International Arbitration: the Doctrine of Separability and Competence-Competence Principle

The Aarhus School of Business
Fuglesangs Allé 4
8210 Århus V

Program: MSc of EU Business and Law
Department: The Department of Law
Student: Aiste Sklenyte
Stud. no: 251634
E-mail: aistepaiste@hotmail.com
Term: 2003 winter
Supervisor: Krsitina Maria Siig
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**INTRODUCTION**

International arbitration is more and more used in all over the world. It is considered more flexible, speedier, confidential then normal jurisdictional procedures in court. The most important fact is that arbitration award is final and biding. Arbitration award can be enforced in another country then much easier, especially if country where arbitration award asked to be enforced is a party to the New York Convention 1958 on recognition and enforcement of foreign awards. Countries such as England, France and Germany has a long history of arbitration. The East Europe, such as Lithuania, use arbitration not so often, they just start to use arbitration now, but still not so much as West Europe. These countries still trust more municipal courts’ decisions then arbitration awards. The reason for lack of trust to arbitration is that the people don’t have enough knowledge about arbitration and they cannot trust their business or money to something they don’t know.

By writing this paper I found many interesting things about arbitration and its nature. Party which considers to submit dispute to arbitration must know, that after the signing the arbitration clause/contract they will not be able to turn back to court. In this case court will direct party to arbitration. Another very interesting thing that arbitration is not ‘dying’ together with the main contract. The arbitration clause survives the termination, voidance or invalidity of the main contract. This feature of arbitration clause ‘staying alive’ is called the separability/autonomy doctrine. This doctrine cannot go alone, another principle follows it. This principle is called the competence – competence principle and it means that arbitrator can decide on its own competence. Without one principle another would not have meaning and vice versa.

From the first site of view it could look that it is pretty simple to know that arbitration has the autonomy clause form the main contract and can decide on its own competence, but it is not simple as it looks like. There are so many details which must be known for parties about the separability doctrine and competence – competence principle. All these mentioned aspects I tried to explain in detail in this paper. I hope people who will read it will find the guidance to easy understanding of doctrine separability and competence – competence principle.
THE PURPOSE AND SUMMARY OF THE PAPER

This paper seeks to deal with the principal problems involved where disputes as to the existence or extent of the arbitrator’s jurisdiction. In this work concentration is on the separability doctrine and competence – competence principle, as these rules are we speak first when we speak about arbitration.

After the theoretical look at the general nature of arbitration in Part I some of the principal objections that may be raised to the arbitrator’s jurisdiction are looked at in Part II. Part III is dealing with the doctrine of separability and competence – competence, their interrelation and how they are applied to national laws and practices.

I. THE NATURE OF ARBITRATION

I.1 Main concepts of arbitration

Many disputes in international trade are not settled in court, but by arbitration. Arbitration is a private, informal process by which the parties to a contract agree, in writing, to submit their disputes to one or more impartial persons who will adjudicate and resolve the controversy by rendering a final and binding award. It is used for a wide variety of disputes - from commercial disagreements involving technology, intellectual property, major commercial activities, construction, securities transactions, real-estate, insurance claims and employment grievances.

There is international and domestic arbitration. In this paper I will concentrate just on international arbitration. International commercial arbitration is one of the most popular methods of dispute resolution in international trade. The increasing significance of inter-state trade and the links it forges between enterprises across borders help develop international methods of dispute resolution. Arbitration is characterised as having a number of distinct advantages over proceedings in national courts. First it provides an independent venue for the resolution of any dispute between the parties by judges of their own selection. Secondly, the dispute is handled by experts and the award rendered is final and enforceable in different jurisdictions. Thirdly, arbitration is a confidential process that may help minimise the effects of a dispute between the parties. Further, commercial arbitration is said to be speedier. These all we will look later a little more detailed.

The major features of arbitration are:

- A written agreement to resolve disputes by the use of impartial arbitration. Such a provision may be inserted in a contract for the resolution of future disputes, or may be a submission agreement to arbitrate an existing dispute.
- Informal procedures. Under the rules, the procedure is relatively simple; strict rules of evidence are not applicable; there is no motion practice or formal discovery; there are no requirements for transcripts of the proceedings or for written opinions of the arbitrators.
- Impartial and knowledgeable neutrals to serve as arbitrators. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.
- Final and binding awards which are enforceable in a court. Court intervention and review is limited by applicable countries’ arbitration laws.

There are several reasons why many parties consider arbitration a more attractive way to resolve disputes than ordinary national jurisdiction:
Neutrality. An arbitral tribunal consist of arbitrators nominated by the parties, or appointed by an authority selected by the parties, and the choice of the arbitrators is usually ensures a certain neutrality, at least as far as the nationalities of the arbitrators is concerned. In international commercial transaction, neither of the parties usually wants to accept the jurisdiction of the other party’s country: this is partly due to the fear that a national judge might be included to decide in favour if the party who is of the same nationality as the judge, and partly due to the awareness that the party in whose country the proceedings take place enjoys the advantage of knowing the applicable law, procedural rules, and legal environment and mentality better than other party. Agreeing on international arbitration allows the parties to avoid this imbalance: the venue of the arbitral tribunal is usually chosen in a country different from the country of each party and the nationality of the arbitrators is also determined so as to avoid the over-representation of one party’s nationality.

Expertise. The arbitrators can be chosen according to criteria that can be tailored to the particular dispute, so as to ensure that they possess the necessary expertise to understand and evaluate the matter at stake. If a dispute is submitted to national courts of law, the dispute will be resolved by one or more judges with a general knowledge of private and commercial law; in some circumstances, this general knowledge might not be sufficient to appreciate all the aspects of complicated transactions with technical implications or transactions based on international commercial practices. This might lead to lengthy proceedings to permit the judge to acquire the appropriate knowledge, or to errors in the judge’s evaluations due to underestimating the technical aspects or commercial practices. Agreeing on arbitration permits a reduction of these difficulties, by selecting experts in the particular fields as arbitrators.

Confidentiality & goodwill. Arbitration is a way of solving disputes that, as opposed to proceedings before courts of law, permits confidentiality to be maintained with respect to the content, the outcome and even the existence of the dispute. The court hearings has an adversary nature that it usually the publicity brought about by a public trial will usually guarantee that parties to a dispute heard in court will never be able to work together again. Confidentiality can be important in certain situations, for example to avoid damaging the commercial reputation of the parties.

Arbitration hearings are usually held in private and in a less adversarial setting where the parties feel that a business disagreement is being sorted out, not that they are going to war. In many cases, the arbitrators will try to persuade the parties to go through mediation which most arbitration systems can provide in an attempt to expedite peaceful settlement without going to

arbitration at all. The more business-friendly nature of arbitration is therefore a form of insurance against loss of good will and, if handled by experienced arbitrators often enables parties to continue after the hearing to have a business relationship.

*Finality and rapidity.* An important characteristic of arbitration is that in most situations the award made by an arbitral tribunal is final and binding upon the parties: either because the parties have agreed this expressly in the arbitration clause, or because the arbitration rules referred to by the parties exclude any appeal against the award\(^2\). By excluding the possibility of retrying the case in front of an appeal instance, therefore, the length of the proceedings is considerably reduced as compared to proceedings before courts of law.

Moreover, arbitration may ensure that the dispute is solved rather quickly, as opposed to proceedings before courts of law, which in some countries may last for several years due to overloaded judges and bureaucratic proceedings.

*Enforceability.* International transactions concern the movement or organisation of assets across the borders of two or more countries, and might involve the entities of different countries. In the case of disputes regarding international transactions, it is important to ensure that the decision resolving the dispute is enforceable in all the countries affected by the transaction, preferably in all countries where the losing party has assets that can be attached to satisfy the credit of the winning party. The enforcement of foreign arbitral awards is regulated primarily by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which has been ratified by very many states and therefore ensures, to a great extent, a uniform and effective treatment of arbitral awards’ enforceability. The enforcement of foreign judicial decisions, on the other hand, does not enjoy the same uniform treatment: the principles of international co-operation and of economy of judicial proceedings are recognised in a large number of states, but implementation of the principles, which results in the recognition and enforcement of foreign judicial decisions, is left to the internal legislation of the single states or to bilateral or multilateral treaties concerning specific areas. Among treaties of outstanding significance are the 1968 Brussels and 1988 Lugano conventions on the recognition and enforcement of decisions issued on civil matters by courts in the countries of the European Union and the European Free Trade Area.

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\(^2\) See, for example: UNCITRAL Arbitration Rules (1976) art. 32 (2): "The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay." Arbitration Act of England (1996) sect. 58: “Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.”. German Act (ZPO) (1998) sect. 1055: “The arbitral award has the same effect between the parties as a final and binding court judgement.”. New York Convention (1958) art. III: “Each contracting state shall recognize arbitral awards as binding[…]."
As a consequence of the foregoing, the enforceability of foreign judicial decisions is not subject to uniform regulations to the same extent as the enforceability of arbitral awards.

*Exclusion of the jurisdiction of courts of law.* One of the effects of agreeing to submit a dispute to arbitration is that courts of law are deprived of their jurisdiction on the subject matter and, if an action is raised in them regarding a matter that had been submitted by the parties to arbitration, they are obliged to refer the parties to arbitration.

The same effect applies while an arbitral procedure is pending or after an arbitral award has been made: the subject matter is covered by the arbitral agreement, consequently courts of law do not have jurisdiction.

From these arbitration features we can see very clearly that the arbitration is more efficient and better than the municipal court procedures. Parties have more trust in arbitration than in courts’ procedures, parties have confidentiality, their dispute solved by expert who is specialised in that particular dispute field. Of course from another point of view it can be more expensive to go to arbitration than to court, but sometimes information which can be disclosed in court can be much more expensive than the arbitration fees.

### I.2 Main principles expressed in the modern arbitration legislation

In order to meet the needs of international commerce to have the dispute settled in arbitration, considerable changes were introduced in a number of arbitration laws. The legislators in many countries world-wide have been attempting to provide for an arbitration friendly legislative framework. It is quite appropriate to characterise the development of arbitration legislation in recent years as a competitive process. Especially in countries with major arbitration centres, significant efforts have been made to provide for a more appropriate legislation to accommodate the needs of international commerce. Such tendency is expressed both in countries of the EU as well as in the countries of Central and Eastern Europe. Some examples can be mentioned: new arbitration statutes enacted in England (1996) and Germany (1998). The same trend be noticed also in the countries of Central and Eastern Europe, where in the last 10 years a number of countries have either enacted new arbitration statutes or significantly amended the existing ones, for example Law on Commercial Arbitration of Lithuania was enacted in 1996.

The fact that many legislators world-wide try to introduce the changes necessary to provide for a favourable arbitration framework does not imply that the same methods and legislative solutions have been adopted. Nor may it be concluded that an absolute uniformity of arbitration laws has been achieved. Similarly, it would be an oversimplification to attempt to draw any
conclusion as to the similarities and differences among various arbitration laws before a careful examination and comparative study have been made. In such a study, regard should be had not only to statutory law, but also to decision of national courts. The basic principles of the modern arbitration statute may be summarised as follows:

\textit{a) a modern arbitration statute expressed the recognition of the parties’ right to settle their disputes in a private forum.} This is done through the obligation of the state courts to refrain from exercising their jurisdiction in matters submitted to arbitration on the basis of a valid agreement of the parties. These are the provisions on the so-called “indirect enforcement” of arbitration agreement that, almost without an exception, form part of any recently enacted arbitration statute.\(^3\)

\textit{b) Party autonomy,} the underlying principle of commercial arbitration, has been widely accepted. Besides the right to agree on a private forum, the acceptance of this principle implies also that the parties are allowed to influence different aspects of arbitration by their agreement. Thus, they may choose the rules of procedure to be applied, to determine the seat of arbitration, to select arbitrators, as well as to choose the applicable substantive law.

\textit{c) Arbitrators are given wide powers} to determine the different aspects of arbitration if the parties have failed to do so. Thus, they are free to determine rules of procedure, as they consider appropriate in the absence of the parties’ choice thereto.\(^4\) There are, usually, few procedural rules of a mandatory nature in arbitration laws (\textit{lex arbitri}) that have to be respected and where no room for party autonomy is left. These, generally, relate to basic principles of due process, a violation of which would be contrary to the basic notions of justice or international standards of justice. The principle of equal treatment of the parties, namely, the equal opportunity to present a case, is such a principle, which may be considered to be a part of international or transnational \textit{ordre public.} Similarly, the arbitrators will determine the applicable substantive law in the absence of the parties’ choice in that respect.\(^5\)

\(^3\) See for example: art. 8 (1) of the UNCITRAL Model Law: “A court which an action is brought in a matter which is the subject of an arbitration agreement shall, […] refer the parties to arbitration […]”; sect. 1032 (1) of the German Act (ZPO): “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, […] reject the action as inadmissible […]”; art. 10 of the Lithuanian Act: “The court receiving a claim, the subject matter is subject to arbitration agreement made by the parties […], at the request of a party, refuses to accept it.”.

\(^4\) See for example: art. 19 (1) of the UNCITRAL Model Law: “[…], the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings;”; sect. 1042 (3) of the German Act (ZPO): “[…], […] the parties are free to determine the procedure themselves or by reference to a set of arbitration rules;”; sect. 34 (1) of the English Act (1996): “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter;”; art. 22 (1) of the Lithuanian Act: “[…] the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”.

\(^5\) See for example: art. 28 (2) of the UNCITRAL Model Law: “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflicts of laws rules which it considers applicable;”; sect. 1051 (2) of the German Act (ZPO): “Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.”; sect. 46 (3) of the English Act (1996): “If
Arbitration is based on private agreements, but results in a decision – an award – which is binding upon the parties, and which can be enforced in legal proceedings by national courts, if not carried out voluntarily. Under modern arbitration statutes the enforcement may be denied only for a certain limited number of reasons. This is particularly so with respect to the enforcement of foreign arbitral award under the 1958 New York Convention. It lists a limited number of reasons for refusal of the recognition and enforcement of foreign awards.

e) Arbitration statutes usually provide solutions for the situations when the parties have failed to determine certain aspects of arbitration. Such provisions are not mandatory, but permissive or discretionary. Their primary and underlying purpose is to provide the possibility for arbitration to commence and to proceed efficiently, to provide the necessary assistance and support to arbitration. Very often the arbitration will not be able to function at all, in the absence of such provisions.

f) From the relevant provisions of arbitration statutes relating to the role of national courts it may be concluded that there is, generally, a limited possibility of judicial intervention. The role of judiciary is mainly one of support and assistance to arbitration before, during and after the arbitral process. Such assistance is provided, for example, in enforcing the agreement to arbitrate, in the establishment of the tribunal, in taking evidence or ordering provisional measures, as well as in the enforcement of arbitral awards. As to the controlling or supervisory role of the judiciary, the general trend is towards a limitation of this function of national courts. Limitation of the reasons for challenge, as well as grounds for refusal of enforcement of the award is one of the common characteristics of recently enacted or amended arbitration statutes, in particular with respect to international arbitration. Indeed, it is not to be concluded that the grounds for challenge are the same in different legal systems. However, the merits of the arbitrators’ decision may not, under any circumstances, be the subject of the control and examination by the judiciary, except in the case of violation of public policy. It is a widely accepted principle, which lies in a very heart of arbitration as a method of dispute settlement. Any provision maintaining a different position is contrary to the very nature and the underlying purpose of arbitration. The possibility of a judicial or to the extent that there is no such choice or agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”; art. 31 (2) of the Lithuanian Act: “Failing any designation by the parties, in case of international commercial arbitration the arbitral tribunal shall apply the law determined by the conflicting legal norms which considers applicable.[…]”.

6 1958 New York Convention art. V.
7 Art. 5 of the UNCITRAL Model Law: “[…], no court shall intervene except where so provided in the Law”; sect. 1026 of the German Act (ZPO): “[…], no court shall intervene except where so provided in this Book”; Art. 7 of the Lithuanian Act: “Arbitral tribunal deciding on the maters […] shall be independent. No court of state shall intervene in its work […]”.

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control of the award with respect to the substance of the dispute undermines the effectiveness and attractiveness of arbitration and, as such, cannot form part of a modern arbitration law and practice.

The need for a greater ‘freedom’ of arbitration from the supervision of national courts and restraints of national laws has more frequently been emphasised in the context of international commercial arbitration, than in situations, which are purely domestic. Therefore, some arbitration laws provide for a duel regulatory scheme, one applicable to domestic and another to international arbitration. Thereby, the latter usually maintains a system of a more limited control over arbitral awards and may even provide the possibility for the parties to exclude any recourse against the award. On the other hand, some jurisdictions provide for the same favourable legislative framework to apply both domestic and international arbitration (e.g. Germany, England, Lithuania).

So as we see there are many similarities between the UNCITRAL rules and national law rules on arbitration, in the same time the national laws on arbitration have similar points with each other. Of course some countries have much longer history of arbitration law that is why these rules are more complicated (for example England) then in countries where arbitration is comparative a new thing (for example Germany and Lithuania).

I.3 The four theories of arbitration

There are four arbitration theories which helps to understand the nature of arbitration better. These four theories are: the contractual theory, the jurisdictional theory, the mixed or hybrid theory and autonomous theory.

The contractual theory is divided into classical and modern contractual theories. The first one is based on the statement that an award was a contract, which was made or complete by the arbitrators as agents of the parties. It was stated that it was the agreement to arbitrate that gave the arbitrators the authority to make the award. They in turn, in resolving the dispute, were acting as agents. The arbitrators’ decision, therefore completed or formed part of arbitral agreement made by the parties. This was the most important feature in the “classical” version of the contractual theory.

Further was stated that arbitrators were not judges, because they did not perform any public function. During the dispute resolution process they did not use any state power as they don’t had any. Since their award depended only on will of the parties and were not limited by local restrictions, they could be enforced anywhere in the world.

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In later development of this theory was said, that the power of an arbitrator could have, as it sole base, the will of the parties without there being any need for intervention on the part of the state.

The classical theory was criticised a lot. For example that the arbitrator could not be an agent of any party. First of all it is obvious that no agent has the capacity to do something which his principal could not be able do himself. Parties cannot solve their disputes themselves as they are not impartial on the merits of the dispute. Second reason is that arbitrator has a duty to make an unbiased decision on the substance of the dispute. The agent has obligation to conform to the wishes or further the interests of his principal, that is why it will never be incompatible with an arbitrator obligations. The last reason is that the arbitrator’s authority could be made irrevocable unlike the agent’s authority.

The second, the modern version of the contractual theory states that arbitration was still essentially private and/or contractual in nature, belonging to the law of obligations rather than to civil procedure. Arbitrators were private individual chosen by the private individuals to resolve their dispute and that arbitrators were not given power by the state to act on it’s behalf.

Arbitration award was considered as the private act ‘*acte prive’* and the arbitration award was not put to any particular jurisdiction category. It was emphasised that arbitration was a private institution and not activity conducted by the state.

From another point of view the arbitration was linked with the contract. It was said that first of all arbitration agreement is a contract. Further it was developed that that the arbitrator derived all his power to act from the arbitration agreement. The modern contractual theory abandoned the idea of classic contractual theory, that arbitrator acts as agents of the parties on the ground, that arbitrator like a judge has a task to determine the rights and obligations of the parties.

The modern contractual theory, was widely criticised for:

- *distorting the real nature of arbitration.* The duty of arbitrator to evaluate the argument put forward by the parties and make the binding decision on the merits of the dispute is too fundamental to the nature of arbitration to be treated merely as a reason why arbitration forms a juridical category of contract all its own. The contractual theory fails to provide an explanation of the universal duty of arbitrator to give the parties and impartial and fair hearing and, where so required, to apply the law in resolving their disputes. The contractual theory doesn’t provide way of distinguishing between the arbitration and other similar contractually based institutions, such as valuation, mediation and conciliation.

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not being compatible with common municipal laws and international treaties on the subject. The principle consequence of the contractual theory is that the arbitral award can be enforced in any country in the world where the parties seek to rely on it. First of all it would be unthinkable to permit a local court to treat domestic and foreign awards alike for the purposes of setting aside proceedings, allowing awards to be set aside by it, which have been made abroad under the law of another country. Second, one cannot enforce an award which has been set aside in its country of origin as a result of art. V (1) (e) of the New York Convention.\(^{10}\)

We have seen that neither the classical nor the modern version of the contractual theory is consistent with significant features of existing arbitral law, some touching on the very definition of the concept of arbitration.

The jurisdictional theory as well divided into two – judgement and delegation (municipal law) theories.

The first one, judgement theory, is based on the argument, that task of arbitrator was to judge and the award, he produce, was, consequently, to be treated as an act of jurisdiction. In the first half of the twentieth century was developed the theory that without the arbitration agreement the award would not have the legal existence. Of course it didn’t mean that award was a contract. It was clear that arbitrators were not judges and that their award was not judgement. The duty of arbitrator was to examine and evaluate the submission of the parties, resolve the dispute, that is to say, judge.

There were two main criticism of the judgement theory. The first criticism was targeted to the statement that arbitrator was a judge. This argument was based on the view that to hold such position, the arbitrator had to perform a public function and have his position conferred on him by the state. The arbitrator cannot be judge, because he doesn’t hold any of the powers of the state and this was cross-purposes with what was said on this theory. The source of the arbitrator’s authority was the parties’ agreement. The activity performed by the arbitrators was that of judging and that, consequently, the result of theirs endeavours was a judgement, but it was not said that it was a state judgement. The criticisers of the theory confused the nature of the act of judging with the source of the authority of its best-known exponents. They stated that arbitrator is a private judge and that once a claim is submitted to a person invested by the law with the power to accept or reject the claim by the application of a rule of law, one is in the presence of a

\(^{10}\) Art. V (1) (e) of New York Convention: “The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”
jurisdiction\textsuperscript{11}. On this bases, one can agree that arbitrators are judges and the arbitral awards are jurisdictional acts.

The second argument was that separation of the agreement to arbitrate and the award reflected neither arbitral practice nor arbitration law. The scope of arbitrator’s authority remains limited by the parties’ agreement and the parties can revoke the arbitrators powers by consent at any time. Arbitrator are not totally free, because they need to follow the procedure agreed by the parties, insofar as it accords within whatever is the relevant applicable law. Otherwise, parties can refuse to accept the award on the grounds of the art. V (1) (d) of 1958 New York Convention\textsuperscript{12}.

The second, delegation/municipal law theory, states the source of the arbitrators’ power as being the state rather than the parties’ contract. Unlike the judgement theory, arbitrator here performing a public function as a temporary judge. It was stated that legal local systems gave the right to arbitrator to act and if its so the same authorities must set the limits of the arbitrator. It was as well said that the state had the monopoly over the administration of justice on its territory. So the consequence was that the enforceability of the award was therefore subject to its validity under the law of the place of arbitration.

The ‘lex facit arbitri’ formula stands in the municipal law theory, which said that it is the law of the seat of the arbitration that gives the arbitrator the power to judge. The meaning of this theory is that every sovereign state is entitled to prohibit or permit the carrying-on of any activity within its territory. It means that every arbitration is subject to the law where it takes place. The main argument of municipal law theory about the nature of arbitration is not that the state should or should not in fact, control arbitration tightly, but that where the state does pass laws which control the way in which they are to be conducted, any breach of those laws committed within the state’s territory is an unwarranted infringement of its sovereignty.

As all other mentioned theories the delegation and the municipal law theories in some way are right. On the other point of view they put too much emphasise on the place of arbitration. The one of the reasons to reject the delegation and municipal law theories, lies on the complete account of the nature of arbitration, is that, in direct contrast with contractual theory, insufficient consideration is given to the role of the parties’ agreement. Arbitration agreement and mane contract are the essence of arbitration. Another criticism of these theories that the state has monopoly over the administration of justice and that this administration can not be given to

\textsuperscript{11} A.Samuel supra at p. 53.

\textsuperscript{12} Art. (V) (1) (d) of 1958 New York Convention says: "the... arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".
anybody else, especially private person – arbitrator. Finally both theories are right that the municipal law is often not used by arbitrators.

*The mixed or hybrid theory* states that arbitral award fell half way between being a judgement and a contract. Arbitrator did not perform the public function and award is not a contract. The parties, agreeing on arbitration, created private jurisdiction and set its limits. By agreeing on arbitration parties agree not to go to court.

The arbitration agreement was treated as being similar to exclusive jurisdiction clause, in that the decision making powers of the municipal courts were substituted for the arbitrators. It was stated later that arbitral proceedings were subject to the vital rules of the forum. It was said that there were both contractual and jurisdictional elements to arbitration.

In later development of this theory was rejected the use of the exclusive jurisdiction clause analogy, and said that the arbitral clause created a private jurisdiction as well as excluding that of the municipal courts. The exclusion of municipal court jurisdiction was one of the procedural aspects of arbitration, on the basis that there were plenty of contractual acts which do no lose that characteristics solely by having procedural implications. This however, rather masked the more serious that the arbitral clause replaced one form of judicial activity by another.

There were very strong arguments against in criticising separation of the contractual and procedural elements of arbitration. It was drown distinction between the contract and procedure in order to produce workable structure for a uniform law on arbitration. The contractual aspects of arbitration were more influential in setting the arbitration in motion and that mandatory rules of procedure, although relevant to the validity of the agreement, played a greater role once the arbitration was under way. It was also formulated that the place of arbitration might have a legitimate interest in controlling the arbitration when its public policy was infringed, whereas the place, where the arbitral agreement was made would rarely be concerned in the matter.

The mixed or hybrid theory argument that arbitration consists from both contractual and jurisdictional elements, leads to consequence that arbitration, like procedure to resolve dispute, has jurisdictional and agreement regulating powers. First of all in the arbitration, like in the court, the dispute is resolved by the independent third person, who makes the final binding award. Second that arbitrator depend on the general agreement of the parties, the same as arbitration procedure. Arbitrator can not act just for the one party on his own will, or act on its behalf or discriminate it. That is why it follows from the mixed or hybrid theory that arbitration has both contractual and jurisdictional elements and it cannot be one or another. Arbitration is independent, exclusively defined, contractual-jurisdictional element.
Despite that the mixed or hybrid theory were closest to nature of arbitration it still were criticised for arbitration description being not very clear and complicated to be used to fill existing gaps in, or provide a basis for the reform of arbitral law.

The autonomous theory looked beyond the structure of the institution to arbitration social and economic context. The main argument of this theory is that the arbitration must be recognised as totally autonomous by its nature, in order to give the expansion in his actions.

There are two description of arbitration which labelled ‘autonomous’:

i) the rejection of the traditional three theories of arbitration;

ii) the exposition of the ‘autonomous’ approach by which the proponents of the autonomous theory propose to replace them.

As was already mentioned the arbitration was mixed in nature. It is jurisdiction and contractual features, however, were so interconnected that it was impossible and undesirable to try to separate the procedural and contractual parts of the institution. Since no distinct segment of the arbitral process was strictly one or the other, it distorted the nature and hindered the development of arbitration to applying the rules relating to either procedure or contract to any part of arbitral process. The moderate version of the hybrid theory was rejected on the basis that in simply accepting the presence of both contractual and jurisdictional aspects of arbitration, they were not actually indicating what type of rules should be applied to this mixed institution.

Later on the concept of jurisdiction and contract has changed very much from their original form. The powers of the court have been expanded beyond the traditional role determining the parties’ right under the law, now courts aim to find the solution most in accordance with both parties’ interests. Courts use more an more techniques associated with conciliation and mediation. This gradual development makes the concepts of jurisdiction unsuitable when making the distinction between arbitration and other alternative dispute resolution devices.

The autonomous theory is not very easy to identify. We must view arbitration as a whole unit rather that in terms of its jurisdictional or contractual parts. The emphasise should be more on the arbitration goal than on its structure and arbitral law should reply to user’s expectations. The complete autonomy of the will is necessary for the full development of arbitration. But from another point of view, it must be justified the limiting factors such as ordre public. Despite that, by giving parties the maximum freedom of choice, user expectation will be satisfied and the arbitration will develop successfully as an institution. All attention should be drawn to real nature of arbitration, but not the nature of structure of arbitration.

In conclusion arbitration is a private means of dispute settlement. It has its “source” in the will of parties. The authority of an arbitrator to determine his jurisdiction is based solely on the
wish of the parties to have their controversies resolved in a private, non-judicial forum. The agreement of the parties determines also the scope of arbitrator’s powers. Although arbitration is based on the will of the parties expressed in the arbitration agreement, the parties and arbitrators operate with a certain legal system, national or international. International commercial arbitration, in practice, operates within different system of laws, including international treaties and national laws. Thus, the support of a particular legal system and of the judiciary is often indispensable for the proper functioning of arbitration.

We can see that recent arbitration law was developed much further than it was talked in theories. It is obvious that modern arbitration has a part from all of mentioned theories. And as we will see later the autonomous theory can be the most relevant theory for the doctrine of separability and competence-competence principle.

I.4 Ad hoc and institutional arbitration

Once agreement is reached by the parties concerning arbitration as the preferred method for the settlement of their disputes, the second step is the choice between ad hoc and institutional arbitration. The distinction between the two alternatives is referred to by the European Convention and has a direct bearing on the subject under examination. The parties to an ad hoc arbitration establish their own rules of procedure, which may be made to fit the facts of the dispute between them, whereas the parties to an institutional arbitration must conduct the arbitration in accordance with the procedural rules of the particular institution concerned. Ad hoc arbitration is not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who is to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a pre-existing set of procedural rules designed to govern ad hoc arbitrations. In an ad hoc arbitration, in fact, utmost care should be taken as to the drafting of the arbitration clause since the parties, by choosing this alternative, wish to shape the arbitration according to their needs and without reference to the services and, more importantly, to the rules of arbitration of a particular arbitral institution.

Both institutional and ad hoc arbitration have strengths. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser

13 Art. 1 (2) (b) European Convention on International Commercial Arbitration of 1961: “[…] the term “arbitration” shall mean not only settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions;[...]”.

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extent, by a professional staff. This reduces the risks procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution’s involvement can be particularly constructive on issue relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators’ fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.

On the other hand, ad hoc arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an ad hoc approach.

Should the choice be in favour of institutional arbitration, which is certainly the most widespread form of international arbitration, the drafting problems are to a large extent made easier thanks to the reference to the set of arbitration rules of the institution which has been selected. In fact, by incorporating directly into the contract the said rules, such a reference not only avoids the process of negotiating the arbitration clause, which constitutes an area of potential conflict, but eliminates the risk, inherent in an ad hoc arbitration clause, of mistakes, ambiguities or gaps in the drafting process. Suffice it to think of the risk of indicating as appointing authority an institution or a person which, when needed, may decline to act in that capacity with the resulting obstruction of the arbitral mechanism (save to the extent that resort may be made to make the relevant appointment(s) to the competent local court). The relevance of the difference between ad hoc and institutional arbitration tends to diminish if reference is made to rules of procedure prepared by an international institution, such as the UNCITRAL Arbitration Rules. Whether the arbitration is ad hoc or institutional, there are still pitfalls to be avoided by the drafter of the arbitration clause.

### 1.5 Categories of arbitration agreement

There are two types of arbitration agreement – the arbitration clause or the arbitration agreement. The first, and more common, is an agreement to submit future disputes to arbitration;

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14See for example: art. 7 (1) of UNCITRAL Model Law: “[...] An arbitration agreement may be in the form of an arbitration clause in a contract or in the for of a separate agreement”; sect. 1029 (2) of German Act (ZPO): “An arbitration agreement may be in the form of a separate agreement (“separate arbitration agreement”) or in the form of a clause in a contract (“arbitration clause”).”; sect. 6 English Act (1996): “ The reference in an agreement to a written
this type of agreement usually takes the form of an *arbitration clause* in the principal agreement between the parties. The second is an agreement to submit existing disputes to arbitration; an agreement of this kind is commonly referred to as a “submission to arbitration agreement” or, simply, an arbitration “submission” agreement.

Arbitration clauses are usually short\(^{15}\), whilst submission agreements are usually long. It deals with disputes which may arise in future, does not usually go into too much details, since it is known what kind of disputes will arise and how they should best be handled. The arbitration “submission” agreement, deals with an existing dispute and can be tailored exactly to fit the circumstances and to provide in detail how the arbitral tribunal should deal with the dispute.

So we know now why arbitration advantages over the court procedures and what are main aspects between the international laws and rules on arbitration. The four arbitration theories helps us understand how arbitration were developed through history up to these days. We found out that arbitration is a contract, which is made by the will of the parties and that arbitrators are not agents and they cannot act on behalf on one party. Further more arbitrators are not judges and their powers are derived from arbitration agreement. Arbitration agreement has jurisdictional and agreement regulating powers. Finally the arbitration agreement must be considered as a whole unit and as autonomous agreement. When parties finally decides and signs under arbitration clause or submission agreement they must refer it to – *ad hoc* or institutional arbitration. Now we can move on to the next part, which deals with the challenge to arbitration jurisdiction. It is important to know on which grounds and when one can challenge the jurisdiction of arbitration in order to understand easier the separability doctrine and competence-competence principle, which will be analysed in third part of this paper.

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\(^{15}\) For example, the London Court of International Arbitration (LCIA) recommends: “Any disputes arising out of connection with this contract, including any questions regarding its existence, validity or termination, shall be referred to a finally resolved arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.”, or the German Institution of Arbitration (DIS) advises: “All disputes arising in connection with the contract (…description of the contract…) or its validity shall be finally settled according to the Arbitration Rules of the German Institution of Arbitration e.V. (DIS) without resource to the ordinary courts of law.”, or Rules of the Arbitration Court at the Association International Chamber of Commerce – Lithuania advises: “ Any dispute, controversy or claim arising out of or relating to this contract shall be settled by arbitration in accord with the Rules of the Arbitration Court at the Association International Chamber of Commerce – Lithuania”.

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II. THE JURISDICTION OF AN INTERNATIONAL COMMERCIAL ARBITRATOR

II.1 Introduction

Given the explanation of nature of the arbitration it should be clear that no one should be obliged to submit to arbitration without having agreed to it. Furthermore, party who agreed to arbitration of the particular dispute doesn’t need to agree on the inclusion in the arbitration of further dispute, which the other party may try to include, but which are outside the scope of the parties’ agreement.

International commercial arbitrators may be asked to decide on their own competence to determine a particular dispute or set of disputes. The right of an arbitrator to decide upon his own competence is a topic which excites both interest and controversy, and which will be discussed below.

It is undoubtedly true that, in some cases, the jurisdiction of an arbitral tribunal may be challenged as a purely tactical device, to gain time or to discourage the claimant; and as the practice of international commercial arbitration becomes increasingly sophisticated, such tactics are likely to become more common-place. Yet there are many cases in which there is a genuine doubt as to the jurisdiction of an arbitral tribunal to rule on the particular dispute that has arisen. There may be no valid agreement to arbitrate; or the dispute in question may not be capable of settlement by arbitration under the applicable law; or again, the procedures required to bring the dispute to arbitration may not have been followed correctly. In such cases, a challenge to the jurisdiction of the arbitral tribunal is perfectly justified. It does not help the reputation of international commercial arbitration, as a useful and effective method of resolving disputes, if arbitral tribunals decide on matters which are outside their competence or jurisdiction and then have their award set aside or refused recognition and enforcement.

Let’s look detailed when and how parties can challenge the jurisdiction of arbitrator.

II.2 Challenges to jurisdiction

The right of parties to an arbitration to challenge an arbitrator is widely accepted in arbitration acts and statutes throughout the world. As was mentioned already before the arbitral tribunal derives its authority from the arbitration clause. The arbitration clause is contained in the main contract between the parties. One of the most pressing problems in international arbitration is
the effect of invalidity of the primary agreement on the arbitration clause. The jurisdiction of the tribunal usually considered from two point of views:\(^\text{16}\):

a) *Whether the tribunal has any jurisdiction at all.* A tribunal will lack jurisdiction if only one matter in dispute between the parties will not fall within the scope of the arbitration agreement, or if some conditions precedent to arbitration has not been fulfilled at the time of the commencement of the arbitration.

b) *Whether the tribunal has jurisdiction over all of the disputes submitted to it, or only some of them.* The answer to this question will be found by construing the arbitration agreement to determine what disputes the parties have agreed should be submitted to arbitration.

Some of the matter which rise the difficulties to establish the scope of the tribunal’s jurisdiction are:

- the submission of claims founded in tort or other criminal behaviour together with claims founded in contract. An arbitration act most probably will not include claims founded in tort or other criminal behaviour by referring the arbitration agreement to “all claims arising under the contract”;
- disputes, not being all the disputes in the arbitration, which require some condition precedent to be fulfilled before they can be submitted to arbitration;
- disputes arising after the commencement of the arbitration. These will normally fall outside the scope of tribunal’s jurisdiction because the jurisdiction is determined, and frozen, by the terms of the reference to arbitration;
- disputes existing at the time of the commencement of the arbitration which were not referred to in the original claim submission, but which the claimant subsequently attempts to introduce into the arbitration by way of amendment of its claim;

If party believes that tribunal lacks jurisdiction it can challenge the jurisdiction of tribunal. There are number of questions which should be kept in mind before party actually challenge it:

a) The law of a number of countries give the tribunal power to deal with issues relating to both the existence and the scope of its own jurisdiction. Before acting, a check should be made for the existence of such a power:\(^\text{17}\).


\(^\text{17}\) It contained for example in art. 16 (1) of the Model Law: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. […]”; sect. 30 (1) of the English Act (1996): “[…], the arbitral tribunal may rule on its own substantive jurisdiction, […]”; sect. 1040 (1) of the German Act (ZPO): “The arbitral tribunal may rule on its own jurisdiction and this connection on the existence or
b) Subject to the laws applicable to the arbitration agreement and to the arbitration proceedings, the arbitration rules of many institutions give the tribunal power to deal with issue relating to both the existence and the scope of its own jurisdiction\(^\text{18}\).

c) The rules and the laws referred to above frequently impose time limits on the making of a challenge to the tribunal’s jurisdiction\(^\text{19}\). The existence of such a time limit may, however, not be effective in preventing a party from raising lack of jurisdiction as a defence to recognition or enforcement of the award, except, in the case of a partial challenge, where the court comes to view that the party has waived the lack of jurisdiction.

d) Whilst a tribunal generally has the power to decide on its own jurisdiction, that decision will seldom be final, in that the court of the place of arbitration may set the decision aside and the courts of the place where enforcement of an award is sought may refuse enforcement of an award if they are of the view that the tribunal did not have jurisdiction\(^\text{20}\).

A challenge to the jurisdiction of an arbitral tribunal may be partial or total.

A partial challenges\(^\text{21}\) to the jurisdiction amount to claims that some of the issues submitted to the tribunal for investigation fall outside of the scope of the arbitration clause and subsequently outside its jurisdiction. It follows from the fact that the challenge only partial that it is accepted by both parties that there is a valid arbitration agreement and valid appointment to the tribunal. A party challenging the tribunal’s jurisdiction as to some only of the disputes before it therefore has the following options:

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\(^{18}\) See for example: art. 21 (1) of UNCITRAL Arbitration Rules: “The arbitral tribunal shall have the power to rule on objection that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”; art. 23 (4) of the LCIA Arbitration Rules: “By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, […]”; art. 20 of Vilnius International Commercial Arbitration Rules: “The arbitral tribunal shall have the power to rule on objection that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”.

\(^{19}\) See for example: art. 16 (2) of the Model Law: “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.[…]”; sect. 1040 (2) of the German Act (ZPO): “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. […]”; sect. 31 of the English Act (1996): “an objection that the arbitration tribunal lacks substantive jurisdiction at the outset of the proceeding must be raised by the party not later that the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal’s jurisdiction.[…]”; art. 19 (2) of the Lithuanian Act: “A plea of the party that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.[…]”.

\(^{20}\) Supra art. V (1) (c) and art. V (1) (a) of the New York Convention: “the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”.

To apply to the tribunal in the course of the proceeding for a decision that it does not have jurisdiction with regard to the disputes said to be outside its jurisdiction. Where the facts relevant to the issue of jurisdiction are closely connected with those relevant to the substance of the dispute the tribunal may refuse to make an interim award on jurisdiction, but leave the question of jurisdiction to be dealt with in its final award.

To apply to the courts of the country (if the local law of that country allow to do that) in which the arbitration proceedings are taking place for:

i) a declaration that the tribunal does not have jurisdiction to deal with the claims in question;

ii) if there is a suspicion that the tribunal will ignore the declaration, an injunction restraining the tribunal from continuing with the arbitration.

To challenge the award in the courts of the place where it was made. This challenge should not be confused with an appeal on the merits of the dispute. It is application to have the award declared void for having been made in excess of the tribunal’s jurisdiction, and set aside.

To resist the recognition and enforcement of the award in a foreign country on the basis that it has been made in excess of the tribunal jurisdiction.

Any lack of jurisdiction may, of course, be cured by agreement of the parties. Even if certain items of the claim or counter-claim are outside the scope of the initial reference to arbitration, the parties may agree that these “new” matters should for convenience be brought within the arbitration, by signing a note or memorandum to this effect. Nevertheless, the party who objects to “new” claims being brought into the arbitration may have good legal grounds for doing so; in consequence, such a party is unlikely to agree to extend the jurisdiction of the arbitral tribunal, however much he may be pressed to do so. In these cases (and indeed, in any case where it seems that it may be exceeding its jurisdiction) the arbitral tribunal should proceed with great caution. If it does exceed its jurisdiction, its award will be vitiated. Two consequences may then follow: first, the award may be set aside in whole or in part by a competent court; secondly, the award may be refused recognition and enforcement in the country, or countries, in which this is sought. National systems of law, and the international conventions on arbitration, both emphasise that it is important that an arbitral tribunal should not exceed its jurisdiction.

Art. V (1) (c) of the New York Convention: “the award delas with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”.
Partial challenges to the jurisdiction of an arbitral tribunal have become relatively common place. They do not in themselves raise any fundamental problems. It is different, however, when there is a total challenge to the jurisdiction of the arbitral tribunal. The issue then is much more serious. It is a matter of deciding whether the arbitral tribunal itself has any right to exist.

The challenge to the entire jurisdiction, in other words total challenges\(^{24}\) to the jurisdiction of the tribunal relate to claims that the parties are not bound by the arbitration agreement. Disputes may be referred to arbitration under the provisions of an arbitration clause, which provides for the reference of future disputes to arbitration; or under the terms of a submission agreement, which is specifically drawn to deal with existing disputes. An arbitral tribunal which derives its authority from a submission agreement is unlikely to face a total challenge to its jurisdiction. The basic purpose of a submission agreement is to give the arbitral tribunal jurisdiction to determine disputes between the parties. It would be perverse indeed (to put it no higher) if one of the parties to such an agreement launched a total challenge to jurisdiction. The most common ground for total challenge includes following:

- The subject matter of the dispute is not arbitrable under the law of the place of arbitration;
- The conditions precedent agreed upon by the parties for arbitration have not been fulfilled;
- Absence of dispute;
- The entire dispute between the parties is not one which they have agreed should be submitted to arbitration.

Total challenge to jurisdiction is alike to arise in practice where the authority of the arbitral tribunal is derived from an arbitration clause. When the validity of the arbitration clause is challenged, we are faced with the difficult question of jurisdiction for the resolution of the problem. Is it the courts that are responsible for determining jurisdiction or the arbitral tribunal itself? There is a logical inconsistency in allowing the arbitral tribunal to decide whether it has jurisdiction to hear the dispute, when the basis for its existence itself is under challenge. If the main agreement between the parties and the arbitration clause are void, the tribunal has no basis on which to anchor its proceedings. Problems with the main agreement may include lack of signature by one of the parties, lack of legal capacity to enter into the contract, misrepresentation or illegality. However, practical considerations suggest that an automatic deferral of jurisdiction to the national courts in the event of such a challenge is not the best solution. Furthermore, it would limit the effectiveness of arbitration agreements only to those claims that do not challenge the tribunal’s jurisdiction.
Finally, it would destroy the function of international arbitration as an autonomous dispute resolution mechanism. For these reasons arbitral practice and national jurisprudence, in most countries where arbitration is welcomed and promoted, tend to recognise the tribunal’s competence to rule on its own jurisdiction. The grant of competence to the arbitral tribunal to enquire into its jurisdiction to hear the dispute is achieved through the use of the doctrines of competence-competence and separability of the arbitration agreement, which will be presented in detail further.

Where the jurisdiction of an arbitral tribunal is challenged, and that jurisdiction is said to derive from an arbitration clause which forms part of a wider agreement between the parties, it may be necessary to consider whether the arbitration clause has a separate or autonomous existence. Where the decision on jurisdiction is to be made by the arbitral tribunal itself, it is necessary to consider what authority the tribunal has to make such a decision. These are two distinct but related questions.

**II.3 Lack of a valid agreement**

Two situations must be distinguished. The first is where there is no arbitration agreement between the parties; the second is where there is such an agreement, but it is alleged by one party to be void.

*No agreement to arbitrate.* The problem is by no means uncommon. The party challenging jurisdiction may argue that he did not make the contract which he is alleged to have made; or he may argue that the contract he made did not contain an arbitration clause. If the parties have not made a valid agreement to arbitrate, any so-called arbitration proceedings are invalid; and so is any purported “award” of the arbitral tribunal. This is a necessary (and indeed inescapable) consequence of the voluntary nature of arbitration, that the contract contains the submission to arbitration, and if the contract was never validly made then there is no submission, and the arbitrators are stripped of any authority or, put more accurately, no authority was ever conferred upon them to hear the dispute.

*Invalid agreement to arbitrate.* A more difficult question is raised in the second situation, where the *existence* of the arbitration agreement is not in doubt, but it is contended that the agreement is for some reason invalid. The UNCITRAL Arbitration Rules states that a decision by the arbitral tribunal that the main contract is null and void need not as a matter of law entail the invalidity of an arbitration clause contained in that contract. This provision of the UNCITRAL

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25 Art. 21 (1) of the UNCITRAL Arbitration Rules: “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the
Arbitration Rules gives rise to difficulties, although they are perhaps more theoretical than real. On an extreme view, which takes to its limits the doctrine of the autonomy of the arbitration clause, the provision means that the arbitration clause will survive even if, for example, the main contract is void for illegality. On a more conservative view, the survival of the arbitration clause depends upon the point of time at which the main contract became null and void. If the main contract was valid when made but became invalid because, for example, of supervening illegality, the arbitration clause may indeed survive; however, if the main contract was null and void \textit{ab initio}, (for example, because it offended public policy) the arbitration clause could not survive; and any decision as to the nullity of the contract would be a matter for the competent court, since no arbitral tribunal could be validly constituted to decide the question.

The provision of the autonomy of arbitration clause/agreement will be discussed in more detail further in third part of this paper.

\textbf{II.4 Court control}

An arbitral tribunal's decision as to its jurisdiction is subject to control by the courts. There are various stages at which this control may be exercised. For example, at the beginning of the arbitral process, an unwilling respondent might wish to challenge the jurisdiction of the arbitral tribunal and seek to do so by recourse to the competent court (which would usually be the court of the place of arbitration). The respondent would ask, in effect, for an order to stop the arbitration going ahead. The availability of this remedy depends on the law of the place of arbitration; if the remedy is not available, the respondent would have to decide whether to boycott the arbitration or to take part, under protest. If the subsequent award went against him, the respondent might either challenge the award in the local courts or resist recognition and enforcement of it, wherever that was sought; as already indicated, lack of jurisdiction would be a ground for resisting recognition and enforcement of an award under the New York Convention\textsuperscript{26}. The most usual course, however, is for a challenge to jurisdiction to be made in the course of the arbitral proceedings, to the arbitral tribunal itself. The arbitral tribunal will then usually (but not invariably) issue an interim award on the issue; and in many jurisdictions this interim award may immediately be challenged in the local courts. In this way, a final decision on the issue of jurisdiction may be obtained at a relatively early stage.

\textsuperscript{26} Supra art. V.1(a) and (c) of the New York Convention.
**Concurrent control.** The procedure by which an immediate application is made to the courts, following an interim award on jurisdiction by the arbitral tribunal, is known as “concurrent control”. For the parties, it has the advantage that they know relatively quickly where they stand; and (unless the arbitral tribunal decides to continue with the proceedings pending a decision from the relevant court) they may be saved time and money on arbitration proceedings which prove to be groundless. The procedure of concurrent control is followed in many countries and has been adopted in the Model Law.\(^{27}\)

**II.5 The choices open to the arbitral tribunal**

An arbitral tribunal which is faced with a challenge to its jurisdiction has three possible courses of action open to it:

- To decide immediately that it has no jurisdiction;
- To hear arguments on the issue of jurisdiction and to issue an interim award; or
- To join the issue of jurisdiction to the merits.

There may be cases in which the lack of jurisdiction is so evident that the arbitral tribunal will feel compelled to take the first course. It will then be for the claimant to seek such remedies as may be open to him, which will usually mean recourse to national courts of law.\(^{28}\) If the facts on which the challenge to jurisdiction are based are so closely connected with the facts of the dispute as to be virtually inseparable, the arbitral tribunal will have to take the third course. It will make a final award which deals with the issue of jurisdiction at the same time as it deals with the merits of the dispute. Moreover, it is the course which is likely to be adopted when the arbitral tribunal is obliged to proceed by default, because the respondent fails or refuses to take part in the arbitral proceedings. If this course is adopted, a party which is aggrieved by the award may then challenge it before the courts of the country in which it was made or resist recognition and enforcement of the award in any countries in which such recognition and enforcement is sought. It is, however, an obvious waste of time and money for an arbitral tribunal to have conducted arbitration from beginning to end, if its award then proves to be invalid for lack of jurisdiction. For this reason, the best course for an arbitral tribunal to take is usually the second; where possible, it should hear arguments on the issue of jurisdiction as a preliminary matter and issue an interim award.

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\(^{27}\) Model Law, Article 16(3), which reads as follows: “The arbitral tribunal may rule on a plea [as to jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

\(^{28}\) There is a possibility, of course, that the court concerned may decide that the arbitral tribunal was wrong to decline jurisdiction, in which case fresh arbitral proceedings would have to be commenced.
award on the point. This enables the parties to know where they stand at a relatively early stage. If
the arbitral tribunal decides in its interim award that it has no jurisdiction, it will in effect have cut
off the branch on which it was sitting. If, however, it decides that it does have jurisdiction, it will
continue with the arbitration. In either event, where the system of concurrent control is operated, the
disappointed party will be able to apply to the competent court for a ruling on the issue of
jurisdiction; and it is this ruling (rather than the award of the arbitral tribunal) which will finally
decide the issue.

Arbitration is an effective method of resolving international trade disputes. It allows
the parties to select judges of their own choice; and it allows them considerable freedom in the way
in which the proceedings are conducted. It does, however, depend upon the agreement of the
parties; if there is no valid agreement, the arbitrators have no authority to act. It must then be for a
court of law, whose jurisdiction does not depend solely upon agreement, to look at the case and
decide whether the arbitral tribunal did or did not have jurisdiction to determine the dispute between
the parties.

II.6 The form of the arbitration agreement

The importance of an agreement which is meant to exclude the jurisdiction of the
national courts, the arbitration agreement must be made in writing. This requirement is also
provided for in the international conventions dealing with the subject, and specifically by the New

Article II of New York Convention states that “each contracting state shall recognise
an agreement in writing…”. The 1961 European Convention on International Commercial
Arbitration applies to arbitration agreement which are defined in Article I (2) (a):
“either and arbitral clause in a contract or an arbitration agreement, the contract or arbitration
agreement being signed by the parties, or contained in an exchange of letters, telegrams or in
communication by teleprinter and, in relations between States that do not require that an
arbitration agreement be made in writing, any arbitration agreement in the form authorised by
these laws”.

This provision resolves a problem which had been left open by the New York
Convention, namely whether the reference to the requirement of the written form is to be interpreted
as establishing a mandatory rule of a uniform nature in the sphere of application of the Convention.

29 This requirement as well is in sect. 1031 of the German Act (ZPO): “The arbitration agreement shall be contained
either in a document signed by the parties or exchange letters, […]” and art. 9 (2) of the Lithuanian Act: “ The
arbitration agreement shall be concluded in writing […]”.

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The words “in writing” are usually widely understood and extend to cover agreement made by most modern forms of communication, including telex and telex copier machines.

Article II (2) of the New York Convention, which states that “the term agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams” no longer corresponds to the needs of international trade practices. As, however, it is a uniform rule, it may be a real stumbling block for full autonomy of the arbitration agreement. It is true that many countries have now formulated necessary rules on the form of arbitration agreements, less strict than the uniform rule of art. II (2), applying to arbitration, which take place within their territories. It is also true that certain courts, on the basis of art. 7 (2) of the UNCITRAL Model Law or on the basis of their own domestic laws interpret art. II (2) of the New York Convention freely or apply their more favourable domestic law pursuant to art. VII of the New York Convention, to such an extent that the uniform nature of the rule contained in art. II (2) is now highly disputable. There is a risk, however, that a court will stick to art. II (2) of the New York Convention when an award in which full autonomy has been applied is to be enforced, if – to take the best justification possible – its own law is not more favourable towards the validity of the arbitration agreement with regard to its form.

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30 For example, sect. 5 (1) of the English Arbitration Act (1996): “The provision of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for purposes of this Par only in writing. […]”.
III. THE DOCTRINE OF SEPARABILITY AND COMPETENCE-COMPETENCE

PRINCIPLE

III.1 Introduction

So as we saw in earlier part of this paper it is important for party, who wants to make challenge to the jurisdiction of the arbitration, to know the competence – competence principle and the doctrine of separability. Both autonomy and competence-competence were already provided for in the 1955 ICC Rules of Arbitration. As for the New York Convention, it contained no specific provisions relating thereto, both notions lying outside its immediate concern which was to ensure the international effectiveness of foreign arbitral awards. Since then, not forgetting the 1961 European Convention, these rules have been sanctioned by a great many statutes and arbitration rules, applied by numerous courts and arbitral tribunals and analysed in countless learned articles.

There is sometimes confusion between the two rules, for both concerns the jurisdiction of arbitrators. Although they may be applied in conjunction with each other and both contribute to the effectiveness of arbitration agreements, they are in fact distinct. To speak of autonomy is to consider the arbitration clause as separate from the main contract, whereas competence-competence means giving arbitrators the power to rule on their own jurisdiction without being under any obligation to stay proceedings if a court is concurrently seized. Although the power of arbitrators to rule on the validity of the main contract, with the possibility of declaring it to be ineffective, null and void or non-existent presupposes acceptance of the autonomy of the arbitration agreement in relation to the main contract, such autonomy alone is not a sufficient basis for allowing arbitrators to rule on the validity of the arbitration agreement itself when the latter is challenged. It is precisely competence-competence which allows this. These rules are also distinguished from each other by their legal nature: the autonomy of the arbitration agreement amounting to a question of substance and competence-competence to a question of procedure. Nor can it be said that the two rules have developed in the same way and been recognised internationally to the same extent. Thus, each rule needs to be treated separately. The ultimate aim is to give the arbitration agreement maximum effectiveness. Autonomy and competence-competence have developed in parallel, regarding both their becoming widespread and generally accepted internationally and concerning the implementation of their intrinsic value. The New York Convention does not appear to have hindered this development. However, although the rules are not

31 Art. 5 (3) of the European Convention 1961: “Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question, shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or validity of the arbitration agreement or of the contract of which the agreement forms part.”
dealt with expressly in the New York Convention, they are indirectly concerned with some of its provisions, which, it may be argued with certainty, do not encourage the full effects of the principles to be realised.

III.2 Autonomy of the arbitration agreement

The objection to the arbitrator’s jurisdiction, that the contract containing the arbitral clause is invalid or, for some other reason, does not bind the parties, raises difficult question about the nature of the arbitral clause and its relationship with the other terms of the agreement in which it is contained. This doctrine can be called a lot of names as the doctrine of autonomy, severability or separability.

Under the autonomy doctrine of the arbitration clause, the agreement to arbitrate contained in an arbitration clause is regarded as a separate agreement from the rest of the contract between the parties; and so it may continue to exist when for all other purposes the contract itself is at an end. Moreover, the arbitration clause may lead this separate existence not only when the contract has come to an end by performance (that is to say, when it has been executed) but also when it has come to an end prematurely, as a result of a supervening event such as force majeure or illegality. Since the arbitration clause is the base on which the arbitration itself is founded, it is important that it should be capable of this separate existence. Most claims are brought to arbitration following termination of a contract. It would be ironic if the arbitration clause was held to have been terminated along with the contract of which it formed part. Indeed it is at this point that it is most needed, as a method of determining the claims and counter-claims of the parties.

The fundamental legal principal governing international arbitration agreement is that of their autonomy. Term ‘autonomy’ has dual meaning: first it is used in traditional sense, which is to refer to the autonomy or separability of the arbitration agreement from the main contract to which it relates, second refer to autonomy of the arbitration agreement from “all national laws”, which is an entirely different concept, related to the issue of the selection of the rules on the basis of which the existence and validity of an arbitration agreement must be assessed.

a) Autonomy of the arbitration agreement from the main contract.

The main and traditional meaning of the autonomy of the arbitration agreement is it its autonomy from the main contract in which it is found or to which it relates.

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The principal that the arbitration agreement is separate/autonomous from the main contract has long been established by the case law accepted from the early 1940s\textsuperscript{34}. The separability of the arbitration clause from the rest of the contract between the parties only came in line with its continental version in England Harbour Assurance case. In Harbour the Court of Appeal extended the separability principle to the initial illegality of the contract. In that case one party claimed that there has been a total breach of contract by the other, this:

“does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.”\textsuperscript{35}

So the separability question was solved in England, even before the Arbitration Act of 1996 was promulgated.

It should be noted, however, that this hostility towards autonomy appeared in the context of the discussion on the resulting competence-competence, over which courts, especially in common law countries, are generally more hesitant. This being said, both courts and arbitral tribunals sometimes confuse the two rules.

There is now full recognition of the separability doctrine in English law. This has been codified in section 7 of the Arbitration Act 1996 that reads:

“We, unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffectible because that other agreement is invalid, or did not come into existence or has become ineffectible, and it shall for that purpose be treated as a distinct agreement.”

Similarly, art. 23.1 of the LCIA Rules provide (in almost identical terms to sec. 7):

“…and arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent of ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause.”

\textsuperscript{34} The doctrine of separability in England was first established in Heyman v Darwins Ltd [1942] App Cas 356.

Furthermore and following on from the express adoption of the separability doctrine\textsuperscript{36}, under the 1996 Act the arbitral tribunal is competent to rule on the existence or otherwise of its own jurisdiction.

In England, the doctrine of separability has slowly won judicial approbation. The arbitration clause is by now generally viewed as a self-contained contract ancillary to the principal in which it is physically embedded, which survives termination by breach,\textsuperscript{37} frustration, rescission, subsequent invalidity and performance. Moreover, whether a contract containing an arbitration clause set out the true intention of the parties or needed to be rectified was recently held to fall within the scope of a sufficiently wide arbitration agreement. However, the traditional view of English law holds disputes as to whether a contract incorporating an arbitration clause was ever concluded and whether such a contract was void \textit{ab initio} to fall outside of the scope of the arbitration clause regardless of its wording.\textsuperscript{38}

The subject matter of the contract is by its very nature always different from that of the arbitration agreement; thus, there is no reason for treating an arbitration agreement which is physically separate from the main contract any differently from an arbitration agreement which is a part of the main contract. It can be said that, when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral agreement survives any defect or acquired disability of the principal agreement.

According to this conception of autonomy, the arbitration agreement remains unaffected by the fate of the main contract, that is the latter's nullity, resolution, termination, or even its non-existence. Accordingly, the arbitrator has jurisdiction to rule on any complaint relating to the existence or the validity of the main contract, provided there are no grounds for declaring the arbitration agreement itself invalid. From the very outset, the corollary of this conception of autonomy was that the arbitration agreement could be governed by a different law from that governing the main contract. Once the autonomy rule had been accepted, its implementation over the years does not appear to have given rise to any objections in connection with this possibility. However, if the parties have not expressly chosen a law for the arbitration agreement, it is true that the application to the arbitration agreement of a law different from that governing the main contract will depend upon the interpretation of certain localising factors which will usually be the same for the arbitration agreement as for the main contract. Consequently, this theoretical possibility is rarely encountered in arbitration case law.

\textsuperscript{36} English law has always tended to consider the question of separability together with that competence-competence.


On the other hand, during the process of development towards acceptance of the rule, there was in certain countries, until quite recently, a degree of reluctance with regard to its basic meaning, i.e., the independence of the arbitration agreement in relation to the fate of the main contract, where the main contract was non-existent or invalid *ab initio*.

The autonomy of the arbitration agreement is very widely recognised in the world today. It became the general principles of arbitration upon which international arbitrators rely, irrespective of their seat and of the law governing the proceedings. Arbitration rules derive their authority *from the intentions of the parties* who refer to them in their arbitration agreement. Consequently, where the parties have referred to arbitration rules which states the doctrine of separability of the arbitration agreement, those parties are presumed to have intended that the arbitration agreement be treated separately from the main contract. There are rare cases where the law governing the arbitration agreement does not recognise the doctrine of separability. In such cases the arbitrators or courts can separate the treatment of the arbitration agreement from that of the main contract simply by basing their decision on the intentions of the parties, provided only that the law in question does not expressly opposed it even though it may not expressly recognise the principle.

As was mentioned already the first arbitral institution which recognised the doctrine of separability of the arbitration agreement was the ICC in 1955. Article 6 (4) provides that:

“arbitral tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void”.

ICC rules confirm the autonomy of the arbitration agreement, both where it is assumed that the main contract is void and where it is assumed to be non-existent. The arbitrator should only refuse jurisdiction if they find that the arbitration agreement itself is either void or non-existent. The revision of the ICC Rules in 1998 reinforces the approach that the goal of the Court’s *prima facie* review being now only established whether “an arbitration agreement under the Rules may exist”.

The UNCITRAL Arbitration Rules adopted in the 1976 also address the separability of the arbitration agreement. Article 21 (2) reads that:

“an arbitration clause which forms part of the contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”.

The provision that decision holding the contract to be null and void shall not entail “*ipso jure*” the invalidity of the arbitration clause should not be understood as some sort of
limitation of the principle of separability. It simply should mean that if the event causing main contract to be void also affect the arbitration clause (e.g. invalid consent) both must be declared void by the arbitrators who, as a result, will be unable to rule on the other aspects of the dispute.

Where the parties put in their contract a clause expressly authorising the arbitrator to decide whether the main contract ever bound the parties or incorporated rules, which were mentioned earlier ICC Arbitration rules, one can infer that separability has been mutually accepted by them. In many institutional arbitration rules originating in common law countries were recently adopted the principle of the autonomy of arbitration agreements.

The principle of the autonomy of arbitration agreement has taken a new dimension within its recognition in national legal systems, rather then simply by norms of private origin such as arbitration rules. The doctrine of separability is not clearly expressed in the major arbitration treaties. The adoption of the mentioned doctrine by the national legal systems therefore involved more than merely ratifying those treaties.

The 1958 New York Convention makes no direct reference to the principle of separability. It just states that recognition and enforcement of the award may be refused if the party against whom such measures are sought can establish that the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where award was made” (art. V (1) (a))\(^{39}\). As we can see the New York Convention left the issue of separability to be decided by the relevant national legal systems.

The 1961 European Convention only deals explicitly with the question of whether arbitrators are competent to rule on the issue of their own jurisdiction (Art. V (3))\(^{40}\). This question no doubt very closely related with the doctrine of separability, but recognition of the doctrine of separability in the European Convention remains implicit nonetheless.

Most modern arbitration laws contain an express provision setting towards the principle of separability of the arbitration agreement. The most significant changes in the area of the autonomy of arbitration agreement came in 1985, with an introduction of the UNCITRAL Model Law on International Commercial Arbitration. Article 16 (1) of the Model reproduces the term of article 21 (2) of the UNCITRAL Arbitration Rules and provide that:

“An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.

Many countries have implemented legislation based on the Model Law, as a result the principle of the separability became widespread. It is the case of Germany and Lithuania

\(^{39}\) New York Convention 1958.

\(^{40}\) European Convention 1961.
A new German Arbitration Act took effect on January 1, 1998. It was incorporated in the German Code of Civil Procedure (Zivilprozessordnung or ZPO) at section 1025. The exceptional feature of the Act is that is nothing exceptional about it: Germany has adopted the UNCITRAL Model Law in a model way.

The driving power force behind the Act is Germany’s desire to compete with traditional arbitration centres such as Switzerland, France, and England, to mention just a few, in the business of settling business disputes. In the last 15 years, those and other countries modernise their arbitration Acts, but most (England being the qualified exception) have taken over at best only selected elements of the UNCITRAL Model Law.

The new Act follows the Model Law in all basic provisions, discarding relics from the 1877 Act and some other longstanding rules. The changes concern every phase of arbitration, from formation of a valid arbitration agreement to proceedings for setting aside an award.

The mentioned doctrine of separability is a common feature of most modern arbitration laws. The art.’s 16 (1) the first two sentences were transformed into German law in sect. 1040 (1) ZPO:

The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The doctrine of separability has been well established before the arrival of the new Act. However, the separability rule has neither a priori status nor is it mandatory, but constitutes a guideline for the presumed intention of the parties, because of the potential complications arising when the validity the arbitration clause is made to depend on that of the commercial contract. In light of these procedural complications, the presumption prevails that rational parties explicitly negotiating the terms of arbitration will choose a rule granting the arbitral tribunal jurisdiction over the validity of the commercial contract claims for restitution. However, this rationale only applies if the arbitration agreement itself is not defective. Such a defect may well coincide with the defect neutralising the commercial contract. The impact of these considerations is not merely theoretical but meant to preserve the autonomy of the contracting parties. If a plaintiff produces documents submitted to his opponent which contain an arbitration clause, the defendant must not be held to such an “agreement” on the ground of a presumption of separability. This presumption exists only when commercial contract is consummated but turns out to be defective – or better, is alleged by one side to be defective – down the road. In such a case the presumption is plausible as a default that the parties wanted the arbitration agreement to cover disputes concerning the validity of their

40 European Convention 1961 supra art. V (3).
commercial arbitration. The case is quite different if one side claims never to have entered into a contract, be it a commercial contract or an arbitration agreement. A presumption of separate consummation of arbitration agreement which were meant to cover disputes concerning the formation of the commercial contract is not acceptable because it interferes with the autonomy of the party reluctant to arbitrate. Forcing a party into arbitration simply because its opponent sent drafts of a contract containing a boilerplate arbitration clause cannot be accepted on any legal grounds.

The Lithuanian arbitration law took the same strategy as the German Arbitration Act, it followed the UNCITRAL Model Law. Lithuania's economic transition from a centrally-planned to a market economy continues to be complicated by the need to implement its new institutions and legal framework for an independent state. Motivated by its desire to become a trading partner with the West, Lithuania has passed a number of pieces of legislation to support a functioning market economy. In the area of international commercial contracts, Lithuania became a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by ratification of the Seimas (Parliament) on January 17, 1995. Seimas also provided that reciprocal effect will be given to contracts made with states not a party to the New York Convention. In 1996 Lithuania adopted a law on commercial arbitration no. I-1274, patterned, as was already mentioned, after the UNICTRAL Model Law. In addition, two international associations were established, Vilnius International Commercial Arbitration (VICA) in 1986, and the Association International Chamber of Commerce Lithuania (AICC) in 1998.

Lithuanian Law on Arbitration follows the UNCITRAL Model Law. The doctrine of separability provisions follows the Model Law art. 16. The art. 19 (1) of Lithuanian Law on Arbitration contains similar provision on the separability doctrine as the art. 16 of the Model law41.

Many arbitral awards have recognised the separability of the arbitration agreement as a general principle of international commercial arbitration, without considering it necessary to justify such recognition by reference to a particular national law. In arriving at the award an arbitrators shall not be restricted by any specific rule of law, but shall have the power to base his award on consideration of equity and on generally recognised principles of law and in particular international law.

*Consequences of the separability doctrine.* There are some consequences of concluding that an arbitration agreement is separable from the main contract. The consequences can be direct or indirect.42

41 Art. 19 (1) of Lithuanian Act: “[…], an arbitral clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.[…]”.
**Direct consequences.** The separability of the arbitration agreement from the main contract gives rise to the two direct consequences. First of all is that the arbitration agreement is unaffected by the status of the main contract. It means that the fundamental principle of doctrine of separability is that, the arbitration agreement is unaffected by the events affecting the main contract what as results the validity of the arbitration agreement does not depend on that of the main contract. The second is that the arbitration agreement may be governed by the law different from the governing the main contract. It means that the autonomy of the arbitration agreement also means that such agreements will not necessarily be governed by rules of the same nature and origin as those governing the main contract.

**Indirect consequences.** There are four indirect consequences. The first of the fundamental principles of arbitration law is that arbitrators have the power to rule on their own jurisdiction. That principle is often presented as direct result of the separability doctrine. The competence-competence and separability principles are closely linked and have similar objective. This issue will be discussed more detailed below in the “Interrelation between doctrines” part. The second consequence is combination of the principle of validity and the rejection of the choice of law method. The principle of separability was initially intended as means of isolating the arbitration agreement from laws affecting the main contract, it has gradually acquired a new purposes with complements, rather than, it is original objective. Some countries now use the principle of autonomy as the source for the principles of the invalidity of international arbitration agreements, under which such agreements are not subject to the traditional choice of law method. So the principle of autonomy denoted autonomy from the main contract, which can refer to autonomy from all national laws. The third consequent is that, the arbitration clause may survive termination of expiry of the main agreement. Parties not infrequently commence arbitral proceedings after their main contract has expired or been terminated. In most jurisdictions there is no general obstacle to this, provided that the claims arise from conduct during the term of agreement (or during the term of specific provisions that survived agreement). Finally, the fourth consequence is that, the invalidity of the parties’ main contract may not deprive an arbitral award of validity, if an arbitral or court concludes that the parties’ entire main contract was void, that conclusion would not necessarily deprive the parties’ arbitration agreement – at hence, the arbitrator’s award – of validity.

The concept of the autonomy of the arbitration clause is important in practice. Most international commercial arbitrations arise under arbitration clauses. It would frustrate the purpose

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42 Gaillard E. & Savage J., supra at p. 209.
43 Born B.G., supra at p. 68.
44 Born B.G., supra at p. 68.
of these clauses if a party was entitled to claim that the agreement to arbitrate ceased to exist as soon as the primary contract came to an end by performance or by some supervening event. The concept of the autonomy of the arbitration clause is relatively new, but widely recognised. Today the concept of the autonomy of the arbitration clause is quite commonly accepted by national legal systems, especially with respect to international commercial arbitration.

The rule of autonomy is apparently accepted by all national systems of law that give it the status of a general principle. Indeed, if the eighties can be seen as the decade of modern legislation on arbitration with explicit recognition of the rule of the autonomy of the arbitration agreement in certain countries, and in others as the decade of consistent assertion of the rule by courts, the nineties have filled out the picture.

It should be noted, finally, that even if there may be some countries which have not yet enshrined the principle of the autonomy of the arbitration agreement in one way or another, the problem of an arbitration agreement being void as a result of the main contract being void does not arise when the parties refer to an arbitration institution which allows this principle, since this amounts to an indirect agreement between the parties to apply the rule. It can thus be reaffirmed without any hesitation that the autonomy of the arbitration agreement in the traditional meaning of separability constitutes a general principle of international arbitration on account of its being universally recognised. It follows that arbitrators no longer need to determine the law applicable to the contract and/or the arbitration agreement in order to check that a plea concerning the existence or the validity of the main contract does not affect ipso facto their jurisdiction. They do not even have to try to determine the intention of the parties in this regard since the principle inherently implies that this is the parties' intention. So long as the validity of the arbitration agreement itself is not questioned, the arbitrators must declare that they have jurisdiction and proceed to judge on the merits, whereby they may possibly rule that the main contract is non-existent or void. It may be observed that this gradual progression towards general acceptance of the principle of the autonomy/separability of the arbitration agreement coincides with the accession of new states to the New York Convention. It cannot be said that there was direct interaction between the two phenomena: it is more a case of parallelism due to an awareness by national legal systems of the importance of international arbitration and of its need to function properly.

b) Autonomy of the arbitration agreement from all national laws

The concept of the arbitration agreement can be described as well as agreements autonomy from various national laws which may apply to it, rather than its autonomy from the main contract. In other words the arbitration agreement remains independent of the various national laws liable to govern it under the choice of law method.
The choice of law method is both oldest method of determining the law governing an arbitration agreement and that most commonly encountered in comparative law. The principle conventions on arbitration refer to the choice of law method. Article V (1) (a) of the 1958 New York Convention provides that recognition or enforcement of an award may be refused if the arbitration agreement is

"not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made”.

The 1961 European Convention has the similar wording in the article IX (1)\textsuperscript{45}. The traditional choice of law can rise number of difficulties: when choosing legal category or categories which may be subject to different law and when deciding which connecting factor or factors should be used identify those laws.

A number of questions arise when choosing the legal category or categories used to determine the law or laws that apply to the arbitration agreement. One always must keep in mind that the arbitration agreement is almost invariably torn between two possible characterisations:

a) one connecting it to the arbitral procedure. The characteristics when the arbitration agreement connected to arbitral procedure deals with problems which arise from applying the choice of law approach to the arbitration agreement is whether that agreement should be characterised as substantive or procedural. In the former case, the arbitration agreement will be characterised as a contract, whereas in the latter the law governing the arbitral procedure will also govern the arbitration agreement. In the past was a resolution that the validity of the arbitration agreement would be governed by the law of the seat of the arbitration\textsuperscript{46}. It was characterised the arbitration agreement as procedural and applied a supposed principle that the arbitral procedure was necessarily governed by the law of the country where the arbitration was held. Later this principle was rejected because it was no longer correct to say that arbitral procedure will necessarily be governed by the law of the seat of the arbitration. Parties could subject it to the law or rules of law of their choice, and arbitrators are not bound to apply the procedural rule of the law of the seat of arbitration even in the absence of the choice of the parties. Other critic were that connecting the arbitration agreement to the law governing procedure would create practical problems, because the parties the same as the arbitrators may prefer not to determine in advance which law is to govern the arbitral procedure and to leave it to open the possibility for the arbitral tribunal to rule on an issue-by-issue basis. Finally there is no theoretical justification for the assimilation of the arbitration

\textsuperscript{45} Art. IX (1) (a) of European Convention says that: “The setting aside of a contracting state of an award…shall only constitute a ground for a refusal of recognition or enforcement in another contracting state […] by the following reason, the parties to the arbitration agreement were under the law applicable to them[…], under the law of the country where the award was made”
agreement and the arbitral procedure, because arbitration is basically a contract, even if it its object is to set up a procedure. It comes before the procedure and does not constitute a part of it. So if one decides to use the choice of law method, it is at the very least necessary to characterise the arbitration agreement as an autonomous contract.

b) *the other connecting it to the main contract to which it relates.* The principle of the autonomy of the arbitration agreement from the main contract requires each to be treated separately when determining the applicable law. But here has often confusion between the law applicable to the arbitration agreement and the law applicable to the main contract. In practice this confusion commonly occurs where the arbitration agreement takes the form of an arbitration clause. Where the main contract does contain a choice of law clause, it is perfectly legitimate to query whether that choice, which is usually expressed in broad terms, applies only to the main contract, or whether it also applies to the arbitration agreement. Where the parties have not chosen a law govern the main contract, it is generally considered that the dispute agreement should be governed by the legal system with which it has the closest connection. Then the question will rise of the whether it is the arbitration agreement or the main contract which needs to be closely connected to a particular law for that law to be applicable to the arbitration agreement. To identify the law most closely connected to the arbitration agreement itself it means to give priority to connecting factors which apply specifically to that agreement (e.g. the chosen arbitration rules and the seat or the language of the arbitration).

If the choice of law method is to be applied to the arbitration agreement, no one obvious *connecting factor* emerges from which the applicable law can be established. In the only case there were no difficulty where parties themselves have chosen the law governing the arbitration agreement. However, where the choice of law approach is used and the parties have made no express choice, there is little evidence of agreement, either among authors or in arbitral case law, as to relative importance of each of the various connecting factors from which the applicable law might be determined. The view according to which law governing the arbitration agreement should be selected by considering all of the connecting factors is not very helpful. The weight should be given to each of the connecting factors that may be taken into account when selecting the law governing the arbitration agreement.

One of the another connecting factors is *the place where the arbitration agreement was concluded.* Neither the substantive conditions governing the validity of the arbitration agreement nor the conditions governing its form should automatically be subject to the law of the place where the contract was concluded, despite a traditional leaning in favour of applying that law.

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46 Gaillard E. & Savage J. supra at p. 220
to conditions of form. In some cases the place where the contract was concluded is not only difficult to establish, but also it is usually chosen completely by chance. Another of connecting factors is factors specific to certain arbitration agreement. These specific factors may carry more weight than the place where that agreement where made. This would be the case where the parties have used an arbitration clause taken from a standard contract which is drafted by a professional organisation in particular country and is closely linked to that country’s legal system. The third connecting factor is the seat of arbitration. Where the parties have no chosen a law governing the arbitration, the seat of the arbitration is undoubtedly considered to be the most significant factor in the determination of the applicable law. However where, in the absence of a choice by the parties, the choice is made by the arbitral institution or by the arbitrators themselves, the seat’s value as a connecting factor is weaker, if the goal is to identify the legal system to which the parties intended to subject their agreement.

Another method to determine the law governing the arbitration agreement, the substantive rules method, consist of the exclusive application of substantive rules, independently of any applicable law. The arbitration agreement is autonomous of any national laws and the validity of the agreement must be judged solely in the light of the requirement of international public policy. The arbitration agreement is governed not by national laws, but only by the requirements – which are, by definition, very limited – of international public policy. The validity of an arbitration agreement are fairly limited (on the prima facie control on the existence and the validity of the arbitration agreement), as a result of the competence-competence principle and the limited grounds on which and award can be set aside or refuse enforcement. The issue will arise where the party has petitioned for an award to be set aside or enforced, and where it is alleged either that the award was made, in the absence of an arbitration agreement or on the basis of an arbitration agreement that was void or had expired, or that the arbitral tribunal decline jurisdiction after wrongly deciding that an arbitration agreement was non-existence or invalid. Where arbitrators are required to examine the existence and validity of the arbitration agreement on which their jurisdiction is founded, it is even more important that transitional rules apply, rather than those designated by a choice of law rules. Since arbitrators belong to no national legal order, they have no institutional reason to give precedence to the choice of law rules or substantive provisions of any of the legal systems connected to dispute. In the absence of any indication by the parties on the point, the approach most consistent with the role of the arbitrators is to apply what they consider to be the fundamental requirements of justice. These can be determined on the basis of comparative law and international arbitral case law, leaving aside the idiosyncrasies of domestic law. Another way of limiting the effect of the idiosyncrasies of local law is to subject the validity of the arbitration agreement to the
law of the seat of the arbitration. As the seat of the arbitration is often located in a country which is neutral for both parties, the validity of the arbitration agreement and thus the jurisdiction of the arbitral tribunal will not be dependent on one or other of the laws of the parties’ home countries. There is consequently a strong tendency in arbitral case law to examine the existence and validity of the arbitration agreement exclusively by reference to transnational substantive rules, in keeping with the transnational nature of the source of the arbitrators’ powers.

The doctrine of the separability/autonomy of the arbitration clause is a useful legal fiction that provides a way out of the complex legal and logical problem. Its function is to disengage the arbitration clause from the rest of the contract and to give it an independent existence. Thus the arbitration clause is not affected by defects in the contract between the parties and as a separate agreement provides the basis for the arbitral tribunal’s appointment. As was mentioned the separability doctrine rests on party autonomy. If it is the parties’ intention to refer any disputes between them to arbitration, then the arbitral tribunal should be the appointed organ of dispute resolution even when the dispute is about the existence of the contract. It is perfectly possible for the parties to exclude the operation of the doctrine. Further, there are no obvious public policy reasons for restricting the parties’ determination of jurisdictional issues. The doctrine improves the integrity of the arbitral process. Further, there is a legal presumption of the existence of two agreements and finally, the role of the courts is review of the arbitral award and not of the merits of the dispute.

**III.3 Competence-competence principle**

This principle is the transposition, in a qualified way, to arbitration of the general procedural principle that any court is entitled to rule on its own jurisdiction. Recalling the distinction between the two principles (separability and competence-competence), we can say that if, under the autonomy/separability principle, arbitrators have jurisdiction to rule on any dispute over the existence or validity of the main contract, under the competence-competence principle they have the power to rule on any question relating to their jurisdiction or, in other words, to the effectiveness of the arbitration agreement as such. The separability doctrine is the first stage in establishing the arbitral tribunal’s functional independence. The survival of the arbitration clause gives the tribunal the right to proceed in hearing the dispute. The first issue that will arise when there is doubt about the propriety of the appointment of the tribunal is its jurisdiction. It is recognised that the arbitral tribunal has the competence to determine its own jurisdiction without involving the courts. The fact that arbitrators have jurisdiction to determine their own jurisdiction –
known as the “competence-competence” principle[^47] – is among the most important, and contentious, rules of international arbitration. Under this theory the arbitrators can determine the existence of the arbitration clause, its validity and scope, without the need to invoke the jurisdiction of a national court.

The competence-competence principle has given rise to much controversy and misunderstanding, and behind the appearance of unanimity – most laws now recognise the principle in some form – it continues to be the subject of considerable divergence between different legal systems.

Express stipulations as to the power of an arbitral tribunal to decide on its own jurisdiction, serve a useful purpose. They make it clear beyond argument that the parties to the arbitration have agreed (by adopting such rules, either expressly or by incorporation) that the arbitral tribunal is to have the powers conferred by the rules. Some caution must be expressed, however, with respect to the views of commentators who affect to see these rules as giving an arbitral tribunal power to decide upon its jurisdiction in almost any circumstances. The most commonly applied international conventions and rules of arbitration all support the autonomy of the arbitration agreement and the power of the arbitrator to rule on his own jurisdiction. The jurisdiction of the arbitral tribunal depends upon the agreement of the parties. Without a valid agreement, there can be no valid arbitration[^48].

More fundamentally, although the arbitrators’ jurisdiction to rule on their own jurisdiction is needed one of the effects of the arbitration agreement, the basis of that power is neither the arbitration agreement itself, nor the principle of *pacta sunt servanda* under which the arbitration agreement is binding. There are several possible variations of competence-competence doctrine:

- **Arbitrators’ power to continue with arbitral proceedings despite one party’s challenge to arbitration agreement.** At a minimum, the competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective. The principle of the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void, because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the allege

[^47]: This is known as ‘kompetenz-kompetenz’ in Germany.
[^48]: This is to some extent recognised in the practice of the ICC which, as has been seen, requires that if one of the parties raises a plea concerning the existence or validity of the agreement to arbitrate, the court must at least be satisfied of “the prima facie existence of such an agreement”, before deciding that the arbitration shall proceed.
invalidity directly concerns the arbitration agreement. That is a consequence of the competence-competence principle alone.

- **Arbitrators’ concurrent power to rule on challenge to arbitration agreement, subject to subsequent judicial review.** Somewhat more broadly, the competence-competence doctrine could permit arbitrators to consider challenges to their jurisdiction in the arbitral proceedings. That is, arbitrators would be permitted to consider and make award on the formation, validity, and scope of the parties’ arbitration agreement. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law they are bound to go without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody’s else. They are not obliged to take either of those course. They are entitled to inquire into the merits of the issue as to whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not. Despite the arbitrators’ power to rule on jurisdictional challenges, either party to the arbitration would be free to seek either immediate or subsequent judicial resolution of the jurisdictional challenge. In the event of an arbitral award on subject of jurisdiction (either interim or final), the arbitrator’s ruling would be subject to judicial review under otherwise-applicable standards of review.

- **Arbitrators’ exclusive power to rule preliminary on challenge to arbitration agreement, subject to subsequent judicial review.** Even more broadly, the competence-competence doctrine could grant an arbitral tribunal exclusive power to preliminary consider and rule on challenges to its jurisdiction. Under this construction, national courts would be precluded from considering challenges to an arbitration agreement until the relevant arbitral tribunal had done so. After the arbitrators had made an award on jurisdiction (interim or final), the award would be subject to judicial review under otherwise-applicable standards of review. Alternatively, no judicial review of a jurisdictional ruling by the tribunal would be permitted until a final award on the merits was made by the tribunal (even if jurisdictional issues were decided in an interim award).

- **Arbitrators’ exclusive power to decide challenges to arbitration agreement.** Most broadly, the competence-competence doctrine could mean that the arbitral tribunal possessed exclusive power to consider and decide challenges to its jurisdiction, subject to little or no judicial review. That is, national courts would be preclude from considering a challenge to an arbitration
agreement, until an arbitral award was made on the challenge. Thereafter, judicial review would be available only on the highly-deferential grounds applicable in many jurisdiction to non-jurisdictional arbitral awards. The basis for the competence-competence principle lies not in the arbitration agreement, but in the arbitration laws of the country where the arbitration is held and, more generally, in the laws of all countries liable to recognise an award made by arbitrators concerning their own jurisdiction.

The term ‘Kompetenz – kompetenz’ is taken from German legal terminology. In case of Germany the new German Act has actually abandoned the competence – competence principle in the extreme form as it had been practised. Kompetenz – kompetenz in Germany meant that if the parties concluded a second arbitration agreement giving the arbitral tribunal the right to rule on its own jurisdiction in the first matter (which merchants could do by simply adding a sentence to that effect in arbitration clause), the issue of jurisdiction of the arbitral tribunal could not be adjudicated by state courts at all as long as the second arbitration clause itself was valid. In other words, the parties could effectively prohibit the state courts from ruling on the jurisdiction of the arbitral tribunal altogether and not just until the arbitral tribunal had made its own jurisdiction. In Germany it was never been a dispute that the arbitral tribunal is empowered to rule on its own jurisdiction, i.e. on the question of a valid and biding arbitration agreement.

The kompetenz – kompetenz concept refers to the exclusive authority of the tribunal concerning matters of contract formation, i.e. to decide the issue of a valid arbitration agreement with a biding effect both for the parties and the public policy. More precisely, kompetenz – kompetenz does not mean the tribunal may continue its proceedings and rule on the question of a valid arbitration agreement up front, after defendant has raised this issue, but that court of law, when called upon to recognise and enforce the award, is barred from reviewing the tribunal’s decision. This theory was labelled the principle “kompetenz – kompetenz” because the arbitral tribunal was thereby effectively granted the power (competence) to make a biding decision on its own jurisdiction (competence).

The first approach towards recognition of kompetenze – kompetenzen occurred in 1955 when the German Federal Supreme Court held that the public forum request to enforce an arbitral award is not entitled to question the existence of a valid arbitration agreement. The court arrived at this conclusion by presuming the parties entered into not one but two arbitration agreements: one with respect to their commercial contract and another regarding a potential dispute about the existence of a valid arbitration agreement. Not a thirty years did the German Federal Supreme Court received the opportunity that this jurisprudence was not limited to the recognition and enforcement stages but also was applicable to the stage preceding the creation of the arbitral
tribunal. If claimant institutes an action in the public courts in violation of a “double arbitration agreement” the court must dismiss the action under sect. 1032 (1) of German Act (ZPO) without being able to rule on the validity of the first arbitration agreement. Rather, judicial review is limited to the ”second” arbitration agreement, pursuant to the kompetenze – kompetenze.

The competence-competence principle is now recognised by the main international conventions on arbitration, by most modern arbitration statutes, and by the majority of institutional arbitration rules. As the 1958 New York Convention only deals with the conditions for recognition and enforcement of award, it does not cover the competence-competence principle. On the opposite, the 1961 European Convention provides clearly in art. V (3) that:

"subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part."

The UNCITRAL Model Law provides in art.16 (3):

“the arbitral tribunal may rule on a plea that the arbitral tribunal does not have jurisdiction either as preliminary question or in an award on the merits” and that, in the event of an action to set aside a partial award concerning jurisdiction “the arbitral tribunal may continue the arbitral proceedings and make an award”.

The UNCITRAL Arbitration Rules provide:

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

With a introduction with a new German Act, the legislator intended to rekindle the stalled discussion about kompetenze – kompetenze. The problem must now be solved upon the foundation of the interaction between sects. 1032 and 1040 of German Act (ZPO), which in turn are a codification of art. 8 and 16 of the Model Law.

Sect. 1032 (1) of German Act (ZPO)\(^49\) clearly establishes that the court must rule in favour of the existence of a valid arbitration agreement before dismissing an action. Even if the courts would retain the notion of a double arbitration agreement, the second agreement is still subject to judicial review and assumes no privileged position whatsoever with regard to the purported jurisdictional power of the arbitral tribunal. If the problem arises after arbitral proceedings have begun or even after the proclamation of the award, the solution is much more

\(^{49}\) Sect. 1032 (1) of German Act (ZPO) says: "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."
complex. However, in correspondence to art. 16 Model Law, sect. 1040 of German Act (ZPO)\textsuperscript{50} does not adopt the directive of non-interference. Instead, said provisions open the arbitral proceedings to a sort of interim resolution of jurisdictional issues by the competent court of law.

Thus, in any case a court – and never the tribunal itself- has the final word on the jurisdiction of the arbitral tribunal. Thus, the drafter of the German code correctly stressed that after the promulgation of sect. 1040 of German Act (ZPO), even in German law, a kompetenze – kompetenze of the arbitral tribunal no longer exists in the true sense of the term.

Germany rolls back kompetenze-kompetenze to the meaning it has come to have elsewhere (but not everywhere) in the world. The arbitral tribunal first rules on its own jurisdiction, there is no more requirement of a second arbitration clause.

The party challenging the competence of arbitral tribunal need not delay its objection until the recognition and enforcement stages, but rather may raise the objection during the arbitral proceedings. Pursuant to sect. 1040 (2) of German Act (ZPO), and objection regarding the competence of the arbitral tribunal must be raised by the time the statement of defence is submitted. If the objection is founded on the arbitral tribunal exceeding it jurisdictional powers, it must be raised without delay after the transgression itself occurred. The arbitral tribunal may accept untimely objections if it considers the delay excused.

In any event, the challenge of tribunal’s competence to arbitrate the dispute may be disposed of by the arbitral tribunal itself, by way of an interim award. Another option is to join the question to the merits and dispose of it in the final award. However, this method of disposition is restricted to cases in which the objection seems frivolous, i.e. raised only for the purpose of protracting the resolution of the dispute.

There are three opinions available to the arbitral tribunal in case of objection. If the objection to its jurisdiction seems well-founded and plausible, the prudent solution is to make an interim award. If one of the parties challenges this ruling in court, it may be sensible not to proceed with the arbitrable proceedings, but rather to await the final resolution of this issue by the competent court of law. In the second scenario, the objection seems neither plausible nor frivolous,
but somewhere in between. In this case, the arbitral tribunal should likewise apply the solution outlined in sect. 1040 (3) of German Act (ZPO), i.e. to make an interim award, but not to discontinue arbitral proceedings if this award is challenged in court. Third, if the objection seems frivolous outright, the arbitral tribunal should join the issue of jurisdiction to the merits and rule on it in the final award. The aggrieved party may then challenge this final award under the pertinent provision of sect. 1059 (2) (1) of German Act (ZPO)\textsuperscript{51}.

German law embraces the separability and competence doctrines in their most absolute formulations. It is noteworthy that the German courts have left the final determination on the issue of jurisdiction to the arbitrators. When the agreement has vested them with this power, the courts are more than willing to step aside. The validity of the arbitration agreement is an arbitrable issue. The theoretical difficulty of assuming jurisdiction even in the absence of a valid arbitration clause is surpassed by assuming a competence-competence agreement (separability doctrine of a second degree) separate from the rest of the arbitration agreement. This is made for reasons of convenience.

The acceptance of the competence-competence doctrine has been more problematic for English courts. The judges have jealously guarded their competence to rule on jurisdictional matters and only recently has the law been streamlined with international standards. Mr. Justice Devlin illustrated the minimal acceptance of this doctrine in Christopher Brown v Genossenschaft Oesterreichischer\textsuperscript{52} where it was held that the arbitrators are entitled to look into the matter of their jurisdiction for their own information, without their decision affecting the legal rights of the parties. Their preliminary determination, in other words, was a matter for the tribunal’s convenience. The courts remained the sole and final judges of jurisdictional matters.

The concept of competence of competence is alive in English arbitration law and the concept is applied in practice in a flexible manner, despite its absence as an ordinary English legal term of art.

\textsuperscript{51} Sect. 1059 (2) (1) of German Act (ZPO) says: "(2) An arbitral award may be set aside only if: 1) the applicant shows sufficient cause that: (a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or (b) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award;"

\textsuperscript{52} Cristopher Brown v. Genossenschaft Oesterreichischer [1954] 1 QB 8
It is axiomatic that commercial arbitration depends first on consent. An arbitration tribunal may only validly determine disputes which the parties have agreed that it should determine. This rule is an inevitable consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to what is essentially a private tribunal the authority to decide disputes between them; and the arbitration tribunal must take care to stay within the terms of this authority an arbitral tribunal must not exceed its jurisdiction.53

This obvious limitation on the jurisdiction of arbitrators, imposed by the dependence of that jurisdiction on the consent of the parties, gives rise to a logical problem and a practical need. The logical problem is that an examination by an arbitrator of his own jurisdiction in the event of challenge, involves an assumption that he has jurisdiction to make the investigation and, accordingly, an unsatisfactory element of circular reasoning. The practical need is that an arbitration should not automatically come to a halt merely because one of the parties challenges the jurisdiction of the arbitrator, otherwise there would be a premium on unmeritorious challenges. Moreover, particularly in the context of an international commercial arbitration, the consequences of an arbitration tribunal declining jurisdiction can be serious – the alternative to London arbitration will generally not be the safe haven of the English Commercial Court.

There are two essential elements of competence of competence. First, the arbitration tribunal has power to rule on its own jurisdiction, to decide on its own competence.54 In this way the demands of convenience are satisfied. Second, generally if not invariably, such a ruling or decision is provisional and not final in nature. By this limitation, the requirements of logic are asserted. Competence of competence and the doctrine of the autonomy of the arbitration clause discussed almost interchangeably. While it would be wrong to say that the two are entirely unrelated, they are however clearly distinguishable.

In English law and arbitration practice, a discussion of competence – competence falls conveniently under three headings: (1) the power of arbitrators to decide provisionally on their own jurisdiction; (2) concurrent court control over questions of arbitrators’ jurisdiction; and (3) flexibility as to the time and manner of disputing the arbitrators’ jurisdiction.

(1) Power. The general rule in English law can be stated simply: arbitrators do have the power to rule on their own jurisdiction; but any such ruling is provisional only and can be challenged in the English Courts. Authority for the general rule is to be found in Christopher Brown

53 Redfern and Hunter, supra at p. 271.
54 Redfern and Hunter, supra p. 276.
v. Genossenschaft Oesterreichischer. In this case, the plaintiff buyers had commenced arbitration against the defendant sellers, claiming damages for non-delivery and like relief. The arbitrators had before them a contention by the defendants that there was no substantive contract at all. The arbitrators decided that the substantive contract was binding and, having so decided, went on to determine the remaining matters in dispute in favour of the plaintiffs. The plaintiffs successfully brought an action to enforce the award. In the course of his judgement, Mr Justice Devlin produced the ‘locus classicus’ on competence of competence in English law, without of course expressly using the term at all:

'It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties... If the plaintiff takes upon himself the burden of proving the award, and fails to prove that the arbitrators had jurisdiction, his action falls, and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds, and his success is not destroyed because the arbitrators themselves went into the matter and came to the same conclusion which, ex hypothesi, was the right one. In short, any view which is expressed by the arbitrators expressly or impliedly in the award, any finding which can be called a finding that they had jurisdiction does not make the award any better, and likewise does not make it any worse.'

Certain features of this decision call for comment. First, the defendants had barely participated in the arbitration. They did not, for instance, appoint an arbitrator for themselves; and they did not appear at all before Mr Justice Devlin. Second, there are dicta in the judgement as to

55 Christopher Brown v. Genossenschaft Oesterreichischer [1954] 1 QB 8
56 Christopher Brown v. Genossenschaft Oesterreichischer [1954] 1 QB 8
the arbitrators’ lack of jurisdiction to make any determination on the making of the substantive contract which it may be thought were wider than necessary for the decision and of perhaps dubious authority today. Third, the decision on the arbitrators’ jurisdiction arose in the context of a more limited concept of autonomy: the issue of the binding nature of the substantive contract having arisen, it appears to have been taken for granted that the arbitrators’ jurisdiction was thereby in issue. As discussed above, the wider the doctrine of autonomy, the more limited the circumstances when the arbitrator is called upon to examine his own jurisdiction. Notwithstanding all this, the decision of Mr Justice Devlin has enjoyed the widest acceptance for now more then forty years. It must have been applied in countless London arbitrations. It can safely be taken as binding authority, supporting the general rule in English law on the power of arbitrators to reach provisional decisions on their own jurisdiction.

(2) Concurrent Court Control. There can be no doubt that in English law, a party who wishes to challenge the jurisdiction of the arbitration tribunal or to dispose of a potential challenge to that jurisdiction, can seek declaratory relief from the English Court prior to any decision on the matter by the arbitration tribunal. To this extent, English law adopts to different approach to that sometimes favoured elsewhere, whereby it is contemplated that a decision as to the jurisdiction of the arbitration tribunal will be taken at least in the first instance by the arbitrators themselves. It is suggested that the flexibility of the English approach has much to commend it; a genuine and serious challenge to the jurisdiction of the tribunal may be bound to end up in court so costs and time can be saved by an early resolution of the issue. The sanction of costs serves as a deterrent to unmeritorious challenges.

(3) Flexibility. In English law a party wishing to challenge the jurisdiction of the arbitration tribunal is free to pursue that challenge in the English Court during or after the arbitration proceedings. It can be said that there are advantages and disadvantages attendant on any approach as to when such challenges can be made. On the one hand, an approach which postpones court challenges – say, until the enforcement stage – can be defended on the grounds that it minimises ‘interference’ by the local courts with the jurisdiction of the arbitral tribunal. On the other hand, not only does such an approach create the possibility for injustice, but it can also be wasteful of time and costs; if a court challenge is apparent and inevitable, continuing with the arbitration regardless up until the award stage may achieve no good for any party. Under English

57 The UNCITRAL Model Law, Article 16(3), which provides for a decision by the arbitrators subject to recourse to the Court. However, it must be noted that jurisdictional questions may arise in Court in any event under Article 8 of the Model Law, should one party commence court proceedings and the other seek a stay for arbitration.

58 Under any such system, there is a premium on a party being in a position to assert an arguable case for the existence of an arbitration agreement and thereafter, in effect, hoisting himself up by his own bootstraps.
law, the parties have a maximum of flexibility as to the time when they choose to challenge the jurisdiction of arbitrators. They can seek declaratory relief from the court at a preliminary stage. They can raise their objections to the arbitration tribunal itself, subject only to waiver or estoppel, at any stage. They can usually appear under protest at the arbitration and take the matter to court after an award has been produced or resist enforcement on jurisdictional grounds. They can refuse to appear at the arbitration and institute or resist court proceedings subsequently. In the consideration of the United Kingdom's response to the possible adoption of the UNCITRAL Model Law, the more circumscribed procedures for challenging the jurisdiction of an arbitration tribunal contained in Article 16(3) of the Model Law were said to impose undesirable time and cost constraints' in contrast to the existing position under English law.

It should be mentioned sect. 32 of the English Arbitration Act 1996 in this connection, given the possibility for courts in common law countries to order arbitrators to stay proceedings. After laying down the precise conditions under which courts will agree to consider a question concerning the jurisdiction of the arbitral tribunal sect. 32 (2) of English Act (1996)\(^59\), then the mentioned section goes on to state expressly that “unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending” sect. 32 (4) of English Act (1996). Sect. 67(2) of English Act (1996)\(^60\) offers arbitrators the liberty of doing likewise in the event an award on jurisdiction is challenged.

Under the Lithuanian Act the principle of competence-competence follows the Model Law art. 16. The art. 19 (1) of Lithuanian Law on Arbitration stays:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. [...].”

Lithuanian Law on Arbitration allowing to challenge the jurisdiction of the arbitral tribunal and it allows to continue the process of arbitration after challenge was raised. It is allowed under that arbitrator will issue interim award while the matter of jurisdiction will be settled.

\(^59\) Sect. 32 (2) of the English Act 1996: “An application under this section shall not be considered unless – (a) it is made with the agreement in writing of all the other parties of the proceeding, or (b) it is made with the permission of the tribunal and the court is satisfied – i) that the determination of the question is likely to produce substantial saving costs, ii) that the application was made without delay, and iii) that there is good reason why the matter should be decided by the court.

\(^60\) Sect. 67 (2) of the English Act 1996: “The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.”
The arbitration award can be challenged under art. 37 of Lithuanian Arbitration Law\textsuperscript{61} on Arbitration. It can be challenged on the ground that arbitration agreement on it’s own was not valid or ineffective.

The competence-competence principle is very often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. The real purpose of the rule is in no way to leave the question of the arbitrators’ jurisdiction in the hands of arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties with the idea that there are no grounds for the \textit{prima facie} suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties of the dispute.

It is important to recognise that the competence-competence rule has a dual function. It has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognised by international conventions and by recent statutes on international arbitration. It is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to review of the award. The principle of competence – competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal – regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement – to refrain from hearing substantive argument as to the arbitrators’ jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. So in that sense the competence – competence principle is a rule of chronological priority. Taking both facets into account, the competence –

\textsuperscript{61} Art. 37 of Lithuanian Law on Arbitration says: “...2. Lithuanian Court of Appeal, after it has accepted application for the setting aside, at the request of a party may suspend the enforcement of the award. 3. An arbitral award may be set aside by the Lithuanian Court of Appeal if the party making the application furnishes proof that: a) a party to the arbitration agreement referred to in Article 9 was under some incapacity; or the said agreement is not valid under the laws to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the arbitral award was made; or b) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present his case for other valid reasons; or c) the award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law. … 5. An arbitral award may be set aside by the Lithuanian Court of Appeal if the Court finds that: a) the subject-matter of the dispute is not capable of settlement by arbitration under laws of the Republic of Lithuania; or b) the arbitral award is in conflict with the public policy of the Republic of Lithuania.
competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts.

From a practical standpoint, the rule is intended to ensure that a party cannot succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent. Such delay is avoided by allowing the arbitrators to rule on this issue themselves, subject to subsequent review by the courts, and by inviting the courts to refrain from intervening until the award has been made. Nevertheless, the interests of parties with legitimate claims concerning the invalidity of the arbitration agreement are not unduly prejudiced, because they will be able to bring those claims before the arbitration themselves and, should the arbitrators choose to reject them, before the courts thereafter.

The competence – competence rule thus concerns not only the positive, but also the negative effect of the arbitration agreement. *The negative effect of the competence-competence principle* is more contentious. This negative effect is that the arbitrators are entitled to be the first to determine their jurisdiction (and not be sole judges of the issue), so that the courts’ review of the arbitral tribunal’s jurisdiction occurs only where is an action to enforce or set aside the arbitral award.

Challenging the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with the arbitration, ruling on its own jurisdiction and, if it retains jurisdiction, making an award on the substance of the dispute, all without waiting for the outcome of any court action aimed at setting aside the award deciding the jurisdiction issue.

### III.4 Competence-competence and national courts

As previously described, the generally accepted competence – competence principle means that arbitrators have the power to rule on their own jurisdiction and, once they have affirmed their jurisdiction, are not obliged to suspend a ruling on the merits of the dispute if their jurisdiction is challenged before the courts. One may wonder whether this principle does not imply that courts, for their part, have a correlative opposite duty to suspend a ruling on any question concerning the jurisdiction of the arbitral tribunal until the arbitration award has been issued. It is possible, moreover, to differentiate according to whether the intervention of the court is considered before or after the matter has been submitted to an arbitral tribunal. National legal systems are a long way from accepting that the exercise of competence – competence has priority in terms of time, even though, rationally, this would seem to be inherent in the principle.
Incomplete acceptance of competence-competence

Acceptance of competence – competence by national legal systems is incomplete, insofar as they always allow their courts the power to rule on the jurisdiction of the arbitral tribunal at any moment, be it before or during arbitral proceedings. This is reflected in the vague way in which, in most countries, legislative provisions relating thereto refer to the moment at which and the extent to which courts intervene. An illustration of such provisions is to be found in those systems which have adopted the UNCITRAL Model Law and its art. 8\textsuperscript{62} also in England sect. 9(4)\textsuperscript{63} of the Arbitration Act 1996. The first example of such vague formulation was Art. II (3) of the New York Convention\textsuperscript{64}.

Courts carry out an in-depth examination of the existence and validity of the arbitration agreement before declining jurisdiction, irrespective of the moment at which the case is submitted to them, be it before or after arbitral proceedings have been initiated. In the civil law system, when courts are satisfied that the arbitration agreement exists and is valid, their decision to refer the matter to arbitration is final, whereas in the common law system the decision is more often than not a mere stay in court proceedings, the courts not being deprived of their jurisdiction.

Finally, with the assertion that when arbitral proceedings are pending, courts should logically be more inclined to suspend judgement than when a matter has not yet been submitted to an arbitral tribunal, is not borne by case law. Courts are usually called upon to determine a question of arbitral jurisdiction – before or during arbitral proceedings – when a party initiates an action on the merits and the other party raises an objection regarding the existence of an arbitration agreement. In certain countries, however, it is also possible to initiate an action before courts with a view of having the arbitration agreement declared non-existent or invalid. This is the case in England. The 1961 European Convention also refers to this action in its art. VI (3)\textsuperscript{65}.

As far as England is concerned, sect. 32 of the Arbitration Act 1996 corresponds to a declaratory action since it provides for courts to be directly seized of an application by a party to

\textsuperscript{62} Art. 8 of Model Law: “1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

\textsuperscript{63} Sect. 9 (4) of the English Act 1996: “On application under this section the court shall grant stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”.

\textsuperscript{64} Art. II (3) of New York Convention: “The court of Contracting State, […], refer the parties to arbitration, unless if finds that the said agreement is null and void, inoperative or incapable of being performed.”.

\textsuperscript{65} The 1961 European Convention art. VI (3): “Where either party on an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting State subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator’s jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.”.
arbitral proceedings for an immediate ruling on a question concerning arbitral jurisdiction. The section is of limited application however, with strict conditions (similar to those provided for in sect. 45 of English Act 1996 for determining points of law)\textsuperscript{66} being laid down for the admissibility of such direct action before the ordinary courts: the application must be made with the agreement in writing of all the other parties to the proceedings, or the permission of the arbitral tribunal in which case the court must be satisfied that its decision is likely to produce substantial savings in costs, that the application was made without delay and that there is good reason why the matter should be decided by the court. A declaratory action may also be brought, under sect. 72(1) of English Act 1996\textsuperscript{67}, by a person alleged to be a party to arbitral proceedings but who takes no part in such proceedings.

Under German law if the tribunal resorts to the solution contained in sect. 1040 (3) pf German Act (ZPO) and promulgates an interlocutory or interim award, the latter is subject to challenge in a court of law. However two requirements must be met. First, resource is granted only against an award affirming jurisdiction of the arbitral tribunal, such that there is no way of directly challenging and award denying the competence of the tribunal. Secondly, sect. 1040 (3) of German Act (ZPO) allows one month period subsequent to reception of a written notice of the preliminary ward in which the aggrieved party may seek a remedy in a court law. Sect. 1062 (1) (2) of German Act (ZPO)\textsuperscript{68} empowers the Court of Appeals designated in the agreement with jurisdiction to review such preliminary awards, or – in the absence of such stipulation – the court sitting in the district in which the arbitration seated. Finally sect. 1040 (3) of German Act (ZPO) provides that if one of the parties seeks relief against the preliminary award in a court of law, this condition does not deprive the arbitral tribunal of its jurisdictional power and thus does not prevent it from continuing proceedings in the mean time.

Under Lithuanian Law on Arbitration, the award can be said aside if the court will find out that the subject matter of the dispute is not comply with the Laws of Republic of Lithuania or the arbitral award is not in conflict with the public policy.

\textsuperscript{66} Sect. 45 (1) of the English Act 1996: “[…], the court may on the application of a party to arbitral proceedings ([…]) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more parties.[…]”.

\textsuperscript{67} Sect. 72 (1) of the English Act 1996: “A person to be a party to arbitral proceedings but who takes no part in the proceedings may question – (a) whether there is valid arbitration agreement, (b) whether the tribunal is properly constituted, (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.”.

\textsuperscript{68} Sect. 1062 (1) (2) of German Act (ZPO) says: (1) The Higher Regional Court (Oberlandesgericht) designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to: …(2) the determination of the admissibility or inadmissibility of arbitration (section 1032) or the decision of an arbitral tribunal confirming its competence in a preliminary ruling (section 1040);
There is no doubt that a declaratory action, at least after the commencement of arbitral proceedings, not only opens the way for an additional concurrent recourse to the court, but also involves a direct challenge to the priority rule. Besides, insofar as the competence-competence principle is established by a rule of positive law – whereas this is not the case of an action seeking a declaration that the arbitration agreement is invalid – it is difficult to see on what basis courts grant themselves this additional power in supervising arbitration.

III.5 Pre-final award judicial review of the arbitrator’s ruling on his own jurisdiction

As was mentioned earlier an arbitrator, faced with a challenge to his own jurisdiction, might have essentially three options. He could either rule on his own jurisdiction, continue with the arbitration without expressing an opinion on the challenge to his authority or he could stay proceedings awaiting a court decision on the question (providing that a municipal court exist with the power to make such a ruling). This part will deal with where the arbitral tribunal has ruled on its own jurisdiction or is behaving as if has done so in favour of it having the power to decide the dispute on the merits.

a) The availability of the pre-final award judicial review of the arbitrator’s ruling on his own jurisdiction. In England, as was already mentioned, applications can be made to court at more or less any time. The court usually decides jurisdictional questions before the arbitrator has had the opportunity of considering them. Nevertheless, it does happen occasionally that the parties chose to wait until the arbitrator has expressed his view as to existence or extent of his authority or that a jurisdictional issue arises during the arbitration. In such a situation, an application to court may be made at any time during the arbitral proceedings for a ruling on the point.

In England the court has discretion as to whether to hear the application or, having heard it, to grant the relief requested. Where the jurisdictional dispute can be resolved quickly and the court’s ruling will enable the arbitration either to proceed smoothly to an award or be stopped immediately thereby saving the parties from having to endure an expensive and worthless hearing on the merits, the court will almost invariably decide the issue there and then. Only where the question as to the arbitrator’s authority will take considerable time to resolve and will involve an investigation of the facts in dispute in the arbitration is the court likely to decline to answer in immediately.

In art. 16 (3) of the UNCITRAL Model Law permits municipal court challenges to the arbitrator’s decision to accept jurisdiction, before the rendering of the award(s) on the merits, only
where the arbitral tribunal has formalised its ruling in some way. Anyway, a failure to challenge that decision within the allotted time-limit does not bar a subsequent attack on the arbitrator’s ruling on jurisdiction during setting aside proceedings. There is likewise no provision for the granting of declaration as to the nullity of the arbitral agreement. The German and Lithuanian laws have the same provision as Model law in art 16 (3).

The New York convention does not deal with the question as to when the parties can apply to court for a ruling on the arbitrator’s own jurisdiction.

The European Convention on International Commercial Arbitration 1961 does have a provision relating to pre-final applications to challenge the arbitrator’s jurisdiction. However, it would be hard to improve on art. VI (3) of that Convention for an illustration of the problems of reaching international agreement in this area. Article VI (3) requires the courts to decline jurisdiction over disputes, which have been submitted to arbitration, from the commencement of the arbitral proceedings: “until the arbitral award is made, unless they have good and substantial reasons to the contrary”.

b) Should pre-final award judicial review of the arbitrator’s ruling on his own jurisdiction be allowed? The arbitrator, the neutral party who knows the case better than anyone else, allows bona fide court applications to proceed, while stopping those purpose is to delay or disrupt the proceedings from achieving such objective. Where the judicial authorities are unable to resolve bad faith applications with sufficient speed to prevent them from succeeding in their aims, the UNCITRAL system may be the only one capable of ensuring that the arbitral proceedings are not unnecessarily disrupted. Article 16 (3) of the Model Law, in authorising the arbitrator to decide whether to give a municipal court the opportunity to halt the arbitration before a consideration of the merits of the dispute, also authorises him to make a decision which may or may appear to affect his own financial interest. Assuming that arbitrator is acting in wholly unbiased fashion, his decision to block one party from bringing a court application which could terminate the entire proceedings, may well lead to that party loosing some or all of his confidence in the arbitral tribunal’s ability to resolve the dispute fairly. This, in itself can create unnecessary tension between the parties and the arbitrator and, consequently, affect the smooth functioning of the arbitral proceedings. There are three stereo-types of the way different court systems handle arbitration cases. The first is the perfect system which is flexible enough to be able to push abusive court application up to the top of the hearing lists and, in this way, ensure that such proceedings are rapidly disposed off. The second type of legal system is where the court administrators are insufficient discriminating or supportive of arbitration to give priority to court applications brought to disrupt the arbitral process. In such a set-up, the ability of bad faith applications to fulfil their
principal objective will depend on the state of the court’s general backlog of cases, which will vary considerably from place to place and at different moment in time. The final variety of legal system is the one where the courts are so overwhelmed with a backlog of cases that either court administrators are incapable of bringing urgent arbitration case to the front of the queue, even if they wanted or had the facilities to do so, or the number of high priority cases is so great that such a move would have no understandable impact on court applications designed it understand the arbitral process.

In countries where court proceedings relating to arbitration can be disposed of speedily and where priority is given to cases where one party’s good faith is in doubt, there is no reason to prevent applications to court from being made whenever a jurisdictional problem arises either during or before the commencement of the arbitration. In countries where the legal system is less efficient or responsive to arbitration needs, limits may have to be placed on the making of court applications before the rendering of the final award. This has to be regarded as an unsatisfactory solution to the problem in that it may discriminate against bona fide applicants who wish to avoid the time and expense of arbitral proceedings which are incapable of giving rise to an enforceable award. The UNCITRAL approach, in giving arbitrator the right to prevent pre-final award court applications from being brought, provides a filter, if rather an inadequate one, by which good faith applications capable of saving the parties a great deal of time and money, can be allowed to proceed, while others whose sole objective is to understand the arbitration, may be held up until the rendering of the final award. The problem with this system is that the arbitrator, whose task is to decide which applications should be allowed to go forward, may himself not be or may not appear to be disinterested in that decision. Moreover, assuming that the challenge to his jurisdiction is justified, the arbitrator will not have been validly chosen by at least one of the parties to resolve the question of whether to allow a pre-award attack on his authority in the municipal courts. In the ideal situation, where the legal system at the seat of arbitration is able to deal efficiently and sensitively with court applications made during arbitral proceedings, it is submitted that either party should be given access to the courts at any time to obtain a binding decision on any issue relating to the arbitrator’s jurisdiction that may have arisen at that point.

c) The effect of the court’s ruling on a pre-final award challenge to the arbitrator’s jurisdiction. The most likely effect of the court’s ruling, on pre-final award challenge to the arbitrator’s jurisdiction, is that it will be obeyed. In countries where injunctions or stays are not available the application of the principles of res judicata and/or issue estoppel or preclusion will ensure that where the arbitrator has failed to comply with an earlier order of a court limiting his jurisdiction, the same court can be relied upon to set aside the award. In practice, therefore, the
availability or otherwise of injunction or stays to enforce the court’s ruling in a pre-final award jurisdictional challenge makes very little difference.

d) The effect on the arbitral proceedings of the making of a pre-final award application to the municipal courts relating to the arbitrator’s jurisdiction. Where one of the parties applies to court for an order relating to the arbitrator’s jurisdiction, two questions may arise, one a matter of law, the other, one of arbitral practice. The first question is whether the courts can stay the arbitral proceedings until they have disposed of the application. The second issue is whether the arbitrator should halt the arbitration pending the court’s decision on the challenge to his authority to continue with the case.

Only in the most extreme cases, where the arbitrator is convinced of the mala fides nature of the challenge to his jurisdiction pending before the local courts and is certain that the relevant legal system will take a long time to dispose of it, should he continue with the arbitration before the court has issued its ruling.

III.6 The interrelation of the doctrines

As was mentioned the fundamental principle of arbitration law is that arbitrators have the power to rule on their own jurisdiction. That principle is often presented as direct result of the separability doctrine. The competence-competence and separability principles are closely linked and have similar objective, but they overlap just partially. Of course the separability doctrine the first stage of the process which results in the arbitrators being able to determine their own jurisdiction. It is because of the autonomy of the arbitration agreement that any claim that the main contract is in some way void will have no direct impact on the arbitration agreement. The separability doctrine allows the examination by the arbitrators of jurisdictional challenges based on the alleged ineffectiveness of the dispute contract. In such kind of situation the doctrine of separability and the competence – competence doctrine overlap and are mutually supportive. However, the principle of separability extends beyond the competence – competence doctrine. Competence – competence principle allows arbitrators to examine their own jurisdiction. If the main contract would be void, with only competence-competence principle they would have no opinion other than just to decline jurisdiction. While the principle of autonomy gives right to arbitrators to declare that main contract ineffective, without necessarily concluding that the arbitration agreement likewise ineffective and therefore declining jurisdiction. In other words saying that the decision of arbitration of an arbitrator to retain jurisdiction and then declare a dispute contract ineffective must be founded on the principle of autonomy and not solely on the competence
– competence. On the other hand, competence – competence goes further than separability in that it gives the tribunal the right to determine challenges to its jurisdiction that go beyond the arbitration agreement itself. In sum, the competence of the arbitral tribunal to rule on jurisdictional challenges is a corollary to the doctrine of separability establishing the autonomous nature of the agreement. So in other words the advantages of the competence – competence doctrine comes very clear in the case when the doctrine of separability cannot serve as the basis for the arbitrator’s jurisdiction over any direct challenge of the arbitration agreement rather that the main contract. The competence – competence doctrine and the separability doctrine must be very carefully separated.

III.7 The New York Convention does not encourage the full effects of the principles to be realized

The both principles the autonomy of the arbitration agreement and of competence – competence have gradually become established throughout the world as international principles of arbitration law, regardless of the accession of new states to the New York Convention, in which these principles are not explicitly provided for. The basic content of these principles would not appear to conflict with any of the provisions of the New York Convention, and it may be noted, in connection with the autonomy/separability principle, that the Convention always refers to the “arbitration agreement”. However, there is cause for doubts when it comes to considering the full effects of these principles, that is full autonomy and the priority rule, from the viewpoint of the Convention through its provisions concerning both the enforcement of the arbitration agreement and the enforcement of the arbitral award.

Enforcement of the Arbitration Agreement

i) The Full Autonomy of the Arbitration Agreement. According to art. II (3) of the Convention, the court of a contracting state must defer to arbitrators the disputes covered by the arbitration agreement as in the meaning given to it by art. II, “unless it finds that the said agreement is null and void, inoperative or incapable of being performed”. Any question which could affect the validity of the arbitration agreement – including any question of form and arbitrability – may thus be considered by courts. Depending on the extent to which the autonomy principle is recognised in their legal systems, the courts will apply conflict of laws rules for this purpose in order to determine which law is applicable to this question, or alternatively proceed with a certain notion of the effectiveness of the arbitration agreement in international trade, whether or not this has become a rule.
Leaving aside the uniform rule of art. II (2) of the Convention on the form of the arbitration agreement, to which paragraph 3 refers, the latter does not contain any conflict of laws rules as does art. V of Convention, which suggests that courts have greater freedom in evaluating the validity of the arbitration agreement when the latter is enforced than when the arbitral award is enforced. It may be observed, however, that for the purpose of such evaluation, courts usually apply either the lex fori or the conflict of laws rules of art. V (1) (a) of the Convention, construing, country where the award was made, by analogy, as country where the award will be made.

Whatever the case, art. II (3) of the New York Convention may be seen as allowing room for the theory of the full autonomy (i.e., autonomy in relation to any national law) of the arbitration agreement, as it does not oblige the courts to use a conflict of laws approach in order to evaluate the validity of the arbitration agreement.

**ii) The Priority Rule.** The way it is worded, art. II (3) of the Convention allows a court to render a judgement on the existence or validity of the arbitration agreement at any point, before or after the matter has been submitted to an arbitral tribunal. Moreover, both the reference to the other paragraphs of the article and the terms “null and void, inoperative or incapable of being performed” suggest an examination of the arbitration agreement on the merits and even in depth. It could be argued that through application by analogy of art. VII of the Convention palliatives might be found in the national legal systems for ensuring that the priority rule is respected. However, the results would be negligible since, most – if not all – national systems also suggest such in-depth review even during arbitral proceedings.

Art. II (3) of the New York Convention certainly does not encourage the priority rule, to become generally recognised. As positive national laws presently stand, there is no doubt that its implementation depends rather on the open-mindedness and willingness of national judges when they are called upon to apply this article and, apparently, the latter are more ready to accept the “substantive” effectiveness of arbitration agreements in international trade, by limiting the grounds upon which such agreements may be invalid, than their “procedural” effectiveness, which implies that they temporarily relinquish their traditional judicial prerogatives.

**Enforcement of the Arbitral Award**

The enforcement of arbitration agreements provided for in art. II (3) of the Convention is the outcome of a last-minute idea. The real aim of the New York Convention was the recognition and enforcement of arbitral awards. The Convention was intended for courts which must allow the enforcement of an award unless the party against which enforcement is sought furnishes proof of one of the limited number of grounds given in art. V (1) for refusing enforcement or the court finds on its own that a ground given in art. V (2) exists.
The competence – competence principle is in itself unaffected by these grounds for refusing enforcement of the award. It is the concrete conclusion reached by the arbitrators in exercising competence-competence – that is to say, their ruling that they have jurisdiction – which may be challenged on one of these grounds. It goes without saying that this will always be the case, regardless of whether or not the priority rule is accepted by the legal system of the forum or of the place of arbitration. Art. V of the Convention is therefore without bearing on the realisation of the full effect of the competence-competence principle.

Realisation of the full effect of the principle of the autonomy of the arbitration agreement, i.e., the application of full autonomy, on the other hand, may be seriously undermined by the provisions of art. V of the New York Convention. I shall therefore limit myself to considering the provisions of the New York Convention covering the stage at which the arbitration award is enforced with respect to the autonomy of the arbitration agreement alone. Although intended for courts, these provisions of the New York Convention are also sometimes taken into account by the arbitrators themselves.

Given that international arbitrators, who are independent of any national legal system, are under no obligation to proceed by way of a national system of conflict of laws rules or to apply the substantive provisions of one rather than any other of the national legal systems concerned, if the parties do not indicate the governing law, one may ask to what extent they make use of this freedom in practice.

It is certain that the New York Convention is intended for courts and not for arbitrators and that arbitrators are not bound to apply the public policy rules of the country or countries in which the award could be enforced. Besides, such an effort on their part would often prove to be unavailing. Be that as it may, the provisions of arts. II (2), V (1) (a) and V (2) (a) of the New York Convention may curb the tendency of international arbitrators to apply the principle of the complete autonomy of the arbitration agreement and cause them to concern themselves explicitly or implicitly with the provisions of the law of the place of arbitration or the lex contractus when called upon to consider the validity of the arbitration agreement, with those of the law of the likely place of enforcement when called upon to consider an issue of arbitrability, and to ask themselves whether the uniform rule of art. II (2) needs to be strictly applied when faced with a problem concerning the validity of the agreement with respect to form.

Unpredictable risks at the enforcement stage complete autonomy is designed to ensure that the arbitration agreement is valid and effective according to the common intention of the parties, without any need to refer to any national law, and within the sole limits of international public policy. The New York Convention, on the other hand, lays down precise rules which always
end with the application of a national law for evaluating questions relating to the validity and effectiveness of the arbitration agreement (the capacity of the parties, existence of consent and possible defects in such consent, arbitrability) and establishes a uniform rule for questions of form. The assumption upon which this section is based is that the arbitrators have declared the arbitration agreement to be valid by interpreting the common intention of the parties and taking into account the requirements of international trade, subject to international – or transnational – public policy, without referring to the national law provided for in the New York Convention in connection with the ground upon which it is alleged that the arbitration agreement is invalid. Is there a serious risk that on the basis of the New York Convention this award will not be enforced? It should first be said that, to the extent that the arbitrators' finding on the validity of the arbitration agreement as based on any or no national law coincides with the result reached by the said provisions of the New York Convention, enforcement of the award should normally be granted, since the court's task is merely to check the finding on the validity and not the reasoning which led to this finding.

Problems could however arise at the enforcement stage if, in determining a question affecting the validity of the agreement, arbitrators base their decision on the full autonomy of the arbitration agreement and if this question is resolved differently under the corresponding rule of the New York Convention.

According to art. V (1) (a) of the New York Convention, the capacity of the parties to agree to arbitration is governed by the law which applies to them. The capacity of legal entities to agree to arbitrate is generally recognised, while that of natural persons is a question which can only arise rarely in international trade. The risk of a conflict between an award in which an a-national rule on the capacity of a legal entity to agree to arbitrate and art. V (1)(a) of the Convention is in fact non-existent. The same cannot be said of the powers of the signatory to an arbitration agreement. It is true that, on this question, arbitrators will usually use a conflict of laws approach. One may wonder, however, if, in the event arbitrators apply a rule accepting that a general mandate to contract is sufficient for validly entering into an arbitration agreement, there is a risk that the enforcement of the subsequent award will be refused. Although the New York Convention does not clearly provide for the question of power, a refusal to grant an enforcement order cannot be excluded under art. V (1)(a), or even art. II (2) for countries which require the mandate to be in written form in order for the arbitration agreement to be valid.

Subjective arbitrability. This concerns the capacity of a State and of public legal entities to agree to arbitrate. Strictly speaking, it cannot be excluded that an award in which arbitrators consider the arbitration agreement signed by a state or state agency to be valid in light of a-national standards, comes up against problems of enforcement when submitted to the court of a
given country before which the state or state agency invokes its incapacity to agree to arbitrate under the law which applies to it on the basis of art. V (1) (a) of the New York Convention. However, a state's capacity to agree to arbitrate is recognised as a general principle of international arbitration law by a great many national legal systems. The enforcement court – at least that of any state other than the one which is party to the agreement – will normally overcome the problem by applying its international public policy.

Existence of and defects in consent. These are ordinary conditions for the validity of the arbitration agreement and are evaluated, according to art. V (1)(a) of the Convention “under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. At a time when international trade is developing through the emergence of transnational rules relating to the law of obligations, this provision of the New York Convention, which lays down a uniform two-staged conflict of laws rule, should be considered as outmoded, especially with regard to the connecting factor provided in the second stage. If the parties have not expressly indicated the law to be applied to the arbitration agreement and the arbitrator decides to examine whether or not there is flawless consent on the basis of the full autonomy of the arbitration agreement, this would normally result in the application of common rules on construction and defective consent as laid down. Enforcement of the award would be granted if the law of the place of arbitration were to give the same directions as such common rules, which is quite likely to be the case.

Objective arbitrability. According to art. V(2)(a) of the New York Convention, a court may refuse on its own the enforcement of an arbitration award if it finds that under the law of the country where enforcement is sought the subject matter of the dispute is not capable of being settled by arbitration. There are apparently very few instances of enforcement of an award being refused because the subject matter of the dispute was considered as non-arbitrable. This is due to the distinction between domestic and international public policy. Besides, there are many countries that allow arbitration with respect to rights which may be freely disposed of, which indicates widespread acceptance of arbitrability, while the systems which have adopted the UNCITRAL Model Law (art. 1(1)) contain broader rules pertaining to the arbitrability of, respectively, property-related matters and operations of international trade. It indeed appears that arbitrability has become the rule and that the exception is currently limited to differences in areas in which rights cannot be disposed of intrinsically, or differences over which State or supra-State courts or authorities have exclusive jurisdiction, by virtue of provisions which relate to international public policy. Consequently, there should be no great risk of courts refusing the enforcement of an arbitral award
in which a question of arbitrability is determined on the basis of the full autonomy of the arbitration agreement and, precisely, within the limits of international public policy.
**CONCLUSION**

International commercial arbitration has met widespread success as a method of international dispute resolution. The multitude of changes that are occurring in the international plane testify to that fact. The increased acceptance of the autonomy of the arbitration clause and more recently of the competence-competence doctrine is part of this process of evolution of international arbitral practice. Specifically in relation to the latter doctrine, the divide between common law and continental jurisdictions seems to be closing.

The principle of autonomy in its broad meaning of full autonomy covers all the grounds on which the arbitration agreement could be invalidated. Its purpose is to ensure the “substantive” effectiveness of the arbitration agreement. The competence-competence principle, also in its broad meaning, including the priority rule, aims to ensure the “procedural” effectiveness of the arbitration agreement. The two principles, as thus understood, ideally constitute a complete international system for the effectiveness of the arbitration agreement.

The England are still reluctant to accept the full versions of the doctrine and may not go so far as Germany in removing the supervisory role of the courts, there is evidence of increased consensus over the rules to be applied. The popularity of the doctrines with the institutional rules and the Model Law suggests that in due course most national arbitration statutes will adopt the same approach. In general it is believed that the increased independence of international arbitration from the intervention of the national courts is a move in the right direction. It is also consistent with the practice of denationalising most aspects of arbitral proceedings, ranging from the governing laws to the procedural processes.

As we have seen above, to a lesser or greater extent, the doctrine of separability and the competence of the arbitral tribunal to decide on its jurisdiction are accepted by national legislative enactments and international arbitral institutions. At this point, it would be useful to summarise the reasons that have made these notions popular and their consequences on arbitral practice.

As it has been already noted, the main reason behind the separability doctrine is the fear that the alleged invalidity of the arbitration agreement may be used as a tool by the party wishing to delay or avoid the arbitral proceedings. Opening such an avenue to parties would negate one of the primary reasons for resorting to arbitration, which is the speedy and effective resolution of disputes. It may be argued, that for matters relating to international commerce, specialised arbitrators are in a better position to reach a fair decision than national courts. Thus, the separability doctrine coupled with the competence theory ensure that these special adjudicators will have the chance to comprehensively look into the dispute and reach an acceptable solution.
On the other hand however, there is no denying that the enforcement of arbitral awards comes under the supervision of national courts. Thus, a mistaken assessment by the tribunal on the question of its jurisdiction may have the effect of the reward being set aside. There will be considerable expense in terms of money and time if the whole procedure has to be duplicated by litigation. In that sense therefore, early court intervention to assist the tribunal in determining its jurisdiction, may make the process much more effective. Also, the court’s intervention can be seen as a guarantee of the adherence to due process and national public policy requirements that serve to limit the wide discretion of the arbitrators.

In sum, the principle of autonomy can be said to have two main consequences. Its primary function is to disengage the arbitration clause from the main contract. Secondly, due to that separation, a law different from that of the main contract may govern the arbitration agreement. This has the effect that the arbitral tribunal can judge the existence and effect of the arbitration agreement by applying substantive rules adapted to the nature of international commercial arbitration.

The comparison of three countries England, German and Lithuania, helped easier to understand and to see how the doctrine of separability and principle competence-competence incorporated in mentioned national laws. Of course the most popular and most practise in arbitration has England, as it arbitration practice dates back long time. The German arbitration Act was revised as Germany became reunited, but still it has more practice then Lithuanian arbitration law. The Lithuania didn’t use arbitration until it got independent. After it got independence everything change very quickly and by 1996 it already had their own arbitration law. The Lithuanian arbitration is not so much attractive as German and of course England. Even though the parties who include the arbitration clause or conclude the arbitration agreement in Lithuania, they would submit it to the English or German arbitration, because they have more experience behind them, then Lithuanian arbitration.
Annex I

The Republic of Lithuania Law on Commercial Arbitration - 2 April 1996

No. I-1274
2 April 1996,
Vilnius

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of Application

1. This Law shall regulate legal relations arising from the agreement between the parties to settle existing or future disputes by way of arbitration, as well as to arbitral proceedings, making and enforcement of arbitral awards, authority of courts of the Republic of Lithuania in the sphere of arbitration, and other relations pertaining to arbitration.

2. This Law shall apply irrespective of the citizenship or nationality of the parties to the dispute, as well as irrespective of whether the arbitral process is organised by a permanent arbitral institution or not:

1) to arbitration if the place of arbitration is in the territory of the Republic of Lithuania;

2) to separate procedural actions if they are carried out in the territory of the Republic of Lithuania.

3. Articles 10, 12, 39 and 40 of this Law shall apply irrespective of the state where arbitration is held.

4. If international agreements to which the Republic of Lithuania is a party set the rules different from this Law, rules set by international agreements shall prevail.

Article 2. Definitions and their Interpretation

For the purposes of this Law:

"arbitrator" means a natural person appointed or chosen by the parties to a dispute, their agreement or in the manner prescribed by the law, to resolve a dispute;

"arbitration" means dispute resolution when natural or legal persons subject to their agreement, submit or undertake to submit the claim to the third party or parties, chosen by them subject to the agreement or appointed in the manner provided by the law, instead of submitting it to the state court;

"institutional arbitration" means arbitration when subject to the agreement of the parties, dispute resolution is organised, attended to, and other authority vested in upon the agreement between the parties is exercised by a permanent arbitral institution;

"ad hoc arbitration" means arbitration when subject to the agreement between the parties, dispute resolution proceedings are not held by a permanent arbitral institution;

"chairman of arbitral tribunal" means a person, subject to the provisions of the statute of institutional arbitration, appointed to organise and administer arbitration, as well as to discharge other functions ascribed to him by this Law;

"arbitral tribunal" means all (one or several) arbitrators appointed in a prescribed manner and authorised to resolve a dispute of the parties;

"regulations (rules) of arbitral proceedings" means the code of rules to be followed in commercial dispute resolution;

"commercial dispute" means a controversy between the parties arising from contractual or non-contractual legal relations, except for the disputes which, subject to the law, may not be submitted to arbitration;
"mediator" means a person who, subject to the agreement between the parties, is authorised to resolve a commercial dispute without submitting the claim to arbitration or court;

"regulations (rules) of mediation (conciliation) procedure" means the code of rules to be followed in pre-arbitral mediation and conciliation proceedings;

"court" means a body of the judicial system of the State, performing functions of supervision of the arbitral process;

"international commercial arbitration" means arbitration meeting the requirements referred to in article 4 of this Law;

"national commercial arbitration" means arbitration to resolve disputes between economic entities of the Republic of Lithuania except for the disputes referred to in article 4 of this Law.

Article 3. Permanent Arbitral Institutions

1. Public organisations of the Republic of Lithuania, representing Lithuanian production, trade and legal economic entities, may establish separate legal persons (permanent arbitration institutions) whose permanent function shall be to organise and attend to arbitration (e.g. sending notifications and documents, providing premises and etc.), as well as perform other functions granted to them by the parties.

2. The procedure for establishment and management, as well as the issues related to representation and responsibility of permanent arbitration institutions referred to in paragraph 1 of this Article, shall be resolved according to the procedure established by law. The statute of permanent arbitration institutions, prepared and approved by the founders, shall be registered with the Ministry of Justice of the Republic of Lithuania.

3. Permanent arbitration institutions shall be prohibited from resolving disputes by way of arbitration or exerting influence on dispute resolution, arbitral proceedings, arbitral tribunal or arbitrators, except for recommendations of a permanent arbitration institution to arbitral tribunals in regard to the form of arbitral award, in order to facilitate enforcement thereof. In the arbitral proceedings permanent arbitral institution shall have only the rights granted to it by agreement between the parties.

4. Arbitration rules (regulations) approved by permanent arbitral institutions shall be of legal significance subject to the agreement between the parties only if the parties in their arbitration agreement decided to apply them.

5. Permanent arbitral institutions may not refuse to execute their functions if they have made a public notice of their activities and the parties to the dispute have paid the fees required.

Article 4. Cases when Commercial Arbitration shall be Recognised as International

1. Arbitration shall be international if:

1) the parties to an arbitration agreement have, at the time of the conclusion thereof, their places of business in different states;

2) the place of arbitration if determined in the arbitration agreement or discussed in any other way corresponding to the arbitration agreement, is situated outside the state in which the parties have their places of business;

3) any place where a substantial part of the obligations arising from the commercial relations of the parties is to be performed, is situated outside the state in which the parties have their places of business;

4) the place with which the subject-matter of the dispute is most closely connected is situated outside the state in which the parties have their places of business;

5) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country;
Article 9. Definition and Form of Arbitration Agreement

1. "Arbitration agreement" means an agreement between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, and which may be the subject matter of arbitral examination. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate contract concluded by the parties.

2. The arbitration agreement shall be concluded in writing and shall be considered to be concluded if:

   1) executed as a joint document signed by the parties;
2) concluded in an exchange of letters, telefax, telegrams or other documents which provide a record of the agreement;

3) concluded in an exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another, or there is other written evidence confirming that the parties have concluded an arbitration agreement or recognise it.

3. The reference in a contract concluded by the parties to a document containing an arbitral clause shall constitute an arbitration agreement provided that the contract is in writing and reference is such as to make that clause part of the contract.

**Article 10. Arbitration Agreement and its Judicial Recognition**

The court receiving a claim, the subject matter of which is subject to arbitration agreement made by the parties according to the provisions of Article 9 of this Law, at the request of a party, refuses to accept it. Arbitration agreement may be recognised null and void at the request of a party, on the general grounds for recognising transactions null and void, as well as upon the violation of Articles 9 and 11 of this Law.

**Article 11. Disputes which may not be Submitted to Arbitration**

1. Disputes arising from constitutional, employment, family, administrative legal relations, as well as disputes connected with competition, patents, trademarks and service marks, bankruptcy and disputes arising from consumption agreement may not be submitted to arbitration.

2. Disputes, the party to which is a state or municipal enterprise, as well as a state or municipal institution or organisation may not be submitted to arbitration unless an advance consent to such agreement has been given by the founder of such enterprise, institution or organisation.

3. The Government of the Republic of Lithuania or its authorised public authority may, in accordance with the regular procedure, enter into an arbitration agreement concerning disputes arising from commercial-economic contracts to which the Government or its authorised public authority is a party.

**Article 12. Arbitration Agreement and Temporary Injunction**

It shall not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an injunction from a court and for a court to grant such an injunction.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

**Article 13. Number of Arbitrators**

1. The parties shall be free to determine the number of arbitrators.

2. Failing such determination, the number of arbitrators shall be three.

3. In all cases the number of arbitrators must be uneven.

**Article 14. Appointment of Arbitrators**

1. Any competent natural person may, irrespective of his nationality, be appointed as arbitrator, unless otherwise agreed by the parties. In all cases the person's consent to act as an arbitrator is required.

2. Persons who are prohibited by law of the Republic of Lithuania from engaging in other paid labour, may not practice arbitration on a permanent basis, neither are they allowed to be paid for arbitration (with the exception of proceeding fees). This rule shall not be applicable to lawyers and their assistants.

3. The parties shall be free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs 5 and 6 of this Article.

4. Failing such agreement,
1) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator;

2) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the chairman of arbitral tribunal;

3) if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the chairman of arbitral tribunal.

5. Where, under an appointment procedure agreed upon by the parties,

1) a party fails to act as required under such procedure; or

2) the parties, or two arbitrators, appointed by them, are unable to reach an agreement on appointment of an arbitrator according to the procedure agreed by the parties; or

3) third parties fail to perform any function in regards to the appointment of arbitrators entrusted to them under such procedure, - any party may request the chairman of arbitral tribunal to take the necessary measures for the appointment of an arbitrator, unless the agreement on the appointment procedure provides other means for securing the appointment of arbitrators.

6. Decisions on matters entrusted by paragraphs 3 and 4 of this Article to the chairman of arbitral tribunal shall be subject to no appeal.

7. The chairman of arbitral tribunal in appointing an arbitrator or arbitrators, shall have due regard to any qualifications required of the arbitrator by the agreement between the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

8. In the case of international arbitration when arbitral tribunal consists of sole arbitrator, or in the case of third arbitrator it shall be advisable to appoint arbitrators of a nationality other than those of the parties to the dispute.

**Article 15. Grounds for Challenging an Arbitrator**

1. When a person is approached in connection with his possible appointment as an arbitrator, he must reveal any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, must reveal such circumstances if he has not done that yet.

2. An arbitrator may be challenged only if there are following circumstances that give rise to justifiable doubts as to his impartiality or independence:

   1) an arbitrator is officially or otherwise dependent on one of the parties;

   2) is a relative of one of the parties;

   3) is directly or indirectly concerned with the outcome of the case in favour of one of the parties;

   4) participated in pre-arbitral mediation procedure;

   5) there are other circumstances that give rise to justifiable doubts as to his impartiality.

3. An arbitrator may also be informed about challenge if he does not possess qualifications agreed to by the parties.

4. A party may inform an arbitrator, appointed by him or together with the other party, about the challenge only for reasons of which he becomes aware after the appointment has been made.
Article 16. Arbitrator's Challenge Procedure

1. The parties may agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph 3 of this Article.

2. Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in paragraphs 2 and 3 of Article 15 of this Law, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. 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 30 days after having received notice of the decision rejecting the challenge, the chairman of the arbitral tribunal to decide on the challenge. The arbitral tribunal chairman's decision shall be subject to no appeal. While such a request is considered by the arbitral tribunal chairman, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings, but an award can be made only when the chairman of the arbitral tribunal finally decides on the challenge.

Article 17. Termination of Arbitrator's Mandate

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate shall terminate if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the chairman of the arbitral tribunal to decide on the termination of the mandate. The arbitral tribunal chairman's decision shall be subject to no appeal.

2. If, under paragraph 1 of this Article or paragraph 2 of article 16 of this Law, an arbitrator withdraws from his office or the parties agree to the termination of the mandate of an arbitrator, this shall not imply acceptance of the validity of any ground referred to in this Article or paragraphs 2 and 3 of Article 15.

Article 18. Appointment of Substitute Arbitrator

Where the mandate of an arbitrator terminates under Articles 16 and 17 of this Law or because of his withdrawal from office for any other reason, or because of the revocation of his mandate by agreement between the parties or on other grounds, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 19. Right to Adopt the Decision Pertaining to Competence to Arbitrate of Arbitral Tribunal to Rule on its Jurisdiction

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitral clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitral clause.

2. A plea of the party that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the chairman of the arbitral tribunal to decide the matter. The arbitral tribunal chairman's decision shall be subject to no appeal. While such request of the party is pending, the arbitral tribunal may continue the arbitral proceedings, but it shall not make a final decision in regard to the essence of the dispute.
Article 20. Powers of Arbitral Tribunal Pertaining to Temporary Injunction

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, make the other party pay a deposit to secure the claim. Arbitral tribunal may, at the request of any party, unless otherwise agreed by the parties, address the district court operating in the same location as arbitral tribunal to grant an injunction.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 21. Equal Treatment of Parties

The parties to the dispute shall enjoy equal procedural rights at the arbitral tribunal. Each party shall be given equal opportunity of supporting his claim and defence.

Article 22. Determination of Rules of Procedure

1. Subject to the provisions of this Law, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 23. Place of Arbitration

1. The parties may agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case and the convenience for the parties.

2. The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among arbitrators, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Article 24. Commencement of Arbitral Proceedings

Unless otherwise agreed by the parties, the arbitral tribunal proceedings shall commence on the date on which a request for the dispute to be referred to arbitration has received by the respondent.

Article 25. Language of Arbitral Proceedings

1. In the event of national arbitration the case shall be tried in the Lithuanian language.

2. In the event of international arbitration the parties may agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language to be used in the proceedings. The agreement between the parties or the decree of the arbitral tribunal, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other documents adopted by the arbitral tribunal.

3. The arbitral tribunal may order that any documentary evidence shall be translated into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 26. Statements of Claim and Defence

1. Within the time fixed by the agreement between the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars. The parties may submit with their statements all documents they consider to be relevant or containing references to the documents or other evidence they will submit later.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendments or supplements having regard to their late filing or possible delay of the case.
Article 27. Hearings and Written Proceedings

1. Subject to any agreement by the parties, the arbitral tribunal shall hold oral hearings for the presentation of evidence or for oral argument, conduct the proceedings on the basis of documents and other materials furnished by the parties. In case the parties agree that no hearings shall be held, the arbitral tribunal shall hold such hearings at a relevant stage of the written proceedings, if so requested by a party to the dispute.

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party must be transmitted to the other party. Any conclusions of experts or other evidentiary documents on which the arbitral tribunal may rely in making its decision must be transmitted to the parties.

Article 28. Failure to Produce Documents or Appear at a Hearing

1. Unless otherwise agreed by the parties, if, without showing sufficient cause:
   1) the claimant fails to communicate his statement of claim in accordance with paragraph 1 of Article 26, the arbitral tribunal shall terminate the proceedings;
   2) the respondent fails to communicate his statement of defence in accordance with paragraph 1 of Article 26, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
   3) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

2. If the proceedings are terminated on the grounds referred to in subparagraphs 1 and 3 of paragraph 1 of this Article, the claimant may again address arbitration to have the same dispute settled, unless otherwise agreed by the parties.

Article 29. Expert Appointed by Arbitral Tribunal

1. Unless otherwise agreed by the parties, the arbitral tribunal may:
   1) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
   2) require a party to give the expert any relevant information, to produce or provide access to any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties and a party so requests or if the arbitral tribunal considers it necessary, the expert shall participate in a hearing and deliver his written or oral report, as well as answer the questions put to him by the parties. The parties may also bring their experts and witnesses to the session in order to testify on the points at issue.

Article 30. Court Assistance in Taking Evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the district court operating in the same location as arbitral tribunal assistance in taking evidence. The court must execute the request according to the rules of the Code of Civil Procedure of the Republic of Lithuania.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 31. Rules Applicable to Substance of Dispute

1. The arbitral tribunal shall decide the dispute in accordance with such laws (legal norms) as are chosen by mutual consent of the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflicting norms.
2. Failing any designation by the parties, in case of international commercial arbitration the arbitral tribunal shall apply the law determined by the conflicting legal norms which considers applicable. National commercial arbitration shall apply the law of the Republic of Lithuania in such case.

3. The arbitral tribunal shall decide *ex aequo et bono* or *as amiable compositeur* only if the parties have expressly authorised it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade practices applicable to the specific transaction.

**Article 32. Decision-making by Panel of Arbitrators**

In arbitral proceedings with 3 or more arbitrators, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of votes of the arbitrators. Questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

**Article 33. Settlement**

1. If, during arbitral proceedings, the parties shall settle the dispute, the arbitral tribunal shall terminate the proceedings. If not objected by the arbitral tribunal, at the request by the parties the record of settlement shall be executed in the form of an arbitral award on agreed terms. The arbitral tribunal may refuse to ratify the settlement, if it contradicts the norms of substantive law on the validity of contracts of the legal system, chosen or applied by the parties or applicable in the proceedings.

2. An award on agreed terms shall be made in accordance with the provisions of Article 34 and shall state that it is an award. Such an award shall have the same status and effect as any other award on the merits of the case.

**Article 34. Form and Contents of Award**

1. The award must be made in writing and must be signed by the arbitrator or arbitrators. In arbitral proceedings with 3 or more arbitrators, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The arbitrator or arbitrators who refused to sign the award shall have the right to state their individual opinion in writing which shall be adjoined to the award.

2. The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is made on agreed terms under Article 33. The award shall state whether the claim is satisfied or denied, as well as the sum of arbitration fee, expenses of the proceedings and their allocation between the parties.

3. The award shall state the date and place of issuing thereof, in accordance with the procedure established in paragraph 1 of Article 23 of this Law. The arbitral award shall be deemed to have been made at the location which is indicated in the award. The award shall also state name(s) of arbitrator(s), parties to the dispute, their place of residence or office, representatives of the parties.

4. A copy signed by the arbitrators in accordance with the requirements specified in paragraph 1 of this Article shall be delivered to each party.

**Article 35. Termination or Discontinuance of Arbitral Proceedings**

1. The arbitral proceedings shall be terminated upon issuing of the final award by the arbitral tribunal or shall be discontinued on the grounds set forth in paragraph 2 of this Article.

2. The arbitral tribunal shall issue an order for the discontinuance of arbitral proceedings when:
   1) the claimant withdraws his claim, unless the respondent objects thereto; or
   2) the parties agree on the discontinuance of the proceedings; or
   3) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Upon disappearance of such reasons that caused the discontinuance of
the proceedings referred to in this subparagraph, the party may again address arbitration in regards of the same dispute.

3. The powers of the arbitral tribunal shall terminate with the discontinuance of the arbitral proceedings, with the exception of the cases provided for in Article 36 and paragraph 7 of Article 37 of this Law.

Article 36. Correction and Interpretation of Award, and Additional Award

1. Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties:

   1) a party, with notice to the other party, may request the arbitral tribunal to correct any spelling mistake or any errors in computation;

   2) a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of an arbitral award or a specific part or point thereof.

2. If the arbitral tribunal considers the request to be justified, it must make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the arbitral award.

3. The arbitral tribunal may, on its own initiative, correct any mistake of the type referred to in subparagraph 1 of part 1 of this Article within 30 days of the date of the award.

4. Unless otherwise agreed by the parties, a party may, with notice to the other party, request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings, but omitted from the award. If the arbitral tribunal considers the request to be justified, it must, within 60 days, consider these claims and make the additional award.

5. The arbitral tribunal may extend, if necessary, the period of time within which it must correct the mistakes, provide interpretation or make an additional award under paragraphs 1, 2 and 4 of this Article.

6. The provisions of Article 34 of this Law must apply when correcting mistakes, interpreting the award or issuing an additional award of the arbitration tribunal.

7. Interpretation or correction of the award may not change its essence.

CHAPTER VII. RECOURSE AGAINST ARBITRAL AWARD

Article 37. Grounds and Procedure for Recourse against Arbitral Award

1. Recourse to the Lithuanian Court of Appeal against an arbitral award may be made only by an application for setting aside in accordance with paragraphs 3 and 5 of this Article.

2. Lithuanian Court of Appeal, after it has accepted application for the setting aside, at the request of a party may suspend the enforcement of the award.

3. An arbitral award may be set aside by the Lithuanian Court of Appeal if the party making the application furnishes proof that:

   1) a party to the arbitration agreement referred to in Article 9 was under some incapacity; or the said agreement is not valid under the laws to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the arbitral award was made; or

   2) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present his case for other valid reasons; or

   3) the award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

4. If the parts of the arbitral award on matters submitted to arbitration may be separated from those not so submitted, only those parts of the award which contains provisions on matters not submitted to arbitration may be set aside.

5. An arbitral award may be set aside by the Lithuanian Court of Appeal if the Court finds that:
   1) the subject-matter of the dispute is not capable of settlement by arbitration under laws of the Republic of Lithuania; or
   2) the arbitral award is in conflict with the public policy of the Republic of Lithuania.

6. The Lithuanian Court of Appeal shall refuse to accept an application for setting aside after three months have elapsed from the date on which the arbitral award was made or, if a request has been made under Article 36, from the date on which that request was disposed of by arbitral tribunal.

7. When asked to set aside an award, the Lithuanian Court of Appeal may, if so requested by a party, suspend the setting aside proceedings for a definite time period in order to enable the arbitral tribunal to resume the arbitral proceedings or take such other action as in the opinion of the Lithuanian Court of Appeal would eliminate the grounds for setting aside the arbitral award.

Article 38. Taking effect and Enforcement of Arbitral Award

1. An arbitral award shall take effect from the moment it is made and must be enforced by the parties.

2. When an arbitral award takes effect, the parties to the dispute shall not have the right to bring suit on the same subject and on the same grounds.

3. If one party refuses to enforce the award, the other party shall have the right to address the district court operating in the same location as arbitral tribunal with the request to issue an executive order.

4. District court in its ruling may refuse to issue an executive order on the grounds referred to in Article 40 of this Law.

5. Arbitral awards shall be enforced in the manner prescribed by the Code of Civil Procedure of the Republic of Lithuania.

6. Ruling in which the court issues or refuses to issue an executive order may be appealed against in the manner prescribed by the Code of Civil Procedure of the Republic of Lithuania.

7. Recognition and enforcement of foreign arbitral awards shall be subject to Articles 39 and 40 of this Law.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article 39. Recognition and Enforcement of Foreign Arbitral Awards

1. An arbitral award made in any State which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shall be recognised and enforced in the Republic of Lithuania according to the provisions of this Convention, Article 40 and the New York Convention mentioned above.

2. The party applying the recognition and enforcement of a foreign arbitral award shall supply the Lithuanian Court of Appeal with the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in Article 9 or a duly certified copy thereof. If the arbitral award or arbitral agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into the Lithuanian language.
3. Recognised foreign arbitral awards in Lithuania shall be enforced in the manner prescribed by the Code of Civil Procedure of the Republic of Lithuania.

Article 40. Grounds for Refusing the Recognition or Enforcement of an Arbitral Award

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused in the Republic of Lithuania only on the grounds referred to in Article 5 of the 1958 New York Convention, when a party to the dispute against whom the award is invoked furnishes proof that:

1) parties to the arbitration agreement referred to in Article 9 of this Law (Article 2 of the New York Convention) were under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

2) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the case; or

3) the arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration may be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

5) the award has not yet become binding on the parties or has been set aside or suspended by a competent state institution of the country in which, or under the law whereof, that award was made.

2. It shall be refused to recognise and enforce an arbitral award if the Lithuanian Court of Appeal finds that:

1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Lithuania; or

2) the recognition or enforcement of the award is contrary to the public policy of the Republic of Lithuania.

3. If an application for setting aside or suspension of an arbitral award has been made to a competent state institution referred to subparagraph 1 of paragraph 5 of this Article, the Lithuanian Court of Appeal may adjourn consideration of the matter pertaining to the recognition and enforcement of this award, and may also, on the application of the party claiming recognition or enforcement of the award, obligate the other party to pay the deposit necessary to secure the enforcement of the award, or may apply other measures to secure the enforcement of the award.

4. Ruling of the Lithuanian Court of Appeal to recognise and enforce a foreign arbitral award or ruling in which the Court refuses to so recognise and enforce it, shall be subject to appeal to the Supreme Court of Lithuania according to the procedure set by the Code of Civil Procedure of the Republic of Lithuania.

CHAPTER IX. PRE-ARBITRAL MEDIATION

Article 41. Grounds for Pre-arbitral Mediation

Parties willing to resolve their dispute without submitting their claim to arbitration or court may, subject to their agreement, address commercial arbitration in regards to pre-arbitral mediation.

Article 42. Grounds for Pre-arbitral Mediation Procedure

Pre-arbitral mediation in commercial arbitration may be conducted in accordance with the UNCITRAL Conciliation Rules its own rules of pre-arbitral mediation, rules prepared by one or both parties and approved by both parties or any other act setting procedure of dispute resolution acceptable to both parties.
Article 43. Enforcement of Mediation Awards

Mediation awards made to resolve disputes by means of pre-arbitral mediation shall be enforced only in good will of the parties.

Annex II


CHAPTER I. GENERAL PROVISIONS

Section 1025 – Scope of application

(1) The provisions of this Book apply if the place of arbitration as referred to in section 1043 subs. 1 is situated in Germany.

(2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated outside Germany or has not yet been determined.

(3) If the place of arbitration has not yet been determined, the German courts are competent to perform the court functions specified in sections 1034, 1035, 1037 and 1038 if the respondent or the claimant has his place of business or habitual residence in Germany.

(4) Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.

Section 1026 – Extent of court intervention

In matters governed by sections 1025 to 1061, no court shall intervene except where so provided in this Book.

Section 1027 – Loss of right to object

A party who knows that any provision of this Book from which the parties may derogate or any agreed requirement under the arbitral procedure has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, may not raise that objection later.

Section 1028 – Receipt of written communications in case of unknown whereabouts

(1) Unless otherwise agreed by the parties, if the whereabouts of a party or of a person entitled to receive communications on his behalf are not known, any written communication shall be deemed to have been received on the day on which it could have been received at the addressee's last-known mailing address, place of business or habitual residence after proper transmission by registered mail/return receipt requested or any other means which provides a record of the attempt to deliver it there.

(2) Subsection 1 does not apply to communications in court proceedings.

CHAPTER II. ARBITRATION AGREEMENT
Section 1029 – Definition

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of a separate agreement ("separate arbitration agreement") or in the form of a clause in a contract ("arbitration clause").

Section 1030 – Arbitrability

(1) Any claim involving an economic interest (vermögensrechtlicher Anspruch) can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.

(2) An arbitration agreement relating to disputes on the existence of a lease of residential accommodation within Germany shall be null and void. This does not apply to residential accommodation as specified in section 556a subs. 8 of the Civil Code.

(3) Statutory provisions outside this Book by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only under certain conditions, remain unaffected.

Section 1031 – Form of arbitration agreement

(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.

(2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage.

(3) The reference in a contract complying with the form requirements of subsection 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

(4) An arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party.

(5) Arbitration agreements to which a consumer<sup>69</sup>(1.) is a party must be contained in a document which has been personally signed by the parties. No agreements other than those referring to the arbitral proceedings may be contained in such a document; this shall not apply in the case of a notarial certification.

(6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings.

Section 1032 – Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

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<sup>69</sup> Sect. 1031, para. 5 sentence 3 which defined the term “consumer” has been deleted as of 27 June 2000, because such definition is now included in the new Sect. 13 of the German Civil Code (BGB) which provides as follows:

“A consumer is a natural person who is concluding a legal transaction (Rechtsgeschäft) for a purpose which can be regarded as outside his trade or self-employed profession (gewerbliche oder selbständige berufliche Tätigkeit).” (Unofficial English translation.)
(2) Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.

(3) Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court.

Section 1033 – Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.

CHAPTER III. CONSTITUTION OF ARBITRAL TRIBUNAL

Section 1034 – Composition of arbitral tribunal

(1) The parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators shall be three.

(2) If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure. The request must be submitted at the latest within two weeks of the party becoming aware of the constitution of the arbitral tribunal. Section 1032 subs. 3 applies mutatis mutandis.

Section 1035 – Appointment of arbitrators

(1) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators.

(2) Unless otherwise agreed by the parties, a party shall be bound by his appointment of an arbitrator as soon as the other party has received notice of the appointment.

(3) Failing an agreement between the parties on the appointment of the arbitrators, a sole arbitrator shall, if the parties are unable to agree on his appointment, be appointed, upon request of a party, by the court. In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as chairman of the arbitral tribunal. If a party fails to appoint the arbitrator within one month of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within one month of their appointment, the appointment shall be made, upon request of a party, by the court.

(4) Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure, or if the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party fails to perform any function entrusted to it under such procedure, any party may request the court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third arbitrator, the court shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Section 1036 – Challenge of an arbitrator

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may
challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Section 1037 – Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection 3 of this section.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within two weeks after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 1036 subs. 2, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection 2 of this section is not successful, the challenging party may request, within one month after having received notice of the decision rejecting the challenge, the court to decide on the challenge; the parties may agree on a different time limit. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Section 1038 – Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. If the arbitrator does not withdraw from his office or if the parties cannot agree on the termination, any party may request the court to decide on the termination of the mandate.

(2) If, under subsection 1 of this section or section 1037 subs. 2, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground for withdrawal referred to in subsection 1 of this section or section 1036 subs. 2.

Section 1039 – Appointment of substitute arbitrator

(1) Where the mandate of an arbitrator terminates under section 1037 or 1038 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(2) The parties are free to agree on another procedure.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Section 1040 – Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.

(3) If the arbitral tribunal considers that it has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
Section 1041 – Interim measures of protection

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1, unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the purpose of enforcing the measure.

(3) The court may, upon request, repeal or amend the decision referred to in subsection 2.

(4) If a measure ordered under subsection 1 proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure or from his providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Section 1042 – General rules of procedure

(1) The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

(2) Counsel may not be excluded from acting as authorized representatives.

(3) Otherwise, subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.

(4) Failing an agreement by the parties, and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence.

Section 1043 – Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection 1 of this section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.

Section 1044 – Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The request shall state the names of the parties, the subject-matter of the dispute and contain a reference to the arbitration agreement.

Section 1045 – Language of proceedings

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.
**Section 1046 – Statements of claim and defence**

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state his claim and the facts supporting the claim, and the respondent shall state his defence in respect of these particulars. The parties may submit with their statements all documents they consider to be relevant or may add a reference to other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it without sufficient justification.

(3) Subsections 1 and 2 apply *mutatis mutandis* to counter-claims.

**Section 1047 – Oral hearings and written proceedings**

(1) Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of taking evidence.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to both parties.

**Section 1048 – Default of a party**

(1) If the claimant fails to communicate his statement of claim in accordance with section 1046 subs. 1, the arbitral tribunal shall terminate the proceedings.

(2) If the respondent fails to communicate his statement of defence in accordance with section 1046 subs. 1, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

(3) If any party fails to appear at an oral hearing or to produce documentary evidence within a set time limit, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

(4) Any default which has been justified to the tribunal's satisfaction will be disregarded. Apart from that, the parties may agree otherwise on the consequences of default.

**Section 1049 – Expert appointed by arbitral tribunal**

(1) Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. It may also require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents or property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Sections 1036 and 1037 subs. 1 and 2 apply *mutatis mutandis* to an expert appointed by the arbitral tribunal.

**Section 1050 – Court assistance in taking evidence and other judicial acts**

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its
rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Section 1051 – Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. The parties may so authorize the arbitral tribunal up to the time of its decision.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Section 1052 – Decision making by panel of arbitrators

(1) In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.

(2) If an arbitrator refuses to take part in the vote on a decision, the other arbitrators may take the decision without him, unless otherwise agreed by the parties. The parties shall be given advance notice of the intention to make an award without the arbitrator refusing to participate in the vote. In the case of other decisions, the parties shall subsequent to the decision be informed of the refusal to participate in the vote.

(3) Individual questions of procedure may be decided by a presiding arbitrator alone if so authorized by the parties or all members of the arbitral tribunal.

Section 1053 – Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, it shall record the settlement in the form of an arbitral award on agreed terms, unless the contents are in violation of public policy (ordre public).

(2) An award on agreed terms shall be made in accordance with section 1054 and shall state that it is an award. Such an award has the same effect as any other award on the merits of the case.

(3) If notarial certification is required for a declaration to be effective, it will be substituted, in the case of an arbitral award on agreed terms, by recording the declaration of the parties in the award.

(4) An award on agreed terms may, upon agreement between the parties, also be declared enforceable by a notary whose notarial office is in the district of the court competent for the declaration of enforceability according to section 1062 subs. 1, no. 2. The notary shall refuse the declaration of enforceability, if the requirements of subsection 1, sentence 2 are not complied with.

Section 1054 – Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 1053.
Section 1055 – Effect of arbitral award

The arbitral award has the same effect between the parties as a final and binding court judgment.

Section 1056 – Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection 2 of this section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when

1) the claimant:
   a) fails to state his claim according to section 1046 subs. 1 and section 1048 subs. 4 does not apply, or
   b) withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute, or

2) the parties agree on the termination of the proceedings, or

3) the parties fail to pursue the arbitral proceedings in spite of being so requested by the arbitral tribunal or when the continuation of the proceedings has for any other reason become impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of sections 1057 subs. 2, 1058 and 1059 subs. 4.

Section 1057 – Decision on costs

(1) Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.

(2) To the extent that the costs of the arbitral proceedings have been fixed, the arbitral tribunal shall also decide on the amount to be borne by each party. If the costs have not been fixed or if they can only be fixed once the arbitral proceedings have been terminated, the decision shall be taken by means of a separate award.

Section 1058 – Correction and interpretation of award; additional award

(1) Any party may request the arbitral tribunal

1) to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature,

2) to give an interpretation of specific parts of the award,

3) to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

(2) Unless otherwise agreed by the parties, the request shall be made within one month of receipt of the award.

(3) The arbitral tribunal shall make the correction or give the interpretation within one month and make an additional award within two months.
(4) The arbitral tribunal may make a correction of the award on its own initiative.

(5) Section 1054 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECURSIVE AGAINST AWARD

Section 1059 – Application for setting aside

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections 2 and 3 of this section.

(2) An arbitral award may be set aside only if:

1) the applicant shows sufficient cause that:

   a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or

   b) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

   c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

   d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award; or

2) the court finds that

   a) the subject-matter of the dispute is not capable of settlement by arbitration under German law; or

   b) recognition or enforcement of the award leads to a result which is in conflict with public policy (ordre public).

(3) Unless the parties have agreed otherwise, an application for setting aside to the court may not be made after three months have elapsed. The period of time shall commence on the date on which the party making the application had received the award. If a request had been made under section 1058, the time limit shall be extended by not more than one month from receipt of the decision on the request. No application for setting aside the award may be made once the award has been declared enforceable by a German court.

(4) The court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal.

(5) Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Section 1060 – Domestic awards

(1) Enforcement of the award takes place if it has been declared enforceable.
(2) An application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 subs. 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 subs. 2, no. 1 shall also not be taken into account if the time limits set by section 1059 subs. 3 have expired without the party opposing the application having made an application for setting aside the award.

Section 1061 – Foreign awards

(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

(2) If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.

(3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.

CHAPTER IX. COURT PROCEEDINGS

Section 1062 – Competence

(1) The Higher Regional Court (Oberlandesgericht) designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to

1) the appointment of an arbitrator (sections 1034 and 1035), the challenge of an arbitrator (section 1037) or the termination of an arbitrator's mandate (section 1038);

2) the determination of the admissibility or inadmissibility of arbitration (section 1032) or the decision of an arbitral tribunal confirming its competence in a preliminary ruling (section 1040);

3) the enforcement, setting aside or amendment of an order for interim measures of protection by the arbitral tribunal (section 1041);

4) the setting aside (section 1059) or the declaration of enforceability of the award (section 1060 et seq.) or the setting aside of the declaration of enforceability (section 1061).

(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammergericht) shall be competent.

(3) In the cases referred to in section 1025 subs. 3, the Higher Regional Court (Oberlandesgericht) in whose district the claimant or the respondent has his place of business or place of habitual residence is competent.

(4) For assistance in the taking of evidence and other judicial acts (section 1050), the Local Court (Amtsgericht), in whose district the judicial act is to be carried out, is competent.

(5) Where there are several Higher Regional Courts (Oberlandesgerichte) in one Land, the Government of that Land may transfer by ordinance competence to one Higher Regional Court, or, where existent, to the highest Regional Court (oberstes Landesgericht); the Land Government may transfer such authority to the Department of Justice of the Land concerned by ordinance. Several Länder may agree on cross-border competence of a single Higher Regional Court.
Section 1063 – General provisions

(1) The court shall decide by means of an order, which may be issued without an oral hearing. The party opposing the application shall be given an opportunity to comment before a decision is taken.

(2) The court shall order an oral hearing to be held, if the setting aside of the award has been requested or if, in an application for recognition or declaration of enforceability of the award, grounds for setting aside in terms of section 1059 subs. 2 are to be considered.

(3) The presiding judge of the civil court senate (Zivilsenat) may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been reached, the applicant may pursue enforcement of the award or enforce the interim measure of protection of the arbitration court pursuant to section 1041. In the case of an award, enforcement of the award may not go beyond measures of protection. The party opposing the application may prevent enforcement by providing as security an amount corresponding to the amount that may be enforced by the applicant.

(4) As long as no oral hearing is ordered, applications and declarations may be put on record at the court registry.

Section 1064 – Particularities regarding the enforcement of awards

(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings.

(2) The order declaring the award enforceable shall be declared provisionally enforceable.

(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards.

Section 1065 – Legal remedies

(1) A complaint on a point of law to the Federal Court of Justice (Bundesgerichtshof) is available against the decisions mentioned under section 1062 subs. 1, nos. 2 and 4 if an appeal on points of law would have been available against them, had they been delivered as a final judgment. No recourse against other decisions in the proceedings specified in section 1062 subs. 1 may be made.

(2) The Federal Court of Justice may only examine whether the order is based on a violation of a treaty or of another statute. Section 546 subs. 1, sentence 3 and subs. 2, section 549 subs. 2, sections 550 to 554 b, 556, 558, 559, 561, 563, 573 subs. 1, section 575 and sections 707, 717 apply mutatis mutandis.

CHAPTER X. ARBITRAL TRIBUNALS NOT ESTABLISHED BY AGREEMENT

Section 1066 – Mutatis mutandis application of the provisions of the tenth book

The provisions of this Book apply mutatis mutandis to arbitral tribunals established lawfully by disposition on death or other dispositions not based on an agreement.

Article 4 of the Act on Arbitral Proceedings

Transitional Provisions

Section 1 – Arbitral proceedings

(1) The effectiveness of arbitration agreements that have been concluded prior to the entry into force of this Act, shall be determined according to the law previously in force.

(2) Arbitral proceedings that are pending but not terminated upon the entry into force of this Act are governed by the law previously in force provided that the arbitral settlement (schiedsrichterlicher Vergleich) is substituted by the award on agreed terms. The parties may agree to apply the new law.
(3) Court proceedings pending upon the entry into force of this Act remain subject to the law previously in force.

(4) Arbitral settlements that have been concluded and declared enforceable prior to the entry into force of this Act are subject to enforcement provided that the decision on their enforceability has become final and binding or has been declared provisionally enforceable.

Section 2

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Annex III

Arbitration Act 1996 (of England)
1996 CHAPTER 23 [17th June 1996]

An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. [17th June 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

I. PART I - ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

Introductory

Section 1. General principles

The provisions of this Part are founded on the following principles, and shall be construed accordingly-

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Section 2. Scope of application of provisions

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined-
(a) sections 9 to 11 (stay of legal proceedings, &c.), and
(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined-

(a) section 43 (securing the attendance of witnesses), and
(b) section 44 (court powers exercisable in support of arbitral proceedings)

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where-

(a) no seat of the arbitration has been designated or determined, and
(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

Section 3. The seat of the arbitration

In this Part “the seat of the arbitration” means the juridical seat of the arbitration designated-

(a) by the parties to the arbitration agreement, or
(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
(c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.

Section 4. Mandatory and non-mandatory provisions

(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.
Section 5. Agreements to be in writing

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.

(2) There is an agreement in writing-
   (a) if the agreement is made in writing (whether or not it is signed by the parties),
   (b) if the agreement is made by exchange of communications in writing, or
   (c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

The Arbitration Agreement

Section 6. Definition of arbitration agreement

(1) In this Part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

Section 7. Separability of arbitration agreement

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

Section 8. Whether agreement discharged by death of a party

(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

Stay of legal proceedings

Section 9. Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
Section 10. Reference of interpleader issue to arbitration

(1) Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.

(2) Where subsection (1) applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

Section 11. Retention of security where admiralty proceedings stayed

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest-

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order.

Commencement of arbitral proceedings

Section 12. Power of court to extend time for beginning arbitral proceedings, &c.

(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step-

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied-

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

(5) An order under this section does not affect the operation of the Limitation Acts (see section 13).

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Section 13. Application of limitation acts

(1) The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.

(2) The court may order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter-

(a) of an award which the court orders to be set aside or declares to be of no effect, or

(b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

(3) In determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

(4) In this Part “the Limitation Acts” means-

(a) in England and Wales, the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and any other enactment (whenever passed) relating to the limitation of actions

(b) in Northern Ireland, the Limitation (Northern Ireland) Order 1989, the Foreign Limitation Periods (Northern Ireland) Order 1985 and any other enactment (whenever passed) relating to the limitation of actions.

Section 14. Commencement of arbitral proceedings

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

The arbitral tribunal
Section 15. The arbitral tribunal

(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.

(3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.

Section 16. Procedure for appointment of arbitrators

(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(5) If the tribunal is to consist of three arbitrators-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

(6) If the tribunal is to consist of two arbitrators and an umpire-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.

Section 17. Power in case of default to appoint sole arbitrator

(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given-

(a) make the required appointment, and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.
(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Section 18. Failure of appointment procedure

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are-

(a) to give directions as to the making of any necessary appointments

(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made

(c) to revoke any appointments already made

(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Section 19. Court to have regard to agreed qualifications

In deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.

Section 20. Chairman

(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).

(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3).

Section 21. Umpire

(1) Where the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be, and in particular-

(a) whether he is to attend the proceedings, and

(b) when he is to replace the other arbitrators as the tribunal with power to make decisions, orders and
awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to the other arbitrators.

(4) Decisions, orders and awards shall be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration.

In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(5) If the arbitrators cannot agree but fail to give notice of that fact, or if any of them fails to join in the giving of notice, any party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court which may order that the umpire shall replace the other arbitrators as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Section 22. Decision-making where no chairman or umpire

(1) Where the parties agree that there shall be two or more arbitrators with no chairman or umpire, the parties are free to agree how the tribunal is to make decisions, orders and awards.

(2) If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators.

Section 23. Revocation of arbitrator’s authority

(1) The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) The authority of an arbitrator may not be revoked except-

   (a) by the parties acting jointly, or

   (b) by an arbitral or other institution or person vested by the parties with powers in that regard.

(4) Revocation of the authority of an arbitrator by the parties acting jointly must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.

(5) Nothing in this section affects the power of the court-

   (a) to revoke an appointment under section 18 (powers exercisable in case of failure of appointment procedure), or

   (b) to remove an arbitrator on the grounds specified in section 24.

Section 24. Power of court to remove arbitrator

(1) A party to arbitral proceedings 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 doubts as to his impartiality

   (b) that he does not possess the qualifications required by the arbitration agreement
(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts 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 despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Section 25. Resignation of arbitrator

(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards-

(a) his entitlement (if any) to fees or expenses, and

(b) any liability thereby incurred by him.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court-

(a) to grant him relief from any liability thereby incurred by him, and

(b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Section 26. Death of arbitrator or person appointing him

(1) The authority of an arbitrator is personal and ceases on his death.

(2) Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority.

Section 27. Filling of vacancy, &c.

(1) Where an arbitrator ceases to hold office, the parties are free to agree-

(a) whether and if so how the vacancy is to be filled,
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(b) whether and if so to what extent the previous proceedings should stand, and

c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.

(4) The tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office.

(5) His ceasing to hold office does not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a chairman or umpire.

Section 28. Joint and several liability of parties to arbitrators for fees and expenses

(1) The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.

(2) Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

(3) If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment.

(4) The above provisions have effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(5) Nothing in this section affects any liability incurred by an arbitrator by reason of his resigning (but see section 25).

(6) In this section references to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

Section 29. Immunity of arbitrator

(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

Jurisdiction of the arbitral tribunal

Section 30. Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-

(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Section 31. Objection to substantive jurisdiction of tribunal

(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

Section 32. Determination of preliminary point of jurisdiction

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless-

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied

   (i) that the determination of the question is likely to produce substantial savings in costs,

   (ii) that the application was made without delay, and

   (iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

**The arbitral proceedings**

*Section 33. General duty of the tribunal*

(1) The tribunal shall-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

*Section 34. Procedural and evidential matters*

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include-

(a) when and where any part of the proceedings is to be held

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

*Section 35. Consolidation of proceedings and concurrent hearings*
(1) The parties are free to agree-

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held, on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

Section 36. Legal or other representation

Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

Section 37. Power to appoint experts, legal advisers or assessors

(1) Unless otherwise agreed by the parties-

(a) the tribunal may-

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

Section 38. General powers exercisable by the tribunal

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is-

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings-

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.
(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

Section 39. Power to make provisional awards

(1) 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.

(2) This includes, for instance, making-

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.

This does not affect its powers under section 47 (awards on different issues, &c.).

Section 40. General duty of parties

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes-

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

Section 41. Powers of tribunal in case of party's default

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.

(4) If without showing sufficient cause a party-

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.
(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

(7) If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following-

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order

(b) draw such adverse inferences from the act of non-compliance as the circumstances justify

(c) proceed to an award on the basis of such materials as have been properly provided to it

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Powers of court in relation to arbitral proceedings

Section 42. Enforcement of peremptory orders of tribunal

(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

(2) An application for an order under this section may be made-

(a) by the tribunal (upon notice to the parties),

(b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or

(c) where the parties have agreed that the powers of the court under this section shall be available.

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Section 43. Securing the attendance of witnesses

(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if-

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.
Section 44. Court powers exercisable in support of arbitral proceedings

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are-

(a) the taking of the evidence of witnesses

(b) the preservation of evidence

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration

(d) the sale of any goods the subject of the proceedings

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

Section 45. Determination of preliminary point of law

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An application under this section shall not be considered unless-

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied-
(i) that the determination of the question is likely to produce substantial savings in costs, and
(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

The award

Section 46. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute-
   (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
   (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Section 47. Awards on different issues

(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2) The tribunal may, in particular, make an award relating-
   (a) to an issue affecting the whole claim, or
   (b) to a part only of the claims or cross-claims submitted to it for decision.

(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.

Section 48. Remedies

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court-
   
   (a) to order a party to do or refrain from doing anything
   
   (b) to order specific performance of a contract (other than a contract relating to land);
   
   (c) to order the rectification, setting aside or cancellation of a deed or other document.

Section 49. Interest

(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case

   (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award

   (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.

Section 50. Extension of time for making award

(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.

(2) An application for an order under this section may be made-

   (a) by the tribunal (upon notice to the parties), or

   (b) by any party to the proceedings (upon notice to the tribunal and the other parties), but only after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Section 51. Settlement

(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.
(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

Section 52. Form of award

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.

Section 53. Place where award treated as made

Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

Section 54. Date of award

(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.

(2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.

Section 55. Notification of award

(1) The parties are free to agree on the requirements as to notification of the award to the parties.

(2) If there is no such agreement, the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.

(3) Nothing in this section affects section 56 (power to withhold award in case of non-payment).

Section 56. Power to withhold award in case of non-payment

(1) The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

(2) If the tribunal refuses on that ground to deliver an award, a party to the arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court, which may order that-

(a) the tribunal shall deliver the award on the payment into court by the applicant of the fees and expenses demanded, or such lesser amount as the court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon
such terms as the court may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrators.

(4) No application to the court may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

(5) References in this section to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

(6) The above provisions of this section also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the tribunal’s award.

As they so apply, the references to the fees and expenses of the arbitrators shall be construed as including the fees and expenses of that institution or person.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

(8) Nothing in this section shall be construed as excluding an application under section 28 where payment has been made to the arbitrators in order to obtain the award.

Section 57. Correction of award or additional award

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party-

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award.

Section 58. Effect of award

(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.
(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Costs of the arbitration

Section 59. Costs of the arbitration

(1) References in this Part to the costs of the arbitration are to-

(a) the arbitrators' fees and expenses,

(b) the fees and expenses of any arbitral institution concerned, and

(c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).

Section 60. Agreement to pay costs in any event

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

Section 61. Award of costs

(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

Section 62. Effect of agreement or award about costs

Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.

Section 63. The recoverable costs of the arbitration

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.

If it does so, it shall specify-

(a) the basis on which it has acted, and

(b) the items of recoverable costs and the amount referable to each.

(4) If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may-

(a) Determine the recoverable costs of the arbitration on such basis as it thinks fit, or

(b) order that they shall be determined by such means and upon such terms as it may specify.
(5) Unless the tribunal or the court determines otherwise—

(a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and

(b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

(6) The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).

(7) Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses.

Section 64. Recoverable fees and expenses of arbitrators

(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)—

(a) Determine the matter, or

(b) order that it be determined by such means and upon such terms as the court may specify.

(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

Section 65. Power to limit recoverable costs

(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

Powers of the court in relation to award

Section 66. Enforcement of the award

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1990 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.
Section 67. Challenging the award: substantive jurisdiction

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Section 68. Challenging the award: serious irregularity

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal)

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties

(d) failure by the tribunal to deal with all the issues that were put to it

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

(f) uncertainty or ambiguity as to the effect of the award

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy

(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

(a) Remit the award to the tribunal, in whole or in part, for reconsideration,
(b) set the award aside in whole or in part, or
(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Section 69. Appeal on point of law

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except-

(a) with the agreement of all the other parties to the proceedings, or
(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied-

(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to determine,
(c) that, on the basis of the findings of fact in the award-
   (i) the decision of the tribunal on the question is obviously wrong, or
   (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may be order-

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part. The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Section 70. Challenge or appeal: supplementary provisions

(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award-

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is-

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.
(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.

Section 71. Challenge or appeal: effect of order of court

(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal's award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

Miscellaneous

Section 72. Saving for rights of person who takes no part in proceedings

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question

(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, or
(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.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award-

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or
(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

Section 73. Loss of right to object

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,
(b) that the proceedings have been improperly conducted,
(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part,
or

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise
that objection later, before the tribunal or the court, unless he shows that, at the time he took part or
continued to take part in the proceedings, he did not know and could not with reasonable diligence
have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings
who could have questioned that ruling-

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of
this Part, he may not object later to the tribunal’s substantive jurisdiction on any ground which was the
subject of that ruling.

Section 74. Immunity of arbitral institutions, &c.

(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an
arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function
unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by
reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his
employees or agents) in the discharge or purported discharge of his functions as arbitrator.

(3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they
apply to the institution or person himself.

Section 75. Charge to secure payment of solicitors’ costs

The powers of the court to make declarations and orders under section 73 of the Solicitors Act 1974 or
Article 71H of the Solicitors (Northern Ireland) Order 1976 (power to charge property recovered in the
proceedings with the payment of solicitors’ costs) may be exercised in relation to arbitral proceedings as if
those proceedings were proceedings in the court.

Supplementary

Section 76. Service of notices, &c.

(1) The parties are free to agree on the manner of service of any notice or other document required or
authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral
proceedings.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post-

(a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade,
profession or business, his last known principal business address, or

(b) where the addressee is a body corporate, to the body’s registered or principal office, it shall be treated
as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which
provision is made by rules of court.
Section 77. Powers of court in relation to service of documents

(1) This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement, is not reasonably practicable.

(2) Unless otherwise agreed by the parties, the court may make such order as it thinks fit-

(a) for service in such manner as the court may direct, or
(b) Dispensing with service of the document.

(3) Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Section 78. Reckoning periods of time

(1) The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement.

(2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.

(3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.

In relation to England and Wales or Northern Ireland, a “public holiday” means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.

Section 79. Power of court to extend time limits relating to arbitral proceedings

(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.

This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.).

(2) An application for an order may be made-

(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or
(b) by the arbitral tribunal (upon notice to the parties).

(3) The court shall not exercise its power to extend a time limit unless it is satisfied-

(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and
(b) that a substantial injustice would otherwise be done.

(4) The court's power under this section may be exercised whether or not the time has already expired.

(5) An order under this section may be made on such terms as the court thinks fit.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Section 80. Notice and other requirements in connection with legal proceedings

(1) References in this Part to an application, appeal or other step in relation to legal proceedings being taken “upon notice” to the other parties to the arbitral proceedings, or to the tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement.

(2) Rules of court shall be made-

(a) requiring such notice to be given as indicated by any provision of this Part, and

(b) as to the manner, form and content of any such notice.

(3) Subject to any provision made by rules of court, a requirement to give notice to the tribunal of legal proceedings shall be construed-

(a) if there is more than one arbitrator, as a requirement to give notice to each of them; and

(b) if the tribunal is not fully constituted, as a requirement to give notice to any arbitrator who has been appointed.

(4) References in this Part to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court.

(5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

(6) Provision may be made by rules of court amending the provisions of this Part-

(a) with respect to the time within which any application or appeal to the court must be made,

(b) so as to keep any provision made by this Part in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court, or

(c) so as to keep any provision made by this Part in relation to legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court.

(7) Nothing in this section affects the generality of the power to make rules of court.

Section 81. Saving for certain matters governed by common law

(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to-

(a) matters which are not capable of settlement by arbitration

(b) the effect of an oral arbitration agreement; or

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.
(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.

Section 82. Minor definitions

(1) In this Part-

“arbitrator”, unless the context otherwise requires, includes an umpire

“available arbitral process”, in relation to any matter, includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter

“claimant”, unless the context otherwise requires, includes a counterclaimant, and related expressions shall be construed accordingly

“dispute” includes any difference

“enactment” includes an enactment contained in Northern Ireland legislation

“legal proceedings” means civil proceedings in the High Court or a county court

“peremptory order” means an order made under section 41(5) or made in exercise of any corresponding power conferred by the parties

“premises” includes land, buildings, moveable structures, vehicles, vessels, aircraft and hovercraft

“question of law” means-

(a) for a court in England and Wales, a question of the law of England and Wales, and

(b) for a court in Northern Ireland, a question of the law of Northern Ireland; “substantive jurisdiction”, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement.

Section 83. Index of defined expressions: part I

In this Part the expressions listed below are defined or otherwise explained by the provisions indicated-

agreement, agree and agreed: section 5(1)

agreement in writing: section 5(2) to (5)

arbitration agreement: sections 6 and 5(1)

arbitrator: section 82(1)

available arbitral process: section 82(1)

claimant: section 82(1)

Commencement (in relation to arbitral proceedings): section 14

costs of the arbitration: section 59

the court: section 105
dispute: section 82(1)

enactment: section 82(1)

legal proceedings: section 82(1)

Limitation Acts: section 13(4)

notice (or other document)party-: section 76(6)

- in relation to an arbitration agreement: section 82(2)

- where section 106(2) or (3) applies: section 106(4)

peremptory order: section 82(1) (and see section 41(5))

premises: section 82(1)

question of law: section 82(1)

recoverable costs: sections 63 and 64

seat of the arbitration: section 3

serve and service (of notice or other document): section 76(6)

substantive jurisdiction (in relation to an arbitral tribunal): section 82(1) (and see section 30(1)(a) to (c))

upon notice (to the parties or the tribunal): section 80

written and in writing: section 5(6)

Section 84. Transitional provisions

(1) The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.

(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order).

II. PART II - OTHER PROVISIONS RELATING TO ARBITRATION

Domestic arbitration agreements

Section 85. Modification of part I in relation to domestic arbitration agreement

(1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a “domestic arbitration agreement” means an arbitration agreement to which none of the parties is-

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been
designated or determined) is in the United Kingdom.

(3) In subsection (2) “arbitration agreement” and “seat of the arbitration” have the same meaning as in Part I (see sections 3, 5(1) and 6).

Section 86. Staying of legal proceedings

(1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

(2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied-

(a) That the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

(3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.

Section 87. Effectiveness of agreement to exclude court’s jurisdiction

(1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under-

(a) section 45 (determination of preliminary point of law), or

(b) section 69 (challenging the award: appeal on point of law), is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

(2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).

(3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

Section 88. Power to repeal or amend sections 85 to 87

(1) The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.

(2) An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.

(3) An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

Consumer arbitration agreements

Section 89. Application of unfair terms regulations to consumer arbitration agreements

(1) The following sections extend the application of the Unfair Terms in Consumer Contracts Regulations 1994 in relation to a term which constitutes an arbitration agreement.

For this purpose “arbitration agreement” means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).
(2) In those sections “the Regulations” means these regulations and includes any regulations amending or replacing those regulations.

(3) Those sections apply whatever the law applicable to the arbitration agreement.

Section 90. Regulations apply where consumer is a legal person

The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person.

Section 91. Arbitration agreement unfair where modest amount sought

(1) A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.

(2) Orders under this section may make different provision for different cases and for different purposes.

(3) The power to make orders under this section is exercisable-

(a) for England and Wales, by the Secretary of State with the concurrence of the Lord Chancellor,

(b) for Scotland, by the Secretary of State with the concurrence of the Lord Advocate, and

(c) for Northern Ireland, by the Department of Economic Development for Northern Ireland with the concurrence of the Lord Chancellor.

(4) Any such order for England and Wales or Scotland shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Any such order for Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution, within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954.

III. Small claims arbitration in the county court

Section 92. Exclusion of part i in relation to small claims arbitration in the county court.

Nothing in Part I of this Act applies to arbitration under section 64 of the County Courts Act 1984.

Section 93. Appointment of judges as arbitrators

(1) A judge of the Commercial Court or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement.

(2) A judge of the Commercial Court shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of business in the High Court and the Crown Court, he can be made available.

(3) An official referee shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of official referees' business, he can be made available.

(4) The fees payable for the services of a judge of the Commercial Court or official referee as arbitrator or umpire shall be taken in the High Court.

(5) In this section-

“arbitration agreement” has the same meaning as in Part I; and

“official referee” means a person nominated under section 68(1)(a) of the Supreme Court Act 1981 to deal with official referees' business.
Statutory arbitrations

Section 94. Application of part I to statutory arbitrations

(1) The provisions of Part I apply to every arbitration under an enactment (a “statutory arbitration”), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98.

(2) The provisions of Part I do not apply to a statutory arbitration if or to the extent that their application-

(a) is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised or recognised by it, or

(b) is excluded by any other enactment.

(3) In this section and the following provisions of this Part “enactment”-

(a) in England and Wales, includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978

(b) in Northern Ireland, means a statutory provision within the meaning of section 1(f) of the Interpretation Act (Northern Ireland) 1954.

Section 95. General adaptation of provisions in relation to statutory arbitrations

(1) The provisions of Part I apply to a statutory arbitration-

(a) as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement, and

(b) as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement.

(2) Every statutory arbitration shall be taken to have its seat in England and Wales or, as the case may be, in Northern Ireland.

Section 96. Specific adaptations of provisions in relation to statutory arbitrations

(1) The following provisions of Part I apply to a statutory arbitration with the following adaptations.

(2) In section 30(1) (competence of tribunal to rule on its own jurisdiction), the reference in paragraph (a) to whether there is a valid arbitration agreement shall be construed as a reference to whether the enactment applies to the dispute or difference in question.

(3) Section 35 (consolidation of proceedings and concurrent hearings) applies only so as to authorise the consolidation of proceedings, or concurrent hearings in proceedings, under the same enactment.

(4) Section 46 (rules applicable to substance of dispute) applies with the omission of subsection (1)(b) (determination in accordance with considerations agreed by parties).

Section 97. Provisions excluded from applying to statutory arbitrations

The following provisions of Part I do not apply in relation to a statutory arbitration-

(a) Section 8 (whether agreement discharged by death of a party)
(b) Section 12 (power of court to extend agreed time limits)
(c) Sections 9(5), 10(2) and 71(4) (restrictions on effect of provision that award condition precedent to right to bring legal proceedings).

Section 98. Power to make further provision by regulations

(1) The Secretary of State may make provision by regulations for adapting or excluding any provision of Part I in relation to statutory arbitrations in general or statutory arbitrations of any particular description.
(2) The power is exercisable whether the enactment concerned is passed or made before or after the commencement of this Act.
(3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

IV. PART III - RECOGNITION AND ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Enforcement of Geneva Convention awards

Section 99. Continuation of part ii of the arbitration act 1950

Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.

Recognition and enforcement of New York Convention awards

100. New York Convention awards

(1) In this Part a “New York Convention award” means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards-

(a) “arbitration agreement” means an arbitration agreement in writing, and

(b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

In this subsection “agreement in writing” and “seat of the arbitration” have the same meaning as in Part I.

(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.


Section 101. Recognition and enforcement of awards

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
As to the meaning of “the court” see section 105.

(3) Where leave is so given, judgment may be entered in terms of the award.

Section 102. Evidence to be produced by party seeking recognition or enforcement

(1) A party seeking the recognition or enforcement of a New York Convention award must produce-

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Section 103. Refusal of recognition or enforcement

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4))

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place

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

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

Section 104. Saving for other bases of recognition or enforcement
Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.

V. PART IV - GENERAL PROVISIONS

Section 105. Meaning of “the court”: jurisdiction of high court and county court

(1) In this Act “the court” means the High Court or a county court, subject to the following provisions.

(2) The Lord Chancellor may by order make provision-
   (a) allocating proceedings under this Act to the High Court or to county courts; or
   (b) specifying proceedings under this Act which may be commenced or taken only in the High Court or in a county court.

(3) The Lord Chancellor may by order make provision requiring proceedings of any specified description under this Act in relation to which a county court has jurisdiction to be commenced or taken in one or more specified county courts.

Any jurisdiction so exercisable by a specified county court is exercisable throughout England and Wales or, as the case may be, Northern Ireland.

(4) An order under this section-
   (a) may differentiate between categories of proceedings by reference to such criteria as the Lord Chancellor sees fit to specify, and
   (b) may make such incidental or transitional provision as the Lord Chancellor considers necessary or expedient.

(5) An order under this section for England and Wales shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) An order under this section for Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 which shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946 shall apply accordingly.

Section 106. Crown application

(1) Part I of this Act applies to any arbitration agreement to which Her Majesty, either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party.

(2) Where Her Majesty is party to an arbitration agreement otherwise than in right of the Crown, Her Majesty shall be represented for the purposes of any arbitral proceedings
   (a) where the agreement was entered into by Her Majesty in right of the Duchy of Lancaster, by the Chancellor of the Duchy or such person as he may appoint, and
   (b) in any other case, by such person as Her Majesty may appoint in writing under the Royal Sign Manual.

(3) Where the Duke of Cornwall is party to an arbitration agreement, he shall be represented for the purposes of any arbitral proceedings by such person as he may appoint.

(4) References in Part I to a party or the parties to the arbitration agreement or to arbitral proceedings shall be construed, where subsection (2) or (3) applies, as references to the person representing Her Majesty or the Duke of Cornwall.

Section 107. Consequential amendments and repeals
(1) The enactments specified in Schedule 3 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

(2) The enactments specified in Schedule 4 are repealed to the extent specified.

Section 108. Extent

(1) The provisions of this Act extend to England and Wales and, except as mentioned below, to Northern Ireland.

(2) The following provisions of Part II do not extend to Northern Ireland—section 92 (exclusion of Part I in relation to small claims arbitration in the county court), and section 93 and Schedule 2 (appointment of judges as arbitrators).

(3) Sections 89, 90 and 91 (consumer arbitration agreements) extend to Scotland and the provisions of Schedules 3 and 4 (consequential amendments and repeals) extend to Scotland so far as they relate to enactments which so extend, subject as follows.

(4) The repeal of the Arbitration Act 1975 extends only to England and Wales and Northern Ireland.

Section 109. Commencement

(1) The provisions of this Act come into force on such day as the Secretary of State may appoint by order made by statutory instrument, and different days may be appointed for different purposes.

(2) An order under subsection (1) may contain such transitional provisions as appear to the Secretary of State to be appropriate.

Section 110. Short title

This Act may be cited as the Arbitration Act 1996.
Annex IV


**CHAPTER I - GENERAL PROVISIONS**

*Article 1 - Scope of application*

1. This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

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.

3. An arbitration is international if:

   (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

   (b) one of the following places is situated outside the State in which the parties have their places of business:

      (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

      (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

   (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

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The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.
4. For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2 - Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration' means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties; such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3 - Receipt of written communications

1. Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

2. The provisions of this article do not apply to communications in court proceedings.

Article 4 - Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5 - Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.
Article 6 - Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II - ARBITRATION AGREEMENT

Article 7 - Definition and form of arbitration agreement

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8 - Arbitration agreement and substantive claim before court

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.

2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9 - Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III - COMPOSITION OF ARBITRAL TRIBUNAL

Article 10 - Number of arbitrators

1. The parties are free to determine the number of arbitrators.

2. Failing such determination, the number of arbitrators shall be three.

Article 11 - Appointment of arbitrators

1. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article. Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
In International Arbitration: the Doctrine of Separability and Competence-Competence Principle

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

3. Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12 - Grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13 - Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. 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 a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14 - Failure or impossibility to act

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
2. If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

**Article 15 - Appointment of substitute arbitrator**

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

**CHAPTER IV - JURISDICTION OF ARBITRAL TRIBUNAL**

**Article 16 - Competence of arbitral tribunal to rule on its jurisdiction**

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

**Article 17 - Power of arbitral tribunal to order interim measures**

Unless 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. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

**CHAPTER V - CONDUCT OF ARBITRAL PROCEEDINGS**

**Article 18 - Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

**Article 19 - Determination of rules of procedure**

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

**Article 20 - Place of arbitration**

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
2. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

**Article 21 - Commencement of arbitral proceedings**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

**Article 22 - Language**

1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

**Article 23 - Statements of claim and defence**

1. Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

**Article 24 - Hearings and written proceedings**

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

**Article 25 - Default of a party**

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

**Article 26 - Expert appointed by arbitral tribunal**
1. Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

**Article 27 - Court assistance in taking evidence**

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

**CHAPTER VI - MAKING OF AWARD AND TERMINATION OF PROCEEDINGS**

**Article 28 - Rules applicable to substance of dispute**

1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

3. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

**Article 29 - Decision-making by panel of arbitrators**

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

**Article 30 – Settlement**

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

2. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

**Article 31 - Form and contents of award**

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
3. The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

**Article 32 - Termination of proceedings**

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
   
   (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
   
   (b) the parties agree on the termination of the proceedings;
   
   (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

3. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

**Article 33 - Correction of interpretation of award; additional award**

1. Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

   (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical errors or any errors of similar nature;

   (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

   If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

2. The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the day of the award.

3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

5. The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

**CHAPTER VII - RECOURSE AGAINST AWARD**

**Article 34 - Application for setting aside as exclusive recourse against arbitral award**

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

2. An arbitral award may be set aside by the court specified in article 6 only if:
international arbitration: the doctrine of separability and competence-competence principle

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

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

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII - RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35 - Recognition and enforcement

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.71

Article 36 - Grounds for refusing recognition or enforcement

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the

71 The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions
said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(iv) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

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

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.
Annex V

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
Done at New York, 10 June 1958; Entered into force, 7 June 1959
330 U.N.T.S. 38 (1959)

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, 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.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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

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

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

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties or has been set aside or suspended by a
competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the
country where recognition and enforcement is sought finds that:

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

(b) The recognition or enforcement of the award would be contrary to the public policy of that
country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority
referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it
considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of
the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements
concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor
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.

Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming
bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the
United Nations and also on behalf of any other State which is or hereafter becomes a member of any
specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the
International Court of Justice, or any other State to which an invitation has been addressed by the General
Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-
General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the
United Nations.

Article X
1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of the constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

**Article XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**Article XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

**Article XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VII.
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