Enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore

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要　　旨

強制執行可能性は、国際商事仲裁における基本的な問題の一つである。仲裁判断の外国における強制執行は、多角的な協定、二国間条約及び国内法によって保証されている。外国仲裁判断の承認及び執行に関する条約（ニューヨーク条約）は、すべての締約国に対して、国際仲裁判断に関する高いレベルでの強制執行可能な手続と、強制執行の限定的な拒否根拠を定めている。英国、米国及びシンガポールはニューヨーク条約の締約国であり、これに従って国際仲裁判断を執行している。本稿の目的は、ニューヨーク条約ならびに英国、米国及びシンガポールの国内法における一般的な強制執行規定と強制執行を拒否する根拠について調査することにある。その際の本稿の中心的な焦点は、いかなる要件と条件が国際仲裁判断の強制執行を獲得するために必要であるか、いかなる法的根拠に基づいて強制執行を拒否できるのか、及び、いかなる法的諸問題が発生する可能性があり、上掲の諸国はかかる諸問題をどのように解決してきているかについての検討にある。

Keywords: international awards, enforcement procedure, refusal grounds for enforcement

I.　Introduction

II.　Enforcement of Foreign Arbitral Awards under the Convention

A. Foreign Award

B. Recognition and Enforcement

C. Conditions for Enforcement

1. Basic requirements

2. Other requirements

III.　Theoretical Analysis of the Refusal Grounds for Enforcement of International Awards under the Convention, the 1996 Act, The FAA and the IAA

A.　Procedural Defenses

B. Substantive Defenses

IV. Judicial Practices of Enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore

A. The United Kingdom

B. The United States

C. Singapore

V. Conclusion

I. Introduction

In international commercial transaction, the common process of resolving business disputes is international commercial arbitration. An award is a result of the arbitral process. The enforcement of the award is the most important in this kind of dispute settlement mechanism. If an arbitral award rendered in a country cannot be recognized and enforced in another country, the party may be less willing to do business with such country, or decline in the use of arbitration mechanism to solve their international trade and commerce disputes. Therefore, if the losing party does not execute the award rendered by arbitrator voluntarily, it is need to be enforced this award in national court systems of relevant countries.

The ultimate aim of the parties to arbitral process is to obtain the legal rights against an award in its favor which it can enforce against the other party in some territories where other party has assets. These assets may exist in different places around the world, and it is sometimes necessary to enforce in one or more countries. Enforceability is a fundamental issue in international commercial arbitration. Thus, the enforcement of the arbitral awards by the court of relevant countries should be one of the topics of great necessity for the parties who are involved in international business transaction and of importance for the success of the international arbitration. [1]

The enforcement of arbitral awards in foreign countries is assured by the multilateral conventions, bilateral treaties and national legislations. Various conventions[2] have attempted to deal with the problems posed by possibility of enforcement in various countries.[3] In order to simplify and harmonize this process, major trading nations have adopted international conventions or bilateral treaties. Among these conventions and treaties, the New York Convention[4] (hereinafter as “the Convention”) is the most globally adopted and the most successful instrument for a high level of uniting countries’ enforcement procedure of all contracting

States. Enforcement under the Convention is important with the number of trading countries becoming parties to the Convention and giving effect on the domestic legislations.[5] In order to provide an efficient and practical dispute resolution system, the contracting States must follow the rules set out in the Convention.[6] However, common membership does not necessarily guarantee a unified application of the terms of the Convention. As a result, contracting States expand or limit the terms of the Convention in a significant way. The United Kingdom, the United States and Singapore are parties of the Convention and enforce the arbitral awards according to the Convention.[7]

The Convention intends to be easy to enforce foreign awards and provides the possibilities of enforcement procedure for contracting States. The conditions required for a party to obtain the recognition and enforcement of foreign awards to be considered under the Convention is important to classify which documents and conditions are required for enforcement. Then, the Convention also limits the scope of legal remedies against arbitral awards and leaves the examination of an award to the court of law during its consideration of the recognition and enforcement of the award.[8] The conditions relevant to the matters of refusal grounds of enforcement under the Convention are the same effect in those three countries. It is, therefore, necessary to analyze the theories of refusal grounds for recognition or enforcement and examine on which condition problem may arise under the Convention and those countries' national legislations as well. There are several distinct procedures under several different national jurisdictions concerning the legal grounds on which a person can be bound to a court's decision.[9] A country's refusal to enforce arbitral award is, of course, only a refusal within its jurisdiction. The winning party can seek recognition and enforcement in other countries after, or at the same time, even if an award has been denied enforcement in one country. However, the losing party must have assets in, or by other terms have connections to this country. There are otherwise no possibilities for a court to perform any sanctions against the losing party in this country. These legal grounds also depend on each country's national legislation and jurisdiction. Thus, the conditions required enforcement of international award and judicial practice of those three countries will be examined.

This paper investigates the general enforcement status and the refusal grounds of the international arbitral awards under the Convention and the Arbitration Act 1996 of the United Kingdom (hereinafter as “the 1996 Act”), the Federal Arbitration Act of the United States (hereinafter as “the FAA”) and the International Arbitration Act of Singapore (hereinafter as “the IAA”). The main focus of this paper is on what requirements and conditions are necessary for obtaining enforcement, on which legal grounds permit to refuse enforcement and, on what legal grounds problems may arise and on how these countries have solved these problems.

II. Enforcement of Foreign Arbitral Awards under the Convention

The purpose of the Convention was mainly to facilitate the recognition or enforcement of international arbitration agreements and awards and increase the effectiveness of international commercial arbitration.[10] The Convention intended to make enforcement of an award rendered in one contracting state to another easier. Under the Convention, it is sufficient that foreign arbitral awards, to be recognized and enforced, should be “binding” in the country of origin.[11] The Convention does not require that the arbitral award be final and enforceable in the rendering county. There was different situation under the 1927 Geneva Convention which required that the award had become final in the country in which the award was made.[12] It is important to note that the award needs not be enforced in the rendering country if there is no asset of the losing party available there. The Convention made the recognition and enforcement of foreign arbitral awards speedy and less expensive in some cases. The Convention does not define the word “binding”. However, the case law generally interprets “binding” to mean that in the rendering country the award is not open to arbitral or ordinary review regardless whether there is an action for setting aside an award.[13] The Convention and most national arbitration statutes provide for two basic legal avenues which may be taken with respect to the award: the winning party in the arbitration may apply to the court for enforcement of the award and the losing party may also apply for refusal of recognition or enforcement and setting aside of the award.[14]

A. Foreign Arbitral Award

The condition required for an award to be considered as “international” is important to identify when an award will be deemed “foreign” or “domestic”. The definition of foreign awards under the different national laws does not play a role in the interpretation of the notion according to the Convention. The definition of the term of “foreign award” was stipulated in Article I of the Convention. Article I of the New

York Convention states that "[T]his 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. It shall also apply to arbitral awards not considered as domestic awards in the state where the recognition and enforcement are sought". Therefore, it can be seen that there are two types of arbitral awards covered by the Convention: (1) "foreign arbitral awards"; and (2) "non-domestic arbitral awards".[15]

The first category is easily understood as it is defined by territorial criterion – the place where the award was made.[16] In particular, the Convention does not state its scope upon either the nationalities of the parties or internationalities of the subject matter involved. Thus, territorial criterion caused two legal disputed questions appeared in theory and practice. The first one is whether each and every award made outside the territory of a state was a foreign award. The second one is whether the subject matter of the dispute is international (foreign) or the law applied is a foreign one, or nationality of the parties.[17] The second, more controversial category refers to awards rendered locally but some reasons considered "non-domestic" by the enforcing court.[18]

These types of arbitral awards in Article I were the product of unforeseen compromises between civil law and common law countries, as each country has its own rule for determining "non-domestic" award. One signatory State would encounter difficulty in predicting which award would be considered non-domestic in another. Article I was in favor of common law countries having a territorial criterion. Although the Convention always applies to the recognition and enforcement of an arbitral award made in another country, Common law countries traditionally lacked a non-domestic concept and the Convention's non-domestic criterion did not increase any obligation on them.[19]

Civil law countries such as France, Italy and Germany strongly objected to this scope of application. They maintained that nationality of parties, subject matter of dispute and rules of arbitral procedure were all factors that should be taken into account when determining whether an award has a substantial foreign connection.[20] Technically, an arbitral award rendered in a foreign territory may or may not be a foreign award in civil law countries. For example, applying French procedural law to an award rendered in Germany may render such an award domestic to France. On the other hand, an arbitration award rendered locally may, under certain circumstances, be considered foreign. For example, applying German procedural law to an award rendered in France may render such an award foreign to France courts. Major civil law countries strongly objected to the single territory criterion in the Convention draft.[21]

B. Recognition and Enforcement

In order to understand the rationale of the Convention's enforcement rules, as well as the importance of recognition and enforcement of arbitral awards, definitions of two terms are necessary. Recognition is that the court declares the award to be valid and binding upon the parties. Then, recognition is not only of importance to prevent future claim, but also to allow the existence of rights.[22] Enforcement is to ask the court to recognize for the legal force and effect of award on the one hand, and to ensure that the award is carried out by using available measures on the other.[23]

C. Conditions for Enforcement

1. Basic Requirements

The basic requirements for enforcement under the Convention are that arbitration agreement is in writing and that arbitral award is valid based on this agreement. This requirement is defined as follows: [T]he 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.[24] However, Article II of the Convention simply requires "each contracting state" to recognize an arbitration agreement in writing without restricting it to foreign related or international agreement.[25]

2. Other Requirements

(a) Reciprocity and Commercial Reservations

The Convention permits a contracting state to make two reservations or limitations on applicability. One is based on "reciprocity" and the other is considered "commercial" under the national law of the contracting State.[26] States, which have ratified the Convention on the basis of reciprocity principle, are only obligated to follow the Convention in relation to awards made in other contracting States.[27] The reciprocity reservation was introduced by some contracting States but the Convention did not subscribe to the principle of universality. More than half of the countries have used the reciprocity reservation. Under the reciprocity reservation, a foreign party who is a national of a non-contracting State can obtain enforcement of an arbitral award, if the arbitral tribunal is located in a contracting State.[28] Thus, the reciprocity reservation should be taken into account when choosing the place of arbitration. Then, if a country entered the commercial reservation it is permitted to refuse to enforce an international award where the dispute is not commercial in

nature. More than 40 countries have used the commercial reservation.[29]

(b) Procedure for Enforcement

The Convention establishes the formalities for enforcement to ease as much as possible the conditions to be fulfilled by the party seeking for enforcement of an award.[30] For enforcement of a foreign award, a proper application made within the time limits for commencement of such action is essential. The winning party must submit the duly authenticated award or a certified copy and, the original or copy of the arbitration agreement, as well as, if necessary, translation.[31] The Convention is silent as to how this certification should be effected, in terms of form or legal requirements. As a general rule it is the law of place of enforcement which stipulates how the award should be authenticated and certified, e.g., by a notary, consular or judicial authorities of the place where the award was made.[32] State procedural rules for the recognition and enforcement of foreign arbitral awards in their countries differ from each other.[33]

III. Theoretical Analysis of Refusal Grounds for Enforcement under the Convention and the 1996 Act, the FAA and the IAA

The Convention attempted to simplify and harmonize enforcement proceedings by limiting the grounds upon which a party may oppose the enforcement of an arbitral award.[34] Article V provides for seven grounds for which recognition or enforcement of an arbitral award can be refused. The Convention places the burden on the defendant to prove that the award is invalid under at least one of the seven grounds it enumerates.[35] Among these grounds, five grounds listed in Article V (1) deal with procedural defenses invoked by the party and two grounds listed in Article V (2) deal with substantive defenses opposed by the party or the enforcing court on its own motion.[36]

Article V of the Convention implies that the judge has the possibility of granting recognition and enforcement of an award on the basis of his discretionary power.[37] Furthermore, the Convention does not permit the judge to review on the merits of arbitral awards even if the arbitrator has manifestly errors in fact or law.[38] This is the outcome of the Article V and there are no grounds for refusal based on the merits of the disputes.[39] The party seeking for enforcement is notable that it will have to consider the substantive law of the enforcing country before initiating an action, but only to limit degree.[40] The 1996 Act, the FAA and the IAA establish the same conditions relevant to the matters of refusal grounds for enforcement which are set out in

the Convention.[41]

A. Procedural Defenses

1. Incapacity of the Parties and Invalidity of the Arbitration Agreement

The New York Convention stipulates that recognition and enforcement of an arbitral award may be refused at the request of the party against whom it is invoked on proof that a party to the arbitration agreement was "under some incapacity".[42] There are two causes against challenges for enforcement of awards: the incapacity of parties and invalidity of the arbitration agreement.[43]

(a) Incapacity of the Party

Each party to contract or agreement should have legal capacity to enter into the contract.[44] The Convention speaks about the incapacity of a party to conclude the arbitration agreement.[45] The Convention does not exclude that a State or public body is a party to an arbitration agreement and award.[46] The lack of the legal capacity of the party to enter into an arbitration agreement is a ground for setting aside the award or for refusal of its recognition and enforcement.[47] The main situation in which a party can be said to be incapable will be if the party is State or a public body. If the arbitration clause is to be written into a contract which a State is a party to, it is of great importance to determine if the State has capacity to agree to arbitration. To determine this, an investigation must be carried out with regards to the national law of the States concerned, as well as the law of the forum of arbitration. The question of the capacity of a State to agree to arbitrate can be considered to be encompassed by the broad wording of the article V (1) (a).[48] However, the drafters of the Convention left open the question how the law applicable of the party – also referred to as the "personal law" – is to be determined. Therefore the questions that must be sorted out in accordance with the law of the enforcing court, relate to the law governing the nationality of a physical person and domicile or habitual residence, and a legal person's place of business or place of incorporation.[49] Every country will have different rules relating to the capacity of the minors to conclude the contract.[50] This matter is not the same as the applicable law to the arbitration agreement but is still to be determined by the conflict of rules of the forum. Furthermore, there is neither uniform interpretation of the capacity of the party nor similar enforcement rules in all contracting States.[51] Therefore, capacity is not necessarily to be determined by the law chosen by the parties or under the law of the country where the award was made. It must be determined by reference to the law of the place of resident of that party or its incorporation.[52]

(b) Invalidity of the Agreement

The existence of a valid arbitration agreement is one of the essential conditions to the validity of the arbitration award. National laws define, each in their own manner, the ways an arbitration agreement may be concluded. The enforcement of arbitral award can be opposed if the award has been rendered on the basis of an invalid arbitration agreement.[53] Under the Convention, the national court can refuse the enforcement of award if 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.[54]

Article II of the Convention defines that an agreement must be in writing. The requirements of what constitutes a writing very among different countries, which define the nature of the writing according to their own law, refusing the application of a foreign law which is either too strict or not strict enough, even if it is a law of the country where the award was rendered. The Convention permits the judge to adopt such a position, even if it is the enforcement is requested pursuant to the Convention.[55] There are various grounds for invalidating an arbitration agreement. This may involve a determination of several things.[56] Recognition and enforcement of an award may be refused if the arbitration agreement itself is not valid. Furthermore, if the contract containing an arbitration agreement does not have separate choice of law clause, problems arise in defining under which applicable law the agreement shall be invalid. This part of Article V (1) (a) consists of two uniform conflict of law rules. The first one relates to agreement of the parties and the second concerns the rules at the seat of the arbitration where the award is made. If the choice of law clause governs the whole contract including the arbitration agreement, the validity of the arbitration agreement is determined according to the law chosen by the parties. However, in the absence of the separate choice of law clause for the arbitration agreement, problems arise in defining under which applicable law the agreement shall be invalid. If there is no indication of choice of law clause or the agreement is seen as a separate part of the contract, the relevant law will be the law of the country where the award was made.[57] This view is in line with the doctrine of separability, which is the prevailing notion in many countries.[58] The doctrine of separability is mainly important when a question is raised as to whether the main contract is invalid.

Many arbitration laws allow the arbitrator to give a power to rules on his own jurisdiction.[59] This power is known as the doctrine of *Kompetenz-Kompetenz*.[60] However, there is no rule stating this authority in the Convention.[61] If the arbitrators have the power to decide the agreement to be valid in accordance with the principle of *Kompetenz- Kompetenz*, a court can prove invalidity of the agreement and then refuse enforcement under Article V (1) (a). Under the doctrine of *Kompetenz- Kompetenz,* the validity of arbitration

agreement is determined by the authority of the arbitrators. In a challenge to an award based on Article V (1) (a), all of these questions should be determined with reference to the law governing the arbitration. In international arbitration, a question which has not yet been clearly resolved is how to determine the law applicable to arbitration agreement. [62]

2. Lack of Due Process

Proper notice of the appointment of the arbitrator or of the arbitration proceedings to the parties and an opportunity to present a case are essential elements of due process. According to Article V (1) (b) of the Convention, if it is proved that "the party against whom the award is invoked was not given proper notice of the appointment of arbitrator or of the arbitration proceedings or was otherwise unable to present his case", recognition and enforcement of the award may be refused. The aim of Article V (1) (b) of the Convention is to ensure that the parties to a process observe certain standards of fairness in arbitral process. The word "proper" refers to such requirements as exist under the contract. The term "unable to present his case" has been held to refer to the standard of due process to be applied in the State where the arbitration took place.[63] The concept of due process may differ substantially from the place of enforcement to the place of arbitration on the same issue. That may lead to a situation of uncertainty between two jurisdictions and additionally, to an unforeseeable outcome of the arbitration. This constitutes a problem, as it is a widespread concept that international arbitration should be more freely compared to national arbitration.[64] The problem is the fact that due process normally is viewed in conjunction with public policy. Thus, this Article is probably the most important ground for refusal under the Convention, and is necessary for ensuring the future of international arbitration.[65]

3. Excess by Arbitrator of his Authority

Article V (1) (c) concerns with the problem of jurisdiction of arbitrator. Arbitrator has the power to handle the submitting disputes under the agreement of the parties and performs the matter outside of the mandate given by the parties, in accordance with the principle of *Kompetenz-Kompetenz*. Thus, arbitrator must perform its jurisdiction conferred by the parties and within the agreement of the parties. Where the arbitral tribunal deals with matters that do not fall within its jurisdiction, partial enforcement of the award may be possible, but only where the courts are able to identify the areas of the award which are not in excess of jurisdiction. According to the doctrine of *Kompetenz-Kompetenz,* if the arbitrator decides the case beyond

the scope of his authority, this part of award may be refused by the competent court but the other part of award containing decisions that falls within the terms of submission to arbitration would be valid and enforceable.[66]

4. Composition of Arbitral Tribunal or Arbitral Proceeding

According to Article V (1) (d), if the respondent can prove that the composition of the arbitral tribunal or the arbitral procedure was not carried out pursuant to the agreement of the parties, the court may refuse to enforce the award.[67] This provision clearly establishes the supremacy of party autonomy, since the law of the country where the arbitration took place can only be applied in the absence of the agreement of the parties, or does not regulate the specific matters. These matters must, of course, comply with the requirement of due process (Article V (1) (b)) and public policy (Article V (2) (b)). [68]

5. Award not Binding or Setting Aside

Under the Convention, an award may be refused to be enforced if it has not yet become binding upon the parties, or set aside or suspended.[69] The interpretation of the term 'binding' by the national courts may cause problems. The issue of when an award becomes binding is determined in different ways by different countries. In many countries the award becomes binding when it is made.[70] As the Convention aims to depart from national consideration and legislations, an autonomous interpretation must be made. This is not specifically mentioned in the Convention, but it is in line with the aims of the Convention. One understanding of the expression "binding", which is interpreted by the national courts of the contracting states, is that the award has obligatory force between the parties and is no longer open for appeal on the merits. A general opinion is that an award can be binding even if some additional formalities are required to make it enforceable in the country where it was made, or formal time limits in the law of the place where it was made have not yet expired. [71]

(B) Substantive Defenses

Article V (2) of the Convention relates to the arbitrability of the disputes and the issue of public policy. In these cases, the enforcing court considers whether the dispute is arbitrable under the law of enforcing country and whether the award conflicts with the rules of its public policy.[72]

1. Non-arbitrability

All disputes are not suitable for settlement by arbitration because of their public importance and need for formal judicial procedure.[73] Each State has its own idea of what disputes may not be resolved by arbitration owing to its own political, social and economic policy.[74] There is no internationally accepted definition as to what issues are arbitrable. The concept of arbitrability is, in fact, a public policy limitation upon the scope of arbitration. The question of arbitrability under the provision of the Convention is, of course, an issue for the law of the enforcing State and, being governed largely by questions of public policy, varies from country to country.[75]

2. Public Policy

Article V (2) (b) of the Convention establishes that enforcement may be refused where such enforcement would be contrary to the public policy of the law of the place of enforcement. The violation of rules of public policy is a ground for setting aside awards in every jurisdiction. The words "public policy" will depend on domestic interpretation. The concept of international public policy protecting the arbitration agreement from nullification by the operation of domestic public policy should only be applied when such concept is defined. The autonomy of arbitration clause, although more and more frequently recognized, is however not applied under the law of many countries, and therefore, the courts in those countries may refuse enforcement of an arbitration award in which the arbitrators have ruled on their own jurisdiction by assuming the validity of arbitration clause notwithstanding that the contract in which it was written was void.[76] When public policy has to be interpreted by national courts and according to national laws, the uncertainty may be even greater because public policy is highly dependent upon national legal culture. The arbitrability and public policy issues are determined by the enforcing court to set aside the award or to refuse the recognition and enforcement of award.[77]

IV. Judicial Practices of enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore

A. The United Kingdom

The U.K. acceded to and ratified the Convention with reciprocity reservation and enacted the

Arbitration Act of 1975. Part III of the 1996 Act was replaced by the equivalent provisions of the Arbitration Act of 1975. Enforcement of foreign arbitral awards is of particular significance to the winning party, especially where the assets of the losing party are located in the U.K. In order to obtain the recognition or enforcement of international arbitral awards under Part III of the 1996 Act, an award must be "a New York Convention award" and the party must also produce various documents.[78] Even if these conditions are satisfied, recognition or enforcement may be refused if the other party against whom the award is invoked can establish a ground for refusing recognition or enforcement.[79]

A "New York Convention award" is an award made in the territory of a contracting state other than the U.K.[80] This award is "made" at the seat of arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.[81] There is no requirement that the arbitration should be international; for example, an award made in Paris in an arbitration involving two French traders is a New York Convention award for the U.K. The 1996 Act does not provide a non-domestic awards. Thus, a New York Convention award applies only the award rendered outside of the territories of the U.K. which are parties to the New York Convention.[82] Moreover, it is not applied to the awards made in Scotland or Northern Ireland, either. It is notable that international awards made in the U.K. are not enforceable as the New York Convention awards, although these awards are enforceable under Section 66 of the Part II of 1996 Act.[83]

The accession provisions of the Convention are retroactive. An award made in a State prior to its accession to the Convention was considered as a New York Convention award. In *Minister of Public Works of the Government of the State of Kuwait and Sir Frederick Snow and Partners and others*, the Court of Appeal held that if a State became a party to the Convention, the arbitration awards, whenever made, were enforceable under the 1996 Act as Convention awards.[84]

The 1996 Act deals with an award made in pursuant to an arbitration agreement. Under the 1996 Act, the arbitration agreement must be made in writing. The formal requirements for agreement in writing are defined in Section 5 of the 1996 Act.[85] If an agreement in writing is not satisfied under Section 5[86], an award is not entitled to recognition and enforcement under the 1996 Act.[87] The only obligation of the party seeking to enforce the award is to produce the evidence required under Section 102 of the 1996 Act. Under Section 102, an award is to produce the duly authenticated original award or duly certified copy of it, and the original arbitration agreement or a duly certified copy of it[88] and if the award or agreement is in 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.[89] Under Section 102, the winning party does not have to prove validity of awards and it is

irrelevant that the award may subsequently be shown to be invalid.[90] However, it is a good reason for the other party and he can only challenge the award on the basis of invalidity of arbitration agreement and award under Section 103 of the 1996 Act.[91]

Section 101 (1) states that "the award shall be recognized 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". There are two methods of enforcement of a Convention award under Section 101 (2) (3) of the 1996 Act. The first is an application directly to enforce the award in the same manner as a judgment or order to the same effect. If permission is given, the applicant may issue execution upon the award as if it was a judgment. The second method, where permission has been given, is an application to enter a judgment in terms of the award.[92] In practice, the foreign award is necessary to be recognized by the court, which orders its enforcement as valid and binding by the parties to it.[93]

A New York Convention award is presumed to be entitled to recognition or enforcement, the burden being placed on the party seeking to resist the award to establish a ground of refusal. At common law, however, there are conditions which must be satisfied by the person seeking to rely on the award before recognition or enforcement of foreign award can be considered.[94] In order for a foreign award to be entitled to recognition or enforcement in the U.K. at common law, the person claiming recognition or enforcement must prove, first, "that there was a submission", and secondly, "that the award is a valid award, made pursuance to the provisions of the submission, and valid according to the *lex forei*[95] where the arbitration was carried out and where the award was made". If the award is invalid under the law governing the arbitration proceedings, it cannot be enforced in the U.K. at common law.[96]

The validity and finality of awards is, in principle, a question to be determined by the law governing the arbitration proceedings.[97] The necessity for the validity of award should be determined by the proper law of the agreement of the parties. However, it cannot see to give raise to problems in practice. The question of validity and finality of an award is determined by the law governing the arbitration proceeding and its determination is the effect of award. Moreover, the question of finality is a question of classification which is determined by the British law. Although the question whether the award is final in the country of origin is directed to showing whether it is final as that the word is understood in the British law. Moreover, the requirement of finality must not be confused with enforceability.[98]

The importance of illustrated by *Union Nationale des Cooperatives Agricole de Cereales v. Robet Catterall & Co Ltd,* this case concerning proceeding for a enforcement of a Danish award in Denmark

depended on a judgment having been obtained from the court based on the award. When enforcement proceeding were commenced in the U.K., the plaintiff had not obtained a judgment on the award in Denmark. Even though award was not enforceable in Denmark, the Court of Appeal concluded that the award was final and entitled to enforcement in the U.K.[99] As a general principle, an award is valid and final unless and until it is set aside by any procedure available for this purpose. Then the award to be binding before a court will enforce it. While a binding award implies that the parties do not have further recourse to another arbitral tribunal, a final award signifies that no available proceeding exists for contesting whether an award is valid.[100] The capacity of parties to enter into an agreement is usually determined by reference to the law of the place of the residence of that party or its incorporation.[101] Every natural or legal person who has general contractual capacity may conclude an arbitration agreement.[102] In international arbitration, however, issues of capacity are more likely to arise where a company claims that it is not permitted under its own law to enter into a transaction, which includes the arbitration agreement or the arbitral proceedings against a wrongly named party.[103]

The concept of the autonomy of the arbitration clause holds that an arbitration clause is an autonomous contract, collateral or ancillary to the main contract in which is it is contained. This concept is founded more on practical considerations than logic. Logically, the invalidity or illegally of the main contract should also extend to the arbitration clause.[104] A concept related to the autonomy of the arbitration clause is the competence of a tribunal to rule on its own jurisdiction. Even in cases where an arbitration clause is considered independent of the substantive contract, the question remains whether jurisdictional objections could be entertained by the tribunal or whether the issue should be transferred the courts. In order to prevent unnecessary delays in the arbitral process, it is well established in arbitration law that a tribunal can in appropriate cases rule on its jurisdiction. British law has long recognized the competence of arbitrators to rule on their jurisdiction. This competence depends in part on the autonomy of the arbitration agreement, for if the invalidity of an arbitration clause is regarded as affecting the arbitration clause, the legal basis for the arbitrator's power is nonexistence.[105]

Any contract containing an arbitration clause may be considered to be two separate parts.[106] The question relates to the separability doctrine which is vitally important in situation where the validity of the main contract is alleged. In each case an examination must be undertaken as to whether the public policy element or illegality goes to root of the contract and renders not only the underlying void contract but also the arbitration agreement. Subject to the parties' contrary agreement, the principle of the separability applies

where the British law is the law applicable to the arbitration agreement, even if the seat of arbitration is in a country other than the U.K. [107] In the U.K., the enforcement of award can also be refused on the fact that the agreement is illegal or immoral under the British law as well as the law of the country of performance. In *Soleimary v. Soleimary*, the Court of Appeal refused to enforce an award where a father and his son entered into an illegal performance because the underlying agreement is illegal or immoral under the British law as well as the law of the country of performance.[108]

The 1996 Act stipulates that the tribunals shall decide disputes "in accordance with the law chosen by the parties as applicable to the substance of disputes”. In the absence of an agreement by the parties, the tribunal is required to apply the law determined by the conflict of laws rules which it considers applicable. The reference to the law chosen by the parties could be determined by the court in consistence with the traditional view that arbitrators must apply a reasonable system of law, namely a national or international law. The British law on choice of applicable substantive law is aligned with the approach adopted in most major arbitration centers. Another notable feature of choice of law the 1996 Act is the rule that applies in cases were the parties had not made a choice of law. In such cases, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. This provision is modeled on the UNCITRAL Model Law. However, the 1996 Act does not provide any guidance as to which conflict of laws rules could be referred to. [109]

B. The United States

The recognition and enforcement of international arbitral awards in the U.S. is governed by the FAA.[110] The U.S. acceded to the Convention and enacted Chapter II of the FAA in 1970. The courts of the U.S. have been obliged to recognize and enforce international arbitration agreements and awards in accordance with standard set forth in the Convention.[111] Section 207 of the FAA restates the obligation imposed by Article III to enforce Convention awards, and incorporates Article V's exceptions by reference. In order to enforce an award in the U.S. under the Convention, the winning party has only to submit the authenticated original award or a certified copy thereof, the original or certified copy of the arbitration agreement, and the official or sworn translations.[112] Copies of the award and agreement which have been certified by a member of the arbitration panel provide a sufficient basis to enforce the award. Any party to arbitration may, within three years after an award, apply to any court having jurisdiction under Section 207 of the FAA for an order confirming the award as against any other party to the arbitration.[113]

The Convention is applicable only to the awards made in the territories of signatory to the

Convention and disputes arising out of contractual or other commercial relationships.[114] Section 202 of the FAA does not apply to agreements and awards arising out of contracts entirely between citizens of the U.S. It applies in dispute between U.S. citizens if the subject matter of dispute has some relation with a foreign State.[115] The FAA has been interpreted broadly by the U.S. courts as to the definition of the Convention award. The U.S. courts give "non-domestic" status to an award, even awards rendered in the U.S. between two U.S. citizens, if the disputes concern the operation of foreign law, or have some reasonable ties with one or several countries, or even more generally, if the object of the dispute is connected to international commerce.[116] In *Bergesen v. Joseph Muller Corp.*,[117] the Second Circuit adopted the view that the Convention permits the enforcing authority to supply its own definition of non-domestic in conformity with its own national law. In this case, the dispute arose out of a transportation agreement between Sigval Bergesen, a Norwegian ship owner and Joseph Muller, a Swiss company. The Second Circuit granted the enforcement of arbitral award and held that the agreement between the parties was not domestic and it had a reasonable relation with a foreign State.[118] In *Lander Co. v. MMP Investment Inc*, two American corporations made a contract for the distribution by MMP Investments Corporation in Poland of shampoos and other products manufactured by Lander Company in the U.S. The U.S. Court of Appeal enforced an award regarding the transaction as foreign commerce between the U.S. parties under the FAA and the Convention because the arbitral award arising out of contract evidencing a transaction involving interstate and foreign commerce and involving performance in a foreign country.[119] The FAA permits a contracting State to limit its application of the Convention to differences arising out of legal relationships considered "commercial" under its own national laws.[120] There is no definition of commercial on the Convention nor the FAA.[121]

The FAA requires that the arbitration agreement be treated like any other types of contract. Therefore, any person, physical or legal, who can enter into a contract, can also agree to arbitrate. This is equally true for persons who are not citizens or residents of the U.S. Under the FAA, the agreement to arbitrate is considered, as a matter of legal theory, to be separate from the rest of the commercial agreement in which it is contained.[122] The law by which the arbitration agreement will be assessed is usually that chosen by the parties to govern by the underlying contract, absent an express choice of law, the U.S. courts tend to follow the Convention's instructions by applying the law of the place where the award is made. The law or laws establishing the parties' capacities to contract, by contrast, will not necessarily be the same as that governing either the main contract or the arbitration clause.[123] The federal law does not have a specific personal law for the capacity to conclude an agreement, but determine this question according to the law of

the place of conclusion of the agreement or the law governing the agreement.[124]

The arbitration agreement's autonomy in relation to the parties' main agreement is an important question. The modern trend is to treat the arbitration clause as constituting a separate and autonomous agreement that does not come to an end when, for example, the main contract has been terminated through frustration or, less dramatically, through performance.[125] The issue arises when the validity or continuing existence of the main agreement has been called into question. The defense that an arbitration agreement is invalid is rooted in contract law. This defense raises both choice of law (i.e., what law should determine whether an arbitration agreement is valid) and substantive (i.e., whether the arbitration agreement is valid) issues. In the U.S, if the underlying contract is void, the arbitration agreement is not invalid due to the separability doctrine.[126]

In *Prima Print Corporation v. Flood & Conklin Mfg. Co.,* the parties executed a contract that had a mandatory arbitration clause. Appellant argued that appellee was in breach of the contract. Appellee filed a notice to arbitrate, and thereafter appellant filed a diversity action in the district court requesting recission of the contract. The court held that an arbitration clause was separable from the contract, and unless a party alleged fraud with regard to the execution of the arbitration clause, the issues of fraud in the inducement for the contract were properly before the arbitrator. However, if a claim is asserted that the arbitration clause itself was induced by fraud or otherwise invalid, that issue – which relates to the making of the agreement to arbitrate – is to be determined by the court, not by the arbitrator.[127]

The FAA establishes the arbitration agreement must be in writing and arbitral award must be final as determined by the law of the jurisdiction where the tribunal is located and award cannot be subject to appeal to the court of the local foreign jurisdiction. The U.S. courts recognize that the law governing an award's validity is the law of the rendering state and that it has primary jurisdiction to determine an award's validity.[128] The party opposing enforcement can claim that the court should not enforce the award because it is not binding. In the U.S., an arbitral award becomes binding when the arbitration panel has resolved all the issues before it, and no further recourse to other arbitration exists. This does not mean, however, that the parties must exhaust all remedies in the rendering country before the award is binding.[129]

In *Person & Whittemore Overseas v. Societe Generale de L' Industrie du Papier*, the 2nd Circuit Court confirmed the enforcement of foreign arbitral award. The Court stated that the Convention's public policy defense should be construed narrowly and applied only where enforcement would violate the forum state's most basic notion of morality and justice.[130]

The U.S. courts have generally concluded that they must recognize the award, subject only to article V's exceptions and other grounds for resisting awards, whether under Section 10 of the FAA or at common law, may not be relied upon.[131] It may be asked whether an award made in these circumstances can be refused enforcement in the countries of the parties by virtue of the public policy provision of the Article V (2) of the Convention. This problem relates to Section 202 of the FAA which contains the express provision that a foreign award made between two U.S. citizens in respect of a U.S. domestic transaction will not fall under the Convention. This case is not different from the case where parties of different nationality have arbitrated abroad and the award violates the public policy of the country where enforcement is sought.[132]

C. Singapore

Singapore signed and ratified the Convention in 1986 and subsequently re-enacted most of its provisions in Part III of the IAA. The reciprocity reservation to the Convention applies in Singapore, pursuant to which they are only required to enforce awards made in other Convention countries. It is notable that foreign awards made in countries or territories that are not signatories to the Convention may also be enforced in Singapore under Section 24 of the IAA.[133] The definition of the term of foreign award was stipulated in Section 27 (1) of the IAA stating: "foreign award means an arbitral award made in pursuance of an arbitration agreement in the territory of a Convention country other than Singapore".[134]

The requirement of writing is prescribed in Section 5 of the IAA. The arbitration agreement must be in writing being contained in: a document signed by the parties, an exchange of written communications, an exchange of statements of case in which the existence of an arbitration is alleged by one party and not denied by the other. No specific words or form are required to effect an arbitration agreement but intention to arbitrate must be clear and unequivocal.[135] The IAA provides the definition of the international arbitration. The relevant factors of international arbitration are: the place of business of the parties; the place where a substantial part of the commercial contract is to be performed or the place to which the subject-matter of the dispute is most closely connected; the place which has the closest relationship to the arbitration agreement.[136] If an arbitral award is rendered by the foreign country and the law governing the arbitration is not Singaporean law, the award is "Foreign Award" and the Part III of the IAA is applied.[137] In relation to international arbitrations, the subject matter must be "commercial" in nature.[138] The term "commercial" is not defined although the footnote to Article 1 of Model law gives a good indication.[139]

Foreign awards made in any other Convention countries may be enforced in Singapore in the same

manner as a Singaporean judgment or order to the same effect, with the leave of the High Court. If leave is granted, judgment will be entered in terms of award. Such awards are also recognized as binding for all purposes upon the persons between whom they were made, and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.[140]

In order to enforce an award made in any of the Convention countries, the following steps must be taken. An application must be made to the High Court within six years after the making of the award.[141] The applicant must file an originating summons together with an affidavit. The affidavit must state the name and usual or last known place or abode or business of the applicant and the person against whom enforcement is sought. The party seeking enforcement must submit the arbitration agreement and the duly authenticated original award or a certified copy thereof. If the agreement or award is in a language other than English, a translation of it into English and certified in English as a correct transaction by a sworn translator or by a diplomatic or consular agent of the country in which the award was made, must also be furnished. A document produced to a court in accordance with this section shall, upon mere production, be received by the court as *prima facie* evidence of the matters to which it relates.[142]

The IAA provides that an arbitration agreement is separate, independent and distinct of the other terms of the commercial contract. Unless the main contract is void, the arbitration clause is treated as separate from the main contract and hence is not affected by termination of the main contract. The judicial decisions in U.K. have developed this doctrine as we have seen in Chapter IV B. There has been no recent decision in Singapore in this regard. [143] In Singapore, arbitrators are given express statutory power to decide on their own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement.[144] By separating the existence of the arbitration agreement from the existence of the underlying contract which may be in dispute, the doctrine of separability facilitates the concept of *Kompetenz-Kompetenz*.[145]

Any natural or legal person who has the capacity to enter into a commercial contract will have the capacity to enter into an arbitration agreement.[146] The invalidity of arbitration agreement is determined by the conflicts of laws rules of Singapore. The capacity to enter into an arbitration agreement is governed by the personal law of the parties.[147] Where an arbitration is “international” within the meaning of the IAA, the tribunal needs to decide in accordance with the law chosen by the parties or the conflict of laws rules of Singapore. In the absence of any express choice of law, arbitral tribunal has a power to choose the international conflict of laws rules or general principles of private international law or transnational law as the applicable law. Then Singaporean court would look at the document produced as the arbitration agreement

under which the award had been made and consider whether such document is capable under the Singaporean law. This would be fairly formalistic examination.[148]

The enforcement process does not require judicial intervention by the court of the jurisdiction in which enforcement is sought. The mechanistic nature of the enforcement process is also supported by Section 31 (1) of the IAA, which states that the court can only refuse enforcement if one of the grounds in Section 31 (2) or Section 31 (4)[149] is established. The court has no residual discretion to refuse enforcement if one of those grounds is not established. The court, hearing the application for enforcement of the foreign award, cannot review the case on its merits and can only refuse to grant leave to enforce the award on one of the grounds which the jurisdiction of that court provided for such an order. These events which justify the court in Singapore refusing enforcement are extremely important, as a party in whose favor an arbitral awards has been made must know how it may be attacked at the enforcement stage.[150] Where a party applies to the courts for recognition or enforcement of a foreign arbitral award, the respondent may request the court to dismiss the application within 14 days from the date of the receipt of the notice of the application if the arbitration agreement is invalid as a result of incapacity of the parties according to the law that must be applied.[151] Within 14 days after service of the order granting leave or such other period as the court granting leave may stipulate, the debtor may apply to set aside the order. The award shall not be enforced if the debtor applies to set aside the order, during the pendency of the application and until after it is finally disposed of.[152]

In *Re An Arbitration Hainan Machinery Import Export Corporation and Donald & McArthy Pte Ltd,* Singaporean court granted the enforcement and held that the default award by arbitrators was valid.[153] Singaporean court does not permit the defendant to resist the same ground if this ground has been denied by the court of country where the award was made. In *Newspeed International Ltd v. Citus Trading Pte Ltd*, the High Court concluded that a party facing the Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no step to set aside award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.[154]

Public policy, as a ground allowing a national court to refuse enforcement of arbitral award is in itself not controversial and quite necessary having regard to difference in both cultural and socio-economic circumstances existing in different countries. It is only right that when it comes to enforcement of a foreign arbitral award that local conditions and policies are considered.[155] In *Re An Arbitration between Hainan*

Machinery Import Export Corporation and Donald & McArthy Pte Ltd., the Judge enforced the foreign arbitral award and rejected an argument made on the grounds of public policy. The Judge said:

"In my view, public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. As the plaintiffs submitted, the principle of comity of nations required that the awards of foreign arbitration tribunal be given due defense and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognize foreign awards if it expects its own awards to be recognized abroad. I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the Commission." The decision of the High Court is indicative as to the attitude of the Singaporean courts towards arbitral awards under the Convention.[156]

V. Conclusion

In the process of international commercial arbitration, the Convention has many virtues regarding to the enforcement of foreign arbitral awards. It has nourished respect for binding commitments whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. It is common knowledge that international trade develops on the rule of law: without it, parties would be reluctant to enter into cross-border commercial transactions or make international investments. For all these reasons, the Convention is one of the most successful treaties in the domain of international commercial law, adhered to by 142 States, including major trading nations. However, there are some areas in the Convention which need improvements. The Convention's provisions on the procedure for enforcement, for example, can be said as skeletal. The details of the procedure for enforcement are entirely left to national arbitration law.

The Convention primarily deals with foreign awards and it also covers the non-domestic awards. There is, however, no definition of what is meant by the foreign or domestic award in the Convention. It thus has to depend on the interpretation of the national courts which may vary according to its domestic legal system. The U.S. courts, for example, interpret the non-domestic award broadly. According to the U.S. court practice, all the awards having international element, even if the awards are made in the U.S., are enforceable under the Convention.

Arbitration agreement is the foundation of the modern international commercial arbitration and under the Convention it must be in "writing", which includes "an arbitral clause in a contract or an arbitration

agreement, signed by the parties or contained in an exchange of letters or telegrams." The document must be signed or exchanged. There are critiques who question the rationale behind the requirement of "writing" and the rejection of the agreements made orally or other modern forms of doing business (e.g. electronic commerce). It is noteworthy that Article 7(2) of the UNCITRAL Model Law retains the Convention definition of "writing". However, a number of arbitration statutes have included a wider definition of the writing requirement. The 1996 Act of the U.K. is a good example.

Moreover, the separability principle significantly curtails judicial supervision with arbitration confining it to situations in which the validity of the arbitration clause itself is in question. The separability principle has been widely adopted in the U.S. It has also been accepted in the U.K. and Singapore.

"Public policy" is the most controversial among the seven grounds for refusing enforcement of a foreign arbitral award. Here again, what is meant by "public policy" is to be determined according to national laws. The uncertainty may be greater because "public policy" is highly dependent upon national legal culture. According to U.S. case law, it can be seen that the public policy ground is narrowly interpreted than in the U.K. and Singapore.

An analysis of the judicial practice of the U.K., the U.S. and Singapore in this paper clearly shows that the national laws in respect of the enforcement of foreign arbitral awards have been extensively developed through judicial practice and that it has gone far beyond the limited scope of the Convention. This paper primarily focuses on the practice of those three countries, all of which can be said as developed. Commercial arbitration has flourished in those countries and there is no doubt that reciprocal enforcement of arbitral awards is in their best interest. A question may be raised as to whether the Convention and its basic principles of enforcing foreign arbitral awards can be acceptable for developing countries like Myanmar. The answer is definitely in the affirmative. If we look at the participants of the Convention, two-thirds of the 142 States parties are developing countries. If the Convention is not in their national interest, they would not have adopted the Convention. Myanmar has not yet acceded to the Convention. Myanmar's Arbitration Act is too outdated and dispute resolution mechanism is in chaos.[157] The best solution for Myanmar is to accede to the Convention as soon as possible and to adopt a new Arbitration Act based on the UNCITRAL Model Law and in line of the 1996 Act of the U.K. because Myanmar has succeeded to its law tradition.

To sum up, the Convention has served the international commercial community for fifty years. It is believed that the UNCITRAL Modal Law nicely complements the Convention in such a manner that the Model Law and the Convention provide together a solid legal basis for international commercial arbitration.

The practices of the U.K., the U.S. and Singapore, even though there may be slight variations, would also supplement the development of the law on enforcement of foreign arbitral awards and the harmonization can be achieved gradually by means of having a systematic compilation and publication of case law of the Convention States.

Endnote

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38 *Ibid* pp. 265, 269-273.
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40 S.I. Strong, *supra*, at p. 35.
41 Article V of the Convention, section 103 of the 1996 Act, Section 207 of the FAA and Section 31 of the IAA.
42 Article V (1) (a) of the New York Convention, "[T]he parties to the agreement referred to in Article II were, under the law applicable to them, under in some capacity, 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.".
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50 For example, under the U.K. law, the age of the capacity is 18 years old and except in a few instances a person under the age of 18 years will not be bound by contract and the contract containing the arbitration agreement.
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58 Section 7 of the 1996 Act, Article 16 of the Model law.
59 Section 30 of the 1996 Act, Section 30 of the AA, Article 16 of the Model Law, the IAA.
60 *Kompetenz- Kompetenz* is a German word that means the arbitral tribunal can independently determine its power to resolve a certain dispute without having to apply to a court for authorization.
61 Van den berg, *supra*, at p.312.
62 Di Pietro& Platte, *supra,* at p.144.
63 Jonathan Hill, *supra*, at p.886.
64 Di Pietro& Platte, *supra*, at pp.148-149.
65 *Ibid*, pp.151-152.
66 Mulyana, *supra*, at p.96.
67 Article V (1) (d) of the Convention, see also, Mulyana, *supra*, at p.96.
68 Di Pietro& Platte, *supra,* at p.144.
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70 For example, Section 58 (1) of the 1996 Act and Article 35 (1) of the Model Law, see also, Jonathan Hill, *supra,* at p.422.
71 Di Pietro& Platte, *supra*, at p.337.
72 Jonathan Hill, *supra*, at p.425.
73 Gary B. Born, *supra*, at p.245.
74 *Ibid*, pp. 283-290.
75 Redfern & M Hunter, *supra,* at p.387.
76 Jean Thieffry, *supra*, at p.45.
77 Redfern & M Hunter, *supra,* at p.387.
78 *Ibid*, p.704.
79 Jonathan Hill, *supra*, at p.704.
80 Section 100 of the 1996 Act.
81 Section 102 (2) (b) of the 1996 Act, see also, Mustill & Boyd, "Commercial Arbitration", p.212, 2001.
82 Jonathan Hill, *supra*, at p.705.
83 *Ibid,* pp.704-705.
84 [1984] AC 426, (House of Lords), (this case arose between a Kuwait government minister and British consulting engineers with regard to the question whether a Convention award should be given retrospective effect or not.), www.lexis.com/research/, accessed on 19.3.2008.
85 Section 100 of the 1996 Act.
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writing. The expression “agreement”, “agree”, and “agree” 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 submission 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 this response constitutes as between those parties an agreement in writing to the effect alleged. (6) Reference in this Part to anything being written or in writing include its being recorded by any means.

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97 *Ibid*, p.727.
98 *Ibid*.
99 2 Q.B., 44, [Court of Appeal], [1958 M. No. 1107.], (The agreement between the parties contains the arbitration clause and it described that “all differences arising out of the contract will be judged by the arbitration Chamber of Copenhagen which will settle without appeal with the powers of an amicable arbitrator”. The differences between the parties were referred pursuant to the arbitration clause to the Copenhagen Chamber of Arbitration. Under the rules regulating the procedure of the arbitration chamber, awards are made by the committee shall be final. An award can only be appealed to the appeal court attached to the committee. If the presidency decides that the appeal cannot be made, the award made by the judgment and it shall be final. The presidency of the arbitration committee refused the appellant's application for leave to appeal and notified them that the award was final.), pp.44-45, The Law Reports [1958] 2 Queen’s Bench.
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106 Jonathan Hill, *supra*, at p.631.
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112 See, Section 207 of the FAA.
113 Xiaowen Qiu, “Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China”, *11 Am. Rev. Int'l Arb.* 607, www.lexis.com, accessed on 28.1 2008.
114 See, Section 202 of the FAA.
115 Georgios Zekos, “Courts’ Intervention in Commercial Arbitration and Maritime Arbitration under U.S. Law”, J*ournalof International Arbitration* , Vol. 14 No. 2, p. 121, 1997.
116 Jean Thieffry, *supra* at p.30.
117 710, F2d 928, U.S. App. LEXIS 26621, (2d Cir. 1983), www.lexis.com, accessed on 10.1.2008.
118*Sigval Bergesen v. Joseph Muller Corporation,* 710, F2d 928, U.S. App. LEXIS 26621, (2d Cir. 1983), www.lexis.com, accessed on 10.1.2008.
119 *Lander Co. v. MMP Investment, Inc*, 107 F. 3d 476, U.S. App. LEXIS 2817, (7th Cir. 1997), www.lexis.com, accessed on 10.1.2008.
120 *Ibid.*
121 Jack J. Coe, Jr., *supra* at pp. 330-331.
122 Harward M. Holtzmann & Donale Francis Donovan, “United States”, *supra*.

123 Jack J. Coe, Jr., *supra*, at pp. 335-336.
124 Ven den berg, *supra*, at pp. 276-277.
125 Refran & Hunter, *supra*, at p. 382.
126 May Lu, *supra*, at p. 757.
127 *Prima Print Corporation v. Flood & Conklin MFG. Co*., 306 F.2d 315, 1966, U.S. App. LEXIS 6175, www.lexis.com, accessed on 12.1.2008.
128 Harward M. Holtzmann & Donale Francis Donovan, *supra*.
129 May Lu, *supra*, at p.757.
130 508 F.2d 969 (2nd Cir. 1974), www.lexis.com, accessed on 10.2.2008.
131 Gary B. Born, *supra*, at.p.779.
132 Ven den berg, *supra*, at pp.17-19.
133 Lawrence G.S. Boo, *supra*.
134 Section 27 (1) of Part III of the IAA.
135 Lawrence G.S. Boo, *supra*.
136 Section 5 (2) of the IAA.
137 *Aloe Vera of America, Inc v. Asianic Food (s) Pte Ltd and Another*, 3 SLR 178, [2006], (High Court), (this case arose out the second defendant has appealed to set aside the order granting leave of enforcement.), www.lexis.com, accessed on 10.2.2008.
138 Michael Hwang, Lawrence G.S. Boo & Amy Lai, *supra*.
139 According to the foot note of Model law, 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."
140 Section 29 (2) of the IAA.
141 Section 6(1) of the Limitation Act of Singapore.
142 Section 30 of the IAA.
143 Lawrence G.S. Boo, *supra*.
144 Article 16 (1) of the Model Law, the IAA.
145 Lawrence G.S. Boo, *supra*.
146 *Ibid*.
147 *Ibid*.
148 *Aloe Vera of America, Inc v. Asianic Food (s) Pte Ltd and Another*, 3 SLR 178, [2006], (High Court), (this case arose out the second defendant has appealed to set aside the order granting leave of enforcement.), www.lexis.com, accessed on 10.2.2008.
149 Section 31 states that: (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that- (a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made; (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made; (c) 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 in the arbitration proceedings.; (d) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration; (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place; or (f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. (4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that- (a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or (b) enforcement of the award would be contrary to the public policy of Singapore.
150 Leslie Chew, *supra*.
151 Lawrence G.S. Boo, *supra.*
152 *Ibid.*
153 *Re An Arbitration Between Hainan Machinery Import and Export Corporation (PR China) v. Donale & McArthy Pte Ltd (Singapore),* 1996, 1 SLR 34, (High Court), Van den berg,Yearbook Commercial Arbitration, Vol. XXII p.771-779, 1997, (the court ordered that the notice of the arbitration was given to the defendants in June 1993 and the hearing of the arbitration took place in April 1994. The defendants therefore had a reasonable time in which to prepare their case.).
154 *Newspeed International Ltd v. Citus Trading Pte Ltd,* [2003] 3 SLR 1, (High Court), (this case arose that the defendant applied to the court for denying the order of leave for enforcement. The High court held that the defendant cannot have

"two bites at the cherry" by first challenging the award in the rendering and then, if its application is unsuccessful, raise the same grounds in opposition to enforcement.), Van den berg, Yearbook Commercial Arbitration, Vol. XXVIII p.829, 2003.

155 Leslie Chew, *supra*.

156 *Re An Arbitration Between Hainan MaChinery Import and Export Corporation v. Donald & Mcarthy Pte Ltd*, 1996, 1 SLR 34 (High Court), (this case arose out the application of the defendant asking the court among other things to refuse enforcement of the award on the grounds that the arbitration had not decided the real issue between the parties and claiming that to enforce the Chinese award in those circumstances would be contrary to the public policy of Singapore. The High Court dismissed the appeal.), www.lexis.com, accessed on 10.1.2008, see also, Van den Berg, Yearbook, Vol. XXII p.779, 1997.

157 See, Ei Ei Khin, "An Overview of Arbitration in Myanmar", The Journal of the Study of Modern Society and Culture, Niigata University, No. 38, pp.291-311, 2007.

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