.\textsuperscript{134} This case concerned an appeal against the High Court’s decision on granting an anti-suit injunction in order to restrain Welex from proceeding its lawsuit in Poland. The Court of Appeal held that, although the Arbitration Act 1996 does not have any express provision to give such power to the High Court to issue the injunction, the court’s jurisdiction to grant

\textsuperscript{131} See \textit{Kaepa} (n 127) 626 where it was noted that although US courts possess the ability to allow anti-suit injunctions, the various circuits disagree on which legal standard to apply concerning injunctive relief.
\textsuperscript{132} Supreme Court Act 1981, section 37.
\textsuperscript{133} See \textit{Welex AG v Rosa Maritime Ltd} [2003] EWCA (Civ) 938, [34]-[40].
\textsuperscript{134} ibid [40].
anti-suit injunction can be inferred from Section 37(1) of the Supreme Court Act 1981.\(^{135}\)

Accordingly, it can be concluded that English courts are able to award an anti-arbitration injunction. In practice, however, they only do so in exceptional circumstances, more precisely only where it is evident that the arbitration proceedings have been triggered in violation of the parties’ agreement. The court clearly expressed in its award that anti-arbitration injunctions should not be issued simply because ‘the balance of convenience favours the injunction’.\(^{136}\) In an attempt to find a set of objective criteria, in *Compagnie Nouvelle France Navigation, SA v Compagnie Navale Afrique du Nord* the Court of Appeal suggested the following guidance on granting anti-arbitration injunctions: first, the order ‘must not cause injustice to the claimant in the arbitration’; and second, the applicant for the order ‘must satisfy the Court that the continuat[ion] of the arbitration would be oppressive or vexatious … or an abuse of the process of the Court’.\(^{137}\) Evidently, English courts, compared with the aforementioned test applied amongst the US courts, have adopted more practical and accurate criteria to issue anti-arbitration injunctions. In other words, while the American tests only reveal the competence of the US courts to grant anti-suit or anti-arbitration injunctions, the English criteria specifically alluded to this concern suggesting that an anti-arbitration injunction is likely to undermine the efficiency as well as the independence of international arbitration.

The approach was affirmed in *Weissfisch v Julius*.\(^{138}\) In that case the English High Court was sought first to annul the arbitration agreement which required arbitration under Swiss law with the seat in Switzerland; and second, to issue an injunction in order to restrain the sole arbitrator from auditing the case. The only real connection with England was the nationality of the arbitrator who was an English lawyer within the jurisdiction of the court. Therefore, following those objective tests, the court rejected the application. In particular, the court stipulated that the arbitration agreement clearly stated that disputes should be governed

\(^{135}\) ibid.
\(^{136}\) ibid [44]-[45].
\(^{138}\) *Weissfisch v Julius* [2006] EWCA (Civ) 218, [32]-[35].
under Swiss law and determined by the sole arbitrator with his seat in Switzerland. Accordingly, challenges to the validity of the arbitration agreement must be determined in Switzerland according to Swiss law.\textsuperscript{139} Consequently, from all the circumstances of the case and in line with the aforementioned guidelines, it was evident that there was no reason for the English courts to get involved and issue an anti-arbitration injunction.

In another case, \textit{J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd}, Jarvis requested a suspension in arbitration proceedings due to the fact that parallel proceedings would be in place which were likely to result in a contradictory conclusion, and the arbitration proceedings would not provide any useful result.\textsuperscript{140} The court affirmed its jurisdiction in the case but stressed that such an injunction would be granted exceptionally, depending on the circumstances of the case.\textsuperscript{141} Refusing to grant an injunction, the court remarked on the Commercial Court’s refusal to issue an anti-arbitration injunction in the recent cases of \textit{Internet FCZo v Ansol Ltd} and \textit{Elektrim SA v Vivendi}, stating that there had been no direct instances of the Commercial Court issuing an injunction to stop an arbitration since 31 January 1997.\textsuperscript{142} The court held that it had the jurisdiction to grant an injunction under Section 37 of the Supreme Court Act 1991; such competence can be implemented only if the injunction does not result in injustice, as ‘the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process’; and above all the court’s competence should be exercised rigorously in the light of the principles of the Arbitration Act.\textsuperscript{143} Again, it is clear that despite the initial confirmation by the court regarding its competence to grant an anti-arbitration injunction, it considers the matter of efficiency and independence from commercial arbitration to grant such an injunction in practice important in this instance.

The risk of contradictory findings has always been the main concern of holding

\begin{flushright}
\textsuperscript{139} ibid.  \\
\textsuperscript{140} See \textit{J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd} [2007] EWHC (TCC) 1262, [19].  \\
\textsuperscript{141} ibid [21] where it was noted that Jarvis submitted their claim at a very late stage in the proceedings, two weeks before the arbitration start date, and as such this factor would weigh heavily against Jarvis.  \\
\textsuperscript{142} ibid [39] (citing \textit{Elektrim SA v Vivendi Universal SA} [2007] EWHC (Comm) 571 and \textit{Internet FCZo v Ansol Ltd} [2007] EWHC (Comm) 226.  \\
\textsuperscript{143} ibid [40].
\end{flushright}
parallel proceedings in several jurisdictions. In this respect, the court stated:

Once those proceedings [i.e., court proceedings brought by a party against Jarvis] have been launched, there will be concurrent proceedings both in court and before the Arbitrator concerning the same subject matter. This carries the risk of inconsistent findings. Costs will be duplicated. Both Jarvis and Blue Circle will be fighting on two fronts before different tribunals about the same subject matter. All of those observations are true, but they do not mean that the arbitration is vexatious. It is an inevitable consequence of the mandatory language of section 9 of [the] Arbitration Act that from time to time there will be concurrent proceedings in court and before an arbitrator.144

As discussed earlier, this conclusion is rooted in two facts. First and foremost, English law has always been reluctant to adhere to the negative effect of the competence-competence doctrine; and secondly, common law systems generally are permissive regarding concurrent proceedings on a case by case basis through forum non conveniens. Therefore, the fact that the same case with the same parties is proceeding before a foreign arbitral tribunal does not lead the English courts to the decision that that arbitration is inevitably or necessarily vexatious. Hence, once again the court circumvented issuing an anti-arbitration injunction despite the fact that it initially acknowledged its competence to do so.

The pertinent questions here are to what extent does granting an anti-arbitration injunction undermine the functionality of commercial arbitration as an alternative means for dispute settlement, and is it necessary to rely on the competence of the courts for issuing such an injunction? The harmonisation of rules should tend in favour of arbitration, and therefore, the authority of the courts to grant any anti-arbitration injunctions should be removed to protect the independence of international arbitration and insulate them from external intervention. If the answer to the second question is no, then how is it possible to compromise between the necessity of insulating arbitration from external intervention and the competence of the courts to grant anti-arbitration injunctions? These questions are tackled in the next section.

144 ibid [45]-[46].
2.4.2 Should national courts grant anti-arbitration injunctions?

It is extremely hard to find grounds to justify court involvement at this stage to grant anti-arbitration injunctions. The following analysis can be considered in support of this position. First, as discussed earlier, a close reading of party autonomy and the principles of separability and competence-competence indicates that recognising international arbitration as an effective alternative to litigation requires that an arbitral tribunal should be competent to determine whether arbitration can be continued or not.\(^{145}\)

Second, Article 5 of the UNCITRAL Model Law reinforces the impossibility of granting anti-arbitration injunctions and in fact makes no mention of these anywhere. Article 5 simply stipulates: ‘[i]n matters governed by this Law, no court shall intervene except where so provided in this Law’.\(^{146}\)

Third, according to the New York Convention the only court with the competence to get involved, albeit in very limited and exceptional circumstances in arbitration, is the court of the seat of arbitration.\(^{147}\) There can be little space for courts at the seat to manoeuvre through granting anti-arbitration injunctions to prevent the possibility of rejection when enforcement of the award is sought.\(^{148}\) Recognition and enforcement must be left to the enforcing court. Therefore, no court other than the court at the seat of arbitration is entitled to interfere at this stage.

Fourth, according to the above, there can be no place for any court to issue an injunction on grounds of comity, balance of convenience, even if arbitration appears to be oppressive or vexatious.\(^{149}\) Rather, the court must only focus on the validity of the arbitration agreement itself.\(^{150}\)

Fifth, although the anti-arbitration injunctions may sometimes culminate with just


\(^{146}\) UNCITRAL Model Law (n 87) art 5.

\(^{147}\) See Lew (n 8) 495.

\(^{148}\) See Lew (n 126) 188-89.

\(^{149}\) See Lew (n 8) 510.

\(^{150}\) Lew (n 4) 477.
ends, at the same time this will amount in a lengthy and costly process or even lead to parallel litigation in various forums. This can be illustrated by the case of *General Electric Co v Deutz AG*¹⁵¹ where a US court issued an anti-arbitration injunction to halt an arbitration abroad. The container contract concluded between General Electric and a third company included a condition for ICC arbitration in London. Deutz subsequently joined in this agreement. A dispute emerged, and General Electric filed a lawsuit before a US court against Deutz alleging breach of contract. In response, Deutz requested an order to compel General Electric to take part in the initiated ICC arbitration in conformity with the arbitration agreement. General Electric, on the other hand, sought an anti-arbitration injunction to restrain Deutz from pursuing the ICC arbitration in London.

The court issued the anti-arbitration injunction on the basis of its general power to grant injunctive relief. It held that in order to respect the internationality of the commercial arbitration, the court should abstain from pursuing the restrictive criteria applicable in anti-suit injunctions which were able to grant a halt to lawsuits in a foreign jurisdiction.¹⁵² Under the restrictive criteria, two conditions had been met prior to the granting of an anti-arbitration injunction: the ICC arbitration started by Deutz threatened the jurisdiction of the US forum; and Deutz was evading strong US public policies through initiating ICC arbitration.¹⁵³ However, on appeal, having found that there was a failure by the District Court to apply the more restrictive approach to issue an anti-arbitration injunction, the Third Circuit Court of Appeals quashed the order granting the injunction. Accordingly, the involved parties in this case had not only wasted their time and money, but they were also unable to settle their dispute.

Sixth, as discussed earlier the only competent court to get involved in the arbitration proceeding is either the court where the recognition or enforcement of a foreign arbitral award is sought (at stage 4) or the court of the seat of arbitration in any other of the three stages of an arbitration proceeding. Nonetheless, the resisting party in arbitration

¹⁵² ibid 787.
¹⁵³ ibid.
is most likely to seek recourse to a court other than the court of the seat of the arbitral tribunal to obtain an anti-arbitration injunction to halt the arbitration. According to the ICC report, anti-arbitration injunctions were granted in thirty-one cases, among which twenty-five were granted by courts which have the same nationality as one of the parties.154

Matters become more disruptive when the resisting party is a state or state-owned entity which seeks and obtains an injunction from its own state court. The history of international arbitration is full of notorious cases of this kind. For example, *Himpurna California Energy v Republic of Indonesia* is the most famous case of an ad hoc arbitration, where an Indonesian court issued an anti-arbitration injunction to halt an arbitral tribunal from ruling against an Indonesian state-owned corporation.155 The case was as a result of a series of contracts to build and operate an electrical generation plant in Indonesia. The contracts contained ad hoc arbitration under the UNCITRAL Rules with the seat in Jakarta. Two different arbitration proceedings were subsequently initiated against Indonesia. Once the first arbitral award was issued against PLN, an Indonesian state-owned electricity corporation, an Indonesian court interfered in the arbitration process by granting two injunctions: one in order to suspend the enforcement of the first award; and the second to inhibit the second arbitration from being triggered.156

Such disruptive injunctions do not only happen in commercial arbitration. *Salini Construttori SPA v The Federal Democratic Republic of Ethiopia* is the most notorious investment arbitration example where the courts of the state party granted an injunction in order to halt arbitration proceedings which were taking an unfavourable turn against the state party. Parties had agreed on Ethiopia as the seat of the arbitration. However, for convenience, the arbitrators decided to conduct the hearings in Paris. The Ethiopian counsel held that such a decision was abusive, and to put the maximum pressure to prevent the arbitration being conducted in Paris, the Ethiopian courts then issued two injunctions against the arbitral

154 Lew (n 126) 185 note 1.  
155 See e.g., Peter Cornell and Arwen Handley, ‘Himpurna and Hub: International Arbitration in Developing Countries’ (September 2000) Mealey’s Int’l Arb Rep 39, 43-44.  
156 ibid 44.
tribunal the claimant to prevent the case proceeding.\textsuperscript{157}

Despite all of the above, it should be added that anti-arbitration injunctions are powerful in preventing a request for enforcement of the arbitral award being rejected and for the award eventually being set aside by the courts of the place of enforcement.\textsuperscript{158} This point is clearly illustrated in the English court’s decision in \textit{Albon v Naza Motor Trading}.\textsuperscript{159} In that case, the claimant requested an injunction to restrain the other party from continuing an arbitration in Malaysia. While there was a written joint venture agreement between the parties containing an arbitration clause subject to Malaysian law, the claimant challenged the authenticity of the signature and claimed that its signature had been forged. The High Court granted an injunction to halt the arbitration pending the English court dealing with the authenticity of the signature. Recognizing its jurisdiction to grant the injunctions, the judge asserted in the injunction that despite the request of the respondent from the English court to stop determining the signature authenticity in favour of arbitration, court refusal to grant the injunction would definitely culminate in a double proceeding regarding the signature authenticity.\textsuperscript{160}

The above discussion reveals that it seems too ambitious to urge national jurisdictions to waive their competence to grant anti-arbitration injunctions in favour of international arbitration. Such a suggestion is neither pragmatic nor efficient to remove the general concerns regarding the threat against independence of arbitration. On the other hand, having acknowledged the competence of the courts to grant an anti-arbitration injunction, and in the light of the following facts and norms, some sort of harmonisation sounds plausible. The most important principle at this stage, is derived from the New York Convention that the only courts that should become involved in the arbitration process are those at the seat of arbitration or the place of enforcement. Therefore, the only courts that may get involved in the process of granting an anti-suit injunction should one of the parties seek this is the court of

\textsuperscript{157} Frédéric Bachand, ‘Must an ICC Tribunal Comply With an Anti-Suit Injunction Issued by the Courts of the Seat of Arbitration?’ (2005) Mealey’s Int’l Arb Rep 47.
\textsuperscript{158} See \textit{Albon v Naza Motor Trading} [2007] EWHC (Ch) 1879.
\textsuperscript{159} ibid [1].
\textsuperscript{160} ibid [1], [20], [22], [27].
the seat and nothing else. Additionally, such discretion can be exercised only if the following criteria exist together: the injunction does not cause injustice; and the continuance of the arbitration might be an abuse of process, unconscionable, vexatious or oppressive. In the light of these principles foreign arbitration, whether commercial, investment, ad hoc or institutional can and should be continued even if any national court wherever in the world grants an anti-arbitration injunction.

2.5 Anti-suit injunctions

Anti-suit injunctions exist to prevent or restrain lawsuits against an arbitration agreement. Such injunctions are quite normal when there are parallel proceedings in different fora. The most notable point about the anti-suit injunction is that it is not against the jurisdiction of the foreign court but it is directed against the defendant who has agreed, through the arbitration clause, not to bring foreign proceedings.\(^{161}\)

Three substantial points should be highlighted regarding anti-suit injunctions: first, the significance of the anti-suit injunction that enables courts to implement their supervisory role is now recognized.\(^{162}\) These injunctions are of great importance for the national courts at the arbitration seat once they decide to play their supervisory role over the arbitration process.\(^{163}\) Nevertheless, there is no unified approach among the national courts before awarding such injunctions. For example, in England, the Court of Appeal acknowledged that it has discretionary jurisdiction to grant injunctions and asserted that English courts are able to issue such injunctions if they are sought in due time ‘before the foreign proceedings are too far advanced’.\(^{164}\) In the same way, the English court in *Starlight Shipping Co v Tai Ping Insurance Co* issued an anti-suit injunction to inhibit Chinese proceedings being brought in action in breach of an arbitration clause incorporated in a bill of lading.\(^{165}\) The defendants argued that as a matter of Chinese Law they did not enter into a binding arbitration agreement.

\(^{161}\) Lew (n 123) 25.
\(^{162}\) Lew (n 126) 187.
\(^{163}\) ibid.
\(^{165}\) *Starlight Shipping Co v Tai Ping Ins Co* [2007] EWHC (Comm) 1893.
agreement. This approach followed in *Aggeliki Charis Compania Maritima SA v Pagnan SPA* when the appeal court affirmed an injunction inhibiting one party of arbitration with its seat in the UK from pursuing a lawsuit in Italy.

The US courts’ approach towards anti-suit injunctions aiming to enforce arbitration agreements is clearly established in *BHP Petroleum (Americas) Inc v Reinhold*. In this case, BHP Petroleum sought the US District Court for the Southern District of Texas to compel Baer to arbitration in Texas and prevent him from proceeding with his lawsuit in Ecuador. The court decided that:

An injunction barring a foreign action was proper if the simultaneous prosecution of an action would result in ‘inequitable hardship’ and ‘tend to frustrate and delay the speedy and efficient determination of the cause.’ … The focus of the inquiry is whether there exists a need to prevent vexatious or oppressive litigation … In light of the strong federal policy favoring arbitration, the court finds that Plaintiffs would be irreparably harmed if Baer were permitted to continue litigating in Ecuador while the same claims were being arbitrated. Therefore, the court [grants] Plaintiffs’ application for injunction.

It appears, from the case law that the approach of American law is stricter than that of the English courts. An important criterion in granting the injunction in the United States is ‘irreparable harm’ which was set out by the US District Court for the Southern District of New York in *Empresa Generadora de Electricidad ITABO v Corporacion Dominicana de Empresas Electricas Estatales (CDEEE)*. In this case, ITABO, a private company registered in the Dominican Republic, requested the court to impel CDEEE which belonged to the Dominican Republic to ICC arbitration with the seat in New York in accordance with the arbitration agreement in ITABO’s bylaws. It also claimed an anti-suit injunction to inhibit CDEEE from proceeding with its lawsuit in the Dominican courts. The court rejected both requests. Concerning the anti-suit injunction, the court asserted that ‘ITABO [had] not

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166 ibid [14].
167 Dalhuisen (n 17) 96-97.
169 ibid I-4 (citing *Kaepa* (n 127)); see also *Wal-Mart Stores, Inc v PT Multipolar Corp* Nos. 98-16952 & 98-17384, 1999 WL 1079625, 2 (9th Cir Nov 30, 1999).
met [the] heavy burden of establishing irreparable harm’. It set out this notion in the following terms. Injunctive relief ‘is an extraordinary and drastic remedy which should not be routinely granted.’…where necessary to prevent irreparable harm, ‘a federal court may enjoin a party before it from pursuing litigation in a foreign forum.’ … irreparable harm is injury that ‘is likely and imminent, not remote or speculative, and … is not capable of being fully remedied by money damages.’ … the movant is required to establish not a mere possibility of irreparable harm, but that it is ‘likely to suffer irreparable harm if equitable relief is denied’. The second point is that national courts are likely to misuse the anti-suit injunction once they consider it necessary to reinforce the parties’ agreement to arbitrate. In this regard, anti-suit injunctions in the arbitration context vary substantially from injunctions issued in other contexts. This distinction is rooted primarily in the nature of arbitration itself. In anti-suit injunctions, the court’s concern should be to preclude a party’s attempt to avoid its promise to arbitrate. In this regard, the court must not to be concerned by issues of oppressive or vexatious conduct, or be overly sensitive to questions of comity. It is a stage that requires great precision from the court. An anti-suit injunction aims to remove any obstacles in front of the implementation of an arbitration agreement, not the direct enforcement of the arbitration agreement itself.

The injunction will be granted only to support the parties’ agreement to settle their dispute by means of an alternative method for dispute settlement. Courts have to recognize this agreement and support it by all means. The English High Court in Starlight Shipping Co v Tai Ping Insurance Co. affirmed that injunctions granted in the arbitration context, unlike anti-suit injunctions granted by the courts of equity, are not about wrongful or unconscionable conduct, but more about precluding ‘a party to a contract from doing

171 ibid 24-26.
172 ibid 16 (citations omitted).
173 See José CF Rozas, ‘Anti-Suit Injunctions Issued by National Courts: Measures Addressed to the Parties or to the Arbitrators’ in Gaillard (n 123) 79-80.
174 Lew (n 8) 505.
175 Lew (n 4) 477.
176 cf Lew (n 126) 192.
177 Lew (n 4) 456.
178 See Starlight Shipping (n 165).
something [that it] has promised not to do’. 179

Additionally, anti-suit injunctions granted in the other context are not subject to limitations imposed by the principles of comity. 180 According to the justice Cooke who quoted from Lord Justice Longmore in *OT Africa Line Ltd v Magic Sportswear Corp*: ‘It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a [forum] is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties’ agreement is respected.’ 181 Lord Justice Longmore continued to add practical observations to these justifications, namely that the most tangible fruit of exercising such discretion in issuing an injunction at an early stage of an arbitration is that it will prevent double hearing of the same matters one time in an arbitral tribunal, and then again in a litigation conducted in national courts. 182 Furthermore, granting anti-suit injunctions will provide this opportunity for the applying party to benefit from contempt of court proceedings. 183 For all these reasons it seems that any movement towards harmonisation should tend in favour of recognition as well as expansion of such discretion for national courts. This will definitely not only insulate international arbitration from external interferences, and therefore, guarantee the independence of arbitration as an efficient alternative to litigation, but will also minimise the unnecessary cost of proceedings.

2.6 Pro-arbitration orders

In order to enforce the arbitration agreement itself, national courts may order for specific performance of the arbitration agreement called a pro-arbitration order. Accordingly, these injunctions directly impel parties to abide by their agreement to arbitrate. Hence, they provide substantial support for the arbitration process. In other words, the pro-arbitration order is an effective instrument to guarantee the independence of commercial arbitration as an alternative to litigation. However, given the fact that ‘specific performance’ is rarely ordered in common law jurisdictions, there are two other important issues about this specific kind of

181 *Starlight* (n 165) [44] (citing *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA (Civ) 710, [32].
182 See *OT Africa* (n 181).
183 cf *Starlight* (n 165) [43].
court involvement in arbitration. The foremost question is to what extent the pro-arbitration order may undermine the fundamental principles of international arbitration discussed above. The second issue relates to the ambit of such an order. In order words, even if the pro-arbitration order is granted in one jurisdiction, how far should it reach, and more particularly, is there any competence for the courts to impel third parties who did not consent to arbitration to participate in the proceeding?

2.6.1 When should courts compel parties to arbitrate?

The answer to this question varies from jurisdiction to jurisdiction. In the United States, for instance, courts hold substantial power to order specific performance for the arbitration agreement. In other words, American Law recognizes the competence of the court to enforce the arbitration agreement against a reluctant party to go to arbitration.\(^\text{184}\) Sections 4 and 206 of the FAA provides this opportunity for the aggrieved party of a written arbitration agreement to request an order to compel its counter party to participate in the arbitration process, and be bound with their agreement; otherwise, that party, the resisting party in the arbitration agreement, will be in contempt of court.\(^\text{185}\) The crucial point in this section is that such an order to impel the resisting party to participate in the arbitration process will be issued even if the seat of the arbitration is located outside the United States. It is evident that this approach has outstanding implications when one party uses it as a tactical method to halt arbitration proceedings despite previous consent having been given for arbitration to be used to resolve the dispute.\(^\text{186}\) Regardless of this statutory regime which enables the US courts to issue pro-arbitration orders, the question will be analysed once again by reference to the competence-competence doctrine, and its negative effect. As discussed earlier, American law has not recognised the negative effect of the doctrine. This, accordingly, allows the national courts to determine the validity and existence of the arbitration agreement prior to establishment of the arbitral tribunal. Thus, once they have found valid grounds for the conclusion of the arbitration agreement, they will enforce it through a pro-arbitration order.

\(^{184}\) See generally Born (n 98) 380.


\(^{186}\) ibid section 4.
The US District Court for the Southern District of New York exercised this power in *Paramedics Electromedica Comercial, Ltd v GE Medical Systems Information Technologies, Inc* when it issued a pro-arbitration order to enforce an arbitration agreement under the provisions of the Inter-American Commercial Arbitration Commission in Miami.\(^{187}\)

Once the dispute emerged, Paramedics, despite its previous undertaking to arbitrate, initiated a lawsuit in Brazil. On the other hand, in conformity with their agreement, GE Medical Systems started arbitration proceedings. Then Paramedics sought from a New York court to grant an anti-arbitration injunction. Reciprocally, GE Medical Systems sought an order to enforce arbitration agreement as well as an anti-suit injunction to refrain Paramedics from proceeding with its lawsuit before the Brazilian court. The court did not grant the anti-arbitration injunction requested by Paramedics, and therefore rejected its request. Having done that, it issued two injunctions as requested by the GE Medical Systems; one injunction to enforce the arbitration and oblige the Paramedics to participate in arbitration, and another anti-suit injunction preventing Paramedics from proceeding with its lawsuit in Brazil. The court stated that where the existence of an arbitration agreement is proved and one of the parties, notwithstanding this fact, does not adhere to this agreement, an order forcing arbitration without further proceedings may be granted.\(^{188}\)

The United States Court of Appeals for the Second Circuit confirmed the anti-suit injunction and the order to enforce arbitration agreement though it remanded the case to reconsider the sanctions which had been imposed compelling the enforcement. The Second Circuit stated that ‘[a]n anti-suit injunction against parallel litigation may be imposed only if: the parties are the same in both matters, and the resolution of the case before the enjoining court is dispositive of the action to be enjoined’.\(^{189}\) The court also stated that ‘the district court did not abuse its discretion in ruling that’ since the two requirements have sufficiently been satisfied.\(^{190}\)

\(^{187}\) 369 F3d 645, 652 (2d Cir 2004). This affirms the judgment of the District Court in granting ‘GEMS-IT’s motion to compel arbitration’.

\(^{188}\) ibid 649.

\(^{189}\) See ibid 652.

\(^{190}\) ibid 652-54.
Irrespective of the practical implications of the use of pro-arbitration injunctions to support the independence of arbitration, there are arguments against its use. For instance, a pro-arbitration order not only undermines the fundamental principle of commercial arbitration, but also it is not clear if it is actually beneficial to the arbitral process or not. First, in most jurisdictions, courts are not permitted to force the parties to participate in arbitral proceedings, but rather by refusing to acknowledge their competence to audit the dispute between the parties they lead them, negatively, to pursue the arbitration process to resolve their dispute.\textsuperscript{191} This approach is totally understandable since otherwise any motion by a national jurisdiction would give rise to a breach in the autonomy of international arbitration as well as a breach in fundamental principles of international arbitration including competence-competence, at least for those countries following the French reading of this doctrine. Furthermore, nothing in the New York Convention suggests that a court is obliged to enforce an arbitration agreement itself. Courts are only obliged to ‘refer’ a party to arbitration.\textsuperscript{192} The same approach is seen in the UNCITRAL Model Law.\textsuperscript{193} Section 9 of the UK Arbitration Act 1996 also refers to the suspension in court action in such circumstances.\textsuperscript{194}

One famous example where courts did not enforce the arbitration agreement but halted the lawsuit in favour of arbitral proceeding is the \textit{Channel Tunnel} case.\textsuperscript{195} The parties of this case, Eurotunnel (the owners of the tunnel) and Trans-Manche Link (a consortium of English and French companies) had entered into a transaction for the construction of a tunnel under the English Channel between England and France. The dispute resolution clause of the contract had set out multi-stage mechanisms to deal with any disputes between the parties thereto. In the first stage, any dispute between the contracting parties shall be determined by a group of experts. Then, if either party challenged the panel’s decision, the dispute could be resolved by recourse to the ICC arbitration with the seat in Brussels. A dispute emerged about the amounts payable for the tunnel’s cooling system. Trans-Manche Link alleged that the contract had been breached by Eurotunnel and threatened to stop

\textsuperscript{191} See \textit{Channel Tunnel Group Ltd v Balfour Beatty Constr Ltd} [1993] AC 334, 367-68 (HL).
\textsuperscript{192} New York Convention (n 11) art II, section 3.
\textsuperscript{193} UNCITRAL Model Law (n 87) art 8, para 1.
\textsuperscript{194} Arbitration Act 1996 (n 115) 23, para 9.
\textsuperscript{195} \textit{Channel Tunnel} (n 191) 367-68.
working. In response, Eurotunnel initiated a lawsuit in the English courts and sought an interim injunction to inhibit the Trans-Manche Link to suspend their works. Trans-Manche Link argued that the English courts were not competent to grant such an injunction.

Additionally, Trans-Manche Link sought suspension of the lawsuit initiated by Eurotunnel in favour of the arbitration. The English House of Lords decided to suspend the proceedings in favour of arbitration based on the natural authority of the court to suspend any lawsuit initiated before it in contrast with the previous agreement of the parties to arbitrate their dispute.\(^{196}\) Section 9 of the Arbitration Act 1975 further provided in its fourth paragraph that ‘the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed’.\(^{197}\)

Similar to the American Law, sections 4 and 206 of the FAA discussed above, the English court could apply the mandate of Section 9 even if the arbitral seat ‘is outside England and Wales or Northern Ireland or no seat has been designated or determined’.\(^{198}\) Nevertheless, the UK Arbitration Act 1996 does not contain any provision allowing courts to grant a pro-arbitration order to enforce a party to participate in arbitration. Accordingly, it seems that the modern UK Arbitration Act 1996 only indirectly supports the arbitration agreement instead of allowing the court to directly enforce an arbitration agreement.\(^{199}\)

Moreover, the court rejects its jurisdiction to determine a lawsuit which is initiated in violation of the parties’ agreement to arbitrate indirectly and to ensure and support the implementation of the arbitration agreement while minimizing the court involvement in an arbitral proceeding. This approach blocks the possibility of recourse to national courts as it remains the only arbitration proceeding open for the claimant to pursue.\(^{200}\)

Finally, as discussed above, pro-arbitration agreements may undermine the fundamental principle of commercial arbitration including competence-competence since

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\(^{196}\) ibid 352.
\(^{197}\) Arbitration Act 1996 (n 115) section 9, para 4.
\(^{198}\) ibid section 2, para 2(a).
\(^{199}\) Channel Tunnel (n 191) 367-68.
arbitrators may feel they are restrained by the court’s decision to enforce the arbitration. Clearly, if the court grants a pro-arbitration order, it means that the judge(s) has confirmed the existence of a valid arbitration agreement between the parties. This is in contrast with the mandate of the competence-competence doctrine which states that the arbitral tribunal has the competence to make a decision on its jurisdiction as well as the existence and validity of the arbitration agreement.

A convergence point between these disparate approaches towards a pro-arbitration order can hardly be achieved. In the light of previous analysis one may conclude that the pro-arbitration order will undermine the independence of international arbitration as an efficient alternative to litigation. Having said that, if a jurisdiction like the United States does not recognise the negative effect of the competence-competence doctrine, then any pro-arbitration order seems to be plausible. To reach a convergence on this matter, it is necessary to harmonise disparate approaches on the competence-competence doctrine. Once this issue is settled, harmonisation on pro-arbitration orders will be easier.

2.6.2 To what extent can courts compel third parties to participate in arbitration?

The most important question regarding the pro-arbitration order is the exact limitation of the court’s power to force parties to participate in arbitration. In other words, are the courts competent to force third parties who are not bound by the arbitration agreement to participate in the arbitration probably based on close business relations with one of the involved parties to the arbitration agreement or any other factor? The question becomes more controversial when parties of the arbitration are companies and entities which are the alter egos of the state.

The approach of the English courts is not clear and it seems that granting an order in this issue depends primarily on the circumstances of the case. In *UK Film Finance Inc. v. Royal Bank of Scotland*, an arbitration agreement encompassed only two of three parties, but the English court, by extending the ambit of the agreement, compelled the third party to

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202 See Lew (n 8) 515.
participate in the arbitration.  

Nevertheless, in *Starlight Shipping*, the English court refused to grant an order favoring the arbitration due to the lack of jurisdiction even though as a matter of English law the proceedings seem to be vexatious and oppressive.  

Courts in the United States have invoked the principle of estoppel to extend the ambit of the arbitration agreement to cover parties who are apparently not bound to that agreement.  

Nonetheless, in *Regent Seven Seas Cruises, Inc v Rolls Royce Plc* a federal judge in Miami rejected the request to extend the scope of an arbitration agreement in a charter agreement.  

Regent and Radisson, the owner of the vessel, had signed a time charter agreement which contained an arbitration clause. It claimed that the other parties, Rolls Royce and Alstom, ‘defrauded and deceived’ it in order to install the Mermaid pod propulsion system.  

Then, Rolls Royce and Alstom applied to the court to impel Regent to participate in arbitration according to the charter agreement. The judge of the Southern District of Florida refused to enforce the arbitration agreement to impel Regent to participate in arbitration since ‘[i]t is inconceivable that, as non-signatories, they would be able to compel Regent to arbitrate claims that do not even appear to arise out of the Time Charter agreement’.

All in all, it seems that the main reason justifying this kind of court involvement is to decrease costs and time expenses; to enhance the efficiency of dispute settlement; and to remove the risk of contradictory findings in various forums that may determine a particular case.  

Despite these worthy implications, it is absolutely necessary to underpin the independence of arbitration and to protect the entire process from being undermined by court intervention. Additionally, as discussed above, a pro-arbitration order will weaken the

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203 [2007] EWHC (Comm) 195 [48].
204 ibid 1893, [42].
205 See Regent Seven Seas Cruises, Inc v Rolls Royce Plc Nos. 06-22347- CIV & 06-22539-CIV, 2007 WL 601992, 7-8 (SD Fla, 21 Feb 2007).
206 ibid 11-12.
207 ibid 1.
competence-competence principle. In any case, arbitrators should be competent to make a decision as to the scope of the arbitration agreement; who should participate in the proceeding; and above all, who will be affected by the arbitral award. In conclusion, it seems that the court’s jurisdiction to issue a pro-arbitration order cannot be gathered with the negative effect of the competence-competence doctrine, and therefore, those jurisdictions which adhere to the French interpretation of competence-competence do not allow their courts to grant such an order. In the rest of the world with those national laws that permit their courts to grant such an order, it must be considered that a pro-arbitration order is not necessarily respected by another court. This will eventually increase the risk of non-recognition or proper enforcement in third countries.\textsuperscript{210}

2.7 \textbf{Gateway problem in international commercial arbitration}

Discussing the gateway issues in international commercial arbitration requires consideration of a set of significant concepts that have been discussed already in this chapter, namely the separability doctrine; competence-competence with both negative and positive effects; anti-arbitration and anti-suit injunctions; and above all, pro-arbitration orders. It also requires constant effort on the part of the participant in international commercial arbitration to maintain arbitration as an efficient and therefore credible alternative to litigation.\textsuperscript{211} In addition, it is important to keep in mind the features of international arbitration elucidated in chapter one whereby despite the independence of international arbitration, no one can purport to be totally independent. The focal point in talking about the independence of international arbitration is the necessity of its insulation from any external intervention. Nonetheless, it does not mean that international arbitration does not welcome outside assistance in its various stages when that assistance is constructive.

Currently, in most jurisdictions courts are committed to carry out all necessary measures to support the arbitral process among which is ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner to guarantee the efficacy and legitimacy of international arbitration. According to Bermann, the concept of gateway issues which has gained

\textsuperscript{210} See, e.g. \textit{Dependable Highway Express, Inc v Navigators Ins Co} 498 F3d 1059 (9th Cir 2007).
\textsuperscript{211} See Bermann (n 111) 3.
prominence in recent US Supreme Court rulings\textsuperscript{212} aims to settle the clash between these two important objectives of international arbitration. Nevertheless, despite its substantial prominence in modern American literature, the essence of gateway issues of international arbitration even in the United States, its original place of emergence, is still under question. However, in a very broad sense, it consists of those issues that a court, in the interests of striking the proper balance between efficacy and legitimacy, consider at the very outset prior to the establishment of an arbitral tribunal. In its precise and narrow meaning, the term ‘gateway issues’ encompasses only ‘those threshold issues that a court, if asked to do so, will address at the outset, but excluding those that the courts reserve for initial determination, along with the merits, to the arbitral tribunal itself’.\textsuperscript{213} To put it differently, gateway issues are those that a court entertains at the beginning to ensure that the consensual foundation of the whole process exists whereas non-gateway refers to issues that an arbitral tribunal, not a court, must be permitted to determine initially to maintain the efficiency of commercial arbitration as an alternative mode of dispute resolution.\textsuperscript{214}

However, this does not mean that the ‘gateway’ issues are exhaustive.\textsuperscript{215} More importantly, it indicates that a special threshold issue is a gateway issue, and therefore, a court may get involve at the outset and if it is asked to do so, it does not mean that the arbitral tribunal is not competent to determine that issue if the issue is first raised before it.\textsuperscript{216} It should be noted that the arbitral tribunals should be, and in fact are, able to determine whether and when to make a decision on all threshold questions raised before them (subject to their being bound by the prior determination of a gateway issue by a competent court). Therefore, what distinguishes gateways from non-gateway issues is that ‘the former may be determined by a court if raised before it at the outset. Thus, gateway issues may be addressed either by a court or an arbitral tribunal,

\begin{itemize}
\item \textsuperscript{212} See, e.g. Howsam v Dean Witter Reynolds, Inc 537 US 79, 83-84 (2002) (‘gateway matters’).
\item \textsuperscript{213} Rent-a-Center v Jackson 130 S Ct, 2772 (2010) 2777-78.
\item \textsuperscript{214} See Berman (n 111) 8.
\item \textsuperscript{215} See, e.g. Cabintree of Wis, Inc v Kraftmaid Cabinetry, Inc 50 F3d 388 (7th Cir 1995).
\item \textsuperscript{216} See, e.g. Three Valleys Mun Water Dist 925 F2d, 1136.
\end{itemize}
whichever is asked first; non-gateway issues are uniquely for the arbitrators to decide in the first instance.\textsuperscript{217}

As seen earlier during the discussion on separability and competence-competence, various issues may be raised prior to the establishment of an arbitral tribunal. The significance of these issues lies in the fact that the greater the number of each claim required to be fully litigated at stage one, the greater is the potential for disruption of the arbitration process or, in other words, the greater is the potential for an obstructing party to frustrate a genuine agreement to arbitrate. Traditional ways to tackle all of the 7 aforementioned problems are to use either separability or the competence-competence doctrine.

Whereas separability sends only the first of the seven issues listed above to the arbitrators, competence-competence and more specifically its positive effect may send issues number 4 to 7 to them as well. Additionally, the French reading of the competence-competence doctrine and its negative effect sends even issues of the existence and the validity of the arbitration agreement so long as there is a \textit{prima facie} agreement to arbitrate. Therefore, one may argue that the gateway issue of commercial arbitration not only undermines the functionality of commercial arbitration, but it is also contrary to the very nature of the competence-competence doctrine. In sum, one may suggest that there is no need for gateway issues in commercial arbitration. A similar argument has already been developed during the discussion on pro-arbitration orders. As was discussed in depth there, a pro-arbitration order is contrary to the competence-competence doctrine that recognises the authority of the tribunal to make a decision on its jurisdiction. Any decision-making by the courts on pro-arbitration orders requires them to initiate substantive determination on the existence or validity of the arbitration agreement. This evidently gives rise to either a potentially contradictory conclusion between the arbitral tribunal and the courts regarding the validity/existence of the arbitration agreement, or it may culminate in the necessity of an arbitral tribunal to abide by a court’s order.

However, none of these concerns are relevant in the context of United States commercial arbitration. Before explaining the ‘gateways issues’ in American Law, which successfully

\[\textsuperscript{217}\text{See, e.g. McLaughlin Gormley King Co v Terminix Int’l Co 105 F3d 1192 (8th Cir 1997).}\]
distinguish between *efficacy* and *legitimacy* in commercial arbitration, it seems essential to outline the circumstances more. The best way to understand and evaluate the emerging framework of analysis in American law is to assume that not all threshold issues in arbitration are alike.\textsuperscript{218} Among those issues that may emerge prior to the establishment of the arbitral tribunal are challenges relating to the arbitration clause itself which may be heard and decided by the court at the outset whereas challenges relating to the contract as a whole are initially for an arbitral tribunal to decide on.

The most important question is whether a party which unwilling to arbitrate, or deny the existence or validity of an arbitration agreement is obliged on the basis of a prior undertaking to do so. If a court compels a party to arbitrate the resisting party may lose a set of fundamental rights including the right to appeal while it reinforces the efficacy of international arbitration as a dispute settlement facility.\textsuperscript{219} On the other hand, this shows that it is based on the fundamental principle that commercial arbitration is a consensual dispute settlement mechanism, and therefore, it is impossible to impel one party to adhere to the result and consequences of an agreement unless it has indicated its consent to be so bound. Therefore, if the court does not compel the resisting party who claims the existence or validity of the arbitration agreement to arbitrate, then it prioritises legitimacy over efficacy. In addition to the clash between efficacy and legitimacy, and for the purpose of proposing a compromise, one should consider that arbitration can become a less effective means of dispute resolution if, prior to arbitration, parties may be permitted to resort to the courts to argue why arbitration should not proceed, with the attendant costs and delays.

As discussed earlier, the ‘gateway issues’ in American law has compromised between *legitimacy* and *efficacy* in commercial arbitration without undermining either the separability or competence-competence doctrines. The foremost and central instrument to achieve this compromise starts with the fact that US law, unlike French law, has not recognised the negative effect of the competence-competence doctrine.\textsuperscript{220} On the other hand, in this regard the American

\begin{footnotesize}
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\begin{enumerate}
\item Bermann (n 111) 1.
\item See, e.g. Three Valleys (n 216) 1140-41.
\item See Gaillard and Banifatemi (n 110) 260.
\end{enumerate}
\end{footnotesize}
law resembles more the German reading of competence-competence,\(^{221}\) where the court is not content with a mere \textit{prima facie} review of the arbitration agreement but rather they prefer to make a full and formal determination on the matter.\(^{222}\)

Furthermore, the American approach, like the German one, is very pragmatic in terms of removing concerns for the delay in the arbitration process if the resisting parties have the option to have recourse to the court before the establishment of the arbitral tribunal. The German legislature was concerned regarding the increase of delay in arbitration proceedings if the arbitral tribunal can commence only after the court upholds the validity of the arbitration agreement. Clearly, resisting parties may use these jurisdictional challenges solely to halt the arbitration process in a seemingly frivolous manner.\(^{223}\) For this reason, the ZPO\(^{224}\) specifically provides that an arbitration once initiated must be permitted to proceed on its course, irrespective of whether the respondent has brought the case before a court under Section 1032(2). This is exactly the American approach which allows the arbitration to proceed simultaneously with litigation. Therefore, there would be no assumption that judicial intervention once triggered will lead to the termination of the arbitral proceeding, or perhaps its suspension until the court makes a decision on gateway challenges. According to American law, no such assumption need be made. It is completely conceivable that the judicial and the arbitral process at this stage can go forward concurrently.\(^{225}\) Thus, gateway issues will not damage the efficacy of commercial arbitration at all.

Additionally, while courts evidently have general competence to audit when a particular claim for whatever reason is no longer timely, it would seem necessary to ascertain in advance a time period within which gateway issues in arbitration may be referred to a court. This time limit


\(^{223}\) Bermann (n 111) 21.

\(^{224}\) ZPO (n 222).

\(^{225}\) The Revised Uniform Arbitration Act expressly provides that arbitral proceedings may go forward despite the tendency of a judicial challenge to the enforceability of the arbitration agreement Uniform Arbitration Act (2000) section 6(d). The UNCITRAL Model Law (n 87) contains a similar provision in Article 8(2).
is primarily to avoid delay tactics in arbitral proceedings since they are evidently being permitted to recourse to a court on gateway issues at any time during the arbitration process. In other words, allowing recourse to a court on gateway issues even after the arbitration process is under way would undermine the efficacy of commercial arbitration. United States law does not do that even though the FAA does not provide specific provisions for the lapse of time.226 Nevertheless, as Bermann suggests, normatively ‘a party resisting arbitration should be permitted to bring a gateway issue to court only prior to the start of the arbitration’.227 Any benefits in allowing judicial recourse after that point in time are outweighed by the costs in terms of delay, disruption, and eventual derailment of the arbitral process. In response to the question regarding the precise timing of the establishment of the arbitral tribunal, it is said for these purposes to begin at the moment when the arbitral tribunal is fully constituted.

Finally, it would seem that gateway issues do not by any means try to prioritise the competence of courts over the arbitral tribunal in order to address the challenge to the validity or existence of the arbitration clause or the arbitration agreement. It would appear quite to the contrary that they just open a new way alongside arbitration, allowing the resisting parties to challenge those specific issues before the courts. Therefore, at no point do they undermine the competence of arbitrators as they address the challenges to the validity or the existence of arbitration agreements. Thus, gateway issues may be addressed either by a court or an arbitral tribunal, whichever is asked first.228

2.8 Conclusion

It is hard to find a clear-cut answer regarding the matter of court involvement prior to the establishment of an arbitral tribunal, and whether it undermines the arbitral process. Clearly, national courts play their role in the historical, social and commercial context of their country which may be a common law or a civil law jurisdiction, in a developing or developed country, with a liberal or communist regime. Therefore, it must be considered that the way each jurisdiction deals with this matter primarily depends on the circumstances of the case as

226 Prima Paint Corp (n 117) 403-404.
227 Bermann (n 111).
228 ibid 8.
well the aforementioned factors that make and then distinguish one jurisdiction from the others.

Nevertheless, discussing various stages whereby national courts may become involved in arbitration prior to the establishment of the arbitral tribunal reveals that there are a set of normative principles which indicate the proper approach for the courts’ involvement with international arbitration. Firstly, irrespective of the independence of international arbitration, national courts should get involve in some circumstances, albeit as an auxiliary hand to provide effectiveness and support because the international arbitration regime is by no means complete. Secondly, the legitimacy of international arbitration has its roots in the parties’ agreement, international arbitration practice and the New York Convention; it does not obtain its legitimacy as an alternative choice to litigation from national courts. Therefore, national courts are permitted to become involved in arbitration only if they are asked to do so. Thirdly, to give effect to the recognition or enforcement of arbitral awards, international arbitration inevitably needs national courts.

Finally, the most common sort of court involvement prior to the establishment of the arbitral tribunal is granting injunctions either to halt an arbitration or suit, or to enforce the arbitration agreement itself. Evidently, despite the initial targets of court injunction, reduction of cost and the risk of parallel proceeding, all injunctions are likely to be abused, and therefore destructive to international arbitration. Additionally, one should always consider the risk of battle between two injunctions. Having said that, all in all, it can be concluded that according to American and English law, courts are competent to grant anti-suit injunctions to inhibit one party from recourse to a national court after initiating a lawsuit despite its agreement to arbitrate. These injunctions aim to reinforce the arbitration process by leading parties to be bound to their previous agreement to resolve their dispute by arbitration. In this regard, as discussed above, the foremost factor for the courts when making a decision granting an injunction will be concentrated on the consent of the parties and their agreement for dispute settlement rather than issues of oppression, fairness. Additionally, according to the provisions of the NY Convention, only the courts at the seat of the arbitration are competent to grant these injunctions. It must be clarified also that the competence of courts at the seat of the arbitration to grant anti-suit injunction does not undermine the competence-competence
doctrine; arbitral tribunal still has jurisdiction to determine its own jurisdiction.

Although an anti-suit injunction may provide some advantages for international arbitration, anti-arbitration injunctions are definitely abusive. They are often granted to undermine the arbitration proceeding. There are various reasons explaining why national courts should not issue such injunctions, the most important of which is that the arbitral tribunal itself is competent to determine if there is any reason to halt the arbitral proceeding, and to this extent there is no need for court intervention at all.

Pro-arbitration orders, despite their practical implications, may undermine the arbitration process and threaten the independence of international arbitration as an efficient alternative to litigation. It seems that the best option is to enforce the arbitration agreement negatively. It means that if the court declines to determine the case due to the existence of an arbitration agreement between the parties, then the resisting party will eventually participate in arbitration because there would be no other place for him to claim his rights. Having said that, if a jurisdiction like the US does not recognise the negative effect of the competence-competence doctrine, then any pro-arbitration order seems to be plausible.

In summary, in this chapter, the thesis suggests that a transnational approach which is based on the ‘gateway issues’ discourse in United States for the reasons discussed earlier which can be used as a model for the harmonization of court involvement in this stage of the arbitration process. To this end, it is absolutely necessary for national jurisdictions to make efforts towards harmonisation regarding the precise ambit of the competence-competence doctrine. According to the US courts’ prevailing perspective, the competence-competence doctrine only has a positive dimension, in the sense of permitting arbitral tribunals to determine all aspects of their own competence. They have not followed the French in giving competence-competence a negative dimension. Therefore, national courts are able to get involved in at least some threshold issues, including the challenge to the existence and validity of the arbitration agreement at the very outset. In other words, as already stated, the gateway issues in commercial arbitration under the American law are an effort to find a compromise between efficacy and legitimacy in international arbitration. According to the author these concepts should be the focus of all harmonisation discussions regarding court
involvement prior to the establishment of the arbitral tribunal. Following this approach, all concerns regarding the possibility of anti-arbitration, the anti-suit injunction as well as pro-arbitration will be subsequently removed since the major concern in all three cases is the clash between the negative effect of competence-competence and the authority of national courts. Evidently, any movement towards this normative approach requires harmonisation in the definite meaning and consequences of the competence-competence doctrine as the prerequisite of this discussion.

The next chapter is devoted to analysing the potential role of national courts at the commencement of an arbitration process. It will also consider the appointment of the arbitrators and the challenge of consolidation and multi-party arbitration.
Chapter Three: Court Involvement at the Commencement of the Arbitration Process

3.1 Introduction

This thesis has discussed the distinguishing features of international arbitration as an independent facility for resolving international commercial disputes, its advantages and disadvantages compared with other dispute settlement mechanisms, and the general tendency for participants in global markets to use this facility as a default mechanism for settling legal disputes. It has also been noted that, as a consensual instrument, international arbitration needs, at least at first glance, to be free from judicial intervention. However, since arbitration does not acquire its own autonomous enforcement mechanism, the necessity for judicial scrutiny of the award becomes apparent once the enforcement of the award is sought. Hence, some sort of involvement, contribution, from national courts is inevitable. In chapter 2, the case for court involvement prior to the establishment of the arbitral tribunal was analyzed. This chapter will proceed along the same theme. It will provide a comparative analysis of the jurisdictions of the United States and the United Kingdom and the UNCITRAL Model Law as well as UNCITRAL Rules with the aim of discussing the potential role of national courts at the commencement of the arbitration proceeding. The outcome of this comparative analysis will enable a recommendation to be made for the most efficient approach of court involvement to be pursued at a transnational level for the purpose of establishing an arbitral tribunal, and thereby harmonizing court involvement in international arbitration.

At this point, a national court may intervene in three distinct but important stages, namely (a) the establishment of the tribunal; (b) the challenge of the arbitrators; and (c) consolidation of two or more arbitration agreements. Despite the fact that international arbitration as a consensual dispute settlement mechanism needs to be free from judicial intervention at all stages of arbitration proceeding, the UNCITRAL Model Law and most national laws recognize specific competence for national courts to give effect to the parties’ agreement by establishing an appropriate tribunal to take over and deal with the dispute
between the parties where the prescribed appointment mechanism does not work. Accordingly, there seems to be a clash point between the underlying purposes of international arbitration: 1) parties resolve their legal dispute by private mechanism out of national courts; and 2) the general competence of national courts to deal with all legal disputes. Bearing in mind the aim of this thesis of protecting the independence of international arbitration vis-à-vis improper judicial intervention on the one hand, and its objectives to provide a fairly transnational approach for harmonization of court involvement in international arbitration on the other, one can suggest that attempts for harmonization of the establishment of the arbitral tribunal, taking the efficiency consideration into account, should tend to first of all retain such an authority for national courts but most notably as a default mechanism. Secondly, the court should avoid direct appointments. Accordingly, in its decree, it should refer disputants, or directly seek a professional arbitral institution to appoint the arbitrator(s), albeit at the expense of the party in default. This is in fact the result of a comparative study between national jurisdictions, and the rules of various arbitration institutions. Thus, instead of arguing the necessity for changing jurisdictional provisions in all countries across the globe, as discussed below, it is suggested to the court that they adapt their approach in applying their authority in establishing the arbitral tribunal.

Another situation where courts may get involved in an arbitration is when one of the parties (or co-arbitrators) challenge the impartiality or independence of the arbitrators. Such a right to challenge them emerged from the fundamental principles of natural justice which guarantee the right of any individual to access to a fair proceeding. The same analysis explains the necessity of recognizing a default competence for national courts to deal with the establishment of the arbitral tribunal. This comparative study on various provisions of impartiality and independence in the jurisdictions of the US and the UK, along with institutional arbitration rules, demonstrates the functionality of preserving such competence for a national court. Nonetheless, externalization of such competence to an arbitration institution can be considered as proper mechanism which minimizes court intervention at this point. Hence, it is advisable for the parties of arbitration agreements to predict the jurisdiction

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229 See UNCITRAL Model Law (n 87) art 11, section 5.
of one of the major arbitration institutions as the ultimate authority to make a decision on the impartiality and independence of the arbitrator. In fact, it can be argued that parties may use this contractual mechanism at the time of drafting arbitration agreements, and therefore, simply remove as much as possible the grounds for court intervention in their arbitration proceeding. This seems to be the least controversial solution to minimize court intervention at this point. This can be easily achieved if all institutions producing an arbitration clause insert such a condition in their arbitration clause. In other words, harmonization of court involvement at this stage can be achieved indirectly if parties contractually opt out national court from the process of challenge, regardless of the recognition of a default competence of a national court to determine the impartiality and independence of the arbitrators.

Finally, this chapter will consider the most controversial issue regarding court involvement at the commencement of any arbitration proceeding, namely the ability of the court to order the consolidation of two or more arbitration agreements as well as its order for the intervention of a third party stranger in an arbitration proceeding. In the same way, this issue should be dealt with at the very beginning of litigation cases, thus preventing the misuse of such right to halt the proceeding of the cases. The arbitral tribunal and the disputants should make a decision on these points at the very beginning of the arbitration.

Indeed, this is in contrast with litigation which benefits from having a variety of mechanisms to consolidate the claims of different parties to a dispute in a single judicial proceeding. It is used to permit intervention, joinder, or ‘vouching in’ of additional parties into an ongoing proceeding. Arbitration is, therefore, a consensual mechanism for dispute settlement in which everything must be based on the parties’ agreement. Thus, traditionally it is seen that arbitral tribunals are unable to order the consolidation of various arbitrations into one. Hence, where efficiency considerations press for consolidation of different arbitrations, or intervention of third parties, there should be a court that issues such an order. Arbitration tribunals in any event are unable to issue such an order.

The question now is to what extent does the recent development in international arbitration allow the arbitral tribunal to follow the same logic that leads national judges to order consolidation or intervention? In other words, is the efficiency consideration powerful
enough to press for the consolidation of two arbitration agreements regardless of the parties’ consent?

Despite traditional dissent against the competence of the arbitral tribunal for issuing consolidation or an intervention order, as discussed in more detail in section 3.4 of this chapter, the complexity of modern business relationships demonstrates the multiparty nature of international commercial transactions. This has primarily come about due to the considerable growth in commercial, financial and technological specialization. At the same time, such complexity and interrelated business relations increase the likelihood and desirability of dispute settlement proceedings with a multiparty nature. Hence, these are the economic realities that cause change and bring about new developments in international arbitration. Accordingly, perhaps the best approach that can be taken for harmonization in the transnational arena is to look into consolidation through interpretation techniques. Thus, arbitrators should attempt to determine and ascertain what implied consent of the parties is for consolidation or intervention. Accordingly, the efficiency consideration and the general provisions of international arbitration coincide with each other, and arbitral tribunals also become competent to consolidate different arbitration proceedings. Such analysis can not only provide an increase in the competence of arbitration tribunals, but it can also remove the potentiality of court intervention at this point in the arbitration proceeding.

3.2 Establishment of the arbitral tribunal

When dispute prevention techniques are not successful in preventing a business conflict from escalating to a legal dispute\textsuperscript{230} and at least one of the parties in a commercial contract containing an arbitration clause decides to seek recourse to arbitration to determine the dispute, establishment of the arbitral tribunal becomes the first obstacle that must be overcome in order to settle the dispute. Usually, an experienced and professional practitioner at the time of signing the contract would consider the possibility of such an eventuality and

\textsuperscript{230} For the difference between a legal dispute and a business conflict, see C Buhring-Uhle, \textit{Arbitration and Mediation in International Business} (2nd edn, Kluwer Law International 2006) 10.
strive to minimize its implication by drafting an effective, easy and swift arbitration clause.\textsuperscript{231} The two main issues that must be addressed in arbitration clauses are the appointment mechanism and the process of establishing the tribunal. Choosing the proper arbitration tribunal will have a direct impact on the outcome of the process as well as on the reputation of the arbitration as an independent alternative dispute mechanism. The cost, additional expenses and the time of the proceeding can be minimized if the parties take absolute caution in drafting the procedural methods for appointing the arbitrators, and therefore, the establishment of the tribunal. The unique distinguishing factor of arbitration, as opposed to national litigation, is the quality of the tribunal as this plays an important role in the final award, either to make it or break it.\textsuperscript{232}

The establishment of the tribunal may be a relatively lengthy process, when one of the parties fails to abide by the prescribed method of an arbitration clause, or perhaps in their nomination of an arbitrator. Even where the relevant rules provide for the institution to make the remaining appointments, including the president of the tribunal, such a process can be time-consuming as the institution will consult in their search for suitable candidates. Other than in cases that are expedited, the establishment of the tribunal takes at least two months from the submission of the notice or request for arbitration.\textsuperscript{233} This section will discuss the various important issues that must be considered in establishing an appropriate tribunal,\textsuperscript{234} the problems that may appear at the time of establishment; and the relevant mechanisms to overcome those issues. As discussed earlier, due to the fact that arbitration is a consensual and therefore contractual dispute settlement mechanism, the traditional solution for resolving any default during the implementation of the contract is recourse to the national courts. Nevertheless, along with the significance of the implementation of the arbitration agreement, it is also important for the arbitrators and disputants to protect the independence of international arbitration as well as its insulation from improper court intervention as far as

\begin{footnotesize}
\begin{enumerate}
\item Blackaby and others (n 22) 242, para 4.02; Richard Kreindler, \textit{Establishment of the Arbitral Tribunal and its Powers and Duties} (Shearman & Sterling 2011).
\item Blackaby and others (n 22) 242, para 4.02.
\item ibid 242, para 4.15.
\end{enumerate}
\end{footnotesize}
possible. Therefore, pertinent issues to be considered here are as follows: party autonomy; national jurisdictions; institutional approaches; and which bodies have the jurisdiction to interfere. In fact, while discussions on party autonomy will elaborate on the consensual basis of the arbitration agreement and whether parties thereto are able to tailor the agreement as they wish, comparative studies of national jurisdictions and institutional rules will shed light on the way of finding a proper policy for the harmonization of court involvement at this stage.

### 3.2.1 Party autonomy for constituting the tribunal

Over the past century, international conventions on arbitration have recognized the autonomy of parties to choose or draft the arbitration rules in order to settle their dispute, or alternatively, exercise this right indirectly by agreeing upon a mechanism which culminates in choosing the arbitrators. These conventions have progressively expanded the role of party autonomy in contrast to the viewpoints of national laws which – by default – govern the establishment of the arbitral tribunal. Hence, under modern international conventions, national law and national courts play a residual role applicable only in limited circumstances as a default mechanism in the selection of international arbitrators.\(^{235}\) Indeed, in principle, the parties should be free to choose their own arbitrators so that the dispute may be resolved by ‘judges of their own choice’.\(^{236}\)

Article II of the Geneva Protocol stipulates that, ‘the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place’.\(^{237}\) Similar provisions are articulated in Article I (2) (d) of the Geneva Convention which indirectly states that the arbitral tribunal shall be constituted ‘in the manner agreed upon by the parties and the conformity … the law governing the arbitration procedures’.\(^{238}\)

Although the autonomy of parties to choose their arbitrators is confirmed in both

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\(^{236}\) The phrase comes from the Hague Convention on the Pacific Settlement of International Disputes (29 July 1899) art 15 and (18 October 1907) art 37.

\(^{237}\) Geneva Protocol on Arbitration Clauses (24 September 1923) art II.

\(^{238}\) Geneva Convention on the Execution of Foreign Arbitral Awards (26 September 1927) art I(2)(d).
documents,\textsuperscript{239} neither instrument clarifies the relations between such freedom and the applicable laws in the seat of arbitration. It is inferred from the language of Article II and Article I (2) (d)\textsuperscript{240} and the significant commentary on this Article that, for various reasons including a valid and enforceable award, the parties’ agreement and the law of the seat must comply with each other.\textsuperscript{241}

Other than that, the New York Convention, in less qualified language than the Geneva Protocol and the Geneva Convention, recognizes the autonomy of the parties to establish an arbitral tribunal. Nevertheless, the language of the New York Convention in this matter can produce difficult issues regarding the interaction of the parties’ autonomy and the mandatory law of the seat. In fact, the conflict between mandatory rules of the seat and the provisions of Article V(1)(d) and II(3), which relate to the recognition of parties’ agreed method for establishing the tribunal, may contradict each other. This is primarily due to the fact that the principle of party autonomy is central in selecting the number of arbitrators.\textsuperscript{242} The general principle, recognized by Article V(1)(d) of the New York Convention and the leading international arbitration conventions is that the parties’ agreement concerning the selection of the arbitrators must be given affect. This principle applies fully to agreements concerning the number. National arbitration statutes even more explicitly recognize the parties’ autonomy in selecting the number of arbitrators. Article 10(1) of the Model Law is representative and provides that ‘the parties are free to determine the number of arbitrators’. Legislative and case law in developed jurisdictions, whether based on the Model Law or not, are uniformly to the same effect. Nevertheless, national jurisdictions may require a specific number of arbitrators, for instance 3 or 5, for complex arbitration cases like construction agreements.

Article 11 of UNCITRAL Model Law and its subsections also recognizes the autonomy of the parties to select the arbitral tribunal. Article 11(2) states that ‘the parties are

\textsuperscript{239} In fact, these two documents have been updated and more or less replaced now by the provisions of the Model Law and the New York Convention 1958. Nonetheless, they still hold their value for discussing the history of arbitration and its gradual development.

\textsuperscript{240} Article II of the Geneva Protocol (n 237).

\textsuperscript{241} Born (n 98) chapter 11, 1368; Blackaby and others (n 22) 315; See Gaillard and Savage (n 6) 212.

\textsuperscript{242} Born (n 98) chapter 11.
free to agree on a procedure of appointing the arbitrator or arbitrators’. 243 However, this provision should be read with Article 11(4) which affirms the right of parties to have recourse to the local court if the prescribed method of the parties fails to constitute the tribunal. Despite the fact that Article 11(4) could be more explicit, 244 it recognizes the judicial appointment of the tribunal only where the parties’ procedural agreement has failed to establish the tribunal. Therefore, even in the language of UNCITRAL Rules judicial appointment is an exception and may only be employed where other mechanisms fail to perform.

Arbitration laws in modern jurisdictions also confirm the parties’ autonomy to choose their own arbitrators, either directly or indirectly, to the fulfillment of the provision of natural justice including equality and due process. For instance, Section 5 of the FAA states that: ‘if in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators … such method shall be followed’. 245

With the same result, the 1996 UK Arbitration Act also expressly confirms the parties’ autonomy to select the arbitral tribunal, either directly or indirectly. Section 15 of the UK Arbitration Act 1996 stipulates that:

(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire

(2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.

Reading these provisions together helps to clarify the next issue, that of court involvement in international arbitration. As stated in chapter one, the foremost attraction of international arbitration is the ability of the parties to actively participate in settling their dispute by having it referred to judges of their own choice. Having said that, once, for whatever reason, the parties’ prescribed method for appointing the arbitrators does not work,

243 UNCITRAL Model Law (n 87) art 11(2).
244 ibid art 11(4).
245 US FAA 9 USC, section 5. See also Uniform Arbitration Act, section 3; Certain Underwriters at Lloyd’s London v Argonaut Ins Co 500 F3d 571 (7th Cir 2007).
then one of the potential options is for one of the parties to have recourse to the national court and request the court to get involved to appoint the arbitrators.246 Before proceeding further, an explanation will be given of the various methods used by parties for the purpose of appointing arbitrators and establishing a tribunal.

3.2.2 Various techniques to appoint the tribunal

There are several different methods of appointing an arbitral tribunal. The most common are: by agreement of the parties; by asking an arbitral institution; through a list system; selecting the chair by existing co-arbitrators; by a professional institution or a trade association; and, finally, by a national court. Where none of the aforementioned methods results in the appointment of arbitrators, a national court default system will intervene to appoint the arbitrators and establish the tribunal. This policy generally prevents failure of the arbitration agreement and encourages the parties to use legal maneuvers to avoid arbitration.

Despite the fact that national arbitration law in developed jurisdictions permits the judicial appointment of arbitrators, one can find few cases where the parties have not come to the agreement regarding the proper mechanism for the establishment of an arbitral tribunal, or where the prescribed methods of the parties have failed to operate appropriately. Nevertheless, it should not lead us to remove, or challenge the necessity of the existence of such provisions in national laws.247 These provisions not only ensure that an arbitration proceeding will never be halted, but they also strengthen the credibility of arbitration as an alternative dispute settlement facility. Nonetheless, one should be rigorous, as unless carefully exercised, invoking judicial appointment may undermine parties’ procedural agreements or put the independence of international arbitration in jeopardy.248

With reference to the jurisdictional debate in chapter 2, it seems that when the parties

246 In fact, the history of international arbitration is replete with cases where one of the parties did not fulfill its obligation to nominate the co-arbitrator in order to avoid an arbitration proceeding or make a delay in establishment of the tribunal. See, e.g., Cargill Rice, Inc v Empresa Nicaraguense De Alimentos Basicos 25 F3d 223 (4th Cir 1994); XL Ins Ltd v Toyota Motor Sales USA Inc (QB, 14 July 1999).
247 National courts may also entertain jurisdictional objections regarding the existence or scope of an arbitration agreement before making an appointment. See Gaillard and Savage (n 6) 851-855.
248 Born (n 98) chapter 11.
are unable to reach agreement upon the appointment of an arbitrator, in the first instance, the claimant should attempt to find a competent court to apply for the judicial appointment of the tribunal or its remaining members. The most likely court to get involved and resolve the problem seems to be the court of the seat of the arbitration. However, as discussed in chapter 2, one may also request the national courts or the court from which the pro-arbitration order is sought to get involved to appoint the arbitrator or the tribunal. As we shall see in the next section, for the purpose of harmonization and in order to minimize instances of court intervention as well as avoiding conflicting awards, it is better to recognize the exclusive competence of the courts at the seat of arbitration.

As the appointment process is merely a procedural issue, a national court should make a decision concerning the appointment irrespective of the law governing the merits or the nationality of the parties. Nevertheless, it must be noted that the request for the establishment or appointment *per se* does not oblige the courts to appoint arbitrators or establish the tribunal directly. Due to the fact that courts must respect the independence of international arbitration, and given the availability of various alternative methods to establish the tribunal without direct intervention of the courts, it seems that courts should encourage the parties to use alternative methods. Indeed, national judges normally have poor knowledge about the requirements of international business, international arbitration and its precedents. Hence, the courts direct intervention to appoint either a tribunal or arbitrators does not seem to be convincing. However, the result of keeping court competence – as a default – for appointing arbitrators (tribunal) on the one hand, and the necessity of obtaining international knowledge regarding various issues of international arbitration, may amount to some sort of hybrid appointment mechanism which considers both aspects concurrently. For example, in the case of the UK Arbitration Act 1996, the courts have default power:

- To give directions as to the making of any necessary appointments;
- To direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

249 Blackaby and others (n 22) 256, para 4.42.
• To revoke any appointments already made; or
• To make any necessary appointments itself.\(^{250}\)

In practice, however, the court will often ask the parties’ lawyers, or the party-appointed arbitrators, to suggest possible candidates.\(^{251}\)

If the parties’ procedural agreement regarding the appointment of the arbitrators fails to achieve a satisfactory result within the time limits specified in an arbitration agreement, the intervention of applicable national law may impose serious consequences on the dispute. English law, for instance, takes a very strict approach with a party who fails to nominate a co-arbitrator. Section 17 of the 1996 UK Arbitration Act stipulates that if a party fails to nominate a co-arbitrator within the agreed time limits, then, in the absence of a contrary agreement, its counterparty may elect to treat its nominated co-arbitrator as a sole arbitrator.\(^{252}\)

On the one hand, this approach will provide the utmost efficiency for the counterparty who appoints its arbitrator properly. Also, it is a pro-arbitration approach as it facilitates considerably the establishment of the arbitral tribunal, and therefore, the commencement of the proceedings. On the other hand, compared with other jurisdictions, such an approach may be considered a breach of the principles of natural justice; for instance, the right to be heard or have an impartial tribunal, and this increases the risk of non-enforcement in foreign jurisdictions.\(^{253}\)

One may also argue that this practice in international arbitration will increase the risk of non-enforcement or may end up with the non-recognition of the final award in other jurisdictions at the time of recognition or enforcement. However, most foreign courts have rejected such challenges in recognition actions.\(^{254}\) This has been the case even when the only basis for proceeding with a sole arbitrator was the fall-back provisions of English laws, which

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\(^{250}\) UK Arbitration Act 1996 (n 115), section 18(3).
\(^{251}\) Blackaby and others (n 22) 257.
\(^{254}\) See Born (n 98) 1372-1373.
arguably overrode the parties’ arbitration agreement.\textsuperscript{255}

In contrast with English Law, other jurisdictions have deployed the stance of UNCITRAL Model Law. When one of the parties fails to nominate arbitrators in conformity with parties’ procedural agreement, the other party is permitted to apply for the judicial appointment of the defaulting party’s co-arbitrator.\textsuperscript{256} Similarly, Section 5 of the US FAA provides that if a party fails to nominate an arbitrator within the party’s agreed time limit, then its counterparty may seek judicial appointment for the vacant position.\textsuperscript{257} Thus, under the English law the arbitrator who is appointed by one of the parties may conduct the case solely, the UNCITRAL Model Law approach requires the courts to appoint the arbitrator on behalf of the party in default. Then, the arbitrator appointed by the court and the other one may make a decision on the third arbitrator and proceed the case accordingly.

On the other hand, the UNCITRAL Rules provide a unique approach to the selection of sole and presiding arbitrators. They take into account that the parties may agree upon an ‘appointing authority’ that will, among other things, appoint sole arbitrators if the parties do not do so.\textsuperscript{258} An unusual feature of the UNCITRAL Rules is that they do not contain an automatic selection of appointing authority; instead, they provide that, unless the parties otherwise agree, the Secretary General of the Permanent Court of Arbitration will designate an appointing authority.\textsuperscript{259}

Other arbitral institutions have generated their own specific procedure for the appointment of arbitrators. In the case of the ICC, for example, where there is to be a sole arbitrator and the parties cannot come to an agreement to nominate the arbitrator within 30 days from the communication of the request for arbitration to the other party, the arbitrator has to be appointed by the ICC Court. As for the arbitral tribunal with three arbitrators, unless

\begin{itemize}
\item \textsuperscript{255} ibid 1372-1374, 2764-2777.
\item \textsuperscript{256} UNCITRAL Model Law (n 87) art 11(4). See Howard Holtzmann and Joseph Neuhaus, \textit{A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary} (Kluwer 1989) 362; See also Swiss Law on Private International Law (1987), art 179(2); Japanese Arbitration Law (Law No 138 of 2003), art 17(2); Born (n 98) 1424-1425.
\item \textsuperscript{257} US FAA 9 USC, section 5.
\item \textsuperscript{258} UNCITRAL Arbitration Rules (revised 2010), arts 6(2) & 7(2).
\item \textsuperscript{259} ibid arts 6(2) & 7(2). See David Caron, Lee Caplan and Matti Pellonpää, \textit{The UNCITRAL Arbitration Rules: A Commentary} (OUP 2006) 332. PCA ‘is not the appointing authority [but rather] designates the appointing authority.’
\end{itemize}
otherwise agreed by the parties, the ICC Court will appoint the third as long as the agreed appointment is made within a limited time.\footnote{ICC Arbitration Rules (January 2012), arts 8.3 and 8.4.}

LCIA takes a different approach to selecting sole and presiding arbitrators from that of the ICC. Instead of allowing the parties a period of time in which to attempt to agree upon a sole arbitrator before institutional selection efforts begin, the LCIA Rules make this the institution’s task from the outset, unless otherwise agreed. Article 5(5) of the LCIA Rules provides that: ‘The LCIA Court alone is empowered to appoint arbitrators.’\footnote{LCIA Rules (October 2014), art 5(5).} In most cases, this approach puts massive pressure on the involved parties, and may deviate from the process of constituting the arbitral tribunal from the parties’ agreed method.\footnote{Born (n 98) chapter 11, 1415.} Nevertheless, among the aforementioned institutional rules, the LCIA approach which considers appointment of the arbitrators as one the institution’s tasks seems to be much more efficient since it removes the basis of conflict regarding the establishment of the tribunal between the parties of an arbitration agreement. As a result, the establishment of the arbitral tribunal under the LCIA Rules will happen quicker and more easily.

Despite the fact that almost all contemporary national arbitration rules recognize their courts’ competence to get involved and make an appointment when parties fail to appoint their arbitrators, recourse to the national courts will give rise to greater delay and relative uncertainty.\footnote{Blackaby and others (n 22) 242, para 4.03.} Such delay is because national courts do not have a sufficiently international perspective to make a suitable appointment. Additionally, it may create difficulties for the recognition and enforcement of the arbitral award at the time of the enforcement. Hence, it is advisable for the parties to avoid recourse to the national court by predicting such an eventuality in advance. One suggestion could be to replace the jurisdiction of the courts by other mechanisms, such as choosing an institutional arbitration to establish the tribunal if the prescribed methods fails to achieve the required result, or, as will be shown, selecting an experienced appointing authority in the case of an \textit{ad hoc} arbitration which will take responsibility for the appointment of the remaining arbitrators. The cost and consequences of
recourse to the national court can be avoided simply by incorporating a provision in the arbitration agreement that allows an experienced arbitration institution to intervene and make the appointment.\textsuperscript{264}

Another relevant issue that needs to be explored is the importance of the place of arbitration. Needless to say, the jurisdiction of the court of the place of arbitration is generally accepted over the arbitration proceedings in its territory.\textsuperscript{265} Nevertheless, if parties wishing to arbitrate their dispute do not specify the place of arbitration, the fate of the arbitration may become unclear. It means that if parties fail to choose the seat in a submission agreement, one suggestion could possibly be to persuade a court to assume jurisdiction, for example, on the ground that the substantive governing law to deal with issues in dispute is the law of the country of that court, or on the basis that the respondent is within the jurisdiction of the court (and so capable of being compelled to carry out its order). In other words, the fate of the arbitration case will be contingent on a series of eventualities including broad discretion of national courts in their interpretation of the arbitration agreement and their choice of the governing law on arbitration agreement. Given the practical difficulties of a non-specified seat and in order to avoid such complexity, it is advisable and much more efficient for the parties to select a seat of arbitration in the arbitration of their container contract.

In conclusion, given the recognition of the party autonomy, both at a national and international level, and the express stipulation of national laws to give priority to the parties’ prescribed procedural agreement, it is advisable for the parties of an arbitration agreement to provide a procedural mechanism for the selection of the arbitrators, either expressly or by incorporating institutional rules\textsuperscript{266} in order to minimize the likelihood of court intervention in their agreement.

Accordingly, most of the concerns and potential difficulties regarding the establishment of the tribunal could be prevented by a proper arbitration clause. Clearly, a clause that fails to provide either for an effective method of constituting the arbitral tribunal or

\textsuperscript{264} See, e.g., ICC Rules (n 260) art 8.4; LCIA Rules (n 261) art 7.2.
\textsuperscript{265} See discussion on \textit{lex-arbitri} in chapter 2; see also Blackaby and others (n 22) 174, para 3.39.
\textsuperscript{266} See Born (n 98) 1382-1384, 1411-1417.
for the place of arbitration may result in being inoperable and may make the enforcement of the arbitration agreement very unlikely for the claimant. In the simplest scenario, there will be considerable potential for delay when the claimant seeks recourse to the court in order to get an injunction regarding the nomination of the co-arbitrator by the other party, or a judicial appointment on its behalf. However in the worst case scenario, the court may refuse to exercise its power; therefore, there would be no effective remedy to enforce an arbitration agreement.

The significance of judicial competence for the establishment and/or appointment of the tribunal is in its ability to overcome these worst scenarios. Therefore, for the purpose of finding a transnational approach regarding the role of a national court in the establishment of an arbitral tribunal, it can be concluded that national legislations should follow a strict policy in empowering their courts to get involved in the appointment process. In other words, such discretion for the courts should always be considered as default, meaning where there is no alternative method to be deployed. Also, courts, in the application of such competence, should not get involved directly in the appointing process but rather, should lead the parties (their lawyers) to use one of the alternative methods for appointing the arbitrators, such as: by asking an arbitral institution; through a list system; selecting the chair by existing co-arbitrators; or by selection of a professional institution or a trade association. This policy, therefore, simply states that national jurisdiction may still recognize their competence to interfere in the process of establishing the tribunal; nonetheless, it would be sheer default mechanism where a badly-drafted arbitration clause does not work or where one of the parties deliberately wants to halt or delay the establishment of a tribunal. Indeed, due to the familiarity of professional institutions with the requirements of international arbitration and the qualifications of proper arbitrators, those professional institutions (trade organizations) are much more eligible to appoint the arbitrators than national judges whose knowledge about international business and arbitration are pretty much under questions.

The extended competence of the court to get involved in arbitration may damage the
private character of international arbitration.²⁶⁷ This fact demonstrates the significance of a proper arbitration clause and its implication for managing not only the associated risks that make an arbitration agreement inoperable but also for removing circumstances that may amount to court involvement in arbitration proceedings. A prudent commercial advisor must consider the applicable arbitration rules of the seat and the precedents set by their courts regarding international arbitration; otherwise, the fate of potential cases will be dependent on various eventualities.

Apart from this, as it has been argued, the most efficient method for the establishment of the tribunal is what is enshrined in Article 5 (5) of the LCIA Rules. It is also advisable for the arbitral institutions to harmonize, or at least converge their Rules, by recognizing the appointment of arbitrators as one of the primary tasks of any arbitral institution.

3.2.3 Who has jurisdiction to interfere

The availability of judicial appointment in international arbitration as a default mechanism has removed general concerns regarding the functionality of this alternative consent-based method. However, this may give rise to forum selection and jurisdictional issues, particularly in terms of conflict of jurisdictions and the applicable law that may govern judicial appointment. The most pertinent issue regarding a judicial appointment is to avoid parallel proceedings in different jurisdictions. To this end, the most common approach in developed jurisdictions is for the power of judicial appointment to be exercised by - and only by - the courts where the arbitral seat is located.²⁶⁸ Hence, according to Article 1(2) of the UNCITRAL Model Law, the judicial appointment mechanism of Article 11 of the Model Law is applicable to - and only to - arbitrations with their seat in that state.²⁶⁹

However, some jurisdictions recognize the competence of their court on judicial

²⁶⁸ Within the EU, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L12/1 (Brussels I) has been held not to apply to judicial proceedings for the selection of an arbitrator.
²⁶⁹ UNCITRAL Model Law (n 87) art 1(2). ‘The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.’
appointments, regardless of whether the arbitral seat is within that state, or if the parties have agreed that the state’s arbitration law should govern the arbitration (i.e. provide the procedural law of the arbitration).\(^{270}\) For example, Article 1493(2) of the New French Code of Civil Procedure\(^ {271}\) provides for the possibility of judicial appointment ‘in an arbitration which takes place in France of which the parties have agreed shall be governed by French procedural law’.\(^ {272}\)

Also, Sections 2(4) and 18 of the UK Arbitration Act 1996 allow more discretion for the English courts and permit them to deal with the circumstances where the parties have not agreed upon an arbitral seat. This enables the English courts to support a transnational arbitral process when no arbitral seat has been agreed by the parties.

In United States arbitration, if the parties have agreed to a specific place in the United States, Section 5 of the FAA also permits the US district court at that place to appoint the arbitrators.\(^ {273}\) Even where the arbitration agreement does not specify a US arbitral seat, if both parties are subject to the personal jurisdiction of a particular district court, Section 5 and Section 206 appear to grant the power to appoint an arbitrator.

Accordingly and in the light of the aforementioned instances, removing the limitations of the national courts to interfere in the appointing process of arbitrators may bring unintended consequences that undermine international arbitration. The possibility of conflicting judicial orders from different national courts and/or competing arbitral tribunals are the most disruptive consequences of the extended authority of local courts to interfere in the appointing process. Therefore, despite the fact that the UNCITRAL Model Law and most other arbitration statutes acknowledge local courts’ competence to appoint arbitrators, this competence must be preserved only for the courts of the seat of the arbitration. Accordingly, the courts of the place of the business of the parties, or the parties back home should by no

\(^{270}\) See Born (n 98) 1310-1347 (especially 1324-1324).
\(^{271}\) In 2011, the French government changed the Code of Civil Procedure including its provisions on internal and international arbitration.
\(^{272}\) French New Code of Civil Procedure (n 267) art 1493(2).
\(^{273}\) See, e.g., Ore & Chem Corp v Stinnes Interoil, Inc 611 F Supp 237 (SDNY 1985); Masthead Mac Drilling Corp v Fleck 549 F Supp 854 (SDNY 1982). This is consistent with section 4's venue restrictions. See US FAA 9 USC, section 4.
means interfere in the appointment mechanism.

Furthermore, it has been stated several times previously that one of the essential objectives of international arbitration is to remove dispute resolution from national courts to avoid nationalistic bias. Hence, to protect the arbitration agreement, jurisdiction of the courts in the arbitral seat can only be justified as a default procedure. Extended involvement of the courts may return parties to the first place. Consequently, even if there is no jurisdictional limit on the appointment of arbitrators, courts should be wary at the time of exercising that power and respect the autonomous existence of international arbitration.

Nonetheless, if the parties have not agreed upon the arbitral seat and where the prescribed mechanism for appointing the arbitrators has failed, court refusal to appoint an arbitrator in a foreign arbitration would frustrate the arbitral process and, therefore, put the economic interest of the injured parties in jeopardy. Thus, in this scenario, it is advisable that the national courts with the closest connection to the parties should protect enforceability and functionality of the arbitration agreement. One classic example of such a case arose in the French courts, in *National Iranian Oil Co v State of Israel*, where the parties had neither agreed upon the arbitral seat nor the procedural law of the arbitration.274 The French court initially declined to appoint an arbitrator (when the respondent refused to make its nomination of a co-arbitrator) because the jurisdictional requirements of Article 1493(2) were not satisfied. Nonetheless, when it became clear that the claimant could not obtain the judicial appointment of an arbitrator in Israel, the French courts reconsidered the matter and, relying on the fact that the appointing authority for the presiding arbitrator was physically located in France, appointed the requested co-arbitrator.275

### 3.3 Challenges of arbitrators

The second instance when the national courts may get involved in an international arbitration proceeding is in the challenge mechanism of the arbitrators. This happens when one of the parties in arbitration tackles the independence and/or impartiality of arbitrators.

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275 *ibid.*
Basically, the right to challenge the person determining the dispute, whether judge or arbitrator, comes from the principles of natural justice which guarantee the right of any individual to access to fair and impartial proceedings. This section will primarily consider the exact meaning of duty to independence and impartiality, and this will be followed by a discussion of the grounds for challenge.

Challenges from the arbitrators may arise at two stages: first, in an action to remove an arbitrator concurrent with the commencement of the arbitration proceeding; and second, at the time of recognition or annulment of an award during the enforcement stage of international arbitration. This section will consider the impartiality and independence of arbitrators at the commencement of the proceeding. However, it will leave the other action for later chapters when this thesis discusses the role of national courts in the recognition and enforcement of foreign arbitral awards.

With the same analysis explaining the necessity of recognizing a default competence for national courts to deal with establishment of the arbitral tribunal, here comparative study of impartiality and independence in the jurisdictions of the US and the UK, along with institutional arbitration rules demonstrates the functionality of preserving such competence for national court. Nonetheless, externalization of such competence to an arbitration institution can be considered as an appropriate mechanism which minimizes court intervention at this point. Hence, it is advisable that the parties to an arbitration agreement predict the jurisdiction of one of the major arbitration institutions as the ultimate authority to make a decision on the impartiality and independence of the arbitrator. In fact, it is suggested that parties should use a contractual mechanism at the time of drafting an arbitration agreement to minimize the grounds for court intervention in the arbitration process. This seems to be the least controversial solution to minimize court intervention at this point. This can be easily achieved if all institutions producing an arbitration clause insert such a condition in their arbitration clause.

**3.3.1 Impartiality and independence of arbitrators**

One of the fundamental principles of international arbitration stipulates that arbitrators must be and must remain independent and impartial from the parties and their dispute. This
principle implies that all involved parties in the arbitration should be aware from the very beginning if there is any ground for them to be considered partial or that they could lose their independence. The starting point is, therefore, to consider the definition of the terms impartiality and independence, and to determine how impartiality and independence is examined.

Independence in its broadest definition is concerned with questions about the relationship, whether financial or otherwise, between an arbitrator and one of the parties. Measuring independence requires an objective test, as a relationship per se has nothing to do with the arbitrator’s state of mind. On the other hand, given that impartiality relates to the actual and apparent bias of an arbitrator either against or towards the issues in a dispute or one of the parties, it requires subjective and abstract examination. The same distinction can be found in Black’s Law Dictionary, which defines ‘impartial’ as ‘unbiased, disinterested’, and ‘independent’ as ‘not subject to the control or influence of another’.

It is crucial to comprehend the important, albeit unclear, difference between impartiality and independence in international arbitration. The implication of such a distinction is that an arbitrator who is not independent, even in a very restrictive sense, may still be impartial and vice versa. Moreover, duty to impartiality and independence, as stated in the Model Law, seems to be mandatory, and, therefore, parties may not derogate from it. Nevertheless, there is no doubt that the parties may agree that a specific, disclosed relationship between an arbitrator and a party is not to be considered as sufficiently substantial as to disqualify the person concerned. Notwithstanding, these concerns about efficiency could also lead us to conclude that a challenge could be merely a tactic deployed by involved parties to halt or disrupt the arbitration process. Regardless of its inevitable delay, it must be dealt with seriously because otherwise the arbitral tribunal may be established inappropriately which may ultimately make the arbitral award unenforceable. Finally, it should be borne in mind that

278 Ibid 785.
279 The distinction between independence and impartiality is discussed by Poudret and Besson (n 200) 348.
280 This requirement is implicit in Art 12(2) of the Model Law: see Holtzmann and Neuhaus (n 256) 409.
independence and impartiality must be maintained during the arbitral proceeding. Interruption of such a continuation would be a ground for non-enforcement or non-recognition of the arbitral award in a foreign jurisdiction.

Such duty to impartiality and independence brings about a duty to disclosure which requires the arbitrators to disclose to the parties (and appointing authority) any circumstances or relationships that may amount to justifiable doubts about their impartiality or independence. Most national laws and institutional rules obligate prospective arbitrators to make such disclosures, both prior to accepting a nomination and (in the event of new developments) during the course of the arbitration. Most often, arbitrators are expected to reveal circumstances that may undermine their impartiality and independence prior to them accepting to act as arbitrators. In this regard, Article 12(1) of the UNCITRAL Model Law expresses that when a person is approached in connection with a possible appointment as an arbitrator, he should disclose any circumstances ‘likely to give rise to justifiable doubts’ as to his impartiality or independence.

Measuring the independence and impartiality of arbitrators is another important issue that may lead to the intervention of national courts. In practice, two methods can be assumed to measure the independence and impartiality of arbitrators. In the first scenario, which is quite confusing, the party-nominated arbitrators may be assumed to be partial and non-partial to the party who appointed them, unless proven otherwise. This was the previous practice in the US in the context of domestic arbitration. In 2004, however, when the AAA/ABA Code of Ethic for Arbitrators in Commercial Disputes was revised, such a presumption of partiality in domestic arbitrations was displaced by the presumption of neutrality for all arbitrators including party-appointed arbitrators unless otherwise agreed by the parties, or if the arbitration rules or applicable laws contained other provisions. In fact, the latter approach was being used in international arbitration even before 2004; nevertheless, the new provisions mean that domestic arbitrations must be carried out in compliance with international standards.

\[\text{Footnotes:}\]
\[\text{281} \] Born (n 98) chapter 11, 1543.
\[\text{282} \] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004). The approach set out in the Code has been approved by subsequent court judgments. See, e.g., Borst v Allstate Insurance Company 717 NW 2d 42, 48 (Wis, 2006).
Consequently, international arbitration in the US, whether national or international, was subject to the same approach regarding impartiality and independence of the arbitrators. This has now ‘brought the American system of arbitrator ethics substantially into line with international norms’.\textsuperscript{283} English law is already in conformity with international norms, meaning that the party-appointed arbitrator is assumed to be impartial unless proven otherwise.\textsuperscript{284} Comparing the approach previously taken by US courts in domestic arbitration with the present international method has emphasized two advantages of the latter approach. Indeed, following the international norm on measuring the impartiality of the arbitrators not only expedites the establishment of the arbitral tribunal, but also removes the likelihood of legal tactics that may halt arbitral proceedings. Accordingly, it can be concluded that a presumption of impartiality will also decrease the possibility of court involvement as well since it circumscribes the possibility of raising this issue in international arbitration.

The next pertinent issue in terms of challenge is the grounds that may damage impartiality and independence of arbitrators. As will be discussed in the next section, national laws and institutional rules specify a set of relationships and circumstances that may damage impartiality and independence of arbitrators. Moreover, it is also possible for the parties to extend the grounds of challenge as they wish in their arbitration agreement. Nonetheless, harmonization of those grounds is likely to impact indirectly on court intervention, if any, at this stage. Accordingly, the general tendency should be towards recognition of those relationships that may result in reasonable (justifiable) doubts regarding the impartiality and independence of the arbitrators. Hence, instead of talking about specific types of relationships, the harmonization policy proposes generic terminology that encompasses any circumstances which amount to reasonable (justifiable) doubts about the impartiality and independence of the arbitrators.

\textbf{3.3.2 Grounds for challenging arbitrators}

For the challenge to be considered, initially, there should be an applicable law which


determines the ground for challenging arbitrators. In an institutional arbitration, these grounds are enumerated in the institutions’ rules whereas in the case of pure ad hoc arbitration, impartiality and independence of the arbitrators is measured in the light of the local arbitration law, usually by the judicial courts of the seat of arbitration. Therefore, challenging the arbitrators could provide potential grounds for national courts to get involved in arbitration proceedings. Apart from quite similar substantive standards on the impartiality and independence of the arbitrators, parties may extend the grounds of challenge and include other bases such as incapacity, failure to conduct or participate in the proceedings, and failure to meet the qualifications required by the parties, which may be prescribed or applied in practice.\(^\text{285}\)

### 3.3.2.1 Challenge under institutional arbitration

Leading arbitral institutions have taken quite similar approaches to the UNCITRAL Rules. Article 7 of the ICC Rules stipulates that ‘every arbitrator must be and remain independent of the parties involved in the arbitration’.\(^\text{286}\) As we shall see later, the Rules also contain procedures for objections to proposed arbitrators and challenges to existing arbitrators to be submitted, and decided by the ICC Court.\(^\text{287}\) Article 7(4) of the Rules state that the ICC Court’s decision ‘shall be final’, and that no reasons for the decision will be given.\(^\text{288}\)

In the same way, Article 5(2) of the LCIA Rules stipulates that, ‘all arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party’.\(^\text{289}\) As with the ICC Rules, the LCIA Court is responsible for auditing challenges from the proposed or existing arbitrators if there are doubts as to their independence. Also, on the same basis the Court's decisions are final.\(^\text{290}\) Other leading institutional rules also require the

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\(^{285}\) Born (n 98).
\(^{286}\) ICC Arbitration Rules (n 260) art 7(1).
\(^{287}\) ibid art 11(1), (3).
\(^{288}\) ICC Arbitration Rules (n 260) art 7(4).
\(^{289}\) LCIA Rules (n 261) art 5(2).
\(^{290}\) ibid art 7(4).
arbitrators to be independent and impartial\textsuperscript{291} and enforce such obligations through institutional appointment and challenge procedures,\textsuperscript{292} normally determined by the appointing institution.\textsuperscript{293}

The finality of the ICC or LCIA court decision on impartiality and independence of the arbitrators does not mean that it would be impossible for the arbitrators appointed by those institutions to make a challenge. On the contrary, it means that if, in any event, the disputants or their counsel challenge the arbitrators, then any decision taken by the court will be final. In other words, parties cannot raise the same issue again at the time of the recognition and enforcement of the award. This issue will be discussed in more detail in chapter 5 where this thesis discusses court involvement in recognition and enforcement of arbitral awards.

Accordingly, it is revealed that almost all leading institutional rules necessitate the arbitrators to be both ‘impartial’ and ‘independent’.\textsuperscript{294} Hence, it can be claimed that the majority of arbitral institutions are taking the general criteria of the UNCITRAL Model Law into account. Moreover, historical studies on the ICC rules reveal that the rules refer only to the arbitrators’ ‘independence’, and thus the fact that they are silent about arbitrators’ impartiality, but it does not imply that arbitrators can be partial.\textsuperscript{295} Consequently, it can be argued that despite quite disparate terminology and language in the arbitral rules, the practice of international arbitration regarding measuring independence and impartiality of the arbitrators is fairly similar.

### 3.3.2.2 Challenge under national jurisdictions

\textsuperscript{291} See, e.g., International Centre for Dispute Resolution (ICDR) Arbitration Rules, art 7(1); ‘impartial and independent’; Convention on the Settlement of International Disputes (entered into force 14 October 1966) (ICSID Convention), art 14(1); China International Economic and Trade Arbitration Commission (CIETAC) Rules, art 19.

\textsuperscript{292} See, e.g., ICDR Rules, art 8; CIETAC Rules, art 26(1); Vienna International Arbitral Centre (VIAC) Rules, art 16(1); Swiss International Arbitration Rules, art 10(1).

\textsuperscript{293} ICDR Rules, art 9; CIETAC Rules art 26(6); VIAC Rules art 16(3); Swiss International Arbitration Rules, art 11(1).

\textsuperscript{294} UNCITRAL Arbitration Rules (revised 2010) art 10; LCIA Rules (n 261) arts 5(2), 10(3); ICDR Rules, art 7(1); CIETAC Rules art 19; SCC Rules art 17(1), Swiss International Arbitration Rules, art 10(1); VIAC Rules art 16(1).

As for the pure *ad hoc* arbitration, national arbitration laws also provide some tests to examine impartiality and independence of the arbitrator(s) where the seat is located inside their jurisdiction. For example, Section 24 of the UK Arbitration Act 1996 explains the circumstances that may give rise to justifiable doubts over the impartiality of arbitrators:

1. The party to an arbitral proceeding may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

   a) that circumstances exist that give rise to justifiable doubt as to this impartiality;
   
   b) that he does not possess the qualification required by the arbitration agreement;
   
   c) that he is physically or mentally incapable of conducting the proceeding or there is justifiable doubt as to his capacity to do so;
   
   d) that he has refused or failed
      
      (i) properly to conduct the proceedings, or
      
      (ii) to use all reasonable dispatch in conducting the proceeding or making an award,
      
      (iii) that substantial injustice has been or will be caused to the applicant.\(^{296}\)

The Act allows for the removal of the arbitrator in the case of justifiable doubts as to his/her impartiality (but not his/her independence). This approach has a more rational foundation because it primarily considers the desire to have experienced people in the field to adjudicate the dispute.\(^ {297}\) The rationality of this policy is that it is not wise to consider all previous relationships between the arbitrator and the parties as an issue that undermines the impartiality of the arbitrator without reference to their triviality. Also, it is not wise to remove arbitrators on the basis of a mere commercial or financial relationship between them and the disputants. The removal process should only be triggered once such an association amounts to justifiable doubts as to impartiality, and then it becomes a disqualifying factor.

Perhaps the most prominent case so far in the UK regarding the impartiality and

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296 UK Arbitration Act 1996 (n 115), section 24(1).

independence of judges is *R v Gough*. It can also be used to examine the impartiality of arbitrators. Prior to that case the main principle developed by Lord Hewart in *R v Sussex Justices Ex p McCarthy* was that ‘justice should not only be done but should manifestly and undoubtedly be seen to be done’. Nevertheless, in *Gough*, Lord Goff reconsidered earlier cases and perceived two main tests that had commonly been applied by English courts, namely the ‘Real Danger Test’ and the ‘Real Suspicion Test’. In endorsing the first test, he proposed that the court should determine the relevant circumstances, knowledge of which may not be available to an observer, and then see if there was a real danger of bias.

Subsequently, the real danger test was also applied in arbitration cases. For instance, in *Laker Airways Inc v FLS Aerospace Ltd*, the barrister for the appellant and the arbitrator appointed by the respondent were from the same barristers' chambers. The court, taking into account the peculiar functioning of barristers' chambers, held that the test of bias was not satisfied in this case. It went on to claim that, notwithstanding the fact that barristers may share certain resources, such as libraries and staff, they are essentially self-employed and work independently. In fact, in the court’s view, Section 24 of the UK Arbitration Act 1996 reflected the real danger test; therefore, the court’s decision relied on that provision. As mentioned previously, this merely required the arbitrator to be impartial and not necessarily independent unless the lack of independence gave rise to justifiable doubts as to impartiality.

Despite Section 24 of the UK Arbitration Act 1996 and the precedents set by English courts regarding impartiality, adhesion to the Human Rights Act 1998 that gives effect to the rights enshrined in the European Convention of Human Rights has transformed the position of the UK regarding impartiality and independence of arbitrators. Article 6 of the aforementioned Convention recognizes the right to a fair hearing by an independent and impartial tribunal.

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298 *R v Gough* [1993] 2 All ER 724.
299 *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256.
300 *Laker Airways* (n 179) 45.
301 ibid.
established by law for everyone. One month after the enforcement of the Human Rights Act, the court in *Re Medicaments and Related Classes of Goods*\(^{303}\) took both the impartiality and independence of a tribunal into account and concluded that the test in *Gough* was no longer satisfactory because it emphasized the court's view of the facts. Following this view, the Court of Appeal proposed a modest adjustment to the test proposed in *Gough*. The suggested test was whether the circumstances, as ascertained by the court, would lead a ‘fair minded and informed observer’ to conclude that there was a real possibility that the tribunal was biased. Soon after, this test was affirmed by the House of Lords in *Porter v Magill*.\(^{304}\) As a concluding remark on English law, it should be said that the currently-prevailing standard of impartiality under English law has been articulated as to whether there is a ‘real likelihood, in the sense of a real possibility, of bias’, or whether a ‘fair-minded and informed observer’ would conclude that there was a ‘real possibility’ that the tribunal was not impartial.\(^{305}\)

On the other hand, the US courts have an unclear approach regarding impartiality and independence and it appears to be caught between ‘actual bias’ and ‘appearance of bias’. According to Section 10 of the FAA, an arbitral award may be vacated by a court if there is ‘evident partiality’ on the part of the arbitrator. Up to the present, *Commonwealth Coatings Corp v Continental Casualty*\(^{306}\) has been the only US Supreme Court case on point.\(^{307}\) In this case, a challenged arbitrator did not disclose that one of the parties was his regular customer. Black J upheld the challenge and asserted that any tribunal must not only be unbiased but must also avoid even the ‘appearance of bias’. He opined that the FAA did not intend to authorize arbitration where the tribunal ‘might reasonably be thought biased against one litigant and favorable to another’.\(^{308}\) In fact, in Black J’s view, arbitrators should hold the same ethical standards as judges. White J, on the other hand, favoured a minor standard of

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\(^{303}\) *Medicaments and Related Classes of Goods, Re* [2001] 1 WLR 700.


\(^{305}\) *ASM Shipping Ltd of India v TTMi Ltd of England* [2005] EWHC 2238 (Comm) (QB).


\(^{308}\) *Commonwealth Coatings* (n 306).
impartiality for arbitrators. Hence, he circumscribed the scope of impartiality and required disclosure only when the arbitrator had a ‘substantial interest in the firm which had done more than trivial business with the party’. 309

The Second Circuit Court in *Morelite Construction Corp v New York DC Carpenters Benefit Funds*, 310 expressed its doubts over the criterion of ‘the appearance of bias’. Kaufman J asserted that there had been a trade-off between expertise and impartiality; consequently, ‘evident partiality’ required something more than the mere ‘appearance of bias’. Nevertheless, having the need to preserve the integrity of the courts in mind, he went on to say that this ‘something more’ could not be extended to proving actual bias. Finally, he suggested a middle course, namely to examine whether a ‘reasonable person’ would consider the arbitrator partial to one of the parties. 311

Subsequently, the trade off theory was applied by Judge Posner in *Merit Insurance Co v Leatherby Insurance Co*. 312 In his view, a literal interpretation of ‘evident partiality’ would require proof of actual bias. Nonetheless, given the extreme difficulties of proving actual bias, he made a concession. According to him, the test sought to reveal whether the alleged relationship between one of the parties and the arbitrator was so intimate - personally, socially, professionally, or financially, as to ‘cast serious doubts’ on his impartiality. He made the test workable by emphasizing that the circumstances forming the basis of the challenge should be ‘powerfully suggestive of bias’.313 The Seventh Circuit Court, in *Sphere Drake Insurance Ltd v All American Life Insurance Co*, 314 affirmed the scope of ‘evident partiality’ as had been delineated by it in the *Merit* decision.

The Ninth Circuit Court in *Schmitz v Zilveti* 315 used different terminology to express the test. It asserted that ‘evident partiality’ existed when the undisclosed facts amounted to a ‘reasonable impression of partiality’. The Supreme Court of Hawaii consequently took up this

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309 ibid.
310 *Morelite Construction Corp v New York DC Carpenters Benefit Funds* 748 F2d (2d Cir 1984).
311 ibid.
312 *Merit Insurance Co v Leatherby Insurance Co* 714 F2d 673 (7th Cir 1983).
313 ibid.
314 *Sphere Drake Insurance Ltd v All American Life Insurance Co* 307 F3d 617 (7th Cir 2002).
315 *J Schmitz v CJ Zilveti* 20 F3d 1043 (9th Cir 1994).
formulation as well.\textsuperscript{316} In \textit{Schmitz} it had also been highlighted that although White J had not agreed with Black J over the application of the same standard to judges and arbitrators, nothing in his judgment disqualified the ‘appearance of bias’ language used by Black J.

The last important case that helps clarify the position of American law on impartiality is the judgment of the Fourth Circuit in \textit{ANR Coal Co v Cogentrix of North Carolina}\textsuperscript{317} which also applied the reasonable man's criterion in determining ‘evident partiality’. The court concluded that, in similar circumstances, the following four factors should be considered by a court: 1) a personal interest in the arbitral proceeding, particularly, its extent and character whether pecuniary or otherwise; 2) the connection of that relationship to the arbitration; 3) the directness of the relationship between the arbitrator and one of the involved parties in arbitration; 4) the proximity in time between the relationship and the arbitration proceeding. Consequently, in each case, the court should determine whether the alleged bias was ‘direct, definite and capable of demonstration rather than remote, uncertain or speculative’.\textsuperscript{318}

It is quite clear from this brief analysis of the US court approach that the only common feature in the different judgments is the belief that the existence of actual bias is a strict standard for disqualification while the concept of ‘appearance of bias’ is too broad. Most of the courts have taken a third way which examines whether a reasonable man would consider the arbitrator partial.\textsuperscript{319} Due to the fact that the world of commerce and business is for the most part well-integrated and its practitioners are more or less connected with each other, if a mere existence of a relationship between one of the parties and the arbitrator, without considering its depth and intimacy of that relationship, were a reasonable ground for removing the arbitrator, then the international business community would lose the advantages of employing professional persons as arbitrators. However, as already discussed in chapter one, one of the main attractions of international arbitration for the market practitioners is that they

\textsuperscript{316} \textit{Daiichi Hawaii Real Estate Corp v Litcher} 103 Hawaii 325 (2003).
\textsuperscript{318} ibid.
have their dispute determined by professional practitioners who have a better knowledge and understanding of international business. Hence, by taking this perception about the grounds that may damage impartiality of the arbitrators into account the grounds for challenge and/or the halting the proceeding will be reduced.

Comparing the above approach with the test of ‘real possibility of bias’ in English law, it is unclear whether the reasonable man under American law would perceive a real possibility or a real probability of bias. Moreover, there is no clarity on the characteristics of this reasonable man, such as the extent of his knowledge. Therefore, the US test may be situated anywhere in the spectrum between actual bias and mere appearance of bias. Hence, it would seem that the English law method in determining the partiality of arbitrators is more straightforward and transparent. This is particularly due to the adherence by the United Kingdom to the Human Rights Act 1998. Consequently, for the purpose of this research one can suggest the English law test as the correct basis for a discussion on harmonization.

So far, the approaches of national jurisdictions as well as arbitral institutions regarding the impartiality and independence of the arbitrators and various criteria which may be grounds for challenges have been discussed. The remaining issue is to discuss the jurisdiction of national court and international arbitration when one party challenges the arbitrator(s).

3.3.3 Procedures for challenge: Who has jurisdiction, the court or the arbitral tribunal?

Although challenging arbitrators rarely occurred in the past, in modern commercial and investment arbitrations it has become a fairly normal phenomenon, particularly because of the considerable changes in this field after the introduction of professional lawyers and their use of tactical manoeuvres to minimize potential disadvantages. Surveys conducted by the main arbitration institutions show a great increase in challenges from arbitrators to the extent that some commentators have concluded that this could undermine the efficiency and legitimacy of arbitration in the long term. Principally, this is due to the fact that one of the main features that has made international arbitration more favourable for market practitioners

is that it is faster than litigation. Clearly, excessive use of challenge as a legal tactic will impact on the attractiveness of international arbitration for market practitioners. Accordingly, challenge in the context of modern arbitration more or less obtained another function which may sometimes threaten the efficiency of international arbitration. However, this new feature should not lead one to conclude that all challenges are unmeritorious. In fact, challenge should not be considered as a mere legal tactic employed by a respondent to cause delay and disruption for a claimant, but rather it is foremost a facility to guarantee the right of the disputants to access to fair trial.

In institutional arbitration, the general tendency is to recognize the jurisdiction of the institution or the arbitral tribunal to deal with this issue. For example, ICC Rules start by highlighting general principles of impartiality and independence; Article 7 states that ‘every arbitrator must be and remain independent of the parties involved in the arbitration’. It then recognises the competence of the ICC Court to determine objections against existing arbitrators. On top of that, Article 7(4) states that the ICC Court’s decision ‘shall be final’ and that no reason for the decision will be given. As discussed in 3.3.2.1, the ICC has deliberately removed the availability of recourse to national courts to challenge the appointed arbitrators. Similarly, the LCIA Rules state that: ‘all arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial for any part’. It continues in the same vein as the ICC Rules, by recognizing the competence of the LCIA Courts to resolve any doubt or objections on the impartiality of the proposed or existing arbitrators through written submissions, and the Court’s decisions are final.

A similar provision is expressed by the UNCITRAL Rules. Articles 11 and 12 recognize the competence of the arbitral tribunal itself to determine the challenge, but they also state that party autonomy should consider other alternatives. Accordingly, if a challenge is placed, the non-challenging party may agree to the challenge or the challenged arbitrator may agree to withdraw. If neither the arbitrators nor the non-challenging party agree to the

321 ICC Rules (n 260) art 7(1).
322 ibid art 7(4).
323 LCIA Rules (n 261) art 5(2).
324 UNCITRAL Rules (n 294) art 11(3).
challenge, then Article 12 states that the challenge shall be determined by an appointing authority selected according to the provisions of Article 6 of the UNCITRAL Rules, or by an appointing authority selected by the Permanent Court of Arbitration. In practice, however, the agreement of parties would most often involve the resolution of challenges by the appointing authority.

These provisions indicate that instead of recourse to the national court, challenges and objections to the arbitrators can be determined swiftly through private mechanisms under the specified standards of independence and impartiality. Nevertheless, Article 13(3) of the UNCITRAL Model Law and some other arbitration statutes recognize the competence of national courts to reconsider a challenge to an arbitrator, notwithstanding the parties’ agreement to either the UNCITRAL Rules or other institutional rules.

Article 11 of the UNCITRAL Rules articulates that a party may send a notice which challenges an arbitrator within a short time period (fifteen days) from his appointment or of learning of circumstances prompting the challenge. The notice must explain the grounds for challenge and should be sent to the other members of the tribunal and the other parties to the arbitration as well as the challenged arbitrator.

Other leading institutional rules follow the same structure. Hence, parties wishing to make a challenge are required to do so within a short period of time from an arbitrator’s appointment or from receiving knowledge of grounds for the challenge. However, unlike most other arbitral institutions, the AAA does not provide notice to a sitting or proposed arbitrator if he or she has been challenged. In other words, AAA forbids parties from sending such notice. Consequently, in the AAA arbitration, challenged arbitrators have no opportunity to reject the challenge. This system is apparently designed to prevent arbitrators from being prejudiced by the knowledge that they have been challenged.

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325 ibid art 12(1)(a) & (b).
326 ibid arts 11-12.
327 See Born (n 98) 1562-1575; Holtzmann and Neuhaus (n 256) 407; Pac China Holding Ltd v Grand Pac. Holdings Ltd [2007] 3 HKLRD 741 (HK Court of First Instance, High Court).
328 UNCITRAL Rules (n 294) arts 11(1).
329 ICC Rules (n 260) art 11(2); ICDR Rules (n 278) art 8(1); LCIA Rules, art 10(4); CIETAC Rules, art 26; DIS Rules, section 18(2); ICSID Additional Facility Rules, rule 15(2); PCA Rules, art 11(1); VIAC Rules, art 16(2).
As for the possibility of judicial removal, Article 13 of the UNCITRAL Model Law stipulates the party autonomy in drafting procedures for challenge and removing arbitrators (for example, by adopting institutional arbitration rules).\(^{330}\) If there is a lack of such procedures in the parties’ agreement, Article 13(2) expresses that the challenge should be made in writing to the arbitral tribunal itself, which will, unless the challenged arbitrator or the other party agree with the challenge, decide upon the application.\(^{331}\) In addition, Article 13(3) of the Model Law provides that:

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal, while such request is pending the arbitral tribunal, including the challenged arbitrators, may continue the arbitral proceedings and make an award.\(^{332}\)

Article 13(3) permits judicial challenge to arbitrators both in \textit{ad hoc} arbitrations, where no contractually-agreed challenge procedure exists, and in institutional arbitrations, where the parties have agreed upon a mechanism for resolving challenges. Parties may not contract out of the Article 13(3) provision for interlocutory judicial consideration of challenges.\(^{333}\)

It can be concluded that despite the availability of judicial intervention to deal with challenge in arbitration, institutional rules like those of the ICC & LCIA on the one hand, and UNCITRAL Model Law on the other, indicate that challenge and objections to the arbitrators may be determined swiftly through private mechanisms instead of through recourse to the national court under the specified standards of independence and impartiality. This once again illustrates that party autonomy, as the main vehicle forming international arbitration, may address all relevant issues of international arbitration much more effectively than court intervention.

\(^{330}\) UNCITRAL Model Law (n 87) art 13(1).
\(^{331}\) ibid art 13(2).
\(^{332}\) ibid art 13(3).
\(^{333}\) ibid art 13(1). See Holtzmann and Neuhaus (n 256) 407; \textit{Pac China Holding Ltd v Grand Pac. Holdings Ltd} [2007] 3 HKLRD 741 (HK Court of First Instance, High Court).
Even in the case of the application of national laws, it is possible for the parties to recognize the jurisdiction of PCA to deal with the challenge of the arbitrators. This shows that externalization of those issues that cannot be performed by the arbitral tribunal *per se* to another pre-established organization rather than a national court can protect the independence of international arbitration more appropriately.

In turn, with the same analysis explaining the necessity of recognizing a default competence for national courts to deal with the establishment of the arbitral tribunal, here comparative study of impartiality and independence in the jurisdictions of the US and the UK, along with institutional arbitration rules demonstrates the functionality of preserving such competence for the national court. Nonetheless, externalization of such competence to an arbitration institution can be considered as a proper mechanism which minimizes court intervention at this point. Hence, it is advisable to the parties of an arbitration agreement to predict the jurisdiction of one of the major arbitration institution as the ultimate authority to make a decision on the impartiality and independence of the arbitrator. In fact, it can be argued that parties may use a contractual mechanism at the time of drafting an arbitration agreement to minimize the grounds for court intervention in the arbitration process. This seems to be the least controversial solution to minimize court intervention at this point. This can be easily achieved if all institutions producing the arbitration clause, insert such a condition in their arbitration clause.

So far, two important points that may end up with the intervention of a national court in international arbitration as well as the policies which may minimize the likelihood of such interference have been discussed. Having said that, In addition to issues of appointment and challenge at this stage of an international arbitration case, perhaps the most important and controversial presumption regarding court involvement at the commencement of arbitration proceeding is the possibility of consolidation of two or more different arbitrations into a single arbitral proceeding along with an ordering joinder as well as the intervention of new parties into the arbitration proceeding. The next section with explain how the consolidation of different arbitration proceedings may cause court intervention in international arbitration. It will also discuss various techniques whereby a consolidation decree of can be issued by the arbitral tribunal itself without interference from national courts.
3.4 Consolidation

In addition to issues of appointment and challenge at this stage of an international arbitration case, perhaps the most important and controversial instance regarding court involvement at the commencement of arbitration proceeding is the possibility of consolidation of two or more different arbitrations into a single arbitral proceeding along with an ordering joinder as well as the intervention of new parties. This is of great importance and may bring about several jurisdictional issues since the arbitration agreement by its very character is consensual and does not have third party affects whereas if consolidation, joinder/intervention of various arbitration agreements take place, then it could potentially amount to derogation from this basic principle, and consequently may affect third parties.

Courts in different jurisdictions have general competence to deal with such cases and may ultimately issue such an order for consolidation, joinder/intervention of third parties into an arbitration process. Along with such general authority for national courts, international arbitration has proposed two different theories that could enable arbitral tribunals to issue an order for consolidation, joinder/intervention in an arbitration process. This section will go through these issues and discuss the theories that enable international arbitration to deal with those aforementioned issues itself without the need to recourse to national courts to get order of consolidation, joinder/intervention.

Despite their apparent similarities, these three subjects are conceptually different. ‘Consolidation’ refers to the joining of two separate or potentially separate arbitrations, possibly with different arbitrators, into a single arbitration, where a single tribunal will render an award binding with regard to all of the claims that would have been included in the separate arbitrations. ‘Intervention’, on the other hand, refers to the request of a party, not yet named as a party to an arbitration, to be added as an additional party to that arbitration. Apart from that joinder and intervention are related in that both involve the addition of a party to an existing arbitrationthey differ in that they are initiated by different parties.

335 Third parties here can be anyone who is not the signatory party in an arbitration agreement.
With the same logic that this issue should be dealt with at the very beginning of 
litigation cases, namely preventing the misuse of the right to seek consolidation and joinder/
intervention in making halt during the proceeding, parties of any arbitral tribunal should raise 
these points, if they wish to, at the commencement of the arbitration so that courts or arbitral 
tribunal will be able to determine them prior to dealing with substantive issues of the case.

3.4.1 Grounds for consolidation and joinder/intervention in international arbitration

The complexity of modern business relationships demonstrates the multiparty nature 
of international commercial transactions.\textsuperscript{336} This has primarily come about due to the 
considerable growth in commercial, financial and technological specialization. Moreover, 
such complexity and interrelated business relations increase the likelihood and desirability of 
dispute settlement proceedings with a multiparty nature. New approaches among corporations 
will also support such desirability. Additionally, it is widely accepted that commercial projects 
are inevitably carried out through several bilateral contracts which may or may not have 
proper bilateral dispute resolution arrangements. These facts lead the different parties of a 
single business deal to be under different competence jurisdiction in what is called the 
‘jurisdictional fragmentation of the multiparty commercial project’.\textsuperscript{337}

Needless to say, national court litigations benefit from a variety of mechanisms for 
consolidating the claims of different parties to a dispute in a single judicial proceeding in 
order to permit intervention, joinder, or ‘vouching in’ of additional parties into an ongoing 
proceeding. For example, assume A, B and C enter into a related contract (A with B and B 
with C). Separate actions between A and B, and B and C can normally be consolidated into a 
single action; henceforth, C can either intervene in, or B join in an existing action between A 
and B. In each of these instances, there is generally no requirement that all parties consent to 
such consolidation, joinder, or intervention. Rather, typically based on perceived 
considerations of fairness and efficiency, courts have broad discretion to order consolidation 
or joinder or to permit intervention.

\textsuperscript{336} Revised Uniform Arbitration Act 2000, section 10, comment 1 – multiparty disputes common in construction, 
insurance, maritime and sales contexts.

\textsuperscript{337} Born (n 98) 2073-2103.
International arbitration, on the other hand, has a consensual basis and, therefore, will only influence parties of the arbitration agreement; in other words, an arbitration agreement does not have any third party affect. Thus, if a legal dispute emerges between two involved parties in connection with a multiparty project, then the dispute must be resolved exclusively on the basis of an arbitration agreement concluded between those disputants. Others, even if they take an active role in constructing the venture and despite their potential legal or financial interest in the outcome of the dispute, will remain third parties both in the arbitration agreement and arbitral award.\(^{338}\) It has already been stated that market practitioners prefer to resolve their legal disputes through arbitration rather than litigation. This is so even in the context of complex transactions including those related to construction. Although empirical evidence is limited, it confirms that a significant and increasing number of international arbitrations involve multiparty disputes with roughly a third of all ICC arbitrations now involving multiparty.\(^{339}\)

The unlikelihood of consolidated proceedings in international arbitration, along with jurisdictional fragmentation lead to multiplicity of legal actions, either arbitral or judicial, which eventually culminate with considerable waste of legal and financial resources as well as a higher risk of inconsistent awards. In order to increase efficiency of proceedings and to avoid the possibility of inconsistent results, national rules permit consolidation, joinder and intervention in court proceedings.\(^{340}\) The question now is to what extent does recent development in international arbitration allow the arbitral tribunal to follow the same logic that leads national judges to order consolidation or third party intervention? Is efficiency consideration powerful enough to press for the consolidation of two arbitration agreement despite the parties’ consent?

It seems that the aforementioned considerations can, at least partially, be applied in

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international arbitration where the efficiency considerations press for consolidation, joinder and intervention. Nevertheless, utilizing such devices, either in international or domestic arbitration will bring about additional issues that are different from national court litigation.

Accordingly, one can argue that consolidation of separate international arbitration, like consolidation of different but related litigation, will provide various advantages for parties. First and foremost, a single arbitration, as we shall see, may enhance efficiency and be more practical than two or more separate arbitrations. Needless to say, a single (consolidated) proceeding will decrease overall legal fees, witness time, preparation efforts and other expenses in litigation. The same can be said for single international arbitration. In other words, a single arbitral proceeding avoids the unique expenses associated with multiparty arbitral tribunals – each of whose members must be compensated by the parties. According to one authority:

[O]n the whole it seems reasonable to conclude that the consolidation of closely-related disputes, where essentially the same evidence will be presented, will result in significant savings of both time and money.

Furthermore, the risk of inconsistent results in two or more separate arbitrations will logically be reduced in a consolidated arbitral proceeding. One party to a tripartite dispute may be recognized as liable to another party in one arbitration, while in a second arbitration the same party may be denied recovery from a different party on a theory inconsistent with the rationale of the first proceeding. An even worse scenario is the conflict between injunctive relief issued by different arbitral tribunals. For instance, one tribunal may require a party to do something while another one may ban it from doing the same action. Neither result is likely in a consolidated arbitration. However, consolidation, joinder and intervention in arbitration may become associated with a set of disadvantages for the disputants which may outweigh their perceived benefits. In particular cases, those consequences may favour one party at the

expense of the other.

The principal issue in consolidation, joinder and intervention in international arbitration is the matter of who decides. Courts obviously have jurisdiction to get involved and order consolidation of different arbitration proceedings, but the question is to what extent this can be done by the arbitral tribunals themselves.

The establishment of the panel and appointment of the arbitrators is the second issue raised in consolidating arbitrations involving multiparties, or those permitting joinder. Many arbitrations involve three-person tribunals, with each party nominating one member of the tribunal and the two party-nominated arbitrators agreeing upon a third (or the appointing authority selecting a third) arbitrator.\textsuperscript{343} If there are more than three parties to the arbitration, with disparate interests, two (or more) parties may disagree about nominating a joint arbitrator even if they happen to be on the ‘same’ side. In this situation, the foregoing model does not work.

There is no doubt about the competence of the appointing authority and the fact that all the members of the tribunal can be appointed by the appointing authority.\textsuperscript{344} Nevertheless, opponents of such a solution argue that it denies the opportunity of each party to participate directly in selecting the tribunal.\textsuperscript{345} Therefore, replacing party autonomy with the competence of an appointing authority will amount to a significant change in the customary arbitral procedure as well as the arbitral process, which may not be desirable for all parties.

A further issue is that the idea of consolidated arbitration has been challenged in the light of confidentiality of international arbitration. It has already been discussed in chapter one that parties have legitimate expectations that their arbitral proceedings will be confidential. Even beyond that, some national laws and institutional rules recognize such a treatment as a default provision.\textsuperscript{346} However, it is quite obvious that joinder of additional and different parties into an existing arbitration between two (or more) parties results in a loss of

\textsuperscript{343} See Born (n 98) 1355-1356, 1387-1416.
\textsuperscript{344} See Born (n 98) 2100-2102.
\textsuperscript{345} ibid 1364-1367.
\textsuperscript{346} See Born (n 98) 2249 \textit{et seq.}
Finally, despite the fact that multiparty arbitral proceedings may be more efficient in general terms, the savings in cost and time will not always be distributed evenly among the parties. There have been instances where arbitration costs actually increased after consolidation or joinder, even though other parties’ legal costs (or total legal costs) decreased. Moreover, a multiparty arbitration may well take longer than a simple two-party proceeding, thus potentially delaying enforcement of a party’s rights.

By comparing these disparate views regarding consolidations, significant issues about consolidation, intervention and joinder in international arbitration emerge which national courts, arbitral tribunals and arbitral institutions have strived to reconcile. Arbitral practices, alongside legal discourse have advanced two distinct viewpoints on this matter. On the one hand, there is a viewpoint which does not recognize any impact whatsoever for the arbitration agreements on the non-signatory parties in that agreement. This is mainly due to the theory of privity of contract and stipulates here that arbitration agreement does not have any third party affect. Hence, this view will look at national courts and their authority to order consolidation once efficiency considerations press for consolidation of different arbitrations. Thus, courts initiations here are not interpreted as ‘intervention’ but ‘assistance’ although in any event it may infringe the principle of competence-competence, more particularly its negative effect, and also may undermine the independence of arbitration process.

International arbitration, however, has invented its own mechanisms to insulate itself from any court initiation at this stage by fabricating a modern approach termed ‘extension doctrines’ [347] which argues the possibility of extending arbitration agreements, albeit under particular circumstances, to persons that have not signed them. This modern approach in continental Europe is extensively debated under the ‘group of companies’ doctrine whereas American scholars discuss it under the doctrine of ‘equitable estoppel’. Extension doctrines basically argue the necessity for a distinction between mere signature and the consent to

arbitration. Accordingly, non-signatories can enter into an arbitration agreement, notwithstanding the fact that they have failed to sign it. In the context of ‘group of companies’ doctrine in particular, it has been argued that the existence of consent of a non-signatory party to arbitrate may even be presumed.

Nonetheless, the counter argument vis-à-vis the extension doctrines emphasizes excessively the concept of privity of contract. In fact, opponents of extension doctrines argue that the foundation of international commercial arbitration is based on the parties’ consent to construct a contractual facility to settle their legal dispute.\(^\text{348}\) Accordingly, when parties agree to settle their legal dispute, they consider two things together: first, that they intend to settle a legal dispute of a specific contract; second, that they intend to arbitrate their mutual dispute according to specified procedures - not to arbitrate with anybody, in any set of proceedings.\(^\text{349}\) Hence, the characteristics of the other party play an important role in international arbitration. As result, national legislators, courts and arbitral tribunals should resolve questions of consolidation, joinder and intervention by reference to the nature of arbitration agreements. It means that consolidation, joinder and/or intervention can only be contemplated in the light of the parties’ agreement. Nevertheless, despite their complexities, these two doctrines will not undermine the consensual basis of international arbitration, but quite the contrary, they will try to find the parties’ consent through a set of very theoretical and abstract analysis. As we shall see, modern trends in legislation understand the discourse of extension doctrines; hence they take them into consideration for development of arbitration laws in their territory.

There is also a third approach, less complex and less theoretical which emphasizes interpretation techniques to find ‘parties’ consent’ to consolidation. This is perhaps the best approach which can also be taken for transnational harmonization since it is based on the traditional and techniques which are familiar to all practitioners, legislative authorities and arbitrators. This approach stipulates that the notions of party ‘intent’ regarding consolidation are somewhat artificial. In other words, at the time of making an arbitration agreement, parties do not ordinarily announce their consent as to whether their future arbitrations can or should

\(^{348}\) Born (n 98) 65-68, 197-199, 211-254.
\(^{349}\) ibid 1133-1136, 1141.
be consolidated, or whether additional parties can be joined, and if so when. What happens normally is that they agree to seek recourse in arbitration in order to obtain a neutral, enforceable and speedy decision; procedural details on the level of consolidation are usually not considered. As a result, determining parties’ intentions with regard to consolidation, joinder and intervention will hold the centrality of all discussions. It follows that, arbitrators should attempt to determine and ascertain ‘implied consent’ of the parties, for consolidation or intervention. Accordingly, with this method the requirement of efficiency considerations and the general provisions of international arbitration will coincide with each other and the arbitral tribunal will also become competent for consolidation in different arbitration proceedings. Such analysis not only can provide a promotion in the competence of arbitration tribunals, but also remove the potentiality of court intervention at this point in arbitration proceeding.

3.4.2 Theoretical debates on extension doctrines

This section will examine the theoretical debate on two important parts of the extension doctrines, namely equitable estoppels and group companies. While the equitable estoppels, its modern version (intertwined doctrine), is being used in the US, the doctrine of group companies exists in continental Europe. Both doctrines require distinction between mere signature and consent to arbitration. Accordingly, non-signatories can enter into an arbitration agreement, notwithstanding the fact that they have failed to sign it. In the context of the group companies doctrine in particular, it has been argued that the existence of consent of a non-signatory party to arbitrate may even be presumed.

3.4.2.1 Equitable estoppel doctrine

In its original meaning, the doctrine of equitable estoppel reflects the general legal principle of non-venire contra factum proprium found in Roman law and recognized in most contemporary civil law jurisdictions. Basically, this doctrine prevents a party from claiming rights against its counterparty when the counterparty reasonably relied on the conduct of its partner and as a result of such reliance changed his position to his detriment. For instance, in a construction agreement, if the contractor, relying on the actions of the project owners signs a

\[\text{ibid 72-90.}\]
contract to purchase cement, then the project owner cannot deny its responsibility to repay that expense on the ground that there was no contract between them at that point.

Nonetheless, in the context of multiparty projects such as secured agreements, construction works, or string sales contracts, and fragmented competence jurisdictions, the doctrine has provided particular meaning applicable to non-signatories. Therefore, the US courts have frequently estopped signatory parties to arbitration agreements from initiating court proceedings against non-signatory parties, and lead signatories from pursuing their dispute with the non-signatories in arbitration. In fact, this can be inferred from the majority of the cases where the US courts have invoked the doctrine to prevent (estop) the signatory party ‘from avoiding arbitration with a non-signatory’. Nevertheless, there are also some cases showing the capacity of the doctrine to estop the non-signatory party from avoiding arbitration with the signatory party.

Prior to the application of the doctrine, courts must consider all factual circumstances of the dispute comprehensively. Accordingly, they will first consider rights and duties emerging from the interrelated contracts between the several parties. The equitable estoppel doctrine requires this analysis to be performed through comparative fact-finding. For instance, in Choctaw Generation v American Home Assurance, the Second Circuit noted characteristically that:

We carefully reviewed the relationship among the parties, the contracts they signed (or did not), and the issues that had arisen, to arrive at the conclusion that the controversy was arbitrable ... The tight relatedness of the parties, contracts and controversies is easily demonstrated by a (necessarily tedious) review of the contract terms in dispute between and among the parties, and the parties' competing analyses of them.

Likewise, in Ex parte Isbell, the court stressed that:

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352 See for example Denney v BDO Seidman 412 F3d 58 (2nd Cir 2005) and International Paper v Schwabelissen Maschinen & Anlagen Gmbh 206 F3d 411 (4th Cir 2000).
353 Choctaw (n 351).
354 ibid 406.
Any case coming before this Court that involves the right of non-signatories to compel arbitration will ... be peculiarly fact-specific and will require a penetrating analysis of the facts and an application of traditional contract principles.  

It has already been stated that even in American law the doctrine of estoppel has an equitable basis. Despite this fact, the US courts have given a dynamic meaning to the doctrine on many occasions and have, therefore, diverged from the traditional equitable origins of this theory. Accordingly, the courts have relaxed their emphasis on whether the party avoiding the arbitration agreement has obtained a direct benefit from the contract including the arbitration clause. Courts also place less emphasis on the degree to which the dispute between the non-signatory and the signatory party is ‘intertwined’ with the contract between the two signatories, as well as whether the non-signatory is interrelated to the signatory parties.

In these cases, courts have stressed the intertwined factors rather than equitable considerations. Interestingly, cases exist where the courts have made no reference to the term equitable estoppel at all. Consequently, in order to determine whether a signatory to a bilateral arbitration agreement has to arbitrate with a party that has never consented to this arbitration agreement, equitable estoppel as a decisive criterion is replaced by the intertwined factor.

It seems that the key-phrase ‘intertwined with the underlying contract obligations’ was first added to the traditional equitable estoppel doctrine by the Seventh Circuit in Hughes. The Court in this case basically applied equitable considerations, and it is not clear whether it was in its intention to expand the doctrine. In any event, this phrase was used in McBro Planning Development v Triangle Electrical Construction; applied in JJ Ryan & Sons v Rhone Poulenc Textile; Smith/Enron Cogeneration v Smith Cogeneration International;

355 Ex parte Isbell 708 So 2d, 577-78 (Ala 1997).
356 For example, no reference to ‘equitable estoppel’ is found in Choctaw Generation (n 351).
360 Smith Cogeneration (n 351).
and finally achieved full recognition in *Choctaw Generation v American Home Assurance*.

According to the intertwined version of the estoppel doctrine, the courts must satisfy two conditions. First, it should analyze the dispute between the signatory party and the non-signatory in the light of the contract between the signatories, which includes the arbitration agreement.

For example, in *Choctaw*, a construction company had concluded a series of contracts with the owner. The contractor was obliged to provide engineering and construction services. This contract contained an arbitration agreement clause for settling a legal dispute between the owner and the contractor. Apart from that, the performance of the contract was secured by a letter of credit provided by a surety company. The security contract, on the other hand, had no arbitration agreement. The Second Circuit found that the dispute between the surety and the owner was strongly intertwined with the underlying construction contract since it ‘concerns the duty to replenish a letter of credit maintained under the Construction Contract, and requires a ruling as to whether that duty is independent of certain others in the context of the Construction Contract as a whole’.

The Court also held that:

The underlying dispute between [the contractor] and [the owner], concerning [the owner's] entitlement to liquidated damages, is now in the early stages of arbitration, and entails the construing of a dozen provisions of the Construction Contract. The immediate dispute in this action between [the owner] and [the surety], concerning whether [the owner] can compel immediate replenishment of the letter of credit to fund the liquidated damages, turns upon many of the same provisions.

The Court concluded that the controversy experienced by the owner and the surety was ‘linked textually to the Construction Contract and its merits [are] were bound up with the dispute now being arbitrated between [the owner] and [the contractor]’.

Courts should also satisfy themselves that there exist close contractual or corporate links between the non-signatory and the signatory parties. Case law shows these links are

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361 Choctaw (n 351).
362 ibid 406.
363 ibid.
364 ibid 407.
usually contractual; for example, the non-signatory and signatory parties may have performed a construction agreement, as in *McBro*\(^{365}\) and in *Hughes*,\(^{366}\) or a purchase agreement as in *Ex parte Napier*,\(^{367}\) or a secured agreement as in *Choctaw*.\(^{368}\)

The above study of the case law in the context of international arbitration and third parties reveals that there has been a growing acceptance of the intertwined factor as the key element for the application of the estoppel doctrine among US courts. Although it is hard to argue that there has been a total shift from the traditional equitable estoppel doctrine to the intertwined version, it is arguable that the intertwined version of the doctrine now qualifies as a valid contemporary version of the equitable estoppel doctrine in international arbitration. Studying the current American case law clearly shows the applicability of both doctrines in the US courts.\(^{369}\) Nevertheless, there exist some signs of concerns in US courts about the non-consensual character of the intertwined version.\(^{370}\) Obviously, the intertwined version demonstrates a more dynamic character in following commercial developments and business practice while the strictly equitable version of the doctrine is based on equitable rather than commercial considerations.

Nonetheless, this by itself does not mean that different versions of the equitable estoppel doctrine do not have any flaws and are in all cases complete. In fact, it should be highlighted that equitable estoppels doctrine does not distinguish between the different types of ‘third parties’. It was discussed earlier that not every non-signatory party can be assumed bound by an arbitration agreement. However, with regard to those earlier discussions, only those third parties with an interest in the dispute before a tribunal are qualified to be considered as third party. However, US case law reveals that equitable estoppels doctrine has been applied to different types of third parties without paying attention to such an important

\(^{365}\) *McBro Planning* (n 358) Memorandum of Opinion.

\(^{366}\) *Hughes Masonry* (n 351).

\(^{367}\) *Ex parte Napier* (n 351).

\(^{368}\) *Choctaw* (n 351).

\(^{369}\) For the equitable interpretation of the doctrine see, for example, *Griffin v Beach Club II Homeowners Ass’n* 384 F3d 157 (4th Cir 2004); *In re Weekley Homes* 180 SW 3d 127 (S C Tex 2005).

factor. Accordingly, precedents of the application of the doctrine show that it has been invoked for various types of contractual relationships. It has been applied to compel arbitration between a debtor and its surety,\textsuperscript{371} between a licensor and a licensee,\textsuperscript{372} and between a yacht owner and a ship classification society.\textsuperscript{373} Nevertheless, it seems that courts should divide the different third parties into two groups, namely genuine and false third parties. The relevant criteria for this categorization, accordingly, would depend on the degree of contractual interrelatedness between the third and the real parties.\textsuperscript{374}

As stated in the introduction of this section, the doctrine of equitable estoppel is being used in the United States in order to justify the underlying grounds to empower the arbitral tribunal to order consolidation and third party intervention. However, in continental Europe the doctrine of group companies is being invoked normally for the same purpose. The next section will examine the latter doctrine and explain its application in that part of the world.

\textbf{3.4.2.2 Group company}

As stated earlier, the second doctrine that enables the arbitral tribunal to consolidate different arbitrations into one, or determine third parties claims even despite the lack of agreement under certain conditions, or allows non-signatory parties to enter into an arbitration proceeding is the doctrine of ‘group companies’.\textsuperscript{375} This fairly controversial doctrine is built up on the premise that a large multinational group, including its subsidiaries, associates and holdings should be regarded as a whole rather than as separate legal entities.

In the context of international arbitration, however, this doctrine took on particular importance when it was employed by an international tribunal as a theoretical basis for the extension of the arbitration agreement to non-signatory parties in a group of companies. This doctrine was first invoked in international arbitration in the seminal award in \textit{Dow Chemical v

\textsuperscript{371} Choctaw Generation (n 351).
\textsuperscript{372} Sunkist Soft Drinks v Sunkist Growers 10 F3d 753 (11th Cir 1981).
\textsuperscript{373} American Bureau of Shipping v Tenccara Shipyard SPA 170 F 3d 349, 353 (2nd Cir 1999).
\textsuperscript{374} See generally, Brekoulakis (n 347) chapter III.
\textsuperscript{375} See Tom Hadden, \textit{The Control of Corporate Groups} (Institute of Advanced Legal Studies, University of London 1983) 2.
Isover-Saint-Gobain. Since then, it has become one of the most challenging doctrines in this field of legal scholarship.

Despite the fact that it has been the subject of numerous debates and has been invoked repeatedly by national courts and arbitral tribunals in different jurisdictions, academic discussions on this doctrine have not been resolved. In order to be precise and avoid irrelevant discussions of this doctrine on international arbitration, a brief overview of the history and the legal premise of the doctrine will be given, followed by an elaboration of the relevant cases of arbitral tribunals. Finally, the conditions required for the doctrine to be applied will be identified.

In Dow Chemical, two subsidiaries of the Dow Chemical Company group entered into two separate distribution contracts with Boussois-Isolation whose rights and obligations were subsequently assigned to Isover Saint Gobain. As for a dispute settlement mechanism, both agreements included an ICC arbitration clause. A legal dispute appeared in a distribution agreement. Then, an arbitration proceeding was initiated against Isover Saint Gobain by the two Dow Chemical subsidiaries, their parent company and another subsidiary of the same group. The jurisdiction of the tribunal was challenged by the respondent on the ground that the third subsidiary and the parent company had not signed the arbitration agreements and, therefore, were not able to be among the claimants. However, the ICC tribunal, with particular reference to the following grounds, issued an interim measure which recognized its competence to conduct the claims of the non-signatory parent and subsidiary company. In its interim measures, the tribunal found the following elements decisive in order to extend the ambit of the arbitration agreement to the non-signatory party:

- The autonomy of the arbitration agreement differed from the main contract which allowed the tribunal to determine the scope and effects of the arbitration agreement in accordance with a law different from that applicable to the merits of the dispute. In particular, the tribunal applied substantive rules of international commerce part of which the tribunal held was the ‘group of company’ concept.

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376 Dow Chemical v Isover-Saint-Gobain (Interim award) ICC4131/1982.
• The factual context of the contractual relationship in question revealed the active role of the non-signatories in the conclusion and performance of the contracts.
• The fact that the signatories and the non-signatories were companies belonging to the same group.
• The common intention of the parties was to arbitrate.

The interim measure of the tribunal was upheld subsequently in the Paris Cour d'appel. Also, the tribunal jurisdictional interim measure over the non-signatories was underpinned by the Paris Cour d'appel.\(^{377}\) Since then, several arbitral tribunals as well as a considerable number of national courts have applied the doctrine.\(^{378}\) Consequently, this case and its award has become one of the most celebrated arbitration cases and has been the reference point in many cases.\(^{379}\)

Regardless of this particular background, it should also be highlighted that it is fairly common for companies with strong financial status to have a separate legal personality within a group of companies. This simply means that none of the members of the group has the capacity to bind another company of the group, unless it acts as the agent of the group. In other words, in the absence of such agency, any agreement signed by one of the members of the group will only be assumed binding for that company. An arbitration agreement is not an exception to this general rule. Therefore, one may argue that only the signatory company will be bound by the arbitration agreement, not any other company in the group. This is the position taken by almost all national and international law regarding members of a group of companies. In the same way, there is no express arbitration provision, neither national rule nor international treaty, recognizing the competence of one of the members in a group in binding its associates contractually. Accordingly, application of the ‘group of companies doctrine’ in international arbitration is based on the precedent of international arbitration including arbitral

Indeed, in order to assume jurisdiction over several companies in the same group, an arbitral tribunal will neither take the applicable law on the merits of the case, nor will it take any other national law, and not even the law of the seat into account. On the contrary, the tribunal defines the boundaries of their jurisdiction on the basis of ‘usages of international trade’, the ‘common intention of the parties’, ‘transnational substantive rules’ and ‘*lex mercatoria*’. This approach, in fact, is rooted in the idea of the delocalization of international arbitration which appeared after 1981 when the French legislature considered the localization of international arbitration to be superfluous. Accordingly, this modern trend in international arbitration argues that international arbitration and the arbitral powers are firmly based in the public order of the transnational commercial and financial legal order or, what the French call, the international arbitral order.

The practice of international arbitration in its application to the group of companies doctrine shows that the doctrine has been applied similarly; either where the non-signatory company has been a claimant attempting to enforce the arbitration agreement, or where the non-signatory company has acted as a respondent, resisting the arbitration agreement. In other words, in practice, there is no distinction between the situation where the doctrine is invoked by the non-signatory company of an arbitration agreement, or where one party of an arbitration agreement attempts to enforce an arbitration clause against a non-signatory. Similarly, there is no evidence of distinction between the application of the doctrine upon a parent or a subsidiary of a group of companies. Therefore, tribunals have occasionally

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381 See for example, the arbitral awards: ICC4131/1982, *Dow Chemical v Isover-Saint-Gobain*. This is the prevailing view in arbitration literature too: Lew, Mistelis and Kröll (n 338) para 6-73; E Gaillard and J Savage (eds), *Fouchard & Gaillard and Goldman, On International Commercial Arbitration* (Kluwer Arbitration 1999) para 443.

382 Gaillard and Savage (n 381) 49.


‘extended’ arbitration agreements to a non-signatory parent company of the group,\textsuperscript{386} to a non-signatory subsidiary,\textsuperscript{387} and even to directors and shareholders of the group.\textsuperscript{388}

Analysis of the precedents set by international tribunals in the application of this doctrine reveals that ‘consent’ is the key factor in the application of this doctrine. Therefore, courts and tribunals will apply the arbitration agreement to the non-signatory only when they satisfactorily meet its consent to the arbitration agreement. This demonstrates that the principle of autonomous validity and effectiveness of an arbitration agreement, derived from the ‘separability’ doctrine, has not wiped off the importance of consent in contractual relations.\textsuperscript{389} As stated before, none of the members of the group has the capacity to bind another company of the group unless it acts as the agent of the group. In other words, in the absence of such agency, any agreement signed by one of the members of the group will only be assumed binding for that company. An arbitration agreement is not an exception to this general rule. Therefore, one may argue that only the signatory company will be bound by the arbitration agreement, not any other company in the group.

Despite the vast application of the doctrine of group companies in international arbitration, a group of commentators\textsuperscript{390} has criticized the fundamental existence of such a doctrine. They argue that if in this doctrine ‘consent’ holds the key-factor, then the well-established principles of contract law, including principles of formation and interpretation will suffice to examine whether the non-signatory party is bound by the arbitration agreement.\textsuperscript{391} Accordingly, the tribunal should take into account legal principles of representation or agency;\textsuperscript{392} principles of contact ratification;\textsuperscript{393} theories of the third party beneficiaries;\textsuperscript{394}

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\textsuperscript{386} Sponsor AB v Lestrade (n 385).
\textsuperscript{387} For example, see the Paris Cour d’appel, Kis France and other v General and other (1991) 16 YBCA 145.
\textsuperscript{388} For example, ICC6519/1991, (1991) 118 JDI (Clunet) 1065.
\textsuperscript{389} Arbitration discourse agrees almost unanimously that the application of the ‘group of companies’ doctrine depends on ‘consent’ of the non-signatory.
\textsuperscript{390} This is the approach taken by I Fadlallah, ‘Clause d’Arbitrage et Groupes de Societes’ (Travaux du Comite Francais de Droit International Prive 1984-1985, 1987) 105.
\textsuperscript{391} ibid 105.
\textsuperscript{392} This can take the form of ‘apparent or ostensible representation’ or ‘agency’ in English law; ‘apparent authority’ or ‘authority by estoppel’ or ‘agency’ in US law; see M Blessing, ‘Extension of the Arbitration Clause to Non-Signatories’ in Arbitration Agreement – Its Multifold Critical Aspects (ASA Special Series No 8, 1999) 161; O Sandrock, ‘Extending the Scope of Arbitration Agreements to Non-Signatories’ in Arbitration Agreement - Its Multifold Critical Aspects (ASA Special Series No 8, 1999) 170.
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corporate veil theories\textsuperscript{395} and above all the general principle of interpretation.\textsuperscript{396}

On the other hand, those who insist on the applicability of group companies doctrine as a theoretical construct in international arbitration, argue that tribunals must also take into account the existence of internal corporate relationships in a group as a determining factor in binding a non-signatory party to an arbitration agreement.\textsuperscript{397} In other words, the existence of corporate structure signifies the implied intention of the non-signatory members of the group to arbitrate.\textsuperscript{398} Indeed, case law has developed specific criteria for ascertaining implied consent of the non-signatories. Therefore, the tribunal will usually extend the arbitration agreement to the non-signatory party only when these conditions are met.\textsuperscript{399} Analyses of the relevant cases in international arbitration provide the following criteria for determining the implied consent of a non-signatory party.

The structure of group companies is the first determining criterion in this regard. Accordingly, several companies must be structured on a corporate group basis despite their separate legal personalities. In other words, a strong financial, organizational and control system must be met within the group. Such status can be achieved if several companies establish a ‘single economic unit’ or a ‘single economic reality',\textsuperscript{400} or when the several companies in the group share assets, intellectual property rights, human or financial resources; or when they are structured in a hierarchical order.

The second criterion addresses the active role of the non-signatory companies in the negotiations, performance or termination of the contract. In other words, the non-signatory party must play an active role in negotiation, performance or termination of the container

\textsuperscript{394} See, for example, award in ICC2375/1975.
\textsuperscript{395} See, for example, ICC6000/1988.
\textsuperscript{396} For example, ICC1434/1975.
\textsuperscript{397} Y Derains and S Schaf, ‘Clauses d Arbitrages et Groupes de Societes’ (1985) Rev Dr Aff Inter'l 231.
\textsuperscript{398} Bernard Hanotiau, ‘Groups of Companies in International Arbitration’ in L Mistelis and J Lew (eds), Pervasive Problems in International Arbitration (Kluwer Law International 2006) 51.
\textsuperscript{399} See, for example, ICC6000/1988.
\textsuperscript{400} This principle was first mentioned in the case of DHN Food Distributors Ltd v Tower Hamlets London Borough Council (1976) 1 WLR 852; Brekoulakis (n 347).
contract. As a result, the mere existence of group structure is not satisfactory; it must also reflect a particular contractual relationship out of which the dispute has emerged.

Finally, besides the group structure and the active role tests, the co-contracting party must prove legitimately that it understood the non-signatory companies to be genuine contracting parties. To determine that impression, the tribunal will especially examine economic or business interests of the co-contracting party in dealing with the whole group rather than just the signatory companies.\(^\text{401}\) Apart from that, the co-contracting party must prove that it understands the non-signatory party to be a genuine party to the arbitration agreement. Thus, the tribunal here should focus on the behaviour of the non-signatory party that misunderstood the co-contracting party.\(^\text{402}\)

In the legal analysis of the ‘group of companies’ doctrine per se, one may find some similarities between the ‘genuine party behavior’ of the non-signatory and the principle of agency or representation that make it difficult to distinguish the group of companies doctrine from traditional principles of contract law. Therefore, ‘real party behavior’ adopted by the non-signatory company can also be considered as an example of ‘apparent or ostensible authority’. In this analysis, the non-signatory party may be bound by the contract under the principles of agency. The ‘genuine party behavior’ may also be a ground for application of the US principle of equitable estoppel. For instance, if the co-contracting party relied on the ‘genuine party behavior’ of the non-signatory, the latter may well be estopped from avoiding the duties arising out of the contract.

It seems fair to say that the clear separation of the group companies doctrine from traditional contract law principles is by no means an easy task to achieve. Nevertheless, it is also wrong to deny the existence of this doctrine or its contribution to the discussion on arbitration agreements and third parties. Despite all the aforementioned similarities and unclear boundaries of the doctrine, it should be highlighted that the doctrine has opened a new

dimension to the debate on arbitration and third parties. Moreover, compared to the different versions of equitable estoppel doctrine where there is no clear distinction between genuine and false third parties, it would seem that the group companies doctrine to some extent has applied this distinction.

It was previously noted that in order to insulate itself from any court initiation regarding consolidation of different arbitration proceedings or even joinder and intervention of the third parties, two different theories, under the term extension doctrines, have been invoked by arbitral tribunals. So far, the content of both theories and the implications of their application have been elucidated. Despite these theories and their implications, as also stated in 3.4.1, there is a third approach which has been developed on the basis of the interpretation of arbitration agreement and the traditional doctrine of implied term of contracts. This may facilitate the consolidation of different arbitration agreements much more than the aforementioned theories and it may also set aside the necessity of recourse to national courts for this purpose. The following sections will deal with this third approach.

### 3.4.3 International arbitral proceedings and issues of multiparty cases

It has already been noted that international arbitration is a consensual dispute settlement mechanism and, therefore, consent of the parties plays an important role in activating this method. Accordingly, as we shall see below, consolidation and joinder/intervention in international arbitration may occur, apart from a few exceptions, normally where all disputants have unanimously agreed to such a result either in their original arbitration agreement or in a submission agreement. In other words, where such a unanimous agreement exists, national laws and international arbitration conventions ordinarily allow consolidation, joinder and/or intervention irrespective of subsequent objections of a party. Nevertheless, in the absence of such unanimous consent, there are a few national legal systems that permit non-consensual arbitration where efficiency and fairness consideration press for consolidation of the arbitral tribunal. These jurisdictions are exceptions to the general

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404 Born (n 98) 2073-2083, 2083-2087, 2069-2073.
recognition of the parties’ autonomy and as it is discussed in the next section, it is also contrary to the approaches adopted by the New York Convention.⁴⁰⁵ This section considers the issues of consolidation and joinder/intervention under the umbrella of international conventions, national jurisdictions and institutional arbitration.

3.4.3.1 Consolidation under international arbitration conventions

It is not possible to find specific provisions on consolidation, joinder or intervention in leading international arbitration conventions. There is no provision in the New York, European, or the Inter-American Conventions that addresses these topics specifically, and there is little authority to apply any of the Conventions to these subjects.⁴⁰⁶

A better way, therefore, to start this discussion is with the New York Convention which refers to recognition of both arbitration agreements and arbitral awards. In the context of enforcing arbitration agreements, the Convention tackles consolidation and/or joinder/intervention in Article II(1) and II(3), where it stipulates that national courts should recognize and give effect to the material terms of international arbitration agreements. Clearly, such an obligation may easily contain agreements regarding consolidation, joinder and intervention in arbitral proceedings.

In other words, if a party obtains a contractual right to settle particular disputes in a consolidated arbitration, or with the presence of a particular party, then Articles II(1) and II(3) of the Convention express recognition of these rights as integral parts of the parties’ agreement to arbitrate. On the other hand, if one of the parties obtains a contractual right to arbitrate in a non-consolidated proceeding, or without the presence of additional parties, Articles II(1) and II(3) again safeguard these rights. Notably, the various terms of an agreement to arbitrate can be implied, as well as express – a principle which should extend to issues of consolidation, joinder and intervention.

⁴⁰⁵ Several articles of the New York Convention including Articles II, III and V show this consensual basis of international arbitration. Hence, any approach that ends up with the involvement of a no-signatory party in an arbitration proceeding would conflict with the provisions of the NY Convention. See Born (n 98) 2087-2089.

As for recognition of the arbitral awards, Article V(1)(d) of the Convention stipulates non-recognition of awards that are rendered following arbitral proceedings where consolidation, joinder, or intervention was ordered, irrespective of an arbitration agreement that did not allow such actions.\(^\text{407}\) The reason for such a conclusion is that Article V(1)(d) gives priority to the parties’ agreement on the ‘arbitral procedures’ which clearly encompasses matters such as consolidation, joinder and intervention.\(^\text{408}\) If consolidation or joinder/intervention were based on the parties’ consent – either express or implied – then Article V(1)(d) would not be implicated. Nonetheless, award for consolidation, intervention, or joinder on the ground of the parties’ express or implied agreement should not be regarded as a basis for denying recognition of an award, and should instead be treated as required by Article II(1) and II(3).

It should also be mentioned here that a group of commentators has argued that the parties’ agreement to arbitrate in a country whose law recognizes mandatory consolidation, even in the absence of the parties’ consent, forms acceptance of such consolidation for the purpose of Article V(1)(d).\(^\text{409}\) Having said that, this analysis should not extend to cases where the parties have expressly excluded consolidation (or joinder/intervention) in their arbitration agreement for two reasons: Article V(1)(d) gives priority to the parties’ agreements over other legal arrangements; and the specific terms of the parties’ agreement should prevail over the more general selection of the arbitral seat.\(^\text{410}\) If this analysis were accepted, then an award could (and should) be denied recognition under Article II(3) and V(1)(d) even when the law of the arbitral seat recognized and allowed consolidation (or joinder/intervention) without the parties’ agreement.

Consequently, according to the New York Convention, consolidation and joinder/intervention in international arbitration can only be assumed where there is unanimous consent, either in an arbitration procedural agreement or in the submission agreement,

\(^\text{407}\) See also Karaha Bodas Co v Perusahaan PertambanganMinyak Dan Gas Bumi Negara, 364 F3d 274, 292-94 (5th Cir 2004).
\(^\text{408}\) Born (n 98) 1258-1260, 1264-1274, 1748-1751, 2764-2777.
\(^\text{409}\) See, e.g., Alan Redfern and Michael Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2010) 3-83, Poudret & Besson (n 200) and Chiu (n 342) 72-73.
\(^\text{410}\) Born (n 98) 1368-1376, 1769, 1965-1966, 2770-2774.
between all the parties who have an interest in the outcome of the proceedings. This result strengthens the outdated and orthodox perception of international arbitration which dismisses efficiency consideration. This clearly means that if all parties agree upon consolidation or joinder and intervention, then there would not remain any point for an arbitral tribunal to make a decision in this regard, nor for court intervention, at least not for the matter of consolidation itself, though there may still remain the risk of non-agreement regarding the establishment of the tribunal and appointment of the arbitrators. In fact, if parties already, or through a submission agreement consent to consolidation, joinder or intervention, they themselves resolve the potential conflicts on these issues, and hence arbitral tribunal on the basis of parties agreement will have jurisdiction to determine all legal disputes between disputants.

3.4.3.2 Consolidation under national jurisdictions

In principle, the law governing the parties’ arbitration agreement should also govern issues of consolidation, intervention and joinder, though this should be in the light of primacy of party autonomy on the subject. Therefore, in the majority of cases this will be the law of the arbitral seat. This is consistent with the quasi-procedural character of questions of consolidation, intervention and joinder, as well as with the tendency of national arbitration legislation (when it addresses the issue) to be limited to locally-seated arbitrations.\textsuperscript{411} Arbitration legislation in many countries does not address issues of consolidation, joinder or intervention expressly.\textsuperscript{412} The same is true under the UNCITRAL Model Law, as well as under the arbitration statute in the United States. However, as we shall see below, judicial authority in these jurisdictions does not strictly pursue the statutory solutions to deal with these topics in those states.\textsuperscript{413}

The dominant approach taken by national laws in almost all cases is that consolidation and joinder/intervention may be ordered by an arbitral tribunal or a national court, subject to the disputants’ (unanimous) agreement. In the absence of such unanimous agreement, both the

\textsuperscript{411} See Born (n 98) 2076-2092.
\textsuperscript{412} Born (n 98) 2067-2104.
\textsuperscript{413} ibid 1368-1376, 2076-2083.
tribunal and local courts will not be authorized to order either consolidation or joinder/intervention. This approach is in conformity with that prescribed by the New York Convention\textsuperscript{414} and more generally with respect to the parties’ procedural autonomy in international arbitration.\textsuperscript{415}

Even, the UNCITRAL Model Law does not contain articulated provisions regarding consolidation and joinder/intervention. Although drafters of the Model Law considered these subjects, the proposals, both in the original 1985 version\textsuperscript{416} of the Law and in the 2006 revisions,\textsuperscript{417} were rejected in the final document. Nevertheless, the fact that the Model Law is silent on these issues does not preclude the topics of consolidation and joinder/intervention from being considered in the light of the Model Law’s basic requirement that: ‘arbitration agreements should be recognized and enforced in accordance with the parties’ intentions.’\textsuperscript{418}

Hence, in the context of the Model Law and in the presumption of the governing Model Law as \textit{lex-arbitri}, consolidation and joinder/intervention should be analyzed as an element of the parties’ agreement to arbitrate.

In adopting the Model Law a number of states amended its provisions and incorporated provisions to address the subject of consolidation, generally providing either courts or arbitral tribunals with the power (where the parties have so agreed) to consolidate arbitrations. These statutory provisions vary, with a few providing the arbitral tribunal,\textsuperscript{419} but the majority providing local courts\textsuperscript{420} with the power to order consolidation. Additionally, some statutory provisions limit the power of consolidation to arbitrations pending before the

\textsuperscript{414} ibid 2073-2076.
\textsuperscript{415} ibid 1748-1751.
\textsuperscript{416} Holtzmann and Neuhaus (n 256) 311-12.
\textsuperscript{418} See UNCITRAL Model Law (n 87) art 8(1).
\textsuperscript{420} See, e.g., Bermuda Arbitration Act, section 9; New Zealand Arbitration Act, Second Schedule, art 2; British Columbia Commercial Arbitration Act, section 21.
same tribunal or to arbitrations pending between the same parties. Nonetheless, the necessary condition for consolidation or joinder/intervention in almost all of these states is the parties’ agreement.

With a similar approach to the Model Law, the FAA remains silent regarding consolidation or joinder/intervention. Hence, the US courts have given divergent, sometimes contradictory, results in cases where the involved parties request the courts to order consolidation of two or more arbitrations. This became more controversial when some courts permitted consolidation even in the absence of parties’ agreement. Nevertheless, recent approaches in US courts show more restriction on consolidation of cases.

Historically, some lower US courts, invoking the implied terms doctrine, have held that the FAA contained an implied authority to the US courts which allowed for the granting of consolidation of separate arbitrations even in the absence of the parties’ agreement. The influential decision in this line of analysis was Compania Espanola de Petroleos, SA v. Nereus Shipping, where the Second Circuit ordered three parties to participate in a consolidated arbitration. The court broadly reasoned that:

We think the liberal purposes of the Federal Arbitration Act clearly require that this Act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases.

In this case, the court did not come to its decision on the existence of any agreement on consolidation or on the particular facts of the case. Instead, the court recognized a judicial power to consolidate arbitral proceedings in the interests of efficiency. After Nereus, a number of lower court decisions ordered consolidation in the absence of either an agreement authorizing consolidation or even a common arbitration agreement binding all the parties.

In spite of this historical background, Nereus no longer represents the approach of

421 See, e.g., Bermuda Arbitration Act, section 9. Providing for consolidation ‘in relation to two or more arbitration proceedings in respect of identical parties’.
422 Compania Espanola de Petroleos, SA v Nereus Shipping 527 F2d 966 (2d Cir 1975).
423 527 F2d at 975 (emphasis added).
American courts in this regard. The precedents of US lower courts and their overwhelming weight, including in the Second Circuit, reject the reasoning in *Nereus* and, therefore, do not recognize any competence for the courts to order consolidation of multiple arbitrations in the absence of the parties’ agreement. The current approach of American courts is that the FAA should give effect to the parties’ procedural autonomy to structure the arbitration as they think best.\(^{425}\) The Second Circuit declared in *Government of the United Kingdom v Boeing Co* that:

A court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly in efficient maintenance of separate proceedings … if contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.\(^{426}\)

Almost all subsequent US cases have reached the same conclusion.\(^{427}\) The rationale for this conclusion, Section 4 of the FAA contains provisions for recognition and enforcement of agreements to arbitrate including agreements with regard to consolidated or non-consolidated arbitrations. According to this view, the FAA articulates that neither arbitral tribunals nor courts may order the consolidation of arbitrations unless this is what the parties have agreed.

On the other hand, the UK Arbitration Act 1996, contains specific provisions regarding consolidation. Section 35 of the Act stipulates that ‘the parties are free to agree’ upon the consolidation of an arbitral proceeding with other arbitral proceedings, or that concurrent hearings will be held,\(^{428}\) but ‘[u]nless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings’.\(^{429}\) In this way, by codifying the common law position, English legislation allows

\(^{425}\) See, e.g., *Champ v Siegel Trading Co* 55 F3d 269 (7th Cir 1995); *Am Centennial Ins Co v Nat'l Cas Co* 951 F2d 107 (6th Cir 1991) and *Baesler v Cont'l Grain Co* 900 F2d 1193 (8th Cir 1990).

\(^{426}\) *Gov't of United Kin0dom of Great Britain and Northern Ireland v Boeing Co* 998 F2d 68 (2d Cir 1993) (quoting *Am Centennial Ins Co v Nat'l Cas Co* 951 F2d 107, 108 (6th Cir 1991)) [emphasis added].

\(^{427}\) See, e.g., *Glencore, Ltd v Schnitzer Steel Products Co* 189 F3d 264 (2d Cir 1999) and *Rolls-Royce Indus Power, Inc v Zurn EPC Serv* 2001 WL 1397881 (ND Ill 2001).

\(^{428}\) UK Arbitration Act, 1996, section 35(1) [emphasis added]. Such consolidation may be ordered by the arbitral tribunal. See Merkin (n 252) 17.6.

\(^{429}\) UK Arbitration Act 1996 (n 115) section 35(2) (emphasis added). The UK Departmental Advisory Committee considered that a provision allowing consolidation unless the parties agreed to the contrary would undermine the
consolidation or concurrent hearings if all parties agree to it. Moreover, the adoption of institutional rules that allow for consolidation is sufficient to constitute such an agreement. The Act does not empower an English court, as distinct from the arbitrators, to order the consolidation of arbitral proceedings.

Despite the fact that US courts initially ordered consolidation on the basis of efficiency even in the absence of the parties’ procedural agreement, the current prevailing approach among them is to implement the parties’ procedural agreement. In other words, this shows the understanding of the US courts regarding the primacy of the party autonomy in international arbitration. Hence, it seems that in order to issue consolidation, a court must be satisfied that all involved parties agree with such consolidation. In fact, English law follows the same approach. Article 35 of the UK Arbitration Act requires unanimous consent of the involved parties to confer such competence to the court. Accordingly, as we have seen in the context of the arbitration law and practice in the US, courts may use their general jurisdiction to order consolidation, though in the UK particular emphasis on the necessity of parties’ agreement in Article 35 of the Arbitration Act 1996 has no place for such court intervention.

So far it appears that there are different ways to deal with the matter of consolidation, joinder and intervention in international arbitration. Regardless of the general competence for courts all over the world to get involved in this issue, as we have seen, international arbitration also fabricated two theories for this purpose. In any event, and notwithstanding the body that makes a decision on such consolidation, whether courts or arbitral tribunal, the key factor is to get the consent of all parties to take part in the arbitration process. To do so, courts and arbitral tribunals may resort to one of the foregoing methods. However, these approaches are somewhat disparate. The next section will discuss to what extent some sort of transnational approach is achievable among different jurisdictions.


431 Whether a particular set of institutional rules allows for consolidation is a matter of construction. See The Bay Hotel and Resort Ltd v Cavalier Constr Co Ltd [2001] UKPC 34 (Privy Council Turk and Caicos Islands).

432 Wealands v CLC Contractors Ltd [1999] 2 Lloyd’s Rep 739 (English CA).
3.4.4 Towards a transnational approach to consolidation

Due to the significance of the parties’ agreement to the resolution of consolidation, under both the New York Convention and national arbitration legislations on the one hand, and the ‘consent’ under the so-called extension doctrine, it is crucial to determine the precise time when the parties make a decision as to whether to consolidate different arbitrations or not. In fact observing arbitration agreements reveals that in the majority of cases parties’ agreement does not expressly address the subjects of consolidation and joinder or intervention. In other words, they will neither expressly prohibit nor permit consolidation. This is common, particularly in ad hoc arbitration agreements, but it also applies to many agreements incorporating institutional arbitration rules. Accordingly, in the vast majority of cases, there will not be any express statement of intention by the parties concerning either consolidation or joinder/intervention.

Nonetheless, there is no reason to stipulate that an agreement permitting or precluding consolidation or joinder/intervention cannot be implied. It is generally accepted in international arbitration that a range of aspects of an arbitration agreement, such as confidentiality, a tribunal’s power to order provisional relief, the choice of applicable law and the like, are normally implied. Consequently, the same approach may, and indeed must, be followed to resolve the questions of consolidation and joinder/intervention. If this is done, then the questions of implied agreement of consolidation and joinder/intervention in substantial part depend on the structure of the parties’ contractual relations and the terms of their agreements to arbitrate.

Following the above conclusion, a number of US courts have held that where the parties’ contract is silent, an agreement to consolidation can be implied from contractual provisions and structure, as well as from considerations of efficiency and consistency of results. One court held that a court has ‘no power to order … consolidation if the parties’

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434 One court has suggested that consolidation can only be ordered if the parties expressly agreed to it. Ore & Chem Corp v Stinnes InterOil, Inc 606 F Supp 1510 (SDNY 1985) (requiring express agreement on consolidation).
435 See, e.g., Connecticut Gen Life Ins Co v Sun Life Assur Co of Canada 210 F3d 771 (7th Cir 2000) (implied consent to consolidation is possible); Maxum Found, Inc v Salus Corp 817 F2d 1086, 1087 (4th Cir 1987) (finding
contract doesn’t authorize it … but in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation’. Due to the role of implied terms in other aspects of the arbitral process, one can hardly challenge this conclusion nor resist it.

The particular importance of implied agreement to consolidation appears more clearly where three (or more) parties agree to utilize arbitration and incorporate such agreement in the same container contract but do not expressly deal with issues of consolidation and joinder/intervention. There is a significant argument which says that in these circumstances the parties have impliedly accepted the possibility of consolidation of arbitrations under their multiparty arbitration agreement and/or joinder of other contracting parties into such arbitrations. Where all the parties have expressly accepted the possibility of arbitration regarding the particular legal relationship with one another, it is difficult to presume that they meant to require that arbitrations proceed with the involvement of only some, and not other, parties to the arbitration agreement – depending on the particular tactical calculations of the claimants in individual cases. In particular, expectations of confidentiality or purely bilateral dispute resolution proceedings are very difficult to justify, given the possibility of multiparty arbitrations involving all the parties to the agreement to arbitrate.

According to this theory, the parties’ joint acceptance of the single dispute resolution mechanism, and willingness to settle the disputes under a single contractual relationship, shows their implied agreement to the possibility of a unified proceeding to address their disputes, rather than different tribunals or fragmented proceedings in all cases. Most notably, such analysis would neither necessitate nor preclude consolidation in all cases, but would instead recognize a competence for the arbitral tribunal to make a decision, in the light of

agreement to consolidated arbitration, even though there is no ‘unambiguous’ provision to that effect; Gavlik Constr Co v HF Campbell Co 526 F2d 777, 778-79 (3d Cir 1975); In re Coastal Shipping Ltd and So Petroleum Tankers Ltd 812 F Supp 396, 402-03 (SDNY 1993) (inquiring whether the parties' agreement provides for consolidation 'either directly or by implication').

Some courts have reached this decision in these or similar circumstances. See, e.g., P/R Clipper Gas v PPG Indus, Inc 804 F Supp 570 (SDNY 1992).

Hanotiau (n 398) 363 (apparently requiring consent of all parties to consolidation of different arbitrations).
efficiency, fairness, and the like, whether or not to consolidate two (or more) arbitrations.\(^{439}\)

The more difficult interpretative question frequently arises in the context of construction and sale of goods contracts\(^{440}\) when three (or more) parties agree to parallel and substantially identical arbitration agreements in related (but different) underlying contracts. Despite the apparent complexity of these kinds of cases, the better interpretative approach to these circumstances is to say that agreement to identical or considerably similar dispute settlement mechanisms (meaning the same institutional rules, arbitral seat, substantive law and number of arbitrators) implies acceptance of a consolidated arbitration with joinder and intervention rights among parties to the relevant arbitration agreements. Even beyond that, in some cases, a tripartite contractual relationship exists, for example, with an owner, contractor, and subcontractor. Although each agreement may contain an arbitration clause, neither the principal contract nor the subcontract will provide for consolidated arbitration. Nevertheless, some courts have held that broad arbitration clauses in the separate contracts should be interpreted as contemplating arbitration of disputes between all three parties to both agreements (notwithstanding the fact that the two contracts each had only two parties (i.e., A with B and B with C)).\(^{441}\)

Additionally, issues of confidentiality in international arbitration do not undermine the aforementioned analysis. There is no doubt that the parties can also be assumed to have implied expectations that their arbitral proceedings with one another will be confidential.\(^{442}\) Moreover, parties would legitimately expect, in accordance with customary international arbitration practice, to play an active role in the selection of the arbitral tribunal in such proceedings.\(^{443}\) Nevertheless, the parties’ agreement to identical dispute resolution provisions can reasonably be interpreted as impliedly accepting consolidation and/or joinder or intervention by other parties to such dispute resolution provisions where all disputants are involved in the same commercial transaction with interrelated contractual obligations and

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\(^{439}\) The application of these factors is discussed below.
\(^{440}\) See Born (n 98) 2068-2070.
\(^{441}\) See, e.g., \textit{Maxum Found} (n 435) and \textit{Gavlik Constr} (n 435).
\(^{442}\) Confidentiality concerns are limited where the only disclosures would be to another party to the same contractual project in the context of a confidential arbitral proceeding.
performance.\textsuperscript{444} This conclusion is strengthened by the parties’ general obligation to settle their disputes by arbitration in good faith,\textsuperscript{445} which can be interpreted as including cooperation in an efficient dispute resolution process that avoids the risks of conflicting decisions.

However, when the parties have entered into contracts containing distinct dispute settlement provisions (including different arbitration provisions), then it will not generally be easy to conclude that they impliedly consented to consolidation or joinder/intervention. On the other hand, the parties might express their preference for incompatible dispute resolution mechanisms by selecting divergent arbitration procedures (e.g. ICC Rules in one arbitration and LCIA Rules in another), arbitral seats and/or appointing authorities, which ordinarily do not acknowledge the possibility of mandatory consolidation.\textsuperscript{446} It is conceivable that, where the parties had selected two or more sets of ‘neutral’ institutional rules, which did not arguably favour any of the parties, an implied agreement on consolidation could override such provisions, but this would be unusual.

Similarly, when the parties have concluded different contracts and some of them do not have any kind of provisions for dispute settlement, it becomes extremely difficult to imply any agreement to consolidation, joinder, or intervention in relation to disputes arising from these agreements; furthermore, it is difficult to assume a non-signatory as party to the arbitration agreement in one contract.

It has already been pointed out that consolidated proceedings and joinder/intervention can only take place at the time of unanimous consent of the parties involved. Accordingly, all aforementioned approaches regarding third party involvement in arbitration proceedings justify the existence of consent to arbitrate even for the parties who did not sign the arbitration contract. In other words, notwithstanding what theory or approach is adopted by the tribunal for ordering consolidation, it should justify the grounds by which the consent of a non-

\textsuperscript{444} That conclusion is supported by the efficiencies that are derived from consolidation and joinder/intervention as well as by the elimination of the risk of inconsistent decisions, which objective business persons, it can be assumed, wish to avoid.

\textsuperscript{445} See Born (n 98) 1008-1014.

\textsuperscript{446} See, e.g., Rolls-Royce Indus (n 427) and Continental Energy Assoc v Asea Brown Boveri, Inc, 192 AD 2d 467 (NY App Div 1993).
signatory party to participate in arbitration is determined. Nevertheless, compared with extended doctrines, the advantage of an implied agreement is that it is less complicated and minimizes the risk of challenge to the award at the time of recognition and enforcement of the award.

More importantly, this doctrine demonstrates that there is no exclusivity for national courts in this regard. In other words, the aforementioned analysis illustrates that arbitral tribunals may directly apply extended doctrines, implied consent or implied agreement and in such a way find the proper ground for the consolidation of different arbitrations or for allowing a third party joiner to arbitration proceeding without the need to get a court order. This represents considerable jurisdictional progress for the arbitral tribunal in terms of consolidation of different arbitration or joinder and intervention of third parties in an arbitration process.

3.5 Conclusion

It is not wrong if one claims that legal issues appearing at the commencement of an arbitration will not only have direct impact on the outcome of the case, but, as they pertain to the principles of natural justice and the right to have a fair, independent and impartial hearing, the entire arbitration proceeding will also be affected by the decisions made at this stage. As stated in chapter two, the way each jurisdiction deals with these matters primarily depends on the circumstances of the case as well as historical, economic, social and commercial factors that altogether distinguish one jurisdiction from another. As a result, any attempt at harmonization should consider these elements properly.

The very first issue at this stage is the matter of establishment. The question is whether the court should have a role in this regard, or whether the parties prescribed agreement is sufficient to guarantee proper and swift establishment for the arbitral tribunal. As stated earlier in this chapter, the consensual feature of international arbitration enables parties to make a decision on all procedural aspects of an arbitration proceeding including the establishment of the tribunal. In this regard, and in order to minimize court involvement in the establishment process, the best policy is to draft a comprehensive arbitration clause, opting out the right to recourse to national courts when the prescribed methods of the parties do not work and replace
national courts with professional arbitral institutions. Such a policy is the result of giving priority to party autonomy in international arbitration. In other words, parties and their advisers should play an active and central role in removing the grounds for involvement of national courts through their procedural agreement. If typical arbitral clauses with this feature become popular in commercial transactions, then not only will the establishment of the tribunal be faster and less costly but also recourse to national courts would have no place, at least for this purpose. International arbitration and its global practitioners could easily avoid the involvement of the national courts if they drafted clear, effective and prudent arbitration clauses. Clearly, a clause that fails to provide either for an effective method of constituting the arbitral tribunal or for the place of arbitration may turn out to be inoperable, and may make the enforcement of the arbitration agreement very unlikely for the claimant.

Nevertheless, this thesis is not suggesting that national legislation should repel the general competence of national courts in the appointment of arbitrators. Obviously, such a suggestion is neither practical nor rational. Courts should, therefore, still be able to deal with this issue. Nonetheless, other measures alongside such authority should be taken in order to insulate international arbitration from improper court intervention. It is necessary to bear the significance of protecting the independence of international arbitration vis-à-vis improper judicial intervention in mind on the one hand, and the objective of providing a fairly transnational approach for harmonization of court involvement in international arbitration on the other. One can then suggest that in establishing the arbitral tribunal attempts at harmonization, and taking the efficiency consideration into account, one should tend first of all to retain such an authority for national courts but more notably as a default mechanism. Furthermore, the court must avoid direct appointment when it is asked to resolve the dispute regarding the appointment of arbitrators. This is mainly because parties in an arbitration agreement normally wish to benefit from the expertise of professionals in settling their legal disputes. National courts rarely have access to this sort of expertise while leading international arbitral institutions can play this role very effectively and easily. Accordingly, in its decree, it should refer disputants, or directly seek a professional arbitral institution to appoint the arbitrator(s), albeit at the expense of the party in default. This is in fact the result of a comparative study between national jurisdictions, and the rules of various arbitration institutions. Thus, as discussed in detail in this chapter, it would seem much more efficient if
instead of arguing about the necessity of changing jurisdictional provisions in all countries across the globe, it is better for national courts to refrain from making direct appointments. Consequently, harmonization trends, if any, at this stage should tend to limit the behaviour of national courts in avoiding direct participation in appointing arbitrators and refer this task to one of the arbitral institutions.

The next pertinent issue at this stage is the challenge of the arbitrators. Such a right to challenge the arbitrators has emerged from the fundamental principles of natural justice which argue the necessity of access to a fair, impartial, and independent tribunal. Similarly, a comparative study on various provisions of impartiality and independence in the UK and the US, along with institutional arbitration rules demonstrates not only the advantages but also the necessity of preserving such competence for national courts. Nonetheless, two things are advisable here. First and foremost, parties of an arbitration agreement should replace the competence of courts with an arbitration institution in order to minimize the likelihood of court intervention. That institution will have ultimate authority to make a decision on the impartiality and independence of the arbitrator(s). Indeed, drafting a comprehensive arbitration clause would take a significant role. In other words, parties will externalize matters of challenge through their individual agreements. The experience of international arbitration institutions such as ICC and LCIA as well as a pre-established organizations like PCA demonstrates that challenges and objections to the arbitrators may be determined more swiftly and more effectively through private mechanisms rather than through a national court under the specified standards of independence and impartiality. Obviously, due to the fact that this is not related to the public policy of states such an externalization would bring about no concerns with the national judiciary systems. Indeed, it may even be expected by courts as such an approach will ultimately reduce the volume of recourse to national courts. This seems to be the least controversial solution to put aside the court’s potential initiation at this stage. Therefore, harmonization of court involvement at this stage can be achieved indirectly if parties contractually take the national court out of the process of challenge even with the recognition of a default competence for national courts to determine the impartiality and independence of the arbitrators.

Finally, the last issue that may cause court intervention in international arbitration at
the commencement of the proceeding is the matter of consolidation joinder/intervention. This is perhaps the most controversial issue at this stage since at first glance any measure for consolidation, joinder or intervention may not only amount to a breach of the consensual character of international arbitration but may also undermine its confidentiality. Hence, one may raise the question as to what extent the pressure of efficiency consideration may cause consolidation of two or more arbitration agreements or end up with the intervention of a third party stranger in an arbitration proceeding.

The very first notable issue in this regard is that in principle nothing prevents the courts from conducting a claim on consolidation or joinder and intervention unless their general competence to determine all legal dispute becomes restricted by specific legislation. In response to general concerns regarding confidentiality, the contractual character of international arbitration and the characteristics of the other party that play an important role in settling the dispute via international arbitration mechanism, courts have paid particular attention to the notion of consent in dealing with consolidation. Accordingly, by distinguishing consent from signature, courts have argued that a non-signatory party may also be deemed bound by the arbitration agreements so long as their consent can be determined or assumed by the courts.

Among the three approaches enabling the courts to deal with consolidation, joinder and intervention, namely equitable estoppel and its modern version (intertwined doctrine) that prevails in United States group companies which is more common in continental Europe, and finally the traditional interpretative analysis one, a signature is just one way of showing consent for arbitration. Accordingly, non-signatories can enter into an arbitration agreement, notwithstanding the fact that they have failed to sign it. Thus, if the courts are satisfied that there are reasonable grounds for the existence of consent for arbitration, then they can order consolidation of different arbitrations. The doctrine of group of companies goes even beyond that and argues that the existence of consent of a non-signatory party to arbitrate may even be presumed.

While the first two approaches are extremely theoretical and complex, the interpretative approach is quite straightforward and comprehensible. In fact, what can be seen
in the majority of cases is that the parties of an arbitration agreement will not expressly address the subjects of consolidation and joinder/intervention. In other words, they will neither expressly prohibit nor expressly permit consolidation. Nonetheless, there is no reason to stipulate that an agreement permitting or precluding consolidation or joinder/intervention cannot be implied. Accordingly, by the same token that enables an arbitral tribunal to conclude that issues such as matters of confidentiality, a tribunal’s power to order provisional relief and the choice of applicable law can be implied from the arbitration agreement, the agreement to arbitration can also be implied *per se* and thus facilitates the possibility of consolidation of different arbitrations. This idea will be endorsed by the logical necessity of avoiding the risk of inconsistent awards and increasing the efficiency in a dispute settlement. If this is done, then the questions of implied agreement of consolidation and joinder/intervention in substantial part depend on the structure of the parties’ contractual relations and the terms of their agreements to arbitrate.

According to this theory, the parties’ joint acceptance about the single dispute resolution mechanism, and willingness to settle the disputes under a single contractual relationship, shows their implied agreement on the possibility of a unified proceeding to address their disputes, rather than different tribunals or fragmented proceedings in all cases. Most notably, such an analysis would neither necessitate nor preclude consolidation in all cases, but would instead recognize the competence of the arbitral tribunal to make a decision, in the light of efficiency and fairness whether or not to consolidate two (or more) arbitrations.

All these three approaches have long precedents in international arbitration and have been invoked by national courts on several occasions for the purpose of consolidation between different arbitration proceedings as well as facilitating joinder and intervention of third party stranger in an arbitration. Nonetheless, one cannot find any specificity for the application of these theories for the courts. Therefore, it can be argued that even an international tribunal may invoke one of these approaches and order for consolidation or joinder and intervention. Notwithstanding what theory or approach is adopted by the tribunal for ordering consolidation, it should justify the grounds by which the consent of a non-signatory party to participate in arbitration is determined.
Furthermore, it seems that the interpretative approach due to the fact that it has less complexity and wider application in the world is far more qualified to be taken for the purpose of harmonization in international arbitration in contrast with equitable estoppel or group companies which more or less belongs to specific territory. By following this approach, arbitrators will also be exempt from having to justify why they are extending the ambit of an arbitration agreement to the non-signatories as it is already accepted as a principle of international arbitration that the competence of arbitrators can be inferred from the arbitration agreement *per se*.

Thus, arbitrators should attempt to determine and ascertain implied consent (agreement) of the parties, for consolidation or third parties’ intervention. Accordingly, the efficiency consideration and the general provisions of international arbitration coincide with each other and arbitral tribunals will also become competent to consolidate different arbitration proceedings. Such an analysis can not only provide a way of promoting the competence of arbitration tribunals, but it can also remove the potentiality of court intervention at this point in arbitration proceeding.

In the next chapter, this thesis will discuss court involvement during an arbitration proceeding with particular emphasis on interim measures in international arbitration and the ability of the arbitral tribunal to order interim measures as well as the necessity of extending such competence for the tribunal even where there is third party effect.
Chapter Four: National Courts and their Complementary Roles in Granting Interim Measures

4.1 Introduction

As discussed in previous chapters, international arbitration as an independent and consensual dispute settlement instrument is free from intervention of national courts in different jurisdictions. However, national courts are permitted to take on a certain role prior to the establishment of the arbitral tribunal or even at its outset in order to reinforce, but not halt, the functionality and operation of the arbitration agreement. In other words, as discussed in chapter 2, some forms of national court involvement are inevitable.

In chapter 2, the case of court involvement prior to the establishment of the arbitral tribunal was analyzed. This chapter will consider the potential role of national courts during the arbitration proceedings on the basis of comparative analysis between dominant approaches in the United States and the UK courts on the one hand, and international arbitration rules and practices on the other. The outcome of this comparative analysis will reveal to what extent the potential role of national courts in international arbitration is the result of intrinsic shortcomings of international arbitration itself and to what extent it is due to the historical unwillingness of national jurisdictions to recognize international arbitration as an independent dispute settlement mechanism. Ultimately, it contributes to finding the appropriate normative argument to be pursued at a transnational level to harmonize court involvement in international arbitration.

Generally speaking, an arbitral tribunal must take all responsibility for handling the proceedings, setting time limits, organising meetings and hearings, issuing procedural directions and ultimately considering the parties’ arguments regarding facts and laws in order to make its decision. However, there appears to be one important question, namely whether the arbitrators have the authority to grant interim relief in an international arbitration proceeding and, if so, whether they are able to order any type of interim measures or if there are limitations on their power to grant interim measures. This question comes from a very basic need to deal with any contentious claim whereby the adjudicator, regardless of being arbitrator or judge, may, on the basis of the parties’ request, require these types of claims to be
dealt with. The first issue of discussion, therefore, is whether arbitrators can grant interim measures or whether this type of relief is to be issued exclusively through the competence of national courts.

If we assume that arbitral tribunals are able to grant interim measures, and thus there is no exclusivity for national courts in this regard, the second question concerns the potential restrictions, if any, on arbitrators’ ability in granting interim measures. The very first question that may emerge is whether arbitrators may grant interim relief in any field or whether there are some connections between the subject matter of the underlying dispute and the subject of the parties’ request for interim measures. Additionally, as discussed earlier, arbitration is a consensual dispute settlement mechanism and, as such, is not able to affect third parties. However, litigation gets its legitimacy from the country’s constitution and, therefore, courts are authorized to grant interim relief which may ultimately affect third parties’ rights. The final potential challenge for arbitrators-ordered interim relief is the matter of enforcement. Chapters one and two referred to the fact that international arbitration cannot enforce its order or award on its own. Therefore, it is not clear on what basis the award or order for interim measures can be enforced in an international arbitration proceeding.

The next question that needs to be addressed is the matter of applicable law. If the arbitrators want to order interim relief in an arbitration case then what standards must be considered by the tribunal at the time of decision-making in this regard. Theoretically, arbitrators may find three different sources of law applicable in their decision-making process including the applicable law of the underlying dispute, the law of the seat and, finally, international standards and common principles of developed jurisdictions. As we shall see below, the sources of arbitrators’ power have not been studied a great deal in international literature but it would seem that for various reasons the international standards that have been developed during different arbitration cases are much more appropriate than the other two.

Accordingly, the next pertinent question relates to the governing international standards regarding granting interim measures by arbitral tribunals. The practical standards accepted by relatively all international arbitral tribunals dealing with the request for interim relief are (a) serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment
of the merits. Nonetheless, some tribunals find it necessary for claimants to prove a kind of *prima facie* case on the merits. Ultimately, and even more importantly, arbitral tribunals also look to the nature of the requested provisional measures and take into account the relative injury to be suffered by each party prior to making any decision on granting such measures. It must also be noted that these standards are to be flexible and applied on a case by case basis particularly due to the level of importance and the potential impact of the type of requested relief on the fate of the dispute.

The next issue would be the types of interim measures that may be ordered in the context of international arbitration. It should also be noted that regardless of different types of interim measures, the aforementioned standards should be applied in the context of each of these specific types of provisional measures. This means that arbitral tribunals enable the granting of interim measures as long as those measures, on the one hand, are directed towards parties of the arbitration (not non-parties), and on the other, they do not exceed any limits of the parties’ agreement or national applicable law.

The last relevant point would be about selecting a reasonable way to recommend considering the current status of international arbitration. It is now quite clear that national courts may get involved in international arbitration to assist arbitration proceedings. One of the important occasions where international arbitration may be in need of external help would be on the issue of interim measures. Accordingly, if one argues that international arbitration has matured and developed enough to deal with this issue by itself, then the next immediate question would be to what extent do we need the concurrent jurisdiction of national courts to grant interim measures in the context of international arbitration.

4.2 Arbitrators’ ability to order interim measures

Prior to opening any debate regarding interim measures in international arbitration, it is necessary to find out where the authority of arbitrators to order interim measures comes from. Such a jurisdictional issue, in fact, forms the main core of the following arguments.\(^{447}\)

\(^{447}\) The arbitral tribunal's authority to order provisional measures is often related to its power to grant injunctive relief. See Born (n 98) 2478-2479, 2480-2483.
Basically, matters of competence and jurisdictional authority have to be considered in the light of (a) any applicable international arbitration convention; (b) applicable national laws; and (c) the parties' arbitration agreement. All of these sources, regardless of historical limitations and prohibitions, show a continuing evolution of the ability of arbitral tribunals to take a direct role in ordering provisional measures and thus granting effective provisional relief.  

International conventions, among these three sources, are at the top of the hierarchy of importance. However, neither the Geneva Protocol/Geneva Convention nor the New York Convention contains specific provisions referring to the matter (either in the form of an award or otherwise) of provisional measures by arbitrators or the power of arbitrators to make such orders.

The European Convention, on the other hand, addresses the provisional relief in very general terms when it stipulates that ‘[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court’. The advantage of such language in practice is to enable parties of an international arbitration agreement to request interim measures from a national court without waiving their rights to proceed with the dispute in arbitration or breaching their agreement to arbitrate. Although again, like the aforementioned conventions, it does not specifically address the question of when or under what conditions an arbitral tribunal may itself grant provisional measures.

Despite the fact that the New York Convention does not expressly deal with the matter of interim relief, one may conclude that it impliedly bans Contracting States from adopting national laws which deny the ability of international arbitration agreements to give arbitrators

448 Some commentators suggest that ‘it is now beyond a question that arbitrators have the power to grant interim and conservatory measures’. JDM Lew, ‘Commentary on Interim and Conservatory Measures in ICC Arbitration Cases’ (2000) 11(1) ICC Ct Bull 23, 30. This generalization is overly-broad. Although most developed jurisdictions and institutional rules grant arbitral tribunals the power to issue provisional measures, there remain important exceptions (including, for example, China, Italy and Argentina). Moreover, arbitrators only have the power to grant provisional relief insofar as the parties have not excluded that power. See Born (n 98) 1973-1974.
449 See Born (n 98) 58-63.
the power to order provisional measures.\textsuperscript{452} In fact, Article II of the Convention provides an obligation for Contracting States to recognize and give effect to the material terms of agreements to arbitrate.\textsuperscript{453} Therefore, where parties in their arbitration agreements grant such a power to the arbitral tribunal, implementation of Article II, in principle, forbids Contracting States from denying effect to all such agreements. Accordingly, if the seat of arbitration is one of the Contracting States, then it must necessarily recognize such authority for arbitrators if the parties have already addressed it in their own agreement. It should also be noted that it is very unlikely to accept the possibility of characterization of such ability under ‘arbitrability’ particularly when it is mentioned in an arbitration agreement because it would be contrary to the Convention's general requirements that non-arbitrability rules are exceptional in the context of the Convention.\textsuperscript{454} Such interpretation of Article II of the Convention is also supported by the fact that the New York Convention, as a ‘constitutional’ instrument, will inevitably impose obligations on Contracting States to eliminate historic national law rules, if any, and thus restrict the efficacy of international arbitration agreements.

Traditionally, law-makers of national laws were reluctant to recognize the power of the arbitrator(s) to grant interim measures.\textsuperscript{455} In practice, also, an arbitrator will hardly issue an interim measure unless he or she is satisfied that the applicable law of the dispute, typically the law of the seat,\textsuperscript{456} recognizes the authority of the tribunal to do so.\textsuperscript{457} Moreover, as we shall see later in … enforcement of a tribunal-ordered interim measure would be very unlikely in national courts if the law(s) governing the arbitral proceedings permits such relief.\textsuperscript{458}

The underlying reason for such prohibitions against tribunal-ordered relief seems to have been a general perception that first, provisional relief is a coercive measure; and second, \hfill

\textsuperscript{452} See Born (n 98) 2030-2042.
\textsuperscript{453} See Born (n 98) 202-205.
\textsuperscript{454} See Born (n 98) 530-535.
\textsuperscript{455} Redfern and Hunter (n 409), art 26(1).
\textsuperscript{457} In principle, if the arbitration agreement granted the arbitrators the power to order provisional relief, legislation in the arbitral seat (or elsewhere) which denied effect to that agreement would often be contrary to the New York Convention. See Born (n 98) 1948-1949. In those circumstances, an arbitral tribunal would be free and indeed obliged, to give effect to the parties' agreement.
\textsuperscript{458} As discussed below, issues also arise as to the enforceability of tribunal-ordered provisional measures in national courts. See Born (n 98) 2019-2066.
arbitrators, unlike judges, may not issue coercive measures. Apart from that, precluding arbitral tribunals from ordering interim measures would be contrary to the purpose of the arbitration process as well as the terms of (most) arbitration agreements. Indeed, when parties go into an arbitration, it can be presumed they wish to settle their dispute in one single process before a neutral tribunal. This means that, as far as possible they would prefer that the arbitral tribunal dealt with the matter of interim measures.

Moreover, due to the fact that dealing with the request for interim measures often requires consideration of the merits of the parties’ main claim, prohibiting an arbitral tribunal from dealing with interim measures will allow the courts to pre-empt or prejudge decisions of the arbitral tribunal on the merits of the parties’ dispute. Again, this is contrary with the objectives of the international arbitral process.

Most developed jurisdictions over the past several decades have replaced historic panic regarding recognizing the power of arbitral tribunals to grant provisional measures with more modern arbitration statutes which expressly, though subject to the parties’ agreement, recognize the power of arbitrators to order interim measures. As we shall see later, apart from this general trend in affirmation of arbitrators’ ability to order interim measures, each jurisdiction requires specific prerequisite conditions when arbitrators want to grant interim measure. Nonetheless, international arbitration practice shows that parties are generally presumed, absent to contrary indications, to have agreed to permit the arbitral tribunal to grant provisional measures (or, at least, certain types of provisional measures).

It is quite clear that such a modern approach in recognizing greater authority for the arbitrators in issuing interim measures will increase the credibility of international arbitration as a proper and satisfactory mechanism in resolving complex international commercial disputes. However, it should be added immediately that provisional measures, like most other aspects of international arbitration, is a variant of party autonomy and parties agreement;

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459 See Born (n 98) 72-78.
460 See Born (n 98) 72-86, 1022-1024.
463 ibid 68-70.
hence, arbitral tribunals will have no power to order provisional measures if parties of the

dispute agreed otherwise.\footnote{ibid 1973-1974.}

The UNCITRAL Model Law, and particularly its 2006 revisions, has a significant

collection to make in expanding the authority of arbitral tribunals to grant interim relief.

Article 17 of the 1985 version of the Model Law stipulates that ‘[u]nless otherwise agreed by

the parties, the arbitral tribunal may, at the request of a party, order any party to take such

interim measure of protection as the arbitral tribunal may consider necessary in respect of the

subject-matter of the dispute.’\footnote{UNCITRAL Model Law (n 87) art 17. See Holtzmann and Neuhaus (n 256) 530-533}

Reading this Article shows that despite express recognition

of the arbitrators’ power to grant an interim measure, its wording in this form will subject the

tribunal's powers to order interim measures to two conditions. First, such a relief must be

‘necessary’ and second it must be ‘in respect of the subject-matter of the dispute’.\footnote{See Born (n 98) 1965-1971.}

Two things shall be elaborated here regarding these two apparent conditions. Firstly, it

seems that the phrase ‘in respect of the subject matter of the dispute’ does not provide a

specific restriction on the arbitral tribunal to orders detaining or presenting a particular item of

disputed property (e.g., a shipment of goods or parcel of real property) but rather a better

interpretation of the original text of Article 17 seems to be a permission for such orders as one

example of available provisional relief. Such terminology in truth intends to allow any

provisional measures that the tribunal considers ‘necessary,’ provided that such measures have

a reasonable relation to the subject matter of the dispute.\footnote{See Born (n 98) 1968-1970.}

Later on, in 2006, Article 17 of the Model Law was substantially revised.\footnote{ibid 1977-1980, 2016-2019.}
The new

formulation omitted the phrases ‘necessary’ and ‘in respect of the subject-matter of the dispute’

and therefore affirmed the expansive scope of Article 17.\footnote{ibid 1952, 1968-1970.}
The new version stipulates that

‘[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party,
grant interim measures. Accordingly, with the current wording of Article 17, it seems that the Model Law does not require an express agreement granting the arbitrators the power to order interim measures but instead an agreement withdrawing such power.

In fact, such an approach is more consistent with the parties’ objective of entering into an arbitration agreement. It is basically due to the fact that reasonable parties to an arbitration agreement presumably intend to organize a capable and effective mechanism for resolving their potential disputes. Accordingly and based on such presumption, it is deemed necessary for the arbitral tribunal to have the authority, even when not expressly granted, to deal with any and all disputes that ordinarily arise during the arbitral process, including disputes over interim relief.

Despite such an explicit approach in the Model Law, the FAA in the United States does not have any provision regarding the arbitrators’ power to grant interim measures. Such a lacuna is then filled by recognition of the ability of arbitral tribunals to grant interim measures by the US courts. Therefore, in contrast with early US judicial decisions which on the basis of narrow interpretation of the parties’ arbitration agreement frequently emphasised on inability of arbitrators to issue provisional relief, more recent US lower court decisions have consistently held that arbitrators may issue provisional relief (provided that the parties have not agreed to the contrary). Indeed, it seems that a refusal to recognize the authority of arbitrators in granting provisional measures would be inconsistent with the FAA’s ratio legis that agreements to arbitrate are enforceable.

Even at national level, US state arbitration statutes have increasingly moved towards incorporation of specific provisions regarding arbitrators’ authority to grant provisional

\[470\text{ UNCITRAL Model Law (n 87) 2006 Revisions, art 17(1).} \]
\[471\text{ See, e.g., EA Schwartz, ‘The Practices and Experience of the ICC Court, in ICC’ (1993) Conservatory and Provisional Measures in International Arbitration 45, 58 & footnote 42; Holtzmann and Neuhaus (n 256).} \]
\[472\text{ See Born (n 98) 1973-1974, 2020-2023.} \]
\[473\text{ See Swift Indus, Inc v Botany Indus, Inc 466 F2d 1125, 1134 (3d Cir 1972); Carolina Power Light v Uranex, 451 F Supp 1044 (ND Cal 1977).} \]
\[474\text{ See, e.g., Banco de Seguros del Estado v Mut Marine Office, Inc, 344 F3d 255 (2d Cir 2003) and Pacific Reins Mgt Corp v Ohio Reins Corp 935 F2d 1019, 1022-1023 (9th Cir 1991).} \]
\[475\text{ See Born (n 98) 141-142, 206-207, 571-572.} \]
measures. More importantly, US courts, in general, are taking the view that, in the absence of a contrary indication, the arbitrators' power to grant interim measures can be implied from the parties' agreement to arbitrate. As one US lower court decision reasoned:

In general ..., in the absence of an agreement or statute to the contrary, an arbitrator has inherent authority to order a party to provide security while the arbitration is continuing. It is reasonable to assume that parties, in agreeing to arbitration, implicitly intended that the arbitration not be fruitless and that interim orders to preserve the status quo or to make meaningful relief possible would be proper. In such a circumstance, the arbitrator's authority to act would reasonably be implied from the agreement to arbitrate itself.

As we shall see later, such an approach in US court precedents has led to the fact that courts in the US do not impose significant limitations other than any limits contained in the parties' agreement, on the scope of the arbitrators' authority to grant provisional measures. As a result, most commentators in the US conclude that arbitral tribunals presumptively have the power to order provisional relief (unless otherwise agreed).

In contrast with the FAA in the US, the UK Arbitration Act 1996 specifically addresses the matter of interim measures and allows, absent to contrary agreement, an arbitral tribunal to issue orders concerning the inspection, sampling, detention or preservation of 'property which is the subject matter of the dispute', and concerning the preservation of evidence. More importantly, the Arbitration Act stipulates that 'the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would

476 US Revised Uniform Arbitration Act, section 8(b) (2000); See California Code of Civil Procedure, paras 1297.91 to 92, 1297.171; Texas Civil Practice & Remedies Code, para 172.083(1).
477 See, for example, Island Creek Coal Sales Co v City of Gainesville 729 F2d 1046 (6th Cir 1984) and Sperry Int'l Trade, Inc v Gov't of Israel 689 F2d 301 (2d Cir 1982).
479 See Born (n 98) 2026-2028.
482 ibid section 38(6). The Arbitration Act also grants arbitral tribunals seated in England the power to order security for costs, see section 38(3); Born (n 98) 2004-2006.
have power to grant in a final award’. Such wording in Arbitration Act indicates that parties are free to affirm the authority of arbitrators to go beyond those types of interim measures related to preservation/inspection but without such an agreement there is no power for arbitrators to grant interim measures beyond those limited issues.

It seems to me that among these three aforementioned, the UK Arbitration Act takes the least desirable approach. Both the Model Law and FAA – albeit combined with the precedents of the US courts – assume broad powers for arbitrators, on the basis of parties’ intention, to grant interim measures. As discussed earlier, recognition of the extensive power of the arbitral tribunal in granting interim measures accords better with the likely expectations of market practitioners and will more likely achieve fair and efficient results than the more limited English statutory provision.

The matter of arbitrators’ authority in granting interim measures is also addressed in many institutional rules. As we shall see below, the general tendency taken at institutional level is to incorporate specific provision regarding arbitrators’ power to grant provisional measures, usually in relatively broad terms. The UNCITRAL Rules, as representative of many contemporary institutional regimes, recognizes the tribunal’s power to issue ‘interim measures’ which it deems ‘necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter of the dispute’.

As discussed previously under Article 17 of the UNCITRAL Model Law, these two limitations shall not be interpreted to restrict a tribunal to orders for the inspection, detention or preservation of disputed goods or property but, rather, such terminology in truth intends to allow any provisional measures that the tribunal considers ‘necessary’ provided that such measures have a reasonable connection with contract, legal or contractual rights of the

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483 UK Arbitration Act 1996 (n 115) sections 38(1), 39(1). See also section 48.
484 See Merkin (n 252) 14.46 to 14.48, 14.63; Krasner v Jason [2004] EWHC 592 (Ch).
485 See Born (n 98) 1953-1954.
486 UNCITRAL Rules (n 294) art 26(1).
487 See Born (n 98) 1952-1954.
disputed parties.\textsuperscript{488}

ICC Rules, particularly Article 23, take an even more expansive view by recognizing the arbitral tribunal authority to order any ‘interim or conservatory measure it deems appropriate,’ absent to contrary agreement by the parties.\textsuperscript{489} Similarly, Article 25(1) of the LCIA Rules recognizes the authority of an LCIA tribunal, though again subject to contrary agreement by the parties, to grant various types of interim measures including security for claims, preservation or sale of disputed property, and any other relief which could be made in a final award.\textsuperscript{490} Even more interestingly, the LCIA Rules recognize specific authority for the arbitrators to order security for costs which can exclusively be found here.\textsuperscript{491}

4.3 Limitation on arbitral tribunal power to order provisional measures

In spite of modern trends in almost all developed jurisdiction regarding recognition of an extensive power for arbitrators in granting interim measures, it can be noted that there are couple of inherent limitations on the concept of interim measures in international arbitration particularly when it comes to the matter of externalities and the rights of the third parties, necessity of interim measures prior to establishment of the tribunal, and enforcement of the interim measures \textit{per se}. All these things are rooted in the fact that international arbitration is a contractual mechanism for resolving potential disputes between contractual parties. Nonetheless, there are also some limitations enshrined, though very limited, in the approach of national legislations.

4.3.1 Party autonomy

As it has been stated many times before, the power of the arbitral tribunal to deal with the dispute as well as those measures that it deems to be necessary is rooted in the arbitration

\textsuperscript{488} Article 26(1) of the UNCITRAL Rules provides merely that an order for the conservation of goods which are in dispute is one example of permissible provisional relief, not suggesting that this is the only form of permissible relief.
\textsuperscript{489} ICC Rules (n 260) art 23.
\textsuperscript{490} LCIA Rules (n 261) art 25(1).
\textsuperscript{491} ibid art 25(2).
Therefore, there would be no authority whatsoever for arbitrators or the tribunal to order interim measures if parties to the arbitration agreement said otherwise. However, in litigation, as distinguished from arbitration, parties may seek attachment of funds owned by adverse parties or debts owed to them regardless of their counter parties’ position. Such limitation, although seemingly evident, is particularly addressed in some national arbitration legislations including those drafted according to the UNCITRAL Model Law by emphasising the authority of the arbitral tribunal to ‘order any party to take such interim measures of protection’ deemed necessary.

4.3.2 Lack of power to order provisional measures prior to establishment

It is quite clear that no arbitral tribunal is able to grant interim measures until it has been duly constituted. Such limitation, both on ad hoc and institutional arbitration, can have a significant role in determining the fate of an arbitration process and erect critical change in the result of the arbitration given the fact that in most cases preservation of the evidence or disposing of disputed property are among the most important initial measures that the claimant seeks to pre-empt itself for the arbitration. In the absence of any arbitral tribunal to deal with the request for granting interim measures, the dispute emerging between the parties may prevent the arbitral tribunal from granting meaningful interim measures. Thus, as we shall see in more detail later, this is perhaps the main reason for recognizing concurrent jurisdiction for national courts, even for institutional arbitrations, to grant provisional measures.

In order to avoid recourse to national courts to obtain urgently-needed provisional relief at the outset of an arbitral proceeding, some arbitration institutions provide a non-judicial mechanism to facilitate the arbitration process for the parties. The ICC Pre-Arbitral

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492 Schwartz (n 471) 59; Caron, Caplan and Pellonpää (n 259) 540; Christopher Huntley, ‘The Scope of Article 17: Interim Measures under the UNCITRAL Model Law’ (2005) 9 Vindobona Journal 1, 86.
493 UNCITRAL Model Law (n 87) art 17; see also Austrian ZPO, para 593(1); Swedish Arbitration Act, section 25(4); UK Arbitration Act, 1996, section 39(1).
494 See, e.g., UNCITRAL Rules (n 294) art 26(1); LCIA Rules, art 25; ICDR Rules, art 21. See also, e.g., ICC Rules, art 23(1). See also Derains & Schwartz (n 295) 296-299.
495 As discussed above, the constitution of an arbitral tribunal may take weeks or months, particularly if one party is obstructive.
496 See Born (n 98) 1972-1973, 2028-2029, 2050-2051.
Referee Procedure is the leading example of such efforts although these rules have been used only very rarely (less than a dozen instances) so far. This is due to the fact that according to these rules parties shall express their agreement in writing. This is notwithstanding the practical realities of litigations or arbitrations because it would be very unlikely for the parties to come to any kind of agreement after the emergence of the dispute. Moreover, it is quite normal for parties not to pay enough attention to the procedural intricacies of future disputes, particularly in order make provision for specialized issues, when they are negotiating arbitration agreement.

Unlike the ICC, the LCIA took a much more effective approach to deal with urgent request for interim measures at the outset of the arbitration process by focusing on a specific mechanism to accelerate establishment of the arbitral tribunal. Accordingly, it predicted expeditious tribunal-ordered provisional measures whereby the emphasis is on expedited constitution of arbitral tribunals in appropriate cases. Here, a tribunal can be formed and be in a position to deal with parties’ requests for provisional measures in a matter of days or weeks. It shall be noted that despite the fact that accelerated mechanisms to set up the arbitral tribunal under the LCIA Rule is not primarily to enable the tribunal to order provisional measures even at the outset of the process, it has indirect implications on urgently-needed provisional relief most notably because it is a very sensible and practical means of making tribunal-ordered provisional relief a realistic possibility in many cases.

4.3.3 Limitation on subject matter of the dispute

The scope of an arbitral tribunal’s authority in granting interim measures may sometimes be restricted by arbitration legislation. As we have seen above, the original text of Article 17 of UNCITRAL Model 1985 recognizes the power of arbitral tribunals to grant interim measures when it seems necessary in respect of the subject matter of the dispute.


499 UNCITRAL Model Law (n 87) art 17 (emphasis added).
Such wording, in some commentators’ view, is interpreted as a kind of limitation on the authority of the tribunals in granting interim measures. In fact, such an interpretation of Article 17 is claimed to be supported by the Model Law's drafting history as well. However, the truth is that the drafting history is ambiguous, and as previously elaborated such interpretation is not compatible with the Model Law's objectives.

Accordingly, it can be noted that the requirement of Article 17, ‘in respect of the subject matter of the dispute’, is not considered as a limit to the power of the tribunal in issuing interim measures regarding particular items whose ownership is in dispute. But as mentioned earlier, it can be construed as extending to the preservation of contractual rights or of the equilibrium between the parties. In other words, where the dispute of the parties is about the existence, validity or continuation of their contractual relationship then provisional measures preserving all aspects of that relationship are properly regarded as being ‘in respect of the subject matter of the dispute.’

A similar analysis can be applied when one party seeks interim measures in order to preserve assets sufficient to satisfy a party's claims, for instance, security for costs or damages. These types of relief can be categorized as ‘necessary’ and therefore may be considered as being ‘in respect’ of the subject matter of the parties' dispute. It should also be noted that a specific property may very rarely be the subject matter of the dispute in arbitration; thus, it

500 See, e.g., Redfern & Hunter (n 409) 7-26 (‘measures contemplated relate to preserving or selling of goods rather than, for instance, preventing the flight of assets’); Huntley (n 541) 78. This urges a ‘narrow interpretation’ of subject matter of the dispute: ‘a broad interpretation of the subject matter could lead to a slippery slope whereby tribunal will define the all-encompassing term to include anything and everything’.

501 See Report of the UNCITRAL on the Work of its Eighteenth Session, UN Doc A/40/17, 68, XVI YB UNCITRAL 3 (1985); Report of the Secretary-General on the Analytical Commentary on Draft Text of a Model on International Commercial Arbitration UN Doc A/CN.9/264, art 9, 4, XVI YB UNCITRAL 104, 115 (1985) (‘range of interim measures of protection covered by article 9 of the Model Law [available from national courts] is considerably wider than that under article [17, from arbitral tribunal]’); Huntley (n 541) 77 – a narrower version of Article 17 prevailed in drafting, and the ‘Model Law should only authorise a tribunal to issue a measure related to the subject matter of the dispute’.

502 The drafting history refers generally to the range of measures available for provisional relief, which can readily be understood as a reference to the inherent limitation of the arbitral process to relief directed towards the parties to the arbitration, not towards third parties; Holtzmann and Neuhaus (n 256) 332-33.

makes little sense to limit Article 17's reach solely to relatively atypical circumstances.\textsuperscript{504}

Apart from the Model Law and those national legislations drafted on that basis, the UK Arbitration Act 1996 also imposes some limits on the arbitrators’ power to issue interim measures. As noted above, it stipulates that an arbitral tribunal has the power to grant provisional measures ‘in relation to any property which is the subject of the proceedings or as to which a question arises in the proceedings’.\textsuperscript{505} Despite this language being an expansion of the earlier approach of English law, the precise scope of this provision is vague and potentially fairly limited.\textsuperscript{506} Nevertheless, and in spite of such uncertainty, the UK Arbitration Act recognizes the parties’ right to empower the arbitrators to grant broader provisional measures.\textsuperscript{507}

4.3.4 No ex parte application

Issuing an ex parte interim measure in litigations, whether at national or international level, is not uncommon at all. However, in international arbitration even where there is no statutory limit on the authority of the tribunal, the contractual nature of the arbitral process implies that the tribunal's authority is limited to the parties to the arbitration and, for example, a tribunal would not be able to issue a provisional relief to attach certain assets in the custody and control of a non-party. However, and notwithstanding the foregoing, an arbitral tribunal would be authorized to grant an interim relief enabling one party to take steps vis-à-vis third parties to accomplish or prevent specified actions. For instance, a corporate entity can possibly be ordered to direct its subsidiary to perform certain steps like returning or preserving specified property, and delivering or safeguarding funds. Such orders test the limits of arbitral powers, but, in appropriate cases where necessary to accomplish justice, a tribunal should be prepared to issue them.

This type of relief will be of great importance particularly where the economic interest

\textsuperscript{504} Caron, Caplan & Pellonpää (n 259) 534 (‘relationship between interim measures and the subject matter of the dispute is usually not problematic’).
\textsuperscript{505} UK Arbitration Act 1996 (n 115) section 38(4).
\textsuperscript{506} Merkin (n 252) 14.58; Sutton, Gill & Gearing (n 132) 5-106, 6-020.
\textsuperscript{507} UK Arbitration Act 1996 (n 115) section 25(4) (‘interim measures to secure the claim’).
of one party can be jeopardized by the actions of the other party such as when destroying critical evidence, transferring needed security to third parties, or calling for a letter of credit. Nonetheless, such practical considerations are surrounded by substantial theoretical controversy regarding the ability of an arbitral tribunal to deal with the request for interim relief which has an impact on third parties’ rights. This influence on third parties’ rights would be contrary to the principles of natural justice which guarantee an opportunity to be heard as well as equality of treatment for all parties of a litigation or arbitration. Given this, many commentators conclude that ex parte provisional relief is beyond the power of arbitral tribunals. Moreover, and due to these considerations some arbitral institutions go even further and expressly forbid ex parte provisional relief.

On the other hand, due to its practical utility, some practitioners take a positive approach to this matter and affirm the possibility of ex parte provisional measures, particularly after the revisions of the UNCITRAL Model Law in 2006 where, albeit in limited circumstances, ex parte provisional measures are expressly permitted. Such express permission is enshrined in the amended Article 17 of the Model Law which stipulates that preliminary orders may be applied for ‘without notice to any other party’. Apart from that, Articles 17B and 17C provide that ex parte preliminary orders may be ordered where the arbitrators come to the conclusion that ‘prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure’.

Nevertheless, up to this date no Model Law jurisdiction has incorporated the

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508 See Born (n 98) 1765-1776, 2573-2594, 2736-2764.
509 See, e.g., Z Stalev, ‘Interim Measures of Protection in the Context of Arbitration’ in A van den Berg (ed), International Arbitration in A Changing World (ICCA Congress Series No 6 1994) 111; Caron, Caplan & Pellonpää (n 259) 543 (‘Before granting interim measures, the arbitral tribunal should provide the party against whom such measures are sought with an opportunity to comment’).
510 ICSID Rules of Procedure for Arbitration Proceedings, Rule 39(4) (‘The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.’).
511 M Wirth, ‘Interim or Preventive Measures in Support of International Arbitration in Switzerland’ (2000) ASA Bull 31, 38 (‘In cases of special urgency, in terms of time and nature of the harm threatening to a party's right, the arbitral tribunal may order interim measures in ex parte proceedings’).
513 UNCITRAL Model Law 2006 Revisions (n 87) art 17B(1).
514 ibid art 17B(2).
controversial 2006 revisions in its arbitration laws.\textsuperscript{515} Even further, some commentators have challenged the ratio legis of the proposed revisions to Article 17\textsuperscript{516} particularly due to the fact that it would be very unlikely, in practice, for an arbitral tribunal to grant provisional measures on an ex parte basis.

Notwithstanding the entire debate on the revision of Article 17, it seems to me that the matter of ex parte relief and particularly the ability of an arbitral tribunal to issue such a relief has not been considered properly. In order to conduct a better analysis of the surrounding circumstances of Article 17, some practical realities shall be pointed out here. Firstly, there is no debate that a tribunal, although it may happen very rarely, truly grants both parties a full and effective opportunity to be heard if it will entertain ex parte applications for interim relief. That is mainly because there are circumstances where not ordering interim relief on an ex parte basis would make such relief ineffective and therefore deprive the moving party of an opportunity to be heard.

Second, the most fundamental objection to the language of Article 17B of the 2006 Model Law regarding ex parte relief in arbitration is that it virtually never accomplishes any serious purpose or makes any sense. This is mainly because the fundamental rationale for prediciating the extraordinary grant of ex parte relief is the fact that it is not reasonable to expect one party to conduct exactly in compliance with its obligations. Therefore, there shall be a legally binding mechanism to impel that person to take particular (immediate) actions without any opportunity to evade its obligation. Obviously such a rationale can be enforced in the context of domestic or even international litigation, for instance a relief to freeze an account, but it has no real application where an arbitral tribunal cannot issue immediately-effective coercive relief for instance, on attachment or garnishment of bank accounts.

As we shall see later, an arbitral tribunal’s orders have no direct coercive effects;\textsuperscript{517} as a result, it is not able to meet the intended purpose of ex parte relief. One could at least assume

\textsuperscript{517} See Born (n 98) 1966-1968.
some utility or similar effectiveness with one of a national court for an ex parte order of provisional measures in its current status under Article 17 if it was enforceable and did require notification to the respondent. Nevertheless, Article 17C specifically prevents that by requiring immediate notice of any preliminary decision to all parties and providing that such decisions are not enforceable.518

Henceforth, it seems to me that the only cases where ordering and ex parte relief by an arbitral tribunal would make sense are exactly those in which Articles 17B and 17C fail to provide relief. This is why I am arguing that Articles 17B and 17C are a non-functional appendage; if not that they will foster distrust of the arbitral process and cause wasted expense. If, contrary to the above analysis, provisional measures on an ex parte basis are to be available, a tribunal shall only order such measures in those cases where they are clearly necessary in order to preclude immediate and severe damage that cannot otherwise be avoided. Additionally, a tribunal shall in these circumstances emphasize the moving party's obligation to fully disclose all matters relevant to its application and must, after issuing any provisional measures, immediately afford the affected party a full opportunity to put its case.519

4.3.5 Lack of power of enforcement

When arbitrators cannot directly enforce an order for interim measures, a couple of other alternatives may be utilized for such a purpose. Initially, and perhaps the most straightforward one is to seek recourse to a national court in order to benefit from the pre-established facilities under national jurisdictions. Here one can think about two separate mechanisms. First, to put the burden of enforcement on the requesting party, whereby national courts will only get involved and reinforce enforcement of provisional relief if one or more of the parties seek them to do so. This is evident, for example, in the language of the Swiss Law on Private International Law which provides that, ‘[i]f the party so ordered [by the arbitral tribunal to take specified provisional measures] does not comply therewith voluntarily, the

518 UNCITRAL Model Law, 2006 Revisions (n 87) art 17C(1), (5). See also Report of the UNCITRAL on the Work of its Thirty-Ninth Session, UN Doc A/61/17, 114 (2006) (‘non-enforceability of preliminary orders was central to the compromise reached’).
519 See UNCITRAL Model Law, 2006 Revisions (n 87) art 17F(2).
arbitral tribunal may request the assistance of the competent court.\textsuperscript{520} In fact, a lack of coercive power of an arbitral tribunal is one of the basic features on this consensual dispute mechanism, either at national or international level. Thus, even in the absence of such statutory provisions and non-availability of direct recourse to the national courts for the arbitral tribunal, such an application for enforcement seems to be the only assumable method for the requesting parties.\textsuperscript{521}

Second, due to the fact that the distinguishing line between ‘direct coercive measures of enforcement,’ and other actions of an arbitral tribunal is not always clear, it may also assume some sort of coercive mechanism for the tribunal to enforce its decision on interim measures. Such a coercive power depends essentially on two things. Primarily, on the language and wording of the arbitral tribunal’s order on interim measures. For instance, if the subject matter of the dispute relates to transferring a specific amount of money, the arbitral tribunal instead of issuing an interim measure against the respondent’s bank may order him to deliver funds to it (tribunal itself) for safekeeping during the course of arbitral proceedings. If such an order is performed by the respondent(s), then the tribunal does, in almost all practical senses, exercise direct coercive authority to enforce its awards.

Moreover, parties can, though it may happen very rarely, empower the arbitral tribunal with some sort of self-executing authority; one which any private party could exercise in a contractual manner (e.g., an escrow agent). Although this type of power is not equivalent to the direct coercive authority of national courts, it has also occasionally been suggested that an arbitral tribunal could order financial penalties of a contractual nature in order to compel a party to comply with provisional measures.\textsuperscript{522}

It can also be noted that the authority of arbitral tribunals to impose sanctions on a party for failing to comply with their interim orders is enshrined in some jurisdictions. In

\textsuperscript{520} Swiss Law on Private International Law, art 183(2). See also Stephen V Berti and others, ‘International Arbitration in Switzerland Art 183’ (2000) BGE II 16.


\textsuperscript{522} See Born (n 98) 49.
contrast, in some other jurisdictions this has been marked as an en forceability issue. Nonetheless, it is almost accepted that an arbitral tribunal can indirectly guarantee compliance with its provisional measures through the express or implied sanction against a non-compliant party. In one commentator’s views:

The fact that arbitral tribunals can draw adverse conclusions from failure to comply with their decisions concerning [provisional] measures encourages voluntary compliance with such orders.

One more question deserves to be addressed here. Historically, enforcement of interim measures in international arbitration was considered in the light of voluntary compliance with tribunal’s order. As such, it was hard to find national arbitration statutes which expressly addressed enforcement of tribunal-ordered provisional measures. In other words, enforcement of tribunal-ordered provisional measures was in general left to general statutory provisions concerning enforcement of arbitral awards. That was the case with the original text of the 1985 UNCITRAL Model Law as well as a number of other arbitration statutes. This policy raised many uncertainties as to the conditions and proper procedures of enforcing an arbitral tribunal ordered interim relief.

Given that in some older arbitration legislation, general enforcement mechanisms by national courts could only support enforcement of an arbitral final award, the main problem was characterization of the arbitrators-ordered interim relief, i.e. whether such decisions could be categorized as an arbitral award under national statutes and international conventions and if it was final or not. In some (older) authorities ‘provisional’ measures by their very definition could not be ‘final’. In the words of one national court decision:

523 A tribunal's sanctions would, if not themselves obeyed, require judicial enforcement and it is not clear whether most national courts would grant such enforcement.
524 Lew (n 448) 24. See also Schwartz (n 471) 59.
526 The FAA in the United States and the New Code of Civil Procedure in France are prime examples.
527 See, e.g., Michaels v Mariforum Shipping SA 624 F2d 411 (2d Cir 1980) (confused decision holding inter alia that arbitrator's decision could not be enforced because it was ‘interlocutory’, ‘preliminary’ and did not ‘purport to
Whilst it is true that a valid interlocutory order is in one sense 'binding' on the parties to the arbitration agreement … an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not ‘final’ and binding on the parties.\(^\text{528}\)

Even in the context of the NY Convention, some commentators challenge recognition of arbitral provisional measures as ‘final’ arbitral ‘awards’. Therefore, they argue that these kinds of decisions cannot benefit from the enforcement mechanism of the New York Convention or national arbitration legislation.\(^\text{529}\) On the other hand, one can find an emerging tendency among a number of more recent authorities towards admitting the significance of judicial enforcement of such measures for the arbitral process and proper settlement of the dispute.

In the United States, the FAA has no express guidance regarding the enforceability of arbitral decisions granting provisional measures.\(^\text{530}\) However, the foregoing reasoning has been adopted by a number of US courts to confirm that such decisions are to be treated as ‘final’ awards and subject to recognition and enforcement.\(^\text{531}\) For example, it was expressly stated in one US decision that an order of provisional measures should be confirmed because:

Such an award is not ‘interim' in the sense of being an ‘intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the ‘interim’ period pending a final decision on the merits … [I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.\(^\text{532}\)

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\(^{528}\) See Born (n 98) 2356-2359, 2815-2826.

\(^{529}\) See, e.g., Arrowhead Global Solutions, Inc v Datapath, Inc 166 Fed Appx 39, 41 (4th Cir 2006); and Publicis Comm v True North Comm, Inc 206 F3d 725 (7th Cir 2000).


\(^{531}\) See Born (n 98) 2356-2359, 2815-2826.

\(^{532}\) See Born (n 98) 2356-2359, 2815-2826.
A considerable body of US commentary as well as some non-US authorities endorse this approach. Having said that, a couple of authorities took the opposite view and argued that the recognition provisions of the New York Convention (and national arbitration legislation) shall apply dedicatedly to awards that finally settle matters submitted to arbitration and not to either orders (or ‘awards’) of provisional relief. As one court put it, ‘the New York Convention … applies to final and binding awards. Provisional or interim measures are not final.’

It seems to me that the better analysis among the two foregoing approaches is to consider provisional measures as enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards. This is primarily because provisional measures are ‘final’ in the sense that they deal with a request for relief pending the conclusion of the arbitration. Furthermore, provisional relief decisions are issued to be complied with and to be enforceable. Accordingly, they play an important role in settling the main dispute between the parties. In this respect, they are objectively different from interlocutory arbitral decisions that merely decide certain subsidiary legal issues (e.g., choice of law, liability) or establish procedural timetables.

The efficiency considerations also endorse the necessity of enforcing arbitrators-ordered provisional measures by national courts. This is mainly because, if this possibility does not exist, then parties will be able and significantly more willing to refuse to comply with provisional relief, thus resulting in precisely the serious harm that provisional measures were meant to foreclose.

4.4 Exercise of tribunal’s authority to order provisional relief

Despite the general agreement about the power of arbitral tribunals in granting interim

535 See, e.g., Lew, Mistelis & Kröll (n 338) 23.94.
536 Resort Condominiums (n 528).
537 See Born (n 98) 2354-2356.
measures under national law, it is not clear enough how international arbitrators implement that authority. This becomes more important when we see that historically arbitrators were hesitant to order provisional relief even where lex arbitri authorized them to do so. Nonetheless, the circumstances in which international arbitral tribunals usually order interim measures have changed considerably, whereby arbitral tribunals are playing a more significant role in this regard.

4.4.1 Increased willingness in the arbitral tribunal

According to the report of the Secretary General of the ICC Court of Arbitration in 1992, only 25 ICC cases had addressed the subject of interim relief between 1977 and 1992.\textsuperscript{538} Such a statistic shows that arbitrators due to various reasons were historically reluctant to grant provisional relief.\textsuperscript{539} On the other hand, some national jurisdictions systematically prohibited arbitrators from granting provisional relief in their arbitration laws.\textsuperscript{540}

In fact such a resistance against arbitrators-ordered interim relief comes from perceived difficulties in enforcement of the relief as well as general concerns regarding prejudging the merits of the dispute. Another reason which increased such reticence was that dealing with such a request appeared to be time-consuming in the view of the arbitrators and as such seemed to contradict the very basic objective of selecting international arbitration as a faster dispute settlement mechanism.

Nonetheless, with the development of international arbitration it became more and more clear that there are many circumstances whereby arbitrators cannot fulfil their mandate to resolve the dispute effectively and efficiently except through ordering different types of interim measures. Therefore, such reticence has been gradually eroded and arbitrators now feel more able to grant interim measures in arbitration cases. Accordingly, in contrast with the earlier report of the ICC, a review of ICC awards between 1985 and 2000 shows 75 cases

\textsuperscript{538} Schwartz (n 471) 45, 47.
\textsuperscript{539} For published examples of awards reflecting this reticence, see Award in ICC2444, 104 JDI (Clunet) 932 (1977); Partial Award in ICC3896, 110 JDI (Clunet) 914 (1983); and Award in ICC3540, in Jarvin & Derains (n 62).
\textsuperscript{540} See Born (n 98) 1949-1951.
containing some form of interim relief.\textsuperscript{541} This demonstrates an increasing willingness among international arbitrators to make a greater contribution in granting provisional measures. As we shall see later, such willingness in granting arbitrators-ordered provisional measures has meant that a set of legal standards regarding the circumstances in which arbitral tribunal may order interim relief has progressively emerged.

4.4.2 Governing law and arbitrators-ordered interim measures

A thorough analysis shows that there may at least be three principal choices for the applicable law which provides the requirements for arbitrators over whether to order provisional relief or not. These are (a) the law of the seat; (b) applicable law of the underlying contract; and (c) international standards created by arbitrators themselves. However, various points shall be considered to find the most appropriate one to be followed and promoted at a transnational level.

Firstly, it should be noted that there is little reason to support the idea that the law of the seat governs and identifies the applicable substantive standards for an arbitral tribunal when it comes to decision-making regarding provisional measures. Nevertheless, except for the 2006 revisions of the Model Law, no national arbitration statute contains meaningful criteria under which the arbitral tribunal can grant interim measures. As discussed earlier, most arbitration legislation has addressed only the arbitrators’ power to order interim measures, without specifying the requirements and substantive standards for exercising such power.\textsuperscript{542} Accordingly, such a formulation only articulates the general authority of the arbitral tribunal in granting interim relief without identifying substantive standards as to how such competence can be exercised.

The absence of any statutory standards in national arbitration law in fact shows that the law of the seat does not necessarily govern the standards for granting interim relief because,

\textsuperscript{541} Lew (n 448) 23. As noted above, provisional measures were requested in only 25 cases between 1979 and 1994. See Born (n 98) 1975. The three-fold increase in requests for provisional measures in the 15 years following 1985 almost certainly increased substantially following 2000.
\textsuperscript{542} See (Born n 98) 1951-1958, 1961-1964; Swiss Law on Private International Law, art 183(1); Belgian Judicial Code, art 1696(1); UK Arbitration Act 1996 (n 115) section 38.
otherwise, one would expect to find those standards in the applicable arbitration legislation. Lacking those standards indicates that perhaps other legal sources are more appropriate to govern the substantive standards determining the circumstances in which interim measures are granted. Even more importantly, these applicable standards for arbitrator-ordered interim measures are not presumably connected to the law of the arbitral seat. For instance, a request for preservation of disputed goods, in the context of an international sale agreement between an American and a Chinese citizen under English Sale of Goods Act shall not be resolved differently in China, England or the United States if the seat of arbitration is located in one of these countries.

Second, there is also little reason to conclude that the applicable law of the underlying contract contains the standards for granting provisional measures. In other words, that the parties have chosen a national law to govern their contract does not provide considerable indication regarding their willingness to leave the matter of provisional measures to that law as well. Additionally, due to the fact that national laws do not have applicable standards for arbitrators-ordered interim relief, if one argues that the governing law of the underlying contract should determine those standards then inevitably those standards which are used in domestic litigation would ultimately be taken to be applied to transnational arbitration as well. The problem is that those standards would have no precedential value or decisive importance for international arbitral tribunals.

It appears that the better view is that international sources, primarily in the practice of international arbitration, arbitral awards and common discourses of law in developed jurisdictions should determine the appropriate standards governing the matter of interim measures in international arbitration. The most significant point is that these international sources are much more compatible with the reasonable expectations of the parties because they propose and support a uniform set of substantive standards for arbitration cases; this uniform set of standards will be applied in all arbitration cases regardless of the seat of the arbitration; and the standard will accordingly be tailored to fit international arbitral proceedings. In addition, it seems that such an approach will remove most of the challenges
and difficulties of the choice of law questions and replace its necessity with a uniform result, both in policy-making and practice.\textsuperscript{543}

This is also in conformity with the limited precedent that exists on the topic. Indeed, it has been shown that arbitrators normally look into international standards elaborated in earlier commentary or awards but not national court provisions.\textsuperscript{544} This also conforms with the treatment of other ‘procedural’ issues in international arbitration including conflicts of interest, standards for disclosure and evidence-taking which are generally governed by international standards.\textsuperscript{545}

Having said that, the 2006 revised version of the UNCITRAL Model Law took the opposite approach to the foregoing analysis where in the revised Article 17A it stipulated that a party seeking provisional relief must satisfy the tribunal’s specified conditions, namely, irreparable harm, outweighing possible injury to other parties and reasonable possibilities of success on the merits existing.\textsuperscript{546} This revision of Article 17 has little to recommend it. In fact, regardless of various criticisms on the formula in Article 17A,\textsuperscript{547} it seems unwise to bind international tribunals to a set of prescribed substantive standards for provisional relief which shall be applied in the same way in different circumstances.

\textsuperscript{543}See Born (n 98) 100-101, 2107-2111. The foregoing conclusion also fosters the development of a body of international authority that provides efficient means of resolving disputes regarding provisional measures. Arbitration is selected in part so that experienced decision-makers will be in a position to resolve disputes in commercially-sensible and effective ways. See Born (n 98) 78-81. Permitting arbitrators to develop authoritative standards for granting provisional measures furthers this objective.

\textsuperscript{544}Lew (n 448) 27 (noting a ‘second approach - i.e., determining the issue of whether to grant relief without reference to any national law - would appear to be more common’); Poudret & Besson (n 200) 625 (stating that ‘these difficulties [of the conflict of law method in the area of provisional matters] explain why the large majority of judgments and awards have not dwelt on the determination of the applicable law.’); Decision in Geneva Chamber of Commerce of 25 September 1997, (2001) 19 ASA Bull 745 (in dealing with application for security for costs, tribunal first considered whether anything in law of arbitral seat forbid such relief and then considered international practice as to whether it should be granted); Interim Award in ICC8894, (2001) 11(1) ICC Ct Bull 94 (2000); Final Award in ICC7589, (2000) 11(1) ICC Ct Bull 60; Final Award in ICC7210, (2000) 11(1) ICC Ct Bull 49 (2000).

\textsuperscript{545}See Born (n 98) 1906-1908.

\textsuperscript{546}UNCITRAL Model Law, 2006 Revisions (n 87) art 17A.

\textsuperscript{547}The formula in Article 17A is lacking in a number of respects. Among other things, Article 17A apparently makes no provision for parties' agreements on the standards of proof, omits any reference to urgency, unduly focuses ‘irreparable’ harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for differing types of interim relief and omits reference to security for costs. See Born (n 98) 1980-1993; for further discussion of the appropriate standards for granting provisional measures.
4.5 Preliminary conditions to order provisional measures

It has already been stated that, in general, international treaties and national laws recognize the authority of arbitral tribunals to order interim measures when such a relief deems it to be ‘necessary’\(^{548}\) or ‘appropriate’\(^{549}\). These formulations merely affirm the tribunal's broad competence to order provisional relief and do not establish standards for when that authority should be applied. Equally, however, these formulations are not intended to leave provisional measures entirely to the arbitrators' unguided discretion\(^{550}\).

In practice, however, arbitral tribunals have created relatively straightforward standards to dispose of requests for provisional relief. Indeed, these standards have been devised to determine in which situations ordering provisional relief is ‘necessary’ or ‘appropriate’. One may also find some, though very rare, cases where parties specifically agree that provisional measures or injunctive orders may be issued upon the claimant to make certain showings. Obviously, clearly, party autonomy may address all procedural aspects, and arbitrators are expected to give effect to the parties' agreement provided that it does not contradict with public policy considerations.

The practical standards accepted by mostly all international arbitral tribunals dealing with the request for interim relief are (a) serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits. Nonetheless, some tribunals find it necessary to compel claimants to prove a kind of prima facie case on the merits. Ultimately, and even more importantly, arbitral tribunals also look to the nature of the requested provisional measures and take into account the relative injury to be suffered by each party prior to making any decision on granting such measures\(^{551}\).

Nonetheless, these standards are flexible and applied on a case-by-case basis particularly due to the level of importance and the potential impact of the type of requested

\(^{548}\) UNCITRAL Rules (n 294) art 26(1).
\(^{549}\) ICC Arbitration Rules (n 309) art 23.
\(^{550}\) This would be contrary to the expectations of the parties except where they have agreed to arbitration ex aequo et bono, and to the adjudicatory character of arbitration. See Born (n 98) 187-189, 247-252.
relief on the fate of the dispute. For instance, ordering performance of a contractual obligation or preserving the status quo will typically require stronger showings of serious injury, urgency and a prima facie case, in contrast with security for cost, enforcement of confidentiality obligations or preservation of evidence. Additionally, due to the fact that it is not precisely clear what type of showing would be relevant to satisfy various elements of a request for provisional measures, it is sometimes suggested that arbitral tribunals may order provisional measures based simply on a ‘probability’ – in the sense of a substantial risk – rather than a 50%.  

4.5.1 Irreparable or serious injury

Irreparable or serious injury is one of the most frequent requirements for the purpose of issuing interim measures by an arbitral tribunal. According to one of the most frequently cited arbitration awards, provisional relief will not be granted unless the requesting party has substantiated the threat of a not easily reparable prejudice. A similar view has been taken by some experienced practitioners who argue that ‘it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted.’

Another group of commentators took the view that only a showing of ‘serious’ or ‘substantial’, without requiring that the injury be ‘irreparable’ in a literal sense, would be sufficient in providing grounds for issuing such a relief. This is mainly because pragmatically it would be very difficult to prove that a specific damage is truly ‘irreparable’ and cannot be compensated by money damages in a final award. Therefore, most decisions which state that damage must be ‘irreparable’ do not actually utilize this formula but instead

552 Caron, Caplan & Pellonpää (n 259) 542.
553 See, e.g., Lew (n 448) 23; W Craig, W Park & J Paulsson, Annotated Guide to the 1998 ICC Arbitration Rules 137 (Kluwer 1998) (‘enjoin conduct likely to cause irreparable harm concerning the subject matter of the dispute (such as, for instance, the calling of bank guarantees provided for in a construction contract where the call would be contrary to the provisions of the contract)’). See also UNCITRAL Model Law, 2006 Revisions (n 87) art 17A(1)(a) (‘harm not adequately reparable by an award of damages is likely to result if the measure is not ordered’).
555 Lew (n 448) 28.
556 UNCITRAL Model Law, 2006 Revisions (n 87) art 17A(1)(a).
they apply the test of ‘material risk of serious damage to the plaintiff’.  

This formulation will cause even more complexity for arbitral tribunals. It seems that prior to making any decision on granting/not-granting, arbitral tribunals should attempt to find the answers to a set of related questions including (a) to what extent the claimant may suffer serious harm during the arbitral proceedings; (b) to what extent such injury can be compensated in a final award; and ultimately the question which is normally called ‘balancing of interests’ or a ‘balancing of hardships’ which tries to find (c) to what extent it is fair or just to put the burden or risk of loss during the arbitral proceedings on one party. The last question can be considered the most important element for the tribunal.

It should also be noted that some forms of relief, for instance, preservation of evidence or the sampling of goods, do not require showings of serious or irreparable injury. Perhaps, it would be better not to be categorized as true requests for provisional measures of protection but instead as requests for taking evidence or disclosure. It seems more accurate if the applications for these types of measures are regarded as part of the tribunal's overall responsibility for considering and collecting the facts of the case given the fact that it would be appropriate to preserve or secure the evidence even if there is no serious risk of irreparable damage. Likewise, as will be discussed in more detail later, applications for security for legal costs normally do not require showings of an urgent risk of irreparable harm.

4.5.2 Urgency

Connected with the requirement of serious/irreparable harm, it is also considered by many commentators and arbitral awards that an award of interim relief should only be granted

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557 See, e.g., Schwartz (n 471) 60 (‘ICC arbitral tribunals have sometimes construed the risk of financial loss itself to constitute irreparable harm’); and Caron, Caplan & Pellonpää (n 259) 537 (‘the terms “grave” or “substantive” might be more appropriate than “irreparable”’)


559 The 2006 revisions to Article 17 of the UNCITRAL Model Law adopt a similar approach. See UNCITRAL Model Law, 2006 Revisions (n 93) art 17A(1)(a).

560 e.g., Redfern & Hunter (n 409) 7-11.

561 See Born (n 98) 1906.

562 See Born (n 98) 2004-2006.
if the requesting party shows its ‘urgency’.\textsuperscript{563} Thus, the tribunal must be satisfied that in order to prevent serious or irreparable damage to the claimant some sort of prompt or immediate action is necessary.\textsuperscript{564} However, the 2006 revisions to the UNCITRAL Model Law omit any reference to urgency, which seems to be unwise.\textsuperscript{565}

As noted above, the ‘urgency’ requirement is closely connected with the requirement of ‘serious harm’. This means that pre-award relief shall not be granted until such time as it becomes necessary to avoid serious harm from taking place. Accordingly, if it can be possible to avoid or mitigate such damage in other ways, a tribunal should generally not interfere in the parties' relations.\textsuperscript{566} On the other hand, where there seems to be an urgent risk of damage, and subject to the existence of other applicable requirements, the arbitral tribunal should grant provisional relief.\textsuperscript{567}

Like the requirement of irreparableness, the urgency test should not be construed strictly. In fact, to do so tribunals should take pragmatic and commercial considerations into account to examine whether it is urgent to grant an interim relief in order to avoid the likelihood of serious damage or not.\textsuperscript{568}

\textbf{4.5.3 No pre-judgment of the merit}

It is also argued by some commentators,\textsuperscript{569} and even in the 2006 UNCITRAL Model Law,\textsuperscript{570} that the tribunal’s decision on interim relief should not bring about prejudgment of the merits of the parties’ underlying dispute.\textsuperscript{571} Thus, ‘an arbitral tribunal must refrain from

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\textsuperscript{563} Ali Yesilirmak, ‘Interim and Conservatory Measures in ICC Arbitral Practice’ (2000) 11(1) ICC Ct Bull 31, 34 (need for ‘urgent’ or ‘prompt’ relief); and Lew (n 448) 27.
\textsuperscript{564} As one ICSID award put it, ‘provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits’.
\textsuperscript{565} UNCITRAL Model Law, 2006 Revisions (n 87) art 17A.
\textsuperscript{566} See \textit{Avco Corp v Iran Aircraft Indus} (Order in Case No 261) (27 January 1984).
\textsuperscript{567} See, e.g., \textit{Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania} (Procedural Order No 1) ICSID ARB/05/22 (31 March 2006) section 76.
\textsuperscript{568} ibid. See also, \textit{Occidental Petroleum Corp v Republic of Ecuador} (Decision on Provisional Measures) ICSID ARB/06/11 (17 August 2007) 91; Interlocutory Award in ICC10596, XXX YB Comm Arb 66 (2005); Partial Award in ICC8113, (2000) 11(1) ICC Ct Bull 65, 67.
\textsuperscript{569} Lew (n 448) 27.
\textsuperscript{570} This is usefully made explicit by the 2006 revisions to the UNCITRAL Model Law. UNCITRAL Model Law, 2006 Revisions (n 87) art 17(A)(1)(b).
\textsuperscript{571} See, e.g., C Schreuer, \textit{The ICSID Convention: A Commentary Art. 47} (CUP 2001) 1-3.
prejudging the merits of the case’. Nonetheless, the precise meaning of this requirement is not actually clear. To put it differently, it is not clear whether this requirement is there to prevent the tribunal from prejudice or bias in its final decision on the merits or to prevent the tribunal from ordering the same relief that is requested on the merits. The lack of importance of this requirement becomes even clearer when it is highlighted that any interim relief will only be a preliminary decision (not a final determination of the dispute) and therefore it would not constitute res judicata like the final award and should in no way prejudice the merits.

Despite the ambiguousness of the reason for recognizing ‘no pre-judgement’, a couple of points can be considered in relation to it. First, in considering and deciding an application for provisional measures a tribunal must take care to ensure that it does not, even partially, close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings. Second, a decision on provisional measures may not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases. In other words, provisional measures should not make it more difficult to render a decision in favour of one party or the other. Finally, provisional measures have no res judicata or similar preclusive effect with regard to a decision on the merits.

4.5.4 Probability of success on merit

It is also said that the requesting party for interim measures has to demonstrate a prima facie interest case on the merits of its claim. As formulated by one award:

The present Arbitral Tribunal is not a referee jurisdiction, but a jurisdiction of the merits seized of provisional measures. … The powers of the merits ruling provisionally are not limited like those of the referee judge and a serious dispute does not prevent a broader appreciation, although on a provisional basis, of the respective arguments of the parties.

572 Lew (n 448) 27.
573 UNCITRAL Model Law, 2006 Revisions (n 87) art 17A(1)(b).
574 Partial Award in ICC Case (Unidentified) in Schwartz (n 471) 60. See also Yesilirmak (n 563) 31-34 (‘the prima facie test [i.e., for establishment of a case on the merits] is gain[ing] substantial recognition’); M Blessing, ‘State Arbitrations: Predictably Unpredictable Solutions?’ (2005) 22 J Int'l Arb. 435; Caron, Caplan & Pellonpää (n 259) 537.
At the same time, one may find other awards and commentary which challenge this requirement due to the fact that this may conflict with no prejudgment requirement by the tribunal. Nevertheless, it seems more rational and practical say that an arbitral tribunal should consider the prima facie seriousness of the parties' respective claims and defences in deciding whether to grant provisional measures. Again, it should be borne in mind that the arbitral tribunals meeting this requirement does not mean prejudging the merits of the case mainly because such an assessment would be purely provisional and based upon incomplete evidence and submissions without preclusive effects.

Even more importantly, the tribunal should assess the existence of a prima facie case in order to make a reasonable decision regarding provisional measures. To do so, the appropriate approach taken in many developed legal systems is to consider the legal sufficiency and strength of the parties' respective cases.

Furthermore, in cases where a party seeking provisional measures has made a credible, but no stronger, case of serious harm, during the course of the arbitral proceedings then consideration of the merits of the case appears both appropriate and sensible. In such circumstances, the real issue is how interim damage arising during the arbitral proceedings (and the risks of such damage) should be allocated pending a final decision in the arbitration that will determine the parties' rights. This allocation of interim damage is necessary precisely because the tribunal's final determination is not yet known; if the final determination were known then the proper allocation of interim damage could be made. Given this, it is entirely appropriate for a tribunal to consider – recognizing that it is not making a decision, but instead a preliminary prediction based on partial submissions – the possible outcomes of a final award. Indeed, it would in many respects be both irrational and unjust not to do so: it would result in parties that have conducted themselves entirely appropriately and that have thoroughly rebutted implausible, defective and/or unsupported claims, being required to act (prior to any

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575 See, e.g., Biwater Gauff (Tanzania) (n 567).
576 See, e.g., Lew, Mistelis & Kröll (n 338) 23-62.
577 See Born (n 98) 1988-1989.
arbitral award) as if they had no defense to claims against them.

4.5.5 Jurisdiction

Jurisdiction of the tribunal has also been discussed extensively in international literature. As already explained, the ability of the tribunal to grant interim measures is in fact part of the necessary facilities that must be available for the arbitrators to audit the parties’ dispute. Therefore, it seems that regardless of the existence of the jurisdictional challenge or otherwise, any tribunal shall be able to issue provisional measures. Thus, among disparate commentary on this particular issue, it sounds more pragmatic for international arbitration to follow the ‘the well-settled position in international adjudication … that an international tribunal may decide on provisional measures prior to establishing its jurisdiction over the dispute if it appears that there is, prima facie, a basis for asserting such jurisdiction’.

4.5.6 Security

Although it is not very common, there is also a tendency among arbitrators which requires the placing of security by the requesting party in order to preserve the adverse party's ability to recover damages resulting from provisional measures that prove to have been wrongfully requested. For example, if a party successfully gets a provisional measure banning its counterparty from using intellectual property or selling a product, it may be required to post security sufficient to cover the likely damages for lost sales or profits. Some national laws expressly provide for the ordering of security by an arbitral tribunal. This should not be the case in practice as one of the requirements needs to be met before granting an interim measure by commercial arbitrators; rather, it should be considered as part of the arbitrators’ discretion in granting interim measures. In other words, arbitrators shall be authorized, on a

579 Lew, Mistelis & Kröll (n 338) 23-68.
580 As noted above, provisional measures are frequently sought at the outset of an arbitration.
581 I Shihata and A Parra, ‘The Experience of the International Centre for Settlement of Investment Disputes’ (1999) 14 ICSID Rev-For Inv LJ 299, 326. Indeed, some arbitral tribunals have refused to address the question of jurisdiction at all during the provisional measures phase. See, e.g., Tokios Tokelés v Ukraine, (Procedural Order No. 1) ICSID ARB/02/18 (1 July 2003), section 6; Biwater Gauff (Tanzania) (n 567).
582 See, e.g., UNCITRAL Model Law, art 17; UNCITRAL Model Law, 2006 Revisions (n 87) art 17E; Swiss Law on Private International Law, art 183(3); Japanese Arbitration Law, art 24(2).
583 See, e.g., UNCITRAL Rules (n 294) art 26(2); ICC Rules, art 23(1); LCIA Rules, art 25(2).
case-by-case basis, to order placing security where in their view it is necessary to protect the economic interests of the counter party of such a claim.\textsuperscript{584}

4.6 Types of interim measures

Given that the objective of international arbitration, such as national and international litigation, is to resolve contentious disputes, it should be armed with a couple of instruments to satisfy such an expectation. As elaborated so far, one of these fundamental instruments is in fact the authority for granting interim measures. Also, either analytically or in practice, each of these interim relief measures may require different types of showings to be granted. Additionally, it shall be noted that depending on the circumstances of the case and its requirements, arbitrators may grant a wide variety of different types of provisional measures. The aforementioned standards in granting provisional measures should be applied in the context of each of these specific types of provisional measures. Therefore, arbitral tribunals enable interim measures to be granted as long as those measures, on the one hand, are directed towards parties of the arbitration (not non-parties)\textsuperscript{585} and on the other do not exceed any limits of the parties’ agreement\textsuperscript{586} or national applicable law.\textsuperscript{587} Accordingly, and subject to these conditions, arbitrators may grant any measures to protect or preserve the tribunal’s jurisdiction, one of the parties' rights, pending the ultimate resolution of the dispute, or the subject matter of the arbitration.\textsuperscript{588} Nonetheless, as we shall see below, some sort of characterization may be of importance to clarify the precise power of the arbitral tribunal in granting different types of interim measures.

4.6.1 Preserving the status quo

Among the most common forms of provisional relief are those which aim to preserve the status quo between the parties or perhaps specific set of facts, legal or contractual

\textsuperscript{584} See, e.g., \textit{Warth Line, Ltd v Merinda Marine Co} 778 F Supp 158 (SDNY 1991) (confirming New York arbitral tribunal's award of damages from arrest of vessel by Belgian courts); \textit{In re Noble Nav Corp} No 83-3983 (SDNY 4 June 1984).
\textsuperscript{585} See Born (n 98) 1965-1966.
\textsuperscript{588} Derains & Schwartz (n 295) 296-297.
relationships are of great importance.\textsuperscript{589} For example, a party may be ordered not to disclose a trade secret or take any steps to call a letter of credit or use a license agreement.\textsuperscript{590} A tribunal may also grant interim relief to prevent one party from altering the contractual status quo,\textsuperscript{591} or even more importantly, to seek one party to restore the circumstances to the state of affairs which had been pursuant to the notice of the commencement of the arbitration process.\textsuperscript{592} Preservation of the evidence is another prime example of this type of interim measure.

The precise meaning of preserving the status quo and the definite time that it refers to are two important issues of this type of interim measure. It is not by default clear whether the ‘status quo’ refers to the status quo prevailing at the time (a) provisional relief is granted, (b) provisional relief is requested, (c) the arbitration is commenced, or (d) the parties' dispute arises.\textsuperscript{593} Needless to say that there would be a significant difference if either of those times were considered as the time which is meant in the arbitrator’s order. It appears that there should not be any stress on attaching decisive importance to either of the aforementioned time but rather tribunals should take into account the relative harm that is likely to be suffered by both parties, either during the arbitral proceedings or at the existence of prima facie claims as well as defences of each of the parties. It follows that if one party can show a strong prima facie case on the merits and prove the likelihood of serious injury during the course of the proceedings, while the other party fails to demonstrate even a prima facie defence, then the tribunal shall grant restoration of the status quo to the prevailing situation of when the parties' dispute emerged.

Perhaps one of the most important types of provisional relief for preserving the status quo is an order for mitigation. This aims to prohibit one party from actions that would

\textsuperscript{589} See, e.g., UNCITRAL Model Law, 2006 Revisions (n 87) art 17(2)(a).
\textsuperscript{590} International arbitral tribunals have not infrequently issued or accepted the availability of such orders. See, e.g., Final Award in ICC7895 (party ordered to refrain from selling other party's products), (2000) 11(1) ICC Ct Bull 64, 65; Final Award in ICC9324 (party ordered to reimburse amount of letter of credit if such letter of credit were called), in Lew (n 448) 29; Tanzania Elec Supply Co v Independent Power Tanzania Ltd (Decision on the Respondent's Request for Provisional Measures) ICSID ARB/98/8 (20 December 1999) 5(iii), 15.
\textsuperscript{592} See art 2.1(a) ICC Rules for Pre-Arbitral Referee.
\textsuperscript{593} Award in ICC6503, 122 JDI (Clunet) 1022 (1995) (ordering parties to continue to perform contract notwithstanding pre-arbitration termination notice).
ultimately exacerbate the parties' dispute. In practice, the arbitral tribunal may typically order it to forbid public statements to guarantee confidentiality of the arbitration or interference with contractual performance.

One may have different terminology taken by different tribunals for this purpose. For instance, in the famous case of Amco v Indonesia, the tribunal referred to ‘the good and fair practical rule, according to which both parties to a legal dispute should refrain … to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult’. Another award held that the parties ‘shall not commit any act of whatever nature, that might aggravate or extend the dispute’.

Finally, it should be noted that in granting such a provisional relief and as its ground, the commercial desirability of stopping unilateral activities would be sufficient for the tribunal to order such a relief. Therefore, tribunals shall not seek one party to prove necessity of this relief with the same showings of serious harm and urgency. This is because:

There is a tendency on the part of many arbitral tribunals, … consistent with the view that they often have of their mandate, to construe the requirement of urgency sufficiently broadly to justify interim measures designed not so much to prevent irreparable harm as to avoid the ‘aggravation’ of the dispute that is the subject matter of the arbitration.

4.6.2 Measures aimed at relief in respect to parallel proceedings

These types of measures have been discussed in chapter two of this research in terms of court involvement prior to establishment of the arbitral tribunal. As discussed in chapter

594 See UNCITRAL Model Law, 2006 Revisions (n 87) art 17(2)(b) (‘take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself’).
595 See Born (n 98) 2249-2287.
596 The principle that an arbitral tribunal may take steps to prohibit aggravation of a dispute is well-described in the order of one arbitral tribunal. Order in ICC7388 in A Reiner, ‘Les mesures provisoires et conservatoires et L’arbitrage international, notamment l’Arbitrage CCI’ (1998) 125 JDI (Clunet) 853, 889, n 82 (1998).
597 Amoco Asia Corp v Republic of Indonesia (Decision on Request for Provisional Measures) ICSID ARB/81/1 (9 December 1983), (1986) XI YB Comm Arb 159, 161. In Amoco v Indonesia such a risk of aggravation and exacerbation did not exist.
598 Partial Award in ICC3892 in Jarvin & Derains (n 62) 161, 164; Partial Award in ICC3896, (1983) 110 JDI (Clunet) 914, 918.
599 Schwartz (n 471) 61.
two, the courts may get involved in an arbitration process and ban one of the parties of an arbitration agreement from continuing with litigation which is contrary with their agreement to arbitrate. Accordingly, if one party attempts to avoid arbitration proceedings after establishment of the arbitral tribunal by commencing a litigation then the tribunal may grant a provisional relief, albeit on the request of the other party, to stop the respondent from such activity. It should also be noted that arbitral tribunals have no power to grant interim measures requiring national courts to stop conducting the case but they can only address the counter party in their order.

4.6.3 Requiring specific performance of contract

Despite the fact that an order for specific performance can be issued in the form of a final award, arbitral tribunals frequently order it during the arbitral proceeding in the form of interim measures particularly to force a party to perform its legal or contractual obligation pursuant to a pre-existing contract. For example, the tribunal may order a relief requiring one party to continue to perform its contractual obligations, such as to keep shipping products or provide intellectual property. One ICC tribunal, by exercising its authority to grant such a relief, held that ‘it is essential, until the final award on all the claims and counter claims, that the contractual provisions agreed between the parties keep producing all their effects’.

In my view, subject to the standards discussed above, an arbitral tribunal may also be able to grant measures related to documentary disclosure or even to the attendance of witnesses. In truth, connected with the ability of the tribunal to place sanction – perhaps normally a monetary fine – to force parties to comply with its order, it can impel the respondent to disclose any relevant document with the arbitration process.

600 In some institutional rules, such orders qualify as ordering ‘on a provisional basis … any relief which the Arbitral Tribunal would have power to grant in an award.’ LCIA Rules (n 261) art 25(1)(c).
601 Interim Award in ICC8894, (2000) 11(1) ICC Ct Bull 94, 97-98 (party ordered to petition administrative authority to cancel license and import permission); Award in ICC6503, (1995) 122 JDI (Clunet) 1022 (order to continue executing a long-term contract pending award); Texaco Overseas Petroleum Co v Libyan Arab Republic (Ad Hoc Award) (19 January 1977), (1979) IV YB Comm. Arb 177 (party ordered to abide by its contract and restore the parties to their original position).
602 Partial Award in ICC Case (Unidentified) in Schwartz (n 471) 61-62.
4.6.4 Orders requiring security for legal cost

According to this type of relief, one party or even sometimes both must post security up to the likely amounts that would be awarded to the counter-party in the event that it prevailed in the arbitration. This form of relief is, in practice, quite common in arbitrations with their seat in Commonwealth jurisdictions but notably in England. The authority of the tribunal to grant this type of relief is specifically addressed by the UK Arbitration Act 1996, and some other common law arbitration legislation. However, courts in some Model Law based jurisdictions, by taking a restrictive view, have held that Article 17 does not give such specific authority to the tribunal to order security for costs.

This goes further and causes disparate approaches between arbitral tribunals in different jurisdictions regarding the authority of the tribunal in granting such a relief when there is no express provision for security for costs in lex arbitri. Whilst common law oriented jurisdictions have recognized a wide authority for the tribunal to grant such relief, those without English or Commonwealth orientations have required an express agreement by the parties permitting such provisional measures for costs.

Given that ordering this type of relief is quite controversial among practitioners, tribunals may typically consider three things to be the likely difficulties in enforcing a final costs award, the extent to which third parties are funding that party’s participation and on top

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604 UK Arbitration Act 1996 (n 115) section 38(3); Merkin (n 252) 14.65 to 14.75.

605 See, e.g., Singapore International Arbitration Act, section 12(1).

606 Lindow v Barton McGill Marine Ltd CP13-SD/02 (Auckland High Court New Zealand, 1 November 2002) (Article 17 does not grant arbitrator power to order security for costs); Yieldworth Eng’rs v Arnhold & Co Ltd [1992] 1 HKLR 34 (HK High Court, S Ct) (1991) (arbitral tribunal lacks authority under Model Law to order security for costs unless specifically authorized by parties).


the financial state of the party from whom security is requested.\textsuperscript{609} Accordingly, case studies show that a strong prima facie case for security for costs exists where the tribunal sees that a party apparently does not have enough assets to satisfy a final costs award or is pursuing claims in an arbitration with the funding of a third party.\textsuperscript{610} Case study and practice of international arbitration also reveal that the likelihood of success on the merits does not necessarily play a significant role in determining whether it is appropriate to order security for costs.\textsuperscript{611}

4.6.5 Orders for interim payment

A largely sui generis type of interim measure contains orders for interim payment of amounts claimed. Interim measures of this type are materially different from other types of interim relief primarily due to the fact that they preclude the merits of the parties' dispute by granting what amounts to a partial, final award for essentially indisputable sums due. Indeed, a partial award of indisputable amounts shall not be considered one type of interim relief but in truth it shall be seen as a partial award of final relief.\textsuperscript{612}

Article 39 of the UK Arbitration Act 1996 expressly states that arbitral tribunals are authorized to grant partial awards of indisputable sums.\textsuperscript{613} It also seems that notwithstanding the lack of specific reference to the possibility of such awards under the UNCITRAL Model Law is not an obstacle for an arbitral tribunal in granting partial relief following very rapid proceedings addressing a single issue.

On the other hand, arbitration laws in France and the Netherlands contain specific provision, `référé-provision' procedures, for this type of relief whereby notwithstanding the existence of an international arbitration agreement, local courts are recognized as authorized

\textsuperscript{609} See, e.g., Coppee-Lavalin SA/NV v Ken-Ren Chem and Fertilizers Ltd [1994] 2 All ER 449 (House of Lords).
\textsuperscript{612} See Born (n 98) 2430-2433, 2434-2435.
\textsuperscript{613} UK Arbitration Act, 1996, section 39. See Merkin (n 252) 18.7; BMBF (No 12) Ltd v Harland and Wolff Shipbuilding and Heavy Indus Ltd [2001] 2 Lloyd's Rep 227.
to grant orders requiring interim payment of indisputable amounts. According to French courts, parties' agreement to arbitrate does not, without more, exclude resort to French courts for the ‘référé-provision’ procedure. The French Cour de Cassation reasoned that:

Since the existence of an arbitration agreement does not exclude the jurisdiction of the court, who had in fact established the urgency of the situation, to order a provisional payment in favor of a creditor whose claim was not seriously disputable, the Court of Appeals rightly rejected the argument that the court lacked the jurisdiction to do so.

Nevertheless, it seems contrary to the parties' arbitration agreement and the provisions of the New York Convention if the référé-provision procedure contains a payment order, or a determination of the parties’ underlying dispute, or final judgment. That is because parties in their arbitration agreement chose arbitration for dispute resolution and accordingly granting of final relief under such an agreement would be in the competence of the tribunal not the courts. If the référé-provision procedure produces only a provisional order, subject to arbitral revision, then it can be considered as an acceptable form of provisional relief although even in this situation courts should be aware not to prejudge the parties' dispute.

4.7 Rationale for concurrent judicial jurisdiction to grant provisional measures in aid of arbitration

Whereas arbitration laws of most developed jurisdictions recognize the competence of international arbitral tribunals to grant interim relief, this is not an exclusive power and therefore, absent to contrary agreement, the lex arbitri of all developed states typically contemplates concurrent competence of the national courts as well as arbitral tribunal for issuing provisional relief. Although such overlapping jurisdiction, both for national courts

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615 Judgment of 9 July 1979, (1980) Rev Arb 78 (French Cour de Cassation civ. 3e). Parties may agree to exclude the ‘référé-provision’ procedure, but neither an arbitration agreement alone nor incorporation of the ICC Rules has been held sufficient to constitute such an exclusion. Gaillard & Savage (n 381) 1342.

616 See Born (n 98) 1004-1005, 1024, 1030-1031.

and arbitral tribunals, in ordering interim measures is unusual, mainly because it increases the costs of proceedings as well as the risk of inconsistent results, it is deeply engrained as part of the international arbitration regime.

This section will consider the authority of national courts to issue provisional measures in connection with the discourse of international arbitrations and examine the rationale for such concurrent authority as well as the circumstances whereby court intervention not only will not be disruptive but in fact will facilitate the arbitration process.

4.7.1 Introduction

As discussed earlier, there is no prospect of obtaining interim relief prior to establishment of the arbitral tribunal. Additionally, the ICC Pre-Arbitral Referee Rules or other similar provisions in other institutions have failed to provide a satisfactory regime for granting interim measures in arbitration. More importantly, due to the consensual nature of international arbitration, attachments and other provisional measures cannot in practice be binding for third parties outside the arbitration agreement. Consequently, the only practical way to obtain provisional relief when it is urgent prior to establishment of the tribunal or even at the outset of a proceeding is to seek it from national courts. In order to conduct a comprehensive analysis of such concurrent authority, this section will discuss it in the light of (a) the New York Convention and other applicable international conventions; and (b) applicable national arbitration legislations.

As detailed below, these sources of authority generally provide national courts with concurrent power to order provisional measures in aid of an international arbitration (absent an agreement to the contrary by the parties). The existence of concurrent jurisdiction, shared

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618 See Born (n 98) 1020-1024, 1030-1031, 1128-1130, 2934-2935. This overlapping competence also has the potential to conflict with the general principle of judicial non-intervention in the arbitral process. See Born (n 98) 1776-1782.

619 See Born (n 98) 1081-1083. As discussed below, principles of preclusion and lis pendens should be interpreted to reduce the scope for such interference. See Born (n 98) 2930-2933, 2947-2950.

620 See Born (n 98) 2050-2051.


by arbitral tribunals and national courts, is an exception to the general principles of arbitral exclusivity and judicial non-interference in the arbitral process. Concurrent jurisdiction in this field is nonetheless well-recognized in both national and international authorities and is essential to the efficacy of the arbitral process.

4.7.2 Authority of national courts in granting provisional relief

The language of the European Convention regarding the concurrent jurisdiction of arbitral tribunal and national courts in granting interim measures is all but explicit where Article VI(4) of the European Convention stipulates that a ‘request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement’. In fact, the obvious conclusion of this Article is that the parties, pursuant to their arbitration agreement, have the right to seek interim measures either from the tribunal or national court and that such a request would not violate their agreement to arbitrate. Accordingly, national courts have used this Article to substantiate their power to grant interim measures in aid of arbitration.

On the other hand, the New York Convention does not have any provision which directly addresses the matter of interim relief, whether granted by national courts or arbitral tribunals. Such silence has raised different, sometimes contradictory, interpretations of the Convention which directly impact on the competence and the power of national courts in granting interim measures in order to aid arbitral proceedings. As we shall see, a group of US courts, though few in number, have construed Article II(3) of the New York Convention as a prohibition for national courts from granting interim measures in connection with an international arbitration. However, other US judicial decisions, much like almost all non-
US decisions and academic commentary,\textsuperscript{630} have explicitly rejected that interpretation of Article II(3).\textsuperscript{631}

Whilst it is wrong to construe the Convention in order to forbid court-ordered interim measures, as done by some US courts, it seems equally nonsensical to conclude from the Convention that all court-ordered provisional measures are permitted. That is because one can assume circumstances whereby applications for court-ordered provisional relief may be used in order to frustrate or evade a party's obligation to arbitrate, which is obviously contradictory with both Article II(3) of the Convention and parties’ arbitration agreement.

4.7.2.1 \textit{McCreary & Cooper: Judicial decision on prohibiting court-ordered interim measures}

\textit{McCreary Tire & Rubber Co v CEAT, SpA} is the generally cited case whereby US courts interpreted Article II(3) of the Convention in a way which prohibits court-ordered provisional relief in aid of arbitration.\textsuperscript{632} That perception formed from this article has been correctly and widely challenged by other courts as well as academic scholars.\textsuperscript{633} Nonetheless, as we shall see, careful reading of the \textit{McCreary} decision shows a more cogent analysis, which seems to be less problematic.

The \textit{McCreary} case emerged from an international distribution contract containing an ICC arbitration with a seat in Belgium. The US party (McCreary), by neglecting the arbitration agreement, started litigation on the merits in the federal district court in Massachusetts although ultimately the district court rejected its competence and referred McCreary to arbitration.\textsuperscript{634}

\textsuperscript{630} See Born (n 98) 2037-2038.
\textsuperscript{631} ibid 2034-2037; \textit{Uranex} (n 473).
\textsuperscript{633} See, e.g., \textit{Filanto Spa v Chilewich Int'l Corp} 789 F Supp 1229 (SDNY 1992), application dismissed, 984 F2d 58 (2d Cir 1993); \textit{Channel Tunnel Group Ltd} (n 191) (rejecting Cooper reading of Article II(3)); and Lawrence F Ebb, ‘Flight of Assets From the Jurisdiction “In the Twinkling of a Telex”: Pre- and Post-Award Conservatory Relief in International Commercial Arbitration’ (1990) 7(1) J Int'l Arb 9; Brower & Tupman (n 689) 24.
\textsuperscript{634} \textit{McCreary} (n 686) 1032.
McCreary then placed another action, this time in the federal district court in Pennsylvania where it reasserted its underlying breach of contract claims against CEAT but more importantly it sought the court to attach sums owed to CEAT by a Pittsburgh bank.\textsuperscript{635} Eventually, on appeal, the third Circuit stated that no attachment would be granted and that arbitration should be enforced.\textsuperscript{636} Accordingly, the court made its decision on two separate issues: first the court’s understanding from parties’ arbitration agreement and second, the court’s interpretation of Article II(3) of the Convention.\textsuperscript{637}

In turn, as stated in the decision of the court, McCreary commenced judicial action in US courts to frustrate (‘bypass’) the parties' arbitration agreement and the arbitral process by requesting court interim measures; one which for very obvious reasons would be contrary to the New York Convention and its discourse.\textsuperscript{638} This conclusion is not contrary to the logic of concurrent jurisdiction for the tribunals and national court in granting interim measures.\textsuperscript{639} However, quite to the contrary, McCreary's reasoning and its conclusion\textsuperscript{640} should be understood as the court’s proposition regarding the authority and responsibility of national courts to prevent their concurrent competence on granting interim relief to be used as a tactic to halt the arbitration process itself by one of the parties.

The McCreary decision and particularly its principal rationale was followed in a few subsequent US lower court decisions. Ultimately, the New York Court of Appeals in \textit{Cooper v Ateliers de la Motobecane, SA}\textsuperscript{641} held that the New York Convention foreclosed any judicial action which appears to be part of an effort to frustrate arbitration. Obviously, such logical analysis is acceptable and is largely welcome as a proper approach concerning dual authority of courts and the tribunal for granting provisional measures.

\textsuperscript{635} ibid 1034.
\textsuperscript{636} ibid 1038.
\textsuperscript{637} As described above, Article II(3) of the Convention requires that courts of Contracting States enforce arbitration agreements by referring the parties to arbitration. See Born (n 98) 202-205, 1005-1007, 1021, 1025-1028.
\textsuperscript{638} McCreary involved an ICC arbitration, and Article 8(5) of the then-prevailing 1988 ICC Rules was therefore applicable.
\textsuperscript{639} See Born (n 98) 1972-1973, 2043-2048, 2049.
\textsuperscript{640} At the same time, the McCreary opinion contained broad language concerning Article II(3), which, if read independently, could be understood as forbidding all court-ordered provisional measures. See McCreary (n 686) 1037.
\textsuperscript{641} \textit{Cooper v Ateliers de la Motobecane, SA} 442 NE 2d 1239 (NY 1982).
Nevertheless and surprisingly, the New York Court of Appeals’ opinion in Cooper has another part which explicitly declares that Article II(3) of the Convention prohibits any court-ordered interim relief in connection with an international arbitration.\(^\text{642}\)

Accordingly, a couple of subsequent US lower courts took this view on their decisions and went considerably beyond the factual circumstances of McCreary/Cooper in refusing to grant court-ordered interim relief even where such orders were clearly in aid of a pending arbitration.\(^\text{643}\)

**4.7.2.2 Uranex decision: Judicial decision announcing that Article II(3) does preclude court-ordered interim measures to aid arbitration**

Almost the majority of the US lower courts did not follow the broad rationale held in Cooper case. By contrast, they took the view that Article II(3) of the Convention did not prohibit court-ordered interim relief in aid of arbitration. In Carolina Power & Light Co v Uranex,\(^\text{644}\) the district court held that:

This court … does not find the reasoning of McCreary convincing. As mentioned above, nothing in the text of the New York Convention itself suggests that it precludes prejudgment attachment. The [Federal Arbitration Act] … which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending arbitration. … There is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded.\(^\text{645}\)

Accordingly, some US lower courts by rejecting Cooper’s apparent interpretation of the Convention, followed the analysis and rational declared in Uranex.\(^\text{646}\) Other judicial decisions in the US tried to narrow the McCreary/Cooper results without rejecting their

\(^{\text{642}}\) ibid 1243 (emphasis added).


\(^{\text{644}}\) Uranex (n 473).

\(^{\text{645}}\) ibid. The court noted that the FAA permits pre-judgment attachments.

\(^{\text{646}}\) For other lower court decisions adopting the Uranex analysis of the Convention, see Borden, Inc v Meiji Milk Prods Co 919 F2d 822, 826 (2d Cir 1990); Ledee v Ceramiche Ragno 684 F2d 184 (1st Cir 1982); and Bahrain Telecomm Co v Discoverytel, Inc 476 F Supp 2d 176, 181 (D Conn. 2007).
holdings. Another group of decisions tried to distinguish between ‘traditional’ maritime provisional remedies, the ones related to maritime attachments or vessel arrests, and other types of provisional measures although at the same time they refused to apply the McCready/Cooper interpretation of Article II(3) to ‘traditional’ maritime remedies.647

In the same way, other US courts have circumscribed Cooper and McCready to prejudgment attachments. Hence, they concluded that regardless of the rules on prejudgment attachments, other forms of interim relief, like for instance preliminary injunctions can be ordered by national courts in aid of arbitration.648

4.7.2.3 UK courts’ view on court-ordered interim measures in aid of arbitration

Judicial decisions not only in the UK but also in all developed jurisdictions other than the US have rejected the reading of Article II of the New York Convention which prohibits national courts to grant interim measures in aid of international arbitration.649

As Lord Mustill stated in writing in the House of Lords:

I am unable to agree with those decisions in the United States (there has been no citation of authority on this point from any other foreign source) which form one side of a division of authority as yet unresolved by the [US] Supreme Court. These decisions are to the effect that interim measures must necessarily be in conflict with the obligations assumed by the subscribing nations to the New York Convention, because they ‘bypass the agreed upon method of settling disputes’: see McCready Tire & Rubber Co. v. CEAT SpA .... I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it.650

Accordingly, it seems that there is no decision outside the United States that adopts the

647 See EAST Inc of Stamford, Conn v M/V Alaia 876 F2d 1168 (5th Cir 1989); and Jesko v United States 713 F2d 565 (10th Cir 1983).
648 Borden, Inc v Meiji Milk Prods Co 919 F2d 822 (2d Cir 1990); Rogers, Burgun, Shahine & Deschler, Inc v Dongsan Constr Co 598 F Supp 754, 758 (SDNY 1984).
650 Channel Tunnel Group Ltd (n 191) 354 (House of Lords) (rejecting Cooper reading of Article II(3)).
McCreary/Cooper interpretation of Article II of the Convention.  

4.7.3 Future directions: Proper application of Article II(3) to court-ordered provisional measures

There appear to be no doubt that the decision of the US court in Cooper and then decisions of some other subsequent lower courts in United States on interpretation of Article II(3) of the New York Convention as a prohibiting provision for the court-ordered interim relief is not only wrong but also inconsistent with the main discourse of international arbitration. As discussed above, there is nothing in the wording or even intent of Article II(3) of the Convention to systematically prohibit court-ordered interim relief in the context of international arbitration, mainly because interim measures are often necessary in order to guarantee the functionality of international arbitration as an efficient dispute settlement mechanism.

Nevertheless, it is elaborated that in some circumstances, notably prior to the establishment of the tribunal, arbitrators are not able to grant interim relief. Even more importantly, due to the consensual nature of arbitration, arbitrators are not authorized to order attachments or any other type of provisional measures which affects third parties. Therefore, it appears that the court-ordered interim relief in such situations may be the only way of ensuring the functionality of international arbitration. Accordingly, in my view, insisting on the prohibition of court-ordered interim relief will threaten the efficiency of the arbitral process by denying what is often the only realistic means of preserving the status quo.

Apart from that, the court in Cooper emphasized that parties should be left authorized to allow national courts to grant pre-award security measures in their arbitration agreement. Accordingly, the court pressed for the primacy of the parties' agreement and the basic requirement of the arbitral process. Nevertheless, there is nothing in Cooper or its subsequent

651 Born (n 98).
652 Certainly, there is nothing in the text of Article II or its drafting history to support the broad conclusion that court-ordered provisional measures are never appropriate.
654 That view is shared by the vast majority of commentators. See Born (n 98) 2037.
655 Cooper v Ateliers de la Motobecane, SA 442 NE 2d at 1242.
cases regarding the burden of proof and its requirement for such an agreement (i.e. who, and thus how, should prove the necessity of) granting court-ordered interim relief. For all these reasons, it is very obvious that, unless otherwise agreed by the parties, justice would be served by the availability of court-ordered interim relief that is truly in aid of arbitration.\textsuperscript{656} This conclusion has also been supported by the dominant view of the US courts by rejecting the interpretation of Article II(3) of the Convention that precludes court-ordered interim relief in aid of arbitration.\textsuperscript{657} As discussed earlier, such a conclusion is also supported by non-US authority in different jurisdictions.\textsuperscript{658}

According to this analysis, Article II(3) does not prohibit court-ordered pre-award attachments or other provisional measures in aid of arbitration as long as they are not contradictory with the parties' agreement or \textit{lex arbitri}. At the same time, it should be noted that Article II(3) does preclude court-ordered interim relief where, contrary to the parties' agreement to arbitrate, they are intended to circumvent or frustrate the arbitral process. This analysis in fact gives priority to the parties' intentions and permits the use of Article II(3) as a means of ensuring enforcement of the parties' agreement to arbitrate.

\textbf{4.8 Conclusion}

As has been discussed in this chapter, despite the historical resistance to recognising the power of the arbitral tribunal to grant interim measures in international arbitration, modern international arbitration does consider such authority as part of the general power of the arbitrators to audit the dispute. It was explained that neither the Geneva Protocol/Geneva Convention nor the New York Convention contain specific provisions referring to the matter (either in the form of award or otherwise) of provisional measures by arbitrators or to the power of arbitrators to make such orders. Nevertheless, it was argued that one may conclude that the New York Convention does recognize this power impliedly by prohibiting Contracting States to adopt national laws which deny the ability of international arbitration agreements in enabling arbitrators the power to order provisional measures. In fact, Article II

\begin{footnotes}
\item[656] See Born (n 98) 1972-1973, 2028.
\item[657] ibid 2034-2037.
\item[658] ibid 2037-2038.
\end{footnotes}
of the Convention provides an obligation for Contracting States to recognize and give effect to the material terms of agreements to arbitrate. Therefore, where parties in their arbitration agreements grant such a power to the arbitral tribunal, implementation of Article II, in principle, forbids Contracting States from denying effect to all such agreements. Accordingly, if the seat of arbitration is one of the Contracting States then it shall necessarily recognize such authority for arbitrators if the parties already addressed it in their own agreement.

Apart from that, as discussed earlier, the law in developed jurisdictions tends to change their approach by extending arbitrators power in granting different types of interim measures. Accordingly, the UK Arbitration Act 1996 specifically addressed the matter of interim measures and allows, absent to contrary agreement, an arbitral tribunal to issue orders concerning the inspection, sampling, detention or preservation of ‘property which is the subject matter of the dispute,’ and concerning the preservation of evidence. More importantly, the Arbitration Act stipulates that ‘the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.’

On the other hand, the FAA in the US does not have any provision regarding the arbitrators’ power to grant interim measures. However, this lacuna was filled later by recognition of the ability of arbitral tribunals to grant interim measures by US courts. Therefore, in contrast with early US judicial decisions which on the basis of a narrow interpretation of the parties’ arbitration agreement frequently emphasised the inability of arbitrators to issue provisional relief, more recent US lower court decisions have consistently held that arbitrators may issue provisional relief provided that the parties have not agreed otherwise. As stated earlier, it seems that a refusal to recognize the authority of arbitrators in granting provisional measures is inconsistent with the FAA's ratio legis that agreements to arbitrate are enforceable.

Even beyond that, it has been shown that US state arbitration statutes at national level

660 ibid section 38(6).
661 ibid sections 38(1), 39(1). See also section 48.
increasingly move towards incorporation of specific provisions regarding arbitrators’ authority to grant provisional measures. More importantly, US courts, in general, are taking this view that, absent to contrary indication, the arbitrators’ power to grant interim measures can be implied from the parties’ agreement to arbitrate.

In spite of such modern trends in almost all developed jurisdictions, it can be noted that there are a couple of inherent limitations on the concept of interim measures in international arbitration particularly when it comes to the matter of externalities and the rights of the third parties, necessity of interim measures prior to establishment of the tribunal and enforcement of the interim measures per se. All these things are rooted in the fact that international arbitration is a contractual mechanism for resolving potential disputes between contractual parties. Nonetheless, there are also some limitations enshrined, though very limited, in the approach of national legislations. Party autonomy, lack of power to order provisional measures prior to establishment, limitation on subject matter of the dispute, lack of power for enforcement and no ex parte application are among the most important limitations on arbitrators’ power in granting interim measures.

Should all the aforementioned issues be resolved in one way or another, the main question remains: on what standards can international arbitrators grant interim relief? In other words, what is the proper applicable law for granting interim relief by international arbitrators? As we have seen, one may consider one of the following options: 1) the law of the seat; 2) applicable law of the underlying contract; or 3) international standards created by arbitrators themselves.

It was revealed that there is little reason to support the idea that the law of the seat governs and identifies the applicable substantive standards for an arbitral tribunal when it comes to decision-making regarding provisional measures. Furthermore, there is also little reason to conclude that the applicable law of the underlying contract contains the standards for granting provisional measures. In other words, that the parties have chosen a national law to govern their contract does not provide considerable indication regarding their willingness to leave the matter of provisional measures to that law as well. However, the better view appears to be that international sources, primarily practice of international arbitration, arbitral awards
and common discourses of law in developed jurisdiction should determine the appropriate standards governing the matter of interim measures in international arbitration. This conclusion is also reinforced by the limited precedents that exist on the topic. Indeed, it has been shown that arbitrators normally look into international standards elaborated in earlier commentary or awards but not national court provisions.

These straightforward standards have been taken by international tribunals to dispose of requests for provisional relief. Indeed, these standards have been set out to elaborate on which situation the ordering of a provisional relief is ‘necessary’ or ‘appropriate’. It has also been argued in granting the interim relief that arbitrators should be flexible and apply the international standards on a case-by-case basis particularly due to the level of importance and the potential impact of the type of requested relief on the fate of the dispute. The practical standards accepted by relatively all international arbitral tribunals dealing with the request for interim relief are (a) serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits. Nonetheless, some tribunals find it necessary for claimants to prove a kind of prima facie case on the merits. Ultimately, and even more importantly, arbitral tribunals also look to the nature of the requested provisional measures and take into account the relative injury to be suffered by each party prior to making any decision on granting such measures.

In line with the main subject of this thesis, the final issue that was discussed in this chapter was the matter of court involvement in granting interim measures in international arbitration. The question is to what extent is it rational to argue that international arbitration as an independent dispute settlement mechanism does not need national court assistance in terms of interim measures. This question is of particular importance because, as shown earlier, there are a series of inherent shortcomings such as the granting of interim measures before establishment or ex parte application which international arbitration cannot overcome at this stage of its development.

Therefore, and notwithstanding the fact that such overlapping jurisdiction, both for national courts and arbitral tribunals, will increase the cost of proceedings as well as the risk of inconsistent results, it is argued that absent to contrary agreement, lex arbitri of all
developed states typically contemplate concurrent competence of the national courts as well as arbitral tribunals for issuing provisional relief.

The above conclusion was discussed in the context of two important but contradictory interpretations of II(3) New York Convention. As discussed above, there is a clear unsound interpretation of the Convention in *McCreary/Cooper* and their progeny whereby US courts were in fact prohibited from granting interim relief in international arbitration. On the other hand, *Uranex* and almost all other authorities, from inside and outside the US, do recognize the authority of national courts to get involved, albeit upon the request of one of the parties, and grant interim relief for an international arbitration proceeding.

The logic behind this concurrent jurisdiction is to assist the international arbitral proceeding by removing a serious uncertainty which may affect the rights of all parties engaged in international commerce. The uncertainty resulting from the *Uranex* versus *McCreary/Cooper* split is particularly serious because of the urgency that often attends requests for provisional relief. Thus, as we have seen, the better interpretation of Article II(3) does not preclude national courts from granting pre-award attachments or other provisional measures in aid of arbitration where they are compatible with the parties' arbitration agreement or applicable institutional rules.

The thesis also suggests that in order to avoid conflicting injunctions, the only authorize court for granting of this type of interim measures should be exclusively given to the court of the place of arbitration.

This thesis continues by considering the harmonization of court involvement in international arbitration in the next chapter by discussing primarily the effective role of national courts to enforce foreign arbitral awards and the possibility of inventing alternative mechanisms for such enforcement in order to minimize national court contribution as much as possible.
Chapter Five: Court Involvement in the Recognition and Enforcement of Foreign Arbitral Award

5.1 Introduction

Where one or both parties do not accept the final award or may decide not to comply with its terms and demands, this can open a back way for interference by national courts in the dispute settlement process, particularly in the form of a challenge or enforcement of the award. The involvement of a national court, either for recognition and enforcement or for the purpose of challenging the final award, is subject to a complex legal framework which contains elements of both national and international law. As outlined later in the chapter, on the international level the New York Convention has a substantial role to play in the determination of the substantive and procedural aspects of the annulment, recognition, enforcement and preclusive effect of international arbitral awards. On the national level, most of the contemporary arbitration statutes have put in place procedural mechanisms and substantive criteria for annulling, correcting, confirming, recognizing and enforcing foreign arbitral awards.

Moreover, given the fact that the enforcement of a law or an award/sentence in all jurisdictions is exclusively implemented by the states, there will be no other choice but for the parties to go to the national courts in one jurisdiction if the losing party does not voluntarily comply with the final award. This means that national courts and their involvement are to be seen as an inevitable exposure for international arbitration if the final award is not voluntarily performed. Thus, it seems that in order to reinforce and promote international arbitration the discrete analysis should focus on regulating court involvement in the annulment, recognition and enforcement of foreign arbitral awards at both the national and international level rather than developing the arguments with the aim to wipe off the grounds of removing these provisions. National and international rules and practices will be discussed in this chapter to

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663 ibid chapter 26.
664 Having said that, some institutional rules go further and provide that the parties waive all forms of recourse against awards. For example, the ICC Rules provide that ‘[b]y 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.’
show to what extent, on what basis, and for what purposes national courts may get involved in the enforcement process of an international arbitral award. It will also be explained how the independence and integrity of international arbitration can be protected whilst international arbitration benefits from the constructive role of national courts for the enforcement of foreign arbitral awards.

As will also be shown, along with the aforementioned facts regarding regulating court involvement at the post-award stage, one of the most influential policies which will clearly promote international arbitration is to recognize the res judicata effect for an international arbitral award. The aim of res judicata (preclusive effect) on an arbitral award is basically to prevent the losing party from pursuing the same dispute again in front of a national court or another arbitral tribunal. Such statutory provisions do not exist in all jurisdictions although common law judicial decisions ordinarily treat awards similarly, affording them binding legal effects, including res judicata and collateral estoppel effects on the parties, from the moment that they are made or, depending on national law, delivered to the parties.\footnote{\textsuperscript{665} Express recognition of such preclusive effect for arbitral awards by all jurisdictions is crucial for reinforcing the independence of international arbitration vis-à-vis national courts. As discussed below, the New York Convention tackled this issue in a comprehensive manner and compelled Contracting States to recognize and give binding effect to international arbitral awards.\textsuperscript{666}}

\footnote{\textsuperscript{665} Born (n 662) 3732-3772.}
\footnote{\textsuperscript{666} ibid 3741-3745.}

Notwithstanding international provisions which were drafted with the intention of harmonising the grounds on which national courts may get involved in international arbitration, disparate interpretations of these provisions incorporated in the New York Convention may also be very problematic in some jurisdictions where courts attempt to extend their competence in non-enforcement by subjective and somewhat biased interpretation of the international provisions which form the basis for their national provisions. As discussed below, unbalanced and overly-subjective interpretation of two concepts that were introduced by the New York Convention in the context of enforcing and recognising arbitral awards, namely
public policy and arbitrability, in some jurisdictions may obstruct the enforcement of foreign arbitral awards in these jurisdictions. International practice has developed two distinct methods to overcome this obstacle. As discussed in 5.5, one argument is to allow universal enforcement of international awards regardless of the place of business or the nationality of the party-debtor in arbitration so that if a national court fails to enforce an arbitral award, it will remain enforceable in other jurisdictions. The other one is to prohibit parties from invoking their applicable national law which may halt international arbitration or make it totally impossible to enforce the award.

Bearing in mind that the objective of this research is to develop an argument about how best to harmonize the involvement of national courts in different stages of international arbitration with specific emphasis on the necessity of safeguarding the independence of international arbitration, and the fact that there is no other choice but for national courts to enforce the foreign arbitral awards in different jurisdictions, means that it is first necessary to inspect international documents drafted for this particular purpose. The shortcomings of these documents will also be discussed, and some approaches will be suggested for further development to achieve harmonization of court involvement at this stage of international arbitration.

5.2 The role of the New York Convention and national legislation in facilitating recognition and enforcement of foreign arbitral awards

With the current status of international arbitration as the main dispute resolution mechanism in international business, there is no doubt that for both market players and jurisdictions international arbitral awards are not just a set of ‘advisory’ recommendations. Rather, they are final and binding legal instruments which may impose immediate legal effects, including the creation of immediate legal rights and obligations for the parties.

As stated earlier, although empirical studies show that most foreign arbitral awards are being fulfilled voluntarily, such voluntary compliance may be rejected in a limited number of

667 Audi-NSU Auto-Union AG (Germany) v Adelin Petit Cie (Belgium) (1980) V Ybk Comm Arb 257.
668 Parties occasionally agree to dispute resolution processes whereby a neutral person (or persons) will render a purely advisory, non-binding opinion.
international arbitral awards by the parties.\(^669\) The main objectives of the New York Convention as well as most contemporary arbitration legislations are to establish a ‘pro-enforcement’ legal regime to facilitate the recognition and enforcement of the awards in all jurisdictions, particularly when one of the parties fails to comply with the mandates and requirements of the arbitral award,\(^670\) and to regulate the potential roles of national courts in enforcing international arbitral awards coercively.

The drafting history of the Convention and the clear approach demonstrated in national court decisions implanting the rules inspired by the New York Convention show that the drafters’ aim was to create a better mechanism for enforcing foreign and non-domestic arbitral awards compared to that of the 1927 Geneva Convention.\(^671\) Moreover, most modern national arbitration statutes attempted to achieve the same objective and as such were generally drafted with the express purpose of facilitating the recognition and enforcement of international awards, including both foreign awards (made in other jurisdictions) and international arbitral awards made locally.\(^672\)

The New York Convention and its provisions played a significant role in promoting arbitration as a method for resolving disputes by facilitating and encouraging the enforcement of the foreign arbitral award in a number of important ways. First, where applicable, the New York Convention eliminated the ‘double exequatur’ requirement for awards which was applicable under the Geneva Convention.\(^673\) According to this requirement, an international award needed to be confirmed in the courts of the arbitral seat (the first exequatur) before it could be recognized abroad (the second exequatur). By specifically eliminating this double exequatur requirement, the likelihood of court involvement in international arbitration was removed.\(^674\) The UNCITRAL Model Law also took the same view and never imposed any


\(^{670}\) See Born (n 662) 77-79, 3411.

\(^{671}\) Historically, that requirement had necessitated the confirmation of an award in the courts of the arbitral seat (the first ‘exequatur’) before it could be recognized abroad (the second ‘exequatur’).

\(^{672}\) See Born (n 662) 3435-3438.

\(^{673}\) ibid 3424.

\(^{674}\) ibid 3424; Yusuf Ahmed Alghanim & Sons v Toys ‘R’ Us, Inc, 126 F3d 15, 22 (2d Cir 1997); Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Gov’t of Pakistan AS [2010] UKSC 46, para 101 (UK S Ct); Murmansk Trawl Fleet v Bimman Realty Inc [1994] OJ No 3018 (Ontario Super Ct) (no confirmation in New York
Second, the Convention requires Contracting States to recognize and enforce international arbitral awards. Accordingly, Article III of the Convention imposes an obligation on Contracting States to recognize foreign awards with no more procedural requirements than those for domestic awards. Article IV of the Convention contained the provisions regarding implementation of this obligation. Again, a similar approach has been taken by contemporary national arbitration legislations including those that have adopted Articles 35 and 36 of the UNCITRAL Model Law.

Thirdly, Article V of the Convention stipulates an exhaustive set of grounds for non-recognition of an international arbitral award. Even beyond that, the exceptions of Article V are also exclusive and exhaustive. This means that if the award is made outside the Contracting State, recognition or enforcement can only be rejected on the basis of one of the grounds contained in Article V. These grounds are deliberately defined strictly and at the same time put the burden of proof on the party resisting recognition of an award. Again, it is quite clear that national arbitration legislations adapted their provisions according to the Convention’s approach and recognized only limited grounds for non-recognition (or annulment) of international arbitral awards.


See Born (n 662) 3435-3438.
676 See Born (n 662) 3411.
677 Article III’s presumption of enforceability is subject to important jurisdictional conditions, set forth in Article I, and substantive exceptions, set forth in Article V.
678 New York Convention, art IV; section 26.01[A].
679 UNCITRAL Model Law (n 87) arts 35, 36.
680 See Born (n 662) chapter 26.03[B][5].
682 See, e.g., UNCITRAL Model Law (n 87) arts 34, 36; para 25.04; para 25.05; para 25.06; para 26.03[D]; para 26.05.
award may be annulled. Accordingly, actions for annulment of an award can only be brought in the seat of arbitration or the country under whose laws the award was made. The second option will indirectly aim to keep such an authority for annulment in the arbitral seat.683 This procedural system for annulment allows an award to be annulled for any reason whatsoever, including reasons not contained in Article V of the Convention, but at the same time stipulates that outside the arbitral seat an award can only be annulled or be denied recognition if one of Article V’s enumerated exceptions is satisfied.684

Finally, one of the most important contributions of the New York Convention is that a Contracting State can voluntarily recognize an award in accordance with its local law even if one of Article V’s exceptions applies and the Convention does not require recognition.685 Accordingly, the Convention recognizes the authority of national jurisdictions to expand the grounds upon which a foreign arbitral award can be recognized and/or enforced while it prevents them from not recognizing foreign arbitral awards which have met the conditions mentioned in the Convention. Such an approach is also taken by some national arbitration legislations including, for example, those which have adopted the approach of Article 36 of the UNCITRAL Model Law.686

All the aforementioned features show that the drafters of the New York Convention objectively attempted to create a ‘general pro-enforcement’ system in order to reinforce the position of international commercial arbitration as an alternative dispute resolution mechanism.687 Accordingly, it is safe to say that the Convention improves materially on the conditions for the recognition and enforcement of foreign awards which were not available under national laws or other international instruments before its adoption.

The combination of all these factors together not only provides a pro-enforcement

683 New York Convention, art V(I)(e).
684 See Born (n 662) chapter 22.04 and chapter 26.03[B], 3411.
685 Article VII of the Convention provides that the Convention shall not ‘deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.’ New York Convention, Art VII.
686 UNCITRAL Model Law (n 87) art 36; Judgment of 28 January 1999, XXIVa YB Comm Arb 714, 719 (Luxembourg Cour d’appel) (1999); Born (n 662) 3445-3446.
687 Yusuf Ahmed (n 674).
system but also attempts to minimize the likelihood of court intervention in the arbitration between the parties. Clearly, in this system there is no place for the judicial review of the arbitral awards, neither in the court of place of arbitration nor the court of place of enforcement. Nevertheless, there are still some problematic issues, particularly issues of arbitrability and public policy incorporated in Article V(2), which the New York Convention does not deal with appropriately. According to the Convention, they have been left for national jurisdictions. Recognition of such discretion for national jurisdictions resulted in unintended consequences which went against the very objectives of the New York Convention. As such, although the practice of international arbitration has attempted to overcome this shortcoming, it should be said that the New York Convention has not entirely achieved its objectives.

Nevertheless, the success of the Convention in providing a pro-enforcement system for international arbitration inspired the drafting of other international documents. The UNCITRAL Model Law and other modern international arbitration legislation follow the Convention’s pro-enforcement regime. Subsequently, the idea of having pro-arbitration legislation in national jurisdictions started to flourish, and international arbitration as an independent dispute settlement mechanism became more popular among international commercial practitioners. Taken together, these statutes and the Convention established a robust and effective ‘pro-enforcement’ legal framework for recognizing and enforcing international arbitral awards which, as discussed, not only regulates but also minimizes court involvement in the post-award stage of international arbitration.

With this analysis and information in mind, it is easier to discuss the potential occasions where the jurisdiction of national courts and the arbitral tribunal may overlap or come into conflict with each other. The following sections will discuss these conflicting points and suggest legal solutions to reinforce the independence of international arbitration and minimize the disruptive role of national courts.

688 See Born (n 662) 3435-3438.
5.3 Impediments to recognition and enforcement of foreign arbitral awards

As stated above, most international arbitral awards are voluntarily complied with. However, there are some occasions where the award-debtor refuses to comply with the arbitral tribunal’s decision. In such situations, if the award-creditor does not have any way to enforce the arbitral award then the whole process of arbitration is for nothing. Various national and international legal developments therefore emerged in order to deal with this problem, the most important of which is the general consensus among nation states and international business players that an arbitral award is a binding legal instrument that has legal effect from the moment that it is made. In fact, the New York Convention and national law created some features for international arbitral awards, such as preclusive effects, in order to minimize the likelihood of non-compliance by the award-debtor in an arbitration process. These preclusive effects include claim preclusion (res judicata) and issue preclusion effects (collateral estoppel or issue estoppel) which prevent parties from both re-litigating and re-arbitrating claims that were or, in some cases, could have been presented and resolved by the arbitral tribunal.

5.4 Potential situations of court involvement in recognition and enforcement of arbitral awards

Correction, interpretation and supplementation of awards can potentially be instances of court involvement in international arbitration. Basically, the issue in question is to determine who has the competence to correct, interpret or supplement the arbitral award if one of the parties requires this – the arbitral tribunal itself or one of the national courts? This is perhaps the simplest instance of potential court involvement at the post-award stage of an arbitration case. Technically, there are two authorities that can deal with issues of correction, interpretation or amendment, namely national courts or the arbitral tribunal itself. Admitting the authority of national courts for correction, interpretation and supplementation of arbitral awards would in fact exacerbate the problem as it must then be determined which court has

\[689\] See Born (n 662) 3750-3753.
\[690\] See ibid chapter 27.01, 3732.
\[691\] ibid chapter 24.03; 24.04; 24.05; UNCITRAL Model Law (n 87) art 33; UK Arbitration Act 1996 (n 115) section 57.
such authority, the one of the place of arbitration or the one of the seat or the court of place of
enforcement. As a result and in order to avoid adding more complexity as well as to insulate
arbitral awards from court interference in these cases, most jurisdictions require applications
to correct, interpret or supplement an award to be made by the arbitrators themselves.\(^{692}\)
Nevertheless, a few national arbitration statutes grant courts the authority to do so. Still,
statutory provisions permitting corrections, interpretations or supplementation of awards apply
only to awards made within national territories.\(^{693}\)

Another occasion which may end with court intervention is the request of one of the
parties for annulment (alternatively termed ‘set aside’ or ‘vacate’) of the award.\(^{694}\) Technically,
the arbitral tribunal that has issued the final award cannot be considered competent to deal
with annulment as well. Thus, there must be another arbitral tribunal for this or the general
competence of national courts should be acknowledged for the purpose of settling annulment
cases. The first option seems to be unworkable, particularly because international arbitration is
a consensual dispute settlement mechanism which has only one step. In other words, there is
no appeal for arbitration cases in general. Moreover, it is quite obvious that even if one argues
that the annulment process must also be in the hands of the arbitration itself, it is unlikely that
the disputing parties would decide to establish a new tribunal to deal with the annulment claim.
Accordingly, it seems that the only viable solution is to support the second option, i.e. that
such an action can only be requested from national courts.

International conventions and national statutes have created a strategy to regulate and
minimize the likelihood of court involvement in this situation. For example, Articles 1(2) and
34 of the UNCITRAL Model Law provide that an international award can be annulled by a
local court ‘only if the place of arbitration is in the territory of the State’. Article 34 then
prescribes an exclusive and exhaustive list of grounds for the annulment of such awards. As
such, the Model Law not only circumscribes national courts which may claim competence in
setting aside the award but also provides very limited grounds for annulment. A similar

\(^{692}\) Those countries that adopted the UNCITRAL Model Law are following its approach incorporated in art 33.
\(^{693}\) See, e.g., UNCITRAL Model Law (n 87) arts 1(2), 31, 33; UK Arbitration Act 1996 (n 115) sections 2, 3, 52-55.
\(^{694}\) See New York Convention, art V(1)(e) (award ‘set aside’); UNCITRAL Model Law (n 87) art 34(1) (‘setting
aside’); Swiss Law on Private International Law, art 190(2) (‘setting aside’) chapter 25.
approach is taken by national arbitration legislation.\textsuperscript{695} However, it should be noted that neither the New York Convention nor other international arbitrations bar national jurisdictions from extending the grounds for annulment.\textsuperscript{696}

In the US, for instance, despite the fact that the FAA addresses internal arbitration, some courts have construed the language of sections 9 and 10 of the FAA to recognize additional common law grounds other than those mentioned in Article V of the New York Convention, such as errors of law or facts, as the basis for accepting the annulment of foreign arbitral awards.\textsuperscript{697} English law also recognizes additional grounds other than those in the New York Convention for judicial review. Section 69 of the UK Arbitration Act 1996 provides that in a limited category of cases, an award may be subject to judicial review by English law.\textsuperscript{698} Accordingly, ‘unless otherwise agreed by the parties’ Article 69 of the UK Arbitration Act allows the English courts to review questions of English (not non-English) law, provided that those issues of English law are of broad public significance or where the award was obviously wrong.\textsuperscript{699} Nonetheless, Article 69 does not recognise the ability of English courts to review the arbitral award under the factual questions of the case.\textsuperscript{700} Despite the existence of such a provision in the Arbitration Act, recent English cases demonstrate that the prevailing approach of English courts under Article 69 is to recognize only a limited approach.\textsuperscript{701}

The last situation that is likely to cause court involvement in international arbitration is the matter of recognition and enforcement of foreign arbitral awards. As stated several times above, not all international awards are implemented voluntarily so there must be a proper system for enforcement of the arbitral award when the party-debtor of the arbitration refuses to execute the requirements of the arbitral award.

\textsuperscript{695} Swiss Law on Private International Law, art 191(1) (action for annulment may only be brought before Federal Tribunal); Austrian ZPO, section 615 (Superior Court of First Instance); Irish Arbitration Act 2010, section 9 (High Court).
\textsuperscript{696} Born (n 662) chapter 24, 2637.
\textsuperscript{697} ibid chapter 25.
\textsuperscript{698} See, e.g., \textit{Egmatra AG v Marco Trading Corp} [1999] 1 Lloyd’s Rep 862 (QB).
\textsuperscript{699} UK Arbitration Act 1996 (n 115) section 69(3)(c).
\textsuperscript{700} \textit{Reliance Indus Ltd v Enron Oil & Gas India Ltd} [2000] 1 A11 ER (Comm) 59 (QB); \textit{Petroships Pte Ltd of Singapore v Petec Trading & Inv Corp of Vietnam, The Petro Ranger} [2001] 2 Lloyd’s Rep 348 (QB).
\textsuperscript{701} \textit{Egmatra} (n 698) 865.
An international arbitral award can be recognized and enforced in two ways; either in the court of the arbitral seat\textsuperscript{702} or in the courts of foreign countries. The former case is actually subject to the provisions of national procedural law for the recognition and enforcement of the arbitral award which is more or less similar to the enforcement of other judgments in that particular jurisdiction\textsuperscript{703} even though there are a number of states where the confirmation or enforcement of international arbitral awards are subject to a statutory regime that differs from that applicable to domestic awards.\textsuperscript{704} US law has just such a distinction but English law has taken quite a similar approach in enforcing the foreign and domestic arbitral award.

With these complex systems in national jurisdictions for the enforcement of foreign arbitral awards, it seems that it is quite hard to talk about harmonization of recognition and enforcement of arbitral award in the court of the place of arbitration. Nonetheless, the UNCITRAL Model Law provisions in this regard can potentially be a good guide for statutory provisions for the recognition and enforcement of awards made within a national territory. These provisions can also be utilized, as will be shown, for the recognition and enforcement of awards made elsewhere.\textsuperscript{705}

Recognition of awards for the locally-seated arbitrations normally occurs through summary proceedings whereby arbitral awards are presumptively valid.\textsuperscript{706} As such, there will be very limited exceptions upon which one court may not recognize an arbitral award. In most modern jurisdictions, matters such as an excess of jurisdiction, gross departures from requirements of procedural fairness, the arbitrators’ failure to comply with the arbitration agreement and violations of public policy, are among the only instances for non-recognition of

\textsuperscript{703} Restatement (Third) US Law of International Commercial Arbitration section 4-1.
\textsuperscript{704} See, e.g., US FAA, 9 USC sections 1-16 (domestic), 201-208 (international); French Code of Civil Procedure (n 120) arts 1489ff (domestic), art 1522 (international).
\textsuperscript{705} See Born (n 662) chapter 22.04[B][1][a], 3004; 25.03[A][1], 3174; 26.03[D], 3435-3438; UNCITRAL Model Law (n 87) arts 35-36.
\textsuperscript{706} See, e.g., Yusuf Ahmed (n 674).
an award in the arbitral seat. Even more pragmatically, on the basis of such presumptive validity there is no requirement or mechanism for judicially ‘confirming’ an award made in the jurisdiction. Thus, such awards may be immediately enforced.

An award may also be ‘recognized’ in jurisdictions outside the arbitral seat. This can be done through the provisions of the New York Convention backed up with national arbitration legislation. It should be noted that the basic objective behind recognition of a foreign award, which is sometimes also referred to as ‘domestication’ or ‘homologation’ of an award, is generally to give the award the status of a national court judgment in the jurisdiction where the award is recognized. It may also be relevant to the preclusive effects of the award in that jurisdiction, which means that the preclusive effect of the award may be recognized once it is issued and as such further recognition or non-recognition of the award does not have any impact on its preclusive effect. Therefore, non-recognition of an award, either in the arbitral seat or elsewhere, does not mean annulment or setting aside of the award but rather it simply means that the recognizing court refused affirmatively to confirm the award’s validity.

Conditions for recognition and enforcement of those foreign awards made outside the territory of the recognizing state are typically incorporated in national arbitration legislation. In developed jurisdictions, these standards are either set out with reference to or they repeat verbatim the pro-arbitration regime of the New York Convention. In some instances, national arbitration legislations offer even more liberal grounds for recognition and enforcement of foreign awards than is required by the New York Convention. However, as

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707 See Born (n 662) chapter 25.03; 25.04. See also UNCITRAL Model Law (n 87) arts 34-36; US FAA 9 USC sections 9, 10; UK Arbitration Act, 1996, sections 67 (substantive jurisdiction), 68 (serious irregularity), 69 (error of law); Swiss Law on Private International Law, arts 191 and 194; Japanese Arbitration Law, art 44.
709 See New York Convention, art V(1); UNCITRAL Model Law (n 87) art 35, art 36.
710 Nobilis Fragrances GmbH v Freeze 24-7 Int’l, LLC 2010 WL 4237850, 1 (SDNY).
711 See Born (n 662) chapters 22.01[B][6], 2907 and 27.01[B], 3739-3741. In many instances, however, an award will have preclusive effects from the moment that it is made, without the need for recognition. See Born (n 662) chapter 25.03[A], 3174 and 27.01[B][5], 3764-3766.
713 See, e.g., UNCITRAL Model Law (n 87) arts 35, 36.
714 See, e.g., French Code of Civil Procedure (n 122) arts 1514, 1520.
discussed below, the Convention approach which aims to provide a summary and expedited method for recognition proceedings for foreign awards has been followed by most of the Contracting States. This, as discussed above, is mainly due to the fact that the Convention attempted to remove all of the grounds for the involvement of national courts in the substantial part of the award prior to their order for enforcement and other shortcomings of the Geneva Convention.

Although recognition and enforcement are used together in the New York Convention, conceptually they are two distinct concepts. To put it differently, the New York Convention refers consistently to the ‘recognition and enforcement’ of arbitral awards in its title and otherwise, even where its provisions in fact address the subject of ‘recognition’ and not ‘enforcement’. The subject of ‘enforcement’ is properly dealt with by national law prescribing how a judgment is enforced or what preclusive effect is to be accorded to a properly-recognized (or recognizable) award.

Nevertheless, the truth is that in spite of occasional imprecisions in terminology, enforcement is intended to address the subsequent reliance of local national courts on this judgment for execution, attachment, garnishment and similar remedies under local law. Recognition of an award, however, refers to confirmation or judicial acceptance of an arbitral award and the entry of a local court judgment accepting or confirming the operative terms of the foreign award. As such, enforcement of an award in particular involves the exercise of coercive state sanctions like execution upon assets, attachment or garnishment.

As mentioned above, courts may get involved to deal with one of the foregoing occasions. It was discussed that some of them are inevitable if the party-debtor of the award does not voluntarily implement it or comply with the consequences of the final award. Otherwise, there would be no need for national courts to take a role at this stage of international arbitration. Nonetheless, it should be noted again that court involvement at this stage, that is, when the debtor party of the arbitration does not comply with the award, will not only be regulated but also exhaustively restricted. Thus, international instruments like the

715 See Born (n 662) chapter 25.03[A][1], 3174.
New York Convention, UNCITRAL Model Law etc, are aimed at meeting these two objectives concurrently and as discussed above they have set out very clear criteria in terms of the material and procedural competence of national courts when they are involved. This is in fact a great development in insulating international arbitration from improper involvement of national courts which undermines the independence of international arbitration as an alternative dispute resolution system. Nevertheless, different interpretations of the provisions incorporated in international instruments, particularly those of public policy and arbitrability, may sometimes increase the risk of improper involvement of national courts and as such undermine the functionality of international arbitration. It seems that the only rational solution to avoid the risk of such contradictory understanding and interpretation is to attempt to come to a common international understanding of the concepts and terminology of the New York Convention. Therefore, the following section will discuss grounds for non-recognition and enforcement of an arbitral award and explain what should be the most appropriate approach to be taken.

**5.5 Grounds for non-recognition or enforcement of an arbitral award**

Subject to narrow, enumerated exceptions, the New York Convention, the Inter-American Convention and most other international arbitration conventions have managed to provide an award with a presumptive recognition system. Similarly, the UNCITRAL Model Law and most arbitration legislation presumptively require the recognition of international arbitral awards but again subject only to very narrowly-defined exceptions.  

Particularly in terms of the grounds for which recognition or enforcement of awards may be refused, the New York Convention, as the leading international text on the subject, succeeded in creating a unique system which reinforces the stability of international arbitration and its functionality as an independent dispute settlement mechanism. For example, Article V(1)(b) introduces an autonomous concept of due process and Article V(1)(d) confirms the primacy of party autonomy as far as issues of procedure are concerned. Nevertheless, the Convention has failed to show the same level of harmony when it comes to

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716 See in this regard Articles 34(2) and 36 of the UNCITRAL Model Law (n 87).
717 See recently, Gaillard & Di Pietro (n 110).
the notions of arbitrability and public policy; those issues addressed in Article V(2) of the Convention.\textsuperscript{718} Perhaps this is mainly because these two notions are not purely legal concepts but also reflect some sort of cultural, nationalistic and sometimes even political considerations which are far harder for the countries to come to an agreement about. However, this does not mean that there has been no way to construct some kind of international approach to harmonize the understanding of different jurisdictions from these challenging concepts.

As will be discussed in the following sections, although there is substantial literature on Article V(1),\textsuperscript{719} it can be argued that the guiding discourse of the Convention itself, in addition to the practice of national courts, have somehow converged in applying a harmonized system for implementation of the provisions incorporated in Article V(1). This means that Article V(1) of the Convention does not address the most significant and controversial issues which if treated otherwise may provide more independence for international arbitration or provide a better system for the enforcement of foreign arbitral awards. On the other hand, because the interpretation of those concepts incorporated in Article V(2) is left to the discretion of national courts, they may attempt to extend their power of involvement by means of applying unusual interpretations based on the two essential concepts, i.e. public policy and arbitrability.

As a result, the controversial and unsettled aspects of the New York Convention which may conflict with each other at the time of recognition and enforcement of foreign arbitral awards are in fact found in Article V(II). Both arbitrability and public policy will be discussed and analysed in detail to show why formulating a single universal approach in defining these two concepts at first glance appears very unlikely.

5.5.1 International public policy

The intrinsic essence of the topic should be understood prior to developing any

\textsuperscript{718} Bernard Hanotiau & Oliver Caprasse, ‘Public Policy in International Commercial Arbitration’ in Gaillard & Di Pietro ibid 805ff.
argument regarding regulating court involvement in international arbitration on the basis of public policy. Public policy by its very definition reflects a series of legal, moral, economic, social and political standards of a state or an extra-national community. As such, it is dynamic and may vary according to the development of the community in which it operates. However, despite this flexibility one can recognize an essential common function for issues of public policy among all jurisdictions. This common function can be condensed in a general perception and recognition of its role at national level where public policy primarily exists to create a balance at the time of a clash between utilitarian and libertarian interests. In other words, it reinforces utilitarian interests in order to nullify private agreements contrary to the public good. Accordingly, it is well recognized in all jurisdictions that a contract which is contrary to public policy is null and void.

Further, public policy at a national level may also have other practical functions. These functions can be divided into two categories, namely, negative and positive functions. In fact, negative public policy by itself may appear in different ways. First, it purifies legal systems from any legal provision that leads to an undesirable, unpredictable or inconsistent result.

At the same time, it drives out the effects of a contravening arbitration award or judicial decision.

On the other hand, the positive function of public policy imposes essential standards on legal relationships. Arbitrators give effect to positive public policy by applying mandatory rules. This means that the operation of positive public policy does not require an offensive contract or chosen law. Rather, it is directly applicable, at least in the world of international arbitration. Accordingly, whereas negative public policy leaves a gap in the applicable law,

720 See Lew, Mistelis & Kroll (n 338) 422, para 17-32.
721 The effects of negative public policy may follow the application of, for example, a statute providing for the invalidity of any contract in breach of public policy or containing provisions governing specific grounds such as incapacity or illegality.
positive public policy provides the solution to the case.\textsuperscript{724}

Questions of public policy at the national level can be seen from other perspectives as well. In fact, irrespective of different doctrinal contributions, the definition and content of public policy remains remarkably similar in both civil and common law jurisdictions. In civil law, a reference to public policy is found almost inevitably in statutory laws, either in national codes\textsuperscript{725} or some other law regulating private international relations.\textsuperscript{726} It should also be added that although the statutes do not define the concept in any detail, courts have construed public policy provisions widely.\textsuperscript{727}

In common law, there is no such thing as an \textit{ordre public} in the sense found in civil law. The content of public policy is far more restrictive, confined to clearly defined topics\textsuperscript{728} found in decided cases.\textsuperscript{729} For a common law practitioner, public policy is a set of written principles\textsuperscript{730} revealed by precedent.\textsuperscript{731}

As in civil law, the notion is broadly defined by the court whereby public policy is regarded as ‘that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good’.\textsuperscript{732} In the US, the courts often

\textsuperscript{724} See J Racine, \textit{L’Arbitrage Commercial International et L’Ordre Public} (LGDJ 1999) 423, para 761 and 425, para 767.
\textsuperscript{725} See e.g., China Civil Code 1986, art 150; Jordan Civil Code 1976, art 29; Germany, Introductory Law to the Civil Code, art 6.
\textsuperscript{726} See e.g., Austria Law on Private International Law of June 1987, art 6; Switzerland Law on Private International Law, art 17; Japan Law of June 1897 (amended 1989), art 33.
\textsuperscript{728} See Julian D M Lew, \textit{Applicable Law in International Commercial Arbitration} (Oceana 1978).
\textsuperscript{730} Written principles here refer to the established principles deduced from precedent of the common law courts in contentious cases.
\textsuperscript{731} As held by Lord Tackleton, the courts should not expand but only expound on questions of public policy. Where a new set of circumstances exists courts will apply existing principles of public policy. See \textit{Fender v St John-Mildway} [1938] 1 AC 23, [1937] 3 All ER 402, 414.
\textsuperscript{732} \textit{Egerton v Brownlow} (1853) 4 HLC 1.
refer to ‘the forum state’s most basic notions of morality and justice’. 733

The image of public policy in the field of international arbitration is not as clear as it is at national level. In other words, despite having a multi-functional role at national level, one can barely draw a conclusion from the established case law regarding the precise role of public policy in international arbitration. However, as discussed below, there appear some kind of clarification from putting practice and precedent of international arbitration along with different applicable national laws on the enforcement of foreign arbitral award.

As previously discussed, national courts only apply domestic public policy rules where the dispute does not contain a foreign element. 734 Domestic public policy may impose, for instance, limits on the arbitrability of local disputes which would not apply in international arbitration or award enforcement under international or transnational public policy. 735 The inclusion of the denomination of the country in the provisions similar to Article V(2)(b) of the New York Convention and Article 34 and 36 of the Model Law is thus not a reference to domestic public policy. 736 This is mainly because the level of public policy is irrelevant to international arbitration.

On the other hand, the courts should restrict the national public policy applied to international arbitration to the domestic-international level. In fact, such a view is now widely supported, and the courts in modern jurisdictions, particularly in the UK and the US, are reinforcing this approach. This is mainly due to the fact that if the courts applied their own domestic public policy, most international arbitral awards could simply be refused at the time

733 See Judge Joseph Smith in American case, Parsons and Whittemore Overseas Co Inc v Societe General de l’Industrie du Papier RAKTA and Bank of America 508 F2d 969 (2d Cir 1974). See also the US decision in Loukas v Standard Oil Co 224 NY 99, 111, 120, NE 198, 202 (1918) where the court found that public policy should only apply if ‘some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal’ is violated.
735 See Craig, Park and Paulsson (n 553) 30.
736 As stated in Luxembourg, Supreme Court, 24 November 1993, XXI YBCA 617 (1996), ‘the public policy of the State where the arbitral award is invoked is thus not the internal public policy of that country but its international public policy’.
of recognition and enforcement on the grounds of conflict with national public policy.\(^{\text{737}}\)

In 1882, Brocher was the first to make a distinction between a domestic (or limited) public policy and an international (external) public policy.\(^{\text{738}}\) According to him, whereas domestic public policy governs domestic affairs, international public policy provides for the application of certain rules of the forum to international cases. The distinction, in fact, is found ‘in the very nature of private international law, a branch of the law which is based on a fundamental distinction between ‘domestic’ situations and ‘international’ situations\(^{\text{739}}\) and can be found in the statutory law of some countries.\(^{\text{740}}\) In France, for instance, Article 1484 of the New Code of Civil Procedure\(^{\text{741}}\) which deals with domestic arbitration refers to public policy whilst Article 1502 which is applicable to international arbitration awards includes the words ‘international public policy’.

In common law countries where statute is silent, courts have expressly or impliedly distinguished the two concepts. For instance, in England where unreasoned foreign awards are not contrary to public policy under paragraph 2(b) of Article V of the New York Convention, lack of reasons in domestic awards have been held to be in breach of public policy.\(^{\text{742}}\) Similarly, in the US a sale of stocks was deemed ‘a truly international agreement’ and for that reason arbitrable in the US.\(^{\text{743}}\)

As such, the scope of public policy of the forum should be determined by reference to principles deemed binding on a court dealing with international legal relationships. It should also be added that the practice and precedent of international arbitration show that such principles need not necessarily emerge from the forum but, rather, when a court or tribunal


\(^{\text{739}}\) See Philip Lalive, ‘Transnational (or Truly International) Public Policy’ (ICC Congress Series No 3) 260.


\(^{\text{741}}\) See (n 267).


plans to construct and apply the notion of public policy, it should consider the rules of regional and international public policy deriving from an arrangement between a developed legal jurisdiction.

While the sources of domestic public policy are relatively recognized for each jurisdiction, the international public policy of a country may be tied to the fundamental rules and interests of the forum ‘concerning international cases’, and retain a relative or self servicing character.\(^{744}\) This simply means that if national courts insist on the application of national public policy on international cases then recognition and enforcement of international arbitral awards will become very unlikely.\(^{745}\) As a result, one of the ideas which may be helpful in increasing the possibility of recognizing and enforcing a foreign arbitral award globally is to take another meaning of public policy than the one of national public policy. As such, it can be suggested that at the time of enforcement and recognition of foreign arbitral awards, it is more appropriate to refer to it as ‘domestic-international’\(^{746}\) public policy.

The question of knowing whether domestic or domestic-international public policy applies turns on the classification of the arbitration as international.\(^{747}\) It is generally believed that an arbitration is international where it contains a foreign element, such as the economic interests of more than one country,\(^{748}\) a truly international arbitration institution, or where the parties originate from different jurisdictions.\(^{749}\) The UNCITRAL Model Law has taken a dynamic approach whereby place of business of the parties, place of performance and party autonomy may have a direct impact on its application. The New York Convention does not address the definition of international arbitration but only international award. Article 1 of the Convention stipulates that the Convention is applicable for the recognition and enforcement of two types of arbitral awards: first, those that are ‘made in the territory of a State other than the State where the recognition and enforcement of such awards are sought’; and second, to the


\(^{745}\) In some jurisdictions like China, national courts are using the concept of public policy as an instrument to avoid the enforcement of foreign arbitral awards. See Blackaby and others (n 22) chapter 11.

\(^{746}\) Conde de Silva (n 737).

\(^{747}\) Lew, Mistelis & Kroll (n 338) 58.


\(^{749}\) This was the solution in Switzerland, Private International Law Act, art 176(1).
‘arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought’. In 1978, Lew identified two situations where this level of public policy\textsuperscript{750} comes into play in international arbitration:

First: where, despite the existence of an agreement to submit to arbitration, one party institutes court proceedings. Whether those proceedings should be stayed pending arbitration will depend on the validity of the arbitration agreement. For this purpose, a court will consider whether national public policy legislation denies one of the parties the right to submit to arbitration or has reserved for the exclusive jurisdiction of its national courts’ disputes of that particular nature.

Second, where a national court is requested to enforce a foreign arbitration award. Here for the purpose of recognition and enforcement, the court must again consider the right of the parties to submit to arbitration and the arbitrability of the subject-matter of the dispute. Furthermore, a court may not give effect to a foreign award per se violate the fundamental public policies of the forum.

In a nutshell, although the public policy exception set out in Article V(2)(b) is an acknowledgment ‘of the right of the State and its courts to exercise ultimate control over the arbitral process’,\textsuperscript{751} it would be very difficult to define it precisely. However, for the purpose of our discussion, it should be noted that regardless of the precise meaning of public policy, national courts must interpret it very narrowly. This is because considering the ambiguity of the notion of public policy, its broad interpretation will give absolute discretion to national courts to not recognise or enforce foreign arbitral awards for unsubstantial reasons. As such, only violation of the enforcement state’s public policy with respect to international relations (international public policy) should be accepted as a valid defence for the purpose of refusal of enforcement. In other words, it can only be accepted ‘where the enforcement would violate the

\textsuperscript{750} Domestic-International public policy corresponds to external public policy identified in Lew (n 728) 533.

forum state’s most basic notions of morality and justice’. Following this analysis, national courts cannot, by invoking national public policy as their wish, impede enforcement of foreign arbitral awards in their own territories. Such an approach, along with the international notion of arbitrability discussed below, will have a substantial role not only in minimizing the potential grounds for court intervention at the time of recognition and enforcement of foreign arbitral awards but also help the New York Convention achieve its objectives in providing a single method to enforce foreign arbitral awards.

5.5.2 International arbitrability

The notion of arbitrability has also attracted and may continue to attract the interest of scholarly writing as the debate on the matter is far from settled. In its very simple meaning, it addresses what types of issues can and cannot be settled by an arbitral tribunal and whether specific classes of disputes are exempted from arbitration proceedings. Like public policy, it is very controversial as it holds some elements of legal and political considerations of national jurisdictions as well as of international arbitration. Although some may argue that the question of what types of disputes are arbitrable has now lost its natural importance, for the purpose of this thesis it is of great importance as the issue is ultimately still under the control of national laws and national courts. Therefore, like the concept of public policy, disparate nationalistic approaches in defining and construing this concept have had a direct impact on the ultimate functionality of international arbitration as an independent dispute settlement mechanism. In other words, the chosen approach to define this concept will have a direct impact to either increase or decrease court involvement in international arbitration.

As discussed earlier, international arbitration is a consensual dispute settlement mechanism, hence, at least theoretically, parties to an arbitration would be able to submit any dispute to arbitration. Nonetheless, national laws often impose limitations or restrictions on the issues that can be referred to and settled by arbitration. This is called ‘objective

752 See, e.g., Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA) 508 F2d 969, 974 (2nd Cir 1974).

The underlying reason for categorizing some particular types of disputes arbitrable or non-arbitrable is based on the jurisdictional policy of each state. For instance, it is generally accepted that arbitrators are not competent to deal with criminal law cases. In 1963, in a very famous award which was only published in 1994, Judge Gunnar Lagergren decided that a dispute where bribery was involved was outside the jurisdiction of international arbitration tribunals. He concluded that:

I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.

Such an approach to restrict party autonomy must be seen as an exception and not the norm. However, there is no doubt that arbitral tribunals are not competent to deal with a series of disputes which are categorically (objectively) outside the ambit of arbitration. In this sense, arbitrability is to be seen as ‘a specific condition pertaining to the jurisdictional aspect of arbitration agreements; in other words, to a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (a contractual requirement)’. Apart from particular examples of objective arbitrability, most of the other restrictions regarding arbitrability of particular types of transactions, conflicts or subjects are influenced by the old perception that find international arbitration in favour of parties from industrialised

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754 For the distinction between subjective and objective arbitrability see Gaillard & Savage (n 381). See also Lew, Mistelis & Kroll (n 338) paras 9-35ff.
755 Award published in 3 Arb Int'l (1994) 282 with note by J Gillis Wetter at 277-281. Subsequently, the award was also published in XXI YBCA 47 (1996).
756 See, e.g., Arts II(1) and V(2)(a) New York Convention and Art 34 UNCITRAL Model Law (n 87).
countries. This type of arbitrability, normally called subjective inarbitrability, is losing its importance these days particularly due to the rapid growth in investment treaty arbitration and due to considerable reference to international arbitration as the main dispute settlement system in the global economy.

This means that although arbitration is created by party autonomy, it is far from realistic to argue at this time that arbitration tribunals are not part of any national judicial system and as such do not have any duty to hold any allegiance to a particular state. This type of argument means that when parties in a dispute decide to arbitrate and the tribunal is established correctly, it should hear the case regardless of the fact that its award may later be set aside for lack of arbitrability. This is a very avant-garde view with very few proponents among international scholars and practitioners. The reality is that although the arbitral tribunal is the creation of the parties in order to resolve their dispute, it also owes a duty to the public. As a result, when the legislator has removed certain disputes from the parties, the arbitral tribunal should consider these types of factual barriers and deny its jurisdiction to arbitrate the dispute. In other words, ‘the success of arbitration proceeding rests on the fact that it is not being abused to circumvent the policy of states in areas which are considered to be so crucial that they are reserved for adjudication by state courts’. Therefore, the more accurate view requires that arbitral tribunals deny jurisdictions by their own initiative if the dispute is inarbitrable on the basis of the facts submitted by the parties.

Therefore, there is no controversy over the concept of arbitrability in general. What is in question is the different understanding and policies of national states in categorizing some types of disputes as inarbitrable. If a state takes a wide approach then there will always be a way for parties in international arbitration to utilize this concept as a defence facility in order to avoid international arbitration and its consequences. A clear example of a situation like this is Article 139 of the Iranian Constitution which makes the referral to arbitration of public contracts with foreign parties dependent, in every case, on the approval of the Council of

758 Sornarajah (n 25) 110; see also J Paulsson, ‘Third World Participation in International Investment Arbitration’ (1987) 3(1) ICSID Rev-FILJ 19 who considers that such a view was justified in the early 1950s.
759 Lew, Mistelis & Kröll (n 338) para 9-97.
Ministers and Parliament. Despite having prior knowledge of the existence of this provision, an Iranian company signed a commercial contract with its international counterparty and chose international arbitration as a dispute settlement mechanism. In Société Gatoil v National Iranian Oil Company the court did not allow the National Iranian Oil Company to rely on the Iranian Constitution to invalidate the arbitration agreement it had entered into. This analysis means that the practice of international arbitration does not apply national restrictions over the arbitrability in any case stated by national law. As a general rule, practice and precedent of international arbitration has banned parties to the arbitration from invoking national applicable law in order to avoid international obligations arising from their agreement to arbitrate. As such, by refusing to accept such a defence, international tribunals strengthen the functionality and stability of international arbitration as the main dispute settlement mechanism in today’s global economy.

Some national states still take a very restricted definition of this concept and prevent the parties from arbitrating certain disputes arising from particular types of contracts. On the other hand, it should also be borne in mind that even with the current development of international arbitration it is not possible to argue that arbitral tribunals should deal with any and all disputes between the parties. The arbitrability of a dispute has a direct relationship with the national public policy of states. In some countries, this direct relationship is the basis for the definition of the notion of arbitrability. Accordingly, in this chaos of different legal opinion it seems that the best approach to defining arbitrability is the one that focuses on finding out which law is applicable in defining this concept. A number of disputes, which may not be arbitrable under the law of one country, can be arbitrable in other jurisdictions.

It may be argued that this matter should be under the control of the applicable national law of each party. As stated in the Iranian example above, this analysis could easily destabilize the functionality of international arbitration and undermine its effectiveness as an

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761 In China, administrative disputes, disputes over personal rights, labour disputes and disputes concerning agricultural projects are excluded from arbitration (Chinese Arbitration Law 1995, arts 2, 3 and 77).
762 In Singapore, arbitrability is also defined by reference to public policy, see Singapore's International Arbitration Act, art 11.
independent dispute settlement mechanism. This is mainly because it opens a legitimate way for parties to avoid their international obligations. Another view suggests that it is important to prioritize international standards as the benchmark for determining which disputes are (not) arbitrable. The internationalization of this concept means that international arbitral tribunals should be competent to deal with any disputes which have economic value or directly affect the economic interests of one of the parties. If this approach is also taken by national legislations then the risk of irrelevant intervention by national law in international arbitration could be considerably reduced; national and international perspectives might converge; global business transactions might obtain the required economic and legal stability; and international arbitration would be boosted.

5.6 Conclusion

Despite the fact that most international arbitral awards are voluntarily implemented by the parties to them, it is naive to believe that all international awards are treated in this way. This means that, sadly, there are circumstances in which one or both parties do not accept the final award or otherwise will not comply with its consequences. This can open the way for interference of national courts in the dispute settlement process, particularly in the form of a challenge or enforcement of the award. In other words, court intervention at this stage can be seen as a must and therefore inevitable.

National and international documents attempt to regulate this involvement by, firstly, defining the situations whereby national courts may intervene in the enforcement process. Accordingly, if the party-debtor in arbitration complies with the award voluntarily then there is no need for any court to get involved in the enforcement process at all.

Secondly, by recognizing arbitral tribunal competence for corrections, interpretations and supplementation of awards, national and international documents have tried to remove a potential area where national courts may get involved in the process of international arbitration. This is a general rule but not every state complies with it. As a result, there are certain jurisdictions that still recognize the authority of their national courts for correction, interpretation and supplementation of the foreign arbitral award. As stated above, it seems that to achieve more stability in international arbitration all national laws should recognise the
competence of an arbitral tribunal to deal with all legal issues at post-award stage as well.

Thirdly, the New York Convention eliminated the ‘double exequatur’ requirement for awards which was applicable under the Geneva Convention. This means that arbitral awards are no longer required to be checked in the courts of the seat of arbitration. In other words, arbitral awards can be enforced directly without any further approval from the courts in the seat of the arbitral tribunal.

Another approach taken to regulate and minimize court involvement at this stage was to precisely define the circumstances whereby national courts may refuse to recognize or enforce foreign arbitral award. Accordingly, the New York Convention stipulates an exhaustive set of grounds for non-recognition of an international arbitral award. Even beyond that, the exceptions of Article V are also exclusive and exhaustive which means that if the award is made outside the Contracting State, recognition or enforcement can only be rejected on the basis of one of the grounds contained in Article V. These grounds are deliberately defined strictly and at the same time put the burden of proof on the party resisting recognition of an award. Again, it is quite clear that national arbitration legislation adapted their provisions according to the Convention’s approach and recognized only limited grounds for non-recognition (or annulment) of international arbitral awards.

Furthermore, parallel proceedings and the likelihood of courts in every country getting involved in the courts in all states all over the world to get involved in the annulment process was another concern which needed to be remove in order to regulate court involvement at this stage. To do this, the New York Convention has developed particular provisions to limit the places in which an award may be annulled. Accordingly, actions for annulment of an award can only be brought in the seat of arbitration or the country under whose laws the award was made. The second option will indirectly aim to keep this jurisdiction for annulment in the arbitral seat. This procedural system for annulment allows an award to be annulled for any reason whatsoever, including reasons not contained in Article V of the Convention. At the same time, it stipulates that outside the arbitral seat, an award can only be annulled or be denied recognition if one of Article V’s enumerated exceptions is satisfied.

Regardless of all the aforementioned attempts to minimize court involvement at this
stage, the fact that the national courts can freely interpret the Convention may still cause some irregularities in its implementation, particularly for public policy and arbitrability. As stated above, international practice has developed two different methods to avoid this obstacle. One idea is to allow universal enforcement of international awards regardless of the place of business or the nationality of the party-debtor in arbitration so that if a national court fails to enforce an arbitral award it will remain enforceable in other jurisdictions. The other one is to prohibit parties from invoking their applicable national law which may halt international arbitration or make it totally impossible. As such, it suggests a transnational definition of the two notions of public policy and arbitrability incorporated in the NYC. The importance of this approach is to ensure similar interpretation of the aforementioned notions in the convention and should facilitate, at least in theory, the harmonization of court involvement in arbitration process.
Conclusion

National courts play different roles at different stages of international arbitration. Given the current developments in international arbitration, such involvements can be inevitable on some occasions but not in all. What we can see in terms of court involvement in international arbitration reverts to the early stages of international arbitration after the Second World War when it was not as popular among the professionals of commercial world. Therefore, when states decided to increase the utilization of such dispute settlement mechanisms, they recognized the significant role of national laws to address the shortcomings and close the loopholes of international arbitration by allowing national courts to play different roles in international arbitration.

The result is that, at the moment, national courts may get involved in an arbitration process even prior to the establishment of the tribunal up until the recognition and enforcement of the foreign arbitral award. Accordingly, the potential grounds for court involvement in international arbitration may have two underlying reasons: 1) the application of the national laws, and 2) party autonomy. As a result, national courts may become involved in arbitration first and foremost because national laws are permissive and because disputants invite or encourage them to do so.

However, a study of international arbitration, particularly after the implementation of the New York Convention, shows that the discretion given to the national courts may sometimes operate as a double-edged sword and undermine the independence and functionality of international arbitration. Thus, there is a considerable need to harmonize as well as minimize court involvement in international arbitration.

Despite the fact that a large number of solutions, including harmonization of arbitration rules and the arbitration process, have been proposed to resolve this problem, court involvement at its current level has become a threat to the independence and functionality of international arbitration. The reason for this is because recently recourse to national courts has become a popular technique among lawyers and advocates to halt the arbitration process.
Furthermore, it should be noted that debates on harmonization and optimization take two general approaches: top-down and down-up. Most of the efforts for the purpose of harmonization and optimization of court involvement in international arbitration has been top-bottom whereby states or national jurisdictions try to define why, where and when national courts should get involved in international arbitration. However, such optimization discussions can also follow a bottom-up approach whereby party autonomy and institutional arbitration lead the debates and find the solutions to resolve unnecessary court involvement in international arbitration.

It should be borne in mind that optimization of court involvement in international arbitration can be very sensitive as it may have a direct impact on state sovereignty and as such contradict the public policy of national jurisdictions. Therefore, it is suggested that any solution should be implemented gradually and in its due time. A sudden and immediate process cannot lead the harmonization discussion towards its objectives. Therefore, it seems that the best solution for the minimization of court involvement in international arbitration, which at the same time promotes the independence of international arbitration, is to use party autonomy as well as the predictable mechanisms of institutional arbitrations. Given that international arbitration is a consensual dispute settlement mechanism which at the same time is very flexible in the sense that the parties can select the governing substantive and procedural law, parties to the arbitration and their legal counsel can design a legal framework which minimizes the possibility of recourse to national courts. Furthermore, arbitration institutions can offer most of the services offered by national courts and as such remove the need to seek recourse to national courts in international arbitrations.

However, these general solutions may not necessarily work prior to establishment of the arbitral tribunal and at the time of recognition and enforcement of the foreign arbitral award. It will be very hard to converge academic opinions regarding court involvement prior to establishment of an arbitral tribunal where national courts may issue anti-arbitration injunctions, anti-suit injunctions and pro-arbitration orders. On the one hand, court involvement may be found to be contrary to both principles of separability and competence-competence, two principles that form part of the core concept of international arbitration. On the other hand, it is
easy to understand the usefulness of court injunctions prior to establishment of the arbitral tribunal as they reduce the risk of parallel proceedings and the likelihood of contradictory results.

However, it is submitted that in spite of the potential functionality of granting anti-arbitration and pro-arbitration injunctions, they may at the same time undermine the independence of international arbitration. Therefore, it seems that the best option is to enforce the arbitration agreement negatively. It means that if the court declines to determine the case due to the existence of an arbitration agreement between the parties, then the resisting party will eventually participate in arbitration because there would be no other place for him to claim his rights. Having said this, again this solution may not work in jurisdictions that do not recognize the negative effect of the competence-competence doctrine.

Where the negative effect of competence-competence is not recognized, national laws necessarily acknowledge the potential roles of national courts prior to establishment of the arbitral tribunal, particularly if one of the parties challenges the validity or existence of the arbitration agreement. Accordingly, it is quite clear that whether the involvement of national courts in international arbitration is disruptive or constructive depends very much on the circumstances of the case, the nature of the requested injunction, anti-suit or anti-arbitration, as well as which court requests such an involvement. Moreover, since issues of court jurisdiction are not purely legal ones but also contain some political considerations, it is very ambitious and hence not convincing to argue for the need to change the courts’ approach (authority) in all jurisdictions in order to promote international arbitration. However, in order to lessen the side effects and unintended disruptive consequences of court involvement prior to the establishment of the arbitral tribunal, some normative arguments can be presented.

First and foremost, it can be strongly argued that the only court that may authorize the grant of injunctions and orders is the court of place of arbitration (seat). Accordingly, there is no risk of contradictory injunctions from different jurisdictions. Secondly, the main factor for the courts for decisions on granting any types of aforementioned injunctions should their concentration on the consent of the parties and their agreement for dispute settlement rather than issues of oppression, fairness. Moreover, it should also be highlighted that the independence feature of international arbitration requires that anti-suit injunctions and pro-arbitration orders
are not considered to be binding for the arbitral tribunal. If that is the case and all jurisdictions are happy with this analysis, then granting such injunctions would not contradict the competence of arbitral tribunals to determine the validity and existence of the arbitration agreement. Accordingly, such injunctions, as long as they are not binding on the arbitral tribunal, will not undermine the principles of separability and competence-competence in international arbitration although there still remains the risk of parallel proceedings.

Courts may also get involved at the commencement of international arbitration in dealing with the establishment of the tribunal, challenge of the arbitrators and ultimately consolidation of two or more arbitration agreements. As discussed earlier, the combination of party autonomy and recourse to the institutional arbitration, instead of ad hoc arbitration, is the main general policy to minimize court involvement at this stage. In other words, it was suggested that the role of national courts at this stage should be externalized to arbitration institutions. So, if the parties predict the jurisdiction of one of the major arbitration institutions as the ultimate authority to make the decision on the appointment of the arbitrators as well as their impartiality and independence, then there will be no need for the interference of national courts to deal with these three issues.

The likely authority of national courts in ordering consolidation of two or more arbitration agreements seems to be more controversial. A group of commentators, in emphasizing the consensual feature of international arbitration, deny the possibility of ordering consolidation without the parties’ consent. However, another group emphasizes the efficiency considerations as well as the actualities of the modern business which in their view necessitate the consolidation of arbitration agreements in order to accelerate resolution of commercial and business disputes of global business.

There are three approaches to deal with the request for consolidation of arbitration agreements. These approaches include: equitable estoppel and its modern version (intertwined doctrine) that prevails in the US; the doctrine of group companies which is more common in continental Europe; and finally the traditional interpretative analysis one which basically argues that a signature is just one way of showing consent to arbitration.
These three approaches have long precedents in international arbitration and have been invoked by national courts on several occasions, and it can be argued that even an international tribunal may invoke these approaches and order consolidation or joinder and intervention. While the first two approaches are extremely theoretical and complex, the interpretative approach is quite straightforward and more comprehensible. Accordingly, perhaps the best approach that can be taken for harmonization in the transnational arena is to look into consolidation through interpretation techniques. Thus, arbitrators should attempt to determine and ascertain what implied consent of the parties is for consolidation or intervention.

Accordingly, the efficiency consideration and the general provisions of international arbitration coincide with each other, and arbitral tribunals also become competent to consolidate different arbitration proceedings. Such analysis not only provides an increase in the competence of arbitration tribunals but it can also remove the potential for court intervention at this point in the arbitration proceedings.

National courts may get involved in the international arbitration process in order to take on a complementary role, in other words, to offer those services to the parties that the arbitral tribunal, due to its intrinsic shortcomings, cannot provide. Thus, the issue of interim measures is the other instances of court involvement in international arbitration.

Although the authority of arbitral tribunals in granting interim relief is very controversial, it is not correct to say that arbitral tribunals are unable to grant interim measures. Rather, in order to answer this question, one should take the following facts into account. First, it is submitted that the consensual feature and flexibility of international arbitration allows party autonomy to define and develop the jurisdictions of the tribunal. Therefore, where parties in their arbitration agreements grant such a power to the arbitral tribunal, the tribunal can grant any interim relief between the parties and states should recognize and give effect to this agreement.

More importantly, the modern arbitration acts, particularly in the UK and the US, are now changing their approach and expanding arbitrators’ power in the granting of different types of interim measures. Nevertheless, it should be noted that there are a couple of inherent limitations in the concept of interim measures in international arbitration particularly when it comes to the matter of externalities and the rights of third parties, the need for interim measures
prior to establishment of the tribunal and enforcement of the interim measures per se. This means that arbitral tribunals enable the granting of interim measures as long as those measures, on the one hand, are only directed to parties of the arbitration (not non-parties), and on the other, they do not exceed any limits of the parties’ agreement or national applicable law. Thus, this is the only occasion whereby international arbitration needs to rely on national courts during the proceedings of an arbitration case.

Finally, international arbitration may require, although it is not necessary, court involvement for the enforcement of a foreign arbitral award as the enforcement of a law or an award/sentence in all jurisdictions is exclusively implemented by states. Therefore, there will be no other choice but to recourse to national courts in one jurisdiction if the losing party does not voluntarily comply with the final award.

Although the NYC already significantly harmonizes matters of recognition and enforcement of foreign arbitral awards, the discretion of national courts in construing public policy and arbitrability, two barriers to recognition and enforcement of foreign arbitral awards, ended up with some uncertainties in terms of the practice of international arbitration. The practice of international commercial arbitration has developed two distinct methods to overcome such a broad and unbalanced competence of national courts which may obstruct the enforcement of foreign arbitral awards in these jurisdictions. One idea is to allow universal enforcement of international awards regardless of the place of business or the nationality of the party-debtor in arbitration so that if a national court fails to enforce an arbitral award it will remain enforceable in other jurisdictions. The other one is to prohibit parties from invoking their applicable national law which may halt international arbitration or make it totally impossible.

There is also another trend in recent practice of international arbitration to overcome these problems. This focuses mainly on offering a transnational notion of the aforementioned concepts. To avoid uncertainty and increase transparency and predictability, it is suggested that instead of offering a series of subjective criteria to define transnational public policy, it is better to construct this concept on the basis of objective benchmarks including the fundamental principles of private law. A similar approach can be taken in defining the notion of arbitrability.
whereby international practices and the requirements of the international legal order play a
significant role in defining what types of disputes can be arbitrable.

To sum up, it can be concluded that apart from the case of interim measures which has
external impacts on third parties, the triangle of party autonomy, institutional arbitration and
transnational legal order can insulate international arbitration from the intervention of national
courts. However, how this may happen depends very much on the different stages of
international arbitration. In other words, there is no general policy to resolve the issue of courts’
involvement in international arbitration and therefore the solutions are very dynamic and
changeable.

Finally, the thesis argued that safeguarding of the arbitration process and autonomy of
international arbitration as well as adopting efficiency consideration which have already
discussed in previous chapters will lead us to practical solutions that could minimize court
involvement in the arbitration process. The thesis suggests that such pragmatic approach is
multifaceted, since it removes all of the grounds for the involvement of the national courts at the
commencement of the arbitration, and reinforces the minimum and managed involvement of
national courts prior to the establishment, during the arbitration process or at the time of the
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