INTRODUCTION

International commercial life witnesses many critical disputes that jeopardize the commercial relationships between the parties. The national courts of the parties became ineffective in handling with those disputes timely and professionally. Instantaneously, an effective and speedy method emerged to deal with these disputes. International arbitration becomes the most widely used private way of dispute resolution in commercial life. There are no fixed rules or any complicated procedure in arbitration. The parties give their mutual consent and put an arbitration clause to their main contracts or they conclude an arbitration agreement which is referred as submission agreement. By this way, they grant the arbitral tribunal jurisdiction, power to deal with the dispute.

Since the arbitration procedure merely commences with it, an international arbitration agreement becomes the cornerstone of an arbitration. It is now the foundation of almost every arbitration. This agreement reveals the free wills of the parties. If an arbitration agreement is handled ineffectively, disputes may create unjust consequences, extravagant legal costs and injustice. Whereas, arbitration has to provide private justice born with parties’ will through international arbitration agreements.

This paper firstly gives an overview of an arbitration agreement and how to enforce it. This analysis is made mainly in regard with UNCITRAL Model Law and the New York Convention. Then it examines the two important doctrines of arbitration, “the doctrine of kompetenz

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kompetenz” and “the separability doctrine”. Requirements and drafting of an arbitration agreement is mentioned just after the determination of the law applicable to the arbitration agreement. The termination of an arbitration agreement constitutes the conclusion part of the paper.

I. International Arbitration

International arbitration is a private method for resolving disputes arising from international relationships. The use of international arbitration has increased so much in many countries so that the parties are able to resolve their disputes without facing with the formalities and difficulties of their own legal systems. Besides, most countries’ legal systems are being changed in accordance with rapid development of international arbitration throughout the world. “All over the world, states have modernised their laws of arbitration to take account of this fact.”

In international arbitration method, parties themselves choose to arbitrate, the procedures that will apply to their dispute and even the arbitrators. In other words, “international arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.” These definitions illustrate that an agreement is necessary for the existence of international arbitration because the real wills of the parties are reflected through international arbitration agreements which became the foundations of almost every arbitration.

II. International Arbitration Agreements

An arbitration agreement (mandate in concreto), in general regarded as the basis of arbitration, is an agreement which submits the existing dispute between the parties or a potential dispute that may arise in the future between the parties to arbitration. “The existence of a valid arbitration agreement is a condition precedent to arbitral proceedings and in this meaning a due process requirement.” In other words, international arbitration agreement is a conditio sine qua non for international arbitration. The jurisdiction of the Arbitral Tribunal is merely based on this agreement. “State courts derive their jurisdiction either from statutory provisions or a

jurisdiction agreement. In contrast, the arbitration tribunal’s jurisdiction is based solely on an agreement between two or more parties to submit their existing or future disputes to arbitration." In other words, arbitration agreement establishes the jurisdiction of the tribunal.

An arbitration agreement can be formed in two different methods. Firstly, it can be drafted as a clause in a contract between the parties. This arbitration clause illustrates that the parties will go to arbitration if there occurs a dispute related to that specific contract. The dispute in this case, may or may not arise in the future. In other words, there is not an existing dispute between the parties to the contract, there is a potential dispute that may arise in the future. This is the basic difference between an arbitration clause and a submission agreement. A submission agreement in contrast, refers to disputes which have already arisen, meaning that it is totally a separate agreement from the main contract, not like a clause. However, “it is difficult to negotiate a submission agreement once a concrete dispute has arisen and litigation tactics have been explored. As a consequence, most disputes are arbitrated because of pre-existing arbitration clauses in the parties’ underlying commercial contract.”

An international arbitration agreement, be it like an arbitration clause or a submission agreement, can freely be drafted by the parties but in any case mostly an arbitration agreement covers some different functions. First of all, it reflects the consent of the parties to arbitration, the real wills of the parties. Second, it provides the basis of the jurisdiction and the authority of the arbitral tribunal over the jurisdiction of the national courts. Finally, the power of arbitrators’ basically comes from the agreement. This shows the fact that an arbitration agreement has both contractual and a jurisdictional character. In respect of an arbitration clause, “the main effect of a valid arbitration clause (jurisdictional effect) is that the dispute may not be heard before courts of law against the will of a party to an arbitration agreement and must be dismissed by the court.” In other words, parties leave certain matters to the decision of the arbitrators. Thus, the parties waive their rights to resolve the dispute through national courts. These consequences bring the subject of enforcement of an arbitration agreement to light.

**III. Enforcement of an Arbitration Agreement**

Enforceability of an arbitration agreement can be analyzed in two aspects. Firstly, it refers to the lack of jurisdiction of national courts which can also be called as negative enforcement.

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8 Matti S. Kurkela & Hannes Snellman, pp. 67-68.
Second, it refers to the submission agreement which can be called as positive enforcement. Arbitration agreement prevents the national courts from resolving the dispute between the parties regarding that specific contract. As per Art. II(3) New York Convention\(^9\), the existence of a valid arbitration agreement prevents courts from entertaining jurisdiction when faced with an action on the merits.\(^10\) If one of the parties brings the dispute before national courts, the other party has the right to challenge the jurisdiction of the court by alleging that they waived their rights to go before national courts by undergoing an arbitration agreement. This lack of jurisdiction can not be declared ex officio. The opposing party has to object to the jurisdiction of the national court. This explains the negative enforcement aspect.\(^11\)

On the other hand, a submission agreement composes the positive enforcement aspect. According to this, parties, by concluding an arbitration agreement, grant arbitrators with jurisdiction. By this way, the arbitrators that are decided by the parties have the power to decide on the concrete dispute and to give binding decisions.\(^12\) Parties have a contractual obligation to submit their disputes to arbitration and this arbitration agreement vests the arbitrators either expressly, or through the rules chosen or the law which governs the arbitration, with all powers necessary for this task.\(^13\)

Apart from these negative and positive aspects, enforceability of the arbitration agreements create many problems and lead to disagreements between the parties of the dispute. There is not a unanimous practice regarding the enforceability. Some argue that arbitration agreements are \textit{sui generis} in some respect. “International arbitration agreements are often sui generis in the sense that they are not children of national jurisdictions but servants of international exchange and as such instruments of law merchant and as a consequence rather supranational than national in their character attaching only slightly to national court systems through the seat or in connection with the enforcement.”\(^14\) As an agreement, although perhaps sui generis, it should be treated as any other contract with some exceptions as may be applicable due to its special character and in this respect there may be some enforceable elements apart from the

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\(^9\) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards


\(^12\) ibid., pp. 4-5.

\(^13\) Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, p. 159.

\(^14\) Matti S. Kurkela & Hannes Snellman, p. 66.
jurisdictional effect of the arbitration agreement. This can be derived from Art. V 1(d) of New York Convention.\textsuperscript{15}

The wording of Art. V 1(d) covers both the main agreement between the parties and the subsequent agreements that are concluded during the arbitral proceedings. The agreement between the parties regarding the arbitral proceedings, is deemed to be the part of international due process. Arbitral proceedings are based on the arbitration agreement between the parties which constitutes the basis, the core of the arbitration. Therefore, arbitral proceedings, all procedural acts, omissions of the parties are contractual. As a consequence, this may mean that the arbitration agreement in itself must be enforceable in the arbitration process.\textsuperscript{16}

At this point, Art. V 1(d) also draws the border for enforceable arbitration agreements. In other words, if parties do not respect the arbitration agreement, then there is the risk of arbitral award to be held unenforceable in accordance with the New York Convention. The Convention leaves the door open to many interpretations\textsuperscript{17} so examining the enforcement of international arbitration agreements under the UNCITRAL Model Law\textsuperscript{18} and New York Convention and additionally examining the enforcement of international arbitration agreements in US Courts under the New York Convention would be beneficial.

A. Enforcement of an Arbitration Agreement under the UNCITRAL Model Law and the New York Convention

Firstly, the New York Convention tries to enhance the enforceability of international arbitration agreements and arbitral awards. The convention requires national courts to recognize and enforce international arbitration agreements, subject to some exceptions (Art. II(1) and Art. II(3)). Besides, it requires the national courts to recognize and enforce foreign arbitral awards, again subject to some exceptions (Art. III and Art. V).\textsuperscript{19}

Second, UNCITRAL Model Law tries to make international arbitration agreements and awards more predictably and uniformly enforceable. It also aims to minimize, if possible prevents, the judicial interference in international arbitral proceedings.\textsuperscript{20} Art. 8(1) of the Model Law is nearly

\textsuperscript{15} Matti S. Kurkela & Hannes Snellman, p. 80.
\textsuperscript{16} ibid., p. 80.
\textsuperscript{17} ibid., p. 80.
\textsuperscript{19} Gary B. Born, p. 123-124.
\textsuperscript{20} Gary B. Born, p. 126.
same with Art. II(3) of the New York Convention. However, Model Law is more specific because it establishes a time limit in order for the request to be made. Both of the articles stated above are mandatory provisions. “When the appropriate conditions for its application are met, the court is obliged to refer the dispute to arbitration.”21

B. Enforcement of International Arbitration Agreements in US Courts under the New York Convention

New York Convention mainly aims to render arbitration agreements enforceable and it contains a number of jurisdictional requirements. Firstly, in order for the Convention to be applicable in US courts, there must be a difference arising out of commercial relationships. Second, it is applied on the basis of reciprocity. Third, the convention can only be applied to foreign awards. Finally, the arbitration agreement between the parties must provide arbitration for the issues which have arisen or may arise in the future.22 If these jurisdictional requirements are satisfied, then Art. II(3) New York Convention will be applied. This provision is mandatory and obliges the signatory states to recognize valid arbitration agreements. “Under Art. II, international arbitration agreements are generally valid and enforceable save where a party can demonstrate that they are null and void, inoperative, or incapable of performance.”23 US courts have interpreted the article differently and generally they state that the judicial role in the determination of the enforceability of an agreement under the Convention is very limited.24 US courts apply a presumption that favors the interpretation of arbitration agreements to extend to disputed issues. Besides, in case of doubt, courts must resolve the dispute in favor of arbitration.25 “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”26 Some other national courts also interpret international arbitration agreements very expansively.

At this point there are two main exceptions to presumptive enforceability of international arbitration agreements. First one is the invalidity of an arbitration agreement. Many courts are reluctant to invoke generally applicable contract rules to invalidate arbitration agreements

23 Gary B. Born, p. 129.
24 Gary B. Born & Peter B. Rutledge, p. 1094.
subject to the New York Convention. Very few courts are willing to accept objections that an arbitration agreement is unreasonable, inconvenient etc. Second exception is *non-arbitrability*. Many countries generally accept some claims as incapable to be resolved by arbitration, that is non-arbitrable. In this respect, Art. II(1) and Art. V(2)(a) of New York Convention do not require enforcement of arbitration agreements if they are in the category of non-arbitrability.

**IV. Competence of the Arbitral Tribunal to Rule on Its Own Jurisdiction (Kompetenz Kompetenz)**

There have been many problems arising out of the decisions of an arbitrator on his own jurisdiction. One of the problems can be put forward as follows: When arbitral tribunal decides that a valid arbitration agreement does not exist between the parties, this decision brings the question that then how does the arbitral tribunal decide that since it lacked jurisdiction to decide on its own jurisdiction? This question arised because there is not a basis for this jurisdiction.

Solution to this problem may be to refer and ask all the questions regarding the jurisdiction of the arbitral tribunal to the national courts but this time it becomes easy for the respondent to considerably delay the arbitral proceedings by merely contesting the existence or validity of the arbitration agreement. This will probably give harm to the rapidity and the efficiency of arbitration mechanism. Further, the doctrine of kompetenz kompetenz was brought in order to prevent these drawbacks. It grants arbitral tribunals the power to rule on their own jurisdiction. For justification, first reference was made in Art. 36(6) Statute of ICJ, in which ICJ can rule on its own jurisdiction. Since then the doctrine was put in ICSID Convention Art. 41(1) and then most importantly, in Art. 16(1) UNCITRAL 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.”

As per this provision, the respondent may raise the defence in arbitral tribunal that the tribunal lacks jurisdiction. The grounds for the plea of lack of jurisdiction may be similar to those in Art. 8(2) Model Law, but not necessarily. The defence must be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the scope

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27 Gary B. Born, p. 129.
28 ibid., p. 130.
30 International Court of Justice.
of the tribunal’s authority is raised during the arbitral proceedings. Further, when Art. 8 and 16 Model Law are analyzed together, it is seen that there is a restriction on the role of the courts in determining whether the arbitration clause is null and void. The arbitral tribunal will itself decide on its own jurisdiction.\(^{32}\)

The principle of Kompetenz kompetenz is emphasized in the case of *Ontario Court of Justice-General Division, March 1st, 1991, Rio Algom Limited v. Sammi Steel Co.*\(^{33}\)

In this specific case, a dispute arises between the buyer and the seller. The buyer submitted the matter to an arbitrator. In addition to that, the seller commenced an action in a Canadian court challenging the jurisdiction of the arbitrator and seeking an order staying the arbitration proceedings. “The Chambers judge granted the order finding that the arbitrator’s jurisdiction is a threshold issue of contract construction to be decided by the court. On appeal, the Chambers judge’s order was reversed. The appellate court found that the Chambers judge’s decision had been erroneously based on principles of the domestic arbitration act rather than those found in the Model Law as enacted by the International Commercial Arbitration Act, Statutes of Ontario, 1988. In particular the court cited Art. 16 Model Law, which provides the arbitral tribunal with the power to rule on its own jurisdiction. The court further noted article 8 that restricts court involvement to a determination of whether the arbitration agreement is null and void.”\(^{34}\)

Moreover, the wording of Art. 16(3) Model Law reveals that while a dispute is pending in the court, the arbitral tribunal may continue the arbitral proceedings. For the avoidance of doubt, the provisions of Model Law are not mandatory regarding whether the arbitration proceedings are commenced or continued while the dispute is pending before national courts. The provision does not oblige the arbitrators to continue with the proceedings. Generally arbitrators do continue if they are sure about the validity and the enforceability of the arbitration agreement. On the contrary, they do not continue the arbitral proceedings and wait for a definite answer from the court if they have doubt regarding the validity or the enforceability of the arbitration agreement.\(^{35}\)

\(^{33}\) Case Law on UNCITRAL Texts, Case No:18, Available at: http://www.uncitral.org/
\(^{34}\) United Nations Conference on Trade and Development, p.8.
\(^{35}\) ibid, p. 8.
V. Separability of the Arbitration Agreement

The general idea regarding the separability of the arbitration agreement is that an arbitration agreement is presumptively “separable” from the underlying contract between the parties. Most national arbitration legislation and most leading institutional arbitration rules support this idea.\(^{36}\) “Under the prevailing doctrine, an arbitration agreement is legally separate and independent from the underlying agreement.”\(^{37}\) In other words, “the doctrine of separability recognises the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract.”\(^{38}\) The separability doctrine provides that an arbitration agreement is an autonomous agreement so that there is a distinction between the arbitration clause and the entire contract.\(^{39}\) In US, seperability doctrine was also emphasized in *Prima Paint* case as “…arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded.”\(^{40}\)

Consequently, the illegality or termination of the main contract between the parties does not affect the arbitration clause or the jurisdiction of the arbitral tribunal. The obligation of the parties to go to arbitration when a dispute arises will continue. “Specifically, if a party alleges that the parties’ underlying contract was fraudulently induced or is invalid for lack of consideration, this will not provide a legal basis for a refusal to arbitrate.”\(^{41}\) At this point, the doctrine of separability plays an important role in ensuring that the parties intention to go to arbitration is not easily prevented. If allegations of the non-existence or invalidity of the main contract automatically affect the jurisdiction of the tribunal, they would be a powerful tool in the hands of the party who want to defeat the arbitration agreement. By this way, the jurisdiction of the arbitral tribunal can also be protected.\(^{42}\) The doctrine of separability ensures that arbitral tribunal can decide on the merits of the dispute while the doctrine of kompetenz kompetenz grants power to arbitral tribunal to decide on the jurisdiction. This matter constitutes the most important difference between the principle of separability and the principle of kompetenz kompetenz and explains that these two principles refer to different situations. But in practice, these two principles complement each other because generally, the defence regarding the

\(^{36}\) Gary B. Born, p. 128.
\(^{37}\) Matti S. Kurkela & Hannes Snellman, p. 72.
\(^{39}\) Gary B. Born & Peter B. Rutledge, p. 1093.
\(^{41}\) Gary B. Born, p. 128.
invalidity of the main agreement, invalidity of the arbitration agreement and arbitral tribunals’ lack of jurisdiction are raised together.  

Bermuda Court of Appeal in *Sojuznefteexport v. Joc Oil*  

expressly emphasized the implementation of separability doctrine and its limitations. Sojuznefteexport wanted to enforce an arbitral award rendered in its favour in Bermuda. Joc Oil on the other hand, tried to prevent the enforcement of the award by alleging that the main agreement between them was invalid because of a missing procedure that was required under Russian Law. The court held that Russian law considered the arbitration agreement as a separate contract which is generally valid although the main contract is invalid. Consequently, considering the limitation of the doctrine of separability, the court made clear that effect of the doctrine of separability is limited to preventing the situation of the main contract automatically affecting the arbitration agreement.

The doctrine of separability is now regulated in most modern arbitration laws. The Model Law provides the doctrine in Art. 16(1) as:

“…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.”

The doctrine is also provided in the arbitration rules of some institutions. For example, Art. 6(4) of the ICC Rules, Art. 21(2) UNCITRAL Rules. Furthermore, even where the applicable law or chosen rules do not provide the doctrine of separability, still some courts have recognized it, like it is in *Prima Paint* case in US stated above.

All of these discussions illustrate that “the doctrine of separability can be considered as one of the true transnational rules of international commercial arbitration, even if it is not expressly mentioned in the different international conventions.”

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43 United Nations Conference on Trade and Development, p. 34.
46 International Chamber of Commerce.
VI. The Law Applicable to the Arbitration Agreement

The law applicable to arbitration agreement must be determined separately from that applicable to the main contract since the arbitration agreement has autonomy and a separate character from the main agreement. The law applicable to the arbitration agreement governs the formation, validity, enforcement and even the termination of the arbitration agreement. The applicable law also determines whether or not the submission agreement is required. There are different and many criteria for determining the applicable law to the arbitration agreement but the most common ones are the law chosen by the parties, the law applicable to the main contract, the procedural law applicable to the arbitration and the law of the place of the arbitration.

A. The Law Chosen by the Parties

Some laws allow the parties to choose the law applicable to the arbitration agreement irrespective of the law applicable to the main contract. In this case, parties’ choice will be applied to the arbitration agreement.

B. The Law Applicable to the Contract

Some authors claim that the law applicable to the arbitration agreement is usually the law applicable to the contract that contains the clause. However afterwards they admit that the law applicable to the arbitration agreement can be different from the law applicable to the main contract because of the separability doctrine. “…a different law may apply to the arbitration agreement (as distinguished from the parties’ underlying contract); this is because most legal systems will deem the arbitration agreement to be a separable contract, that may not be subject to a substantive choice of law clause in the underlying contract.”

C. The Procedural Law Applicable to the Arbitration

In general, if there is not an agreement between the parties then the procedural law is the law of the place of arbitration. Parties have the right to choose a procedural law other than the law of the place of arbitration, although it is seen very rarely in practice.

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50 United Nations Conference on Trade and Development, p. 11.
51 Sweet & Maxwell, p. 71.
52 Gary B. Born, p. 80.
D. The Law of the Place of the Arbitration

Parties may indicate a special law applicable to the arbitration agreement or even they may determine a specific procedural law. As a consequence the place of arbitration becomes important because it will determine the law applicable to the arbitration agreement.\textsuperscript{53} If parties select a body of separate procedural law to apply to the procedural conduct of the arbitration itself, different from that of the place of arbitration, then they must include choice of law provisions which determines the procedural law applicable to future arbitral proceedings. This may at least provide some protection against the risk of judicial intervention in the conduct of an arbitration.\textsuperscript{54}

E. The Model Law

Model law does not have any provision regarding the choice of law to determine the applicable law to the arbitration agreement but when it is adopted by any country, the applicable law issue is solved because Model Law determines the validity requirements for an arbitration agreement for an arbitration agreement.\textsuperscript{55}

F. The New York Convention

The provisions in New York Convention are wider than the ones in the Model Law. New York Convention expressly lets the parties to determine a law different from the law of the place of arbitration as the law applicable to the arbitration agreement. Regarding the existence and validity of the arbitration agreement, there may be two possible situations:

1- When one of the parties requests a court to recognize the arbitration agreement;

2- At the end of the arbitration, when one of the parties raises a defense to challenge recognition and enforcement of the arbitral award.

New York Convention deals only with the second case. When a dispute arises regarding the existence or validity of the arbitration agreement during the process of recognition and enforcement of the arbitral award, then Art. V(1) applies. According to this provision; parties are free to determine the rules to which they submit the validity of the arbitration agreement but

\textsuperscript{53} United Nations Conference on Trade and Development, p. 11.
\textsuperscript{54} Gary B. Born, p. 80.
\textsuperscript{55} United Nations Conference on Trade and Development, p. 12.
if parties do not agree on any rules, then the Convention determines the local rules of the country where the award was made.

In contrary to the second case, the Convention does not regulate the situation in the first case. It only states, in Art. II, that:

“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, shall, 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”.

As it is seen in this provision, there is not any choice of law directive. Therefore, there is not a single opinion regarding this issue.56 “New York Convention defines its scope only in relation the Convention.”57 This fact was not made on conscious by the drafters of the Convention. Its scope in relation to arbitration agreements has to be deduced from the provisions regarding the award and also the underlying rationale of the Convention.58 In this respect, there are two main approaches. Firstly, Art. II only applies to those arbitration agreements which will probably lead to an award covered by the Convention. Second, any international element will be sufficient to bring an arbitration agreement within the ambit of the Convention. This can be the place of arbitration in a third country. It may also refer to the parties having their principal places of business in different countries.59 60

VII. Requirements of the Arbitration Agreement

In order for an arbitration agreement to be valid there are some requirements having crucial importance since the invalidity of an arbitration agreement is one of the grounds for requesting the setting aside of an arbitral award or challenging its enforcement. The most common requirements of a valid arbitration agreement are as follows:

1- The arbitration agreement must arise out of mutual consent. The consent of the parties is the basic requirement for the arbitration agreement. The agreement must have concluded with both parties’ free will.61

58 ibid, p. 111-112.
59 ibid, p. 112.
60 ibid, p. 12.
2- The parties must have legal capacity. If the parties lack legal capacity while concluding the arbitration agreement, then that agreement will be invalid. The arbitration agreement is subjected to the same rules applicable to the validity of contracts in general. As a consequence, the lack of legal capacity in general makes the whole act void.  

3- The arbitration agreement must be made in writing. Both the Model Law and the New York Convention required that the agreement be made “in writing”. New York Convention, by stating the term “agreement in writing”, refers to both the arbitral clause in a contract or an arbitration agreement. Similarly, Model Law defines it in Art. 7(2) as:

   “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.”

4- Both Art. II(1) New York Convention and Art. 7(1) Model Law regulate that the arbitration agreement must refer to a concrete and specific legal relationship between the parties.

5- The subject matter of the arbitration must be arbitrable. Parties must submit arbitrable disputes to arbitration. The Model Law, indirectly lays out the requirement for arbitrability. First, in defining its field of application, it states that it shall not affect any other domestic law by saying that certain disputes may not be submitted to arbitration. On the other hand, the New York Convention, in Art. II (1) expressly states that “the content of the agreement must be concerning a subject matter capable of settlement by arbitration.”

In international arbitration, generally the question of ‘arbitrability’ arises most often related to the disputes regarding strong public policy. Securities, antitrust related issues and labour disputes are other examples for the matters which are generally considered as non-arbitrable issues. However in antitrust law, there is now a potential like many courts are consistently deciding that disputes related to antitrust law are indeed arbitrable. For example in Labinal v. Mors⁶⁴, Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.⁶⁵, Audiencia Provincial de

⁶² ibid., p.18.
⁶³ UNCITRAL Model Law Art. II(2) & New York Convention Art. 7(2)
⁶⁵ US Supreme Court, July 2, 1985, Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.
Barcelona and many other cases, it is seen that the courts are deciding in the favor of arbitrability.

As it is seen, “there is a remarkable trend toward a pro-arbitration policy, which in turn has led the judiciary to rule in favour of the arbitrability of a broad range of claims, including those based on statutory rights, and have reaffirmed the suitability of arbitration as a fair and effective means of resolving international commercial disputes.”

**VIII. Drafting an Arbitration Agreement**

If parties want to resolve their disputes by the help of arbitration, they have to express their intent and free will clearly and unambiguously. This intent of the parties will be expressed through the arbitration agreement concluded between them. The agreement should also be evidenced in writing and signed by the parties but in practice, no one gives enough attention to the drafting of the arbitration. Ambiguous or defective arbitration agreements can lead to lengthy litigations. “An arbitration agreement should not only result in granting jurisdiction to the tribunal and excluding jurisdiction of the courts, but it should also lead to a procedure ‘leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement’.” When there is inattention to drafting a dispute resolution clause, then the efficiency of arbitration and the party control would probably be eliminated. “Inattention to drafting a dispute resolution clause squanders the opportunity offered by alternative dispute resolution techniques to exert party control over the process.”

Common law and civil law perspectives regarding the drafting of an arbitration agreement are totally different. According to common law practice every detail are included in the arbitration clause or the arbitration agreement. On the contrary, civil law system only mentions the main points and deals only with some specific issues. Actually, “the most sensible drafting approach is a relatively short arbitration clause identical to or based closely on one of the model clauses recommended by a leading arbitral institution.” By this way, potential ambiguities, internal inconsistencies gaps and other problems can be avoided.

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71 Gary B. Born, p. 37.
An arbitration agreement, be it a long one or a short and simple one, has to include some crucial issues in order to be clear. Therefore, taking the necessary and critical elements into consideration while drafting an arbitration agreement would be very beneficial for both of the parties. Here, the necessary, recommended and optional elements of an arbitration agreement can shortly be denoted. The necessary and essential points that must be found in every arbitration agreement can be emphasized as ‘the agreement to arbitrate’, ‘the scope of the arbitration agreement’ and ‘finality of awards’. Further, the recommended elements of an arbitration agreement can be specified as ‘the place of arbitration’, ‘the method of selection and number of arbitrators’ and ‘the language of the arbitration’. Furthermore, ‘the institution chosen’, ‘the seat of the arbitration’, ‘the procedure to be followed’, ‘costs of the arbitration’, ‘confidentiality’, ‘time limits’, ‘interest and punitive damages’ and many other less crucial points are the optional elements of an arbitration agreement.

IX. Termination of the Arbitration Agreement

A. Termination of the Agreement by Mutual Consent

The parties, by giving their consent mutually, can terminate the arbitration agreement. This termination can be made either expressly or in an implied way.

B. Termination Grounds Related to the Parties

Some argue that the death of one of the parties to arbitration automatically causes the termination of the arbitration agreement. However, this is not the case. As a rule, the death of one of the parties does not terminate the arbitration agreement. “Under legal systems that adopt the principle of universal succession, the mortis causae successor to a person inherits all the rights and duties of the deceased, except those that could have only been exercised or performed personally (intuitu personae).”

Further, universal succession has some other examples like mergers and acquisitions and liquidation. An arbitration agreement, in general, will not be affected by these issues. Therefore, the universal successor will be bound by the arbitration agreement. However, some specific

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73 Paul D. Friedland, p. 50-51.
74 Gary B. Born, p. 82-116.; Paul D. Friedland, p. 53-84.
75 United Nations Conference on Trade and Development, p. 29.
issues are definitely decided to be resolved by domestic legislations. Therefore, the legislation of each country will determine the impact of these specific subjects in an arbitration agreement.

C. Termination Grounds Related to the Arbitrator

Similarly, the death of an arbitrator does not automatically terminate the arbitration agreement between the parties. In other words, this situation does not constitute a ground for termination of an arbitration agreement. However, the provisions of the applicable law has to be analyzed since the death of an arbitrator might have been considered as a ground for termination under some laws.\textsuperscript{76}

\textsuperscript{76} United Nations Conference on Trade and Development, p. 31.
CONCLUSION

Arbitration has emerged as a lifesaver alternative to traditional litigation, with the expansion of international trade. Arbitration arises out of the arbitration agreement between the parties so that it reflects merely parties’ free will. It provides speed, flexibility and even economic efficiency in dispute resolution. However, parties to the dispute are drafting arbitration agreements without due care resulting with many problems and even with the invalidity of the international arbitration agreement. Be it an arbitration clause in a main contract or a submission agreement, the arbitration agreement at least requires the necessary elements which can be specified as ‘the agreement to arbitrate’, ‘the scope of the arbitration agreement’ and ‘finality of awards’. As stated above, these elements are crucial in order for the enforcement of the arbitration agreement.

Art. V 1(d) New York Convention regulates the enforcement of the arbitral awards and also draws the border of the enforceability. Although some argue that this provision of New York Convention only deals with arbitral awards, it is generally accepted that the enforcement of arbitration agreements are also covered under New York Convention.

Another important issue in international arbitration, the doctrine of “kompetenz kompetenz”, provides the arbitral tribunal to decide on its own jurisdiction. The doctrine as a matter of fact, expressly stated both in UNCITRAL Model Law and New York Convention, is based on the arbitration agreement between the parties because the power of the tribunal merely comes from this agreement. Further, “the separability doctrine” is a principle that tries to sustain the arbitration agreement valid. When it is thought that the arbitration agreement is separate from the main contract between the parties, then the invalidity of the main contract will not affect the validity of the arbitration agreement.

Finally, the requirements, necessary and optional elements of the arbitration agreements were specified. Parties in commercial life generally do not conclude accurate arbitration agreements which lead to many problems in international relationships. Conclusively, these elements and requirements play an important role in drafting an arbitration agreement.
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Case Law on UNCITRAL Texts, Case No:18, Available at: http://www.uncitral.org/


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