

Judicial Supervision on Commercial Arbitration under the UNCITRAL Model Law and Arbitration Laws of the United Kingdom, the United States and Singapore

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要 旨

この論文の目的は、イギリス、アメリカ、及びシンガポールにおける国内外の商事紛争を解決するメカニズムとしての訴訟との関連において、仲裁の有効性を考察することである。分析結果は、UNCITRAL Model Lawの基本的な原則とイギリス、アメリカ、シンガポールの法的な枠組みと裁判の慣例のもとで、商事仲裁のさまざまな段階の司法的な監督の研究に限定する。分析は主に仲裁裁判所と裁判所の関係についてとりあげる。これは仲裁手続全体の中における裁判所の役割を明らかにするためである。これには手続停止による仲裁契約の強制、仲裁者の任命と解任、仮処分の命令、仲裁裁定の裁判所による再審理、および仲裁裁定の承認と執行が含まれる。

Keywords: interim measures, enforcement of arbitration agreements and awards, judicial review of arbitral awards

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I. Introduction

Arbitration is a type of ‘alternative dispute resolutions’- ‘ADRs’- which refers to various procedures rather than court litigation. Other forms of ADRs are negotiation, conciliation and mediation. Arbitration, like litigation, may be entirely domestic or it may involve a foreign element.

1.1 What is arbitration?

Arbitration is a binding, non-judicial dispute settlement mechanism by which a difference among the parties as to their mutual legal right is referred and determined by an arbitral tribunal and the application of law.¹ There are various general characteristics of arbitration which distinguish it from litigation. In each, it has several defining characteristics.² The fundamental aspect of the arbitral process is that it is built on the foundation of the agreement of the parties. Whereas the jurisdiction of the court is derived directly from the

law and the jurisdiction of an arbitrator is derived from the arbitration agreement itself.³ Such an agreement is typically embodied in the terms of a contract between the parties. Although Arbitration may depend on the agreement of the parties, it is a system built on the law and it relies upon that law to make it effective both nationally and internationally.⁴ Then, arbitration becomes international when the parties to a dispute reside or do their main business in different countries. The term commercial in international commercial arbitration is broadly conceived and covers activities such as sale of goods, distribution agreements, commercial representation of agency, leasing, consulting, transportation, construction work, joint venture and other terms of industries or business cooperation. International arbitration can be conducted in two ways: *ad hoc* arbitration and institutional arbitration. If the parties choose institutional arbitration, they agree to submit their dispute to an institution, who will administer the arbitration. If the parties choose *ad hoc* arbitration, the parties have the freedom to specially choose the rules by which their arbitration will be governed. *Ad hoc* arbitration does not rely on the supervision or formal administration of an arbitration centre, according to the institution's own rules of arbitration.⁵

A key feature of arbitration is its procedural flexibility. Arbitration provides the parties with full control over the arbitral process. Furthermore, national court proceedings are typically open to the public, and court decisions are published and readily available. Arbitral proceedings, however, are held in private, details about the cases, including the arbitral awards, are confidential. In the domestic context, parties who seek a binding method of resolving disputes through third-party intervention have the choice between a national public court and private arbitration.⁶ In the international context, such a choice does not exist because there are no international public courts that handle international commercial disputes between private parties. In the absence of any international court for the resolving of private international disputes, international commercial arbitration has become widely utilized dispute resolution mechanism.⁷

The disadvantages of international commercial arbitration are the lack of the tribunal's coercive powers necessary to support arbitration process. Yet, arbitration is not without its disadvantages. Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a role to play in making system of arbitration work.⁸

1.2 Relationship between the arbitral tribunal and the court

Arbitration law defines the nature and extent of the court powers in relation to the arbitral process. The nature of the relationship between the arbitral tribunal and the court is the cause of debate about

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the effectiveness of arbitration and its independence from the court. There are three stages of arbitral proceedings when powers exercised by the courts are necessary. Firstly, the parties' agreement to arbitrate cannot be enforced without a competent court authority. Secondly, courts provide necessary assistance to arbitrator during the proceedings whenever the conduct of arbitration depends on the use of measures which cannot be enforced by the arbitral tribunal itself. Thirdly, courts give binding effect to arbitral awards.⁹

The purpose of this paper is to examine the effectiveness of arbitration, in comparison with the litigation as a mechanism of resolving disputes in domestic and foreign elements in the United Kingdom, the United States and Singapore. The analysis will be limited to investigation of the various stages of judicial supervision on commercial arbitration under the basic principle of the UNCITRAL Model Law and the statutory frameworks and judicial practices of those countries. The analysis is chiefly concerned with the relationship between the arbitral tribunal and the court, in order to highlight the role of the court in the whole of arbitral process which includes the enforcement of agreement to arbitrate by staying the proceedings, appointment and removal of arbitrator, ordering interim measures, recognition and enforcement of arbitral awards and finally, judicial review of arbitral awards.

II. Legal Frameworks of Arbitration in the United Kingdom, the United States and Singapore

The essentials of arbitration dispute settlement mechanism have emerged over the years from practice and the enactment of modern arbitration legislations, international treaties and institutional rules.

2.1 The Arbitration Act 1996 of the United Kingdom

Arbitration in the United Kingdom is presently governed by the Arbitration Act, 1996 (hereinafter as "the 1996 Act"). The 1996 Act has significantly reformed the former arbitration law and consolidated changes made by recent judicial decisions in the United Kingdom. The modern legislative trend in international arbitration law is embodied in the UNCITRAL Model Law on International Commercial Arbitration. Although the representatives of the U.K. participated in the drafting of the Model Law, the United Kingdom did not adopt the documents. The 1996 Act largely replaces the previous piecemeal legislation that governed arbitration in the United Kingdom, namely the Arbitration Acts of 1950, 1975 and 1979.¹⁰

The principal legislation applicable to arbitrations in the U.K. is the Arbitration Act 1950, which, for the most part, is still the governing statute. The 1975 Act gives effect in the United Kingdom to the New York Convention of 1958. Modern international arbitration law has, however, moved on from some of the features of the 1979 Act. Most significant reforms introduced by the 1979 Act were the abolition of the stated case procedure for judicial review of arbitration and granting the parties to an international contract a limited right to exclude review on the merits of the award. The 1979 Act established a relatively effective regime for international arbitration in the U.K. and it plays a key role in increasing the effectiveness of the arbitral procedure by limiting the right of appeal, thus ensuring the finality of the majority of arbitration awards. A remarkable feature of the 1996 Act is the abandonment of the historical distinction between the domestic and international arbitrations. However, there remains a separate regime for the recognition and enforcement of foreign awards.¹¹

The 1996 Act consists of four major parts. Part I contains the general principles and deals with the arbitration agreement, the arbitral tribunal and its powers, conduct of arbitral proceedings and the powers of the court.¹² Part II has special provisions for Consumer Arbitration Agreements and Small Claims Arbitration.¹³ Part III ensures the recognition and enforcement of foreign awards.¹⁴ Part IV contains supplementary provisions.¹⁵

The 1996 Act is based on three procedural principles. The first one is the object of arbitration, which is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. The second is that it grants to the autonomy of the parties to arbitration. The third is the court intervention which reflects the trend towards less court intervention in international commercial arbitration. The first two principles appear to especially assist the arbitrators on the grounds of due process, equity and public policy.¹⁶ The 1996 Act also includes a number of mandatory provisions which may not be waived or amended by the parties and a number of non-mandatory default rules.¹⁷

In the United Kingdom, the courts have traditionally had rather strong supervisory powers with regard to arbitration. The 1996 Act contains a complete enumeration of the courts' intervention powers. As a result, the parties and their advisers are able to determine the specific limits to the powers of the British courts. They will not have to fear an unexpected intervention from the court based on some principles derived from the common law. Furthermore, the 1996 Act reflects the Model Law on this point, which makes a very similar provision in Article 5. Although the 1996 Act was intended to limit judicial interference, British courts have retained some authority to supervise and assist arbitral procedures.¹⁸

2.2 The Federal Arbitration Act of the United States

In the United States, arbitration as a dispute settlement mechanism was viewed by the court in the early times. The origins of arbitration can be found in British common law and some of the same shortcomings that existed in the United Kingdom were transplanted to the United States. The New York State Arbitration Act was enacted as a modern arbitration law in 1920. In 1925, the New York State arbitration law of 1920 was followed and the Federal Arbitration Act (hereinafter as “the FAA”) was passed. The primary aim of the enactment of the FAA 1925 was to overcome courts’ refusal to enforce agreements to arbitrate. The legislative history of this Act focuses on two benefits derived from it: the enforceability of arbitration agreements and desirability of arbitration.¹⁹

The current FAA consists of three chapters. Chapter 1 enacted in 1925, commonly referred to as the domestic FAA, establishes the rules for recognizing and enforcing arbitration agreements and awards in both domestic and international context. And then, the United States ratified the New York Convention 1958 and implemented the legislation as the Chapter II of the FAA in 1970. Furthermore, Chapter 3 enacted in 1990, incorporated and implemented the Inter-American Convention on International Commercial Arbitration (“the Panama Convention”).²⁰

The law in the United States does not clearly differentiate between international and domestic arbitration. Arbitration disputes involving foreign elements may be heard in both state and federal courts. Until the U.S. Congress enacted the FAA in 1925, state laws were applicable to all arbitration cases in both federal and state courts. In addition, arbitration is regulated at both federal and state levels, and both state laws and federal statutes may concurrently apply to arbitration cases. The FAA created federal substantive and procedural laws to be enforced both in federal and state courts.²¹

2.3 The Arbitration Act Cap 10 and the International Arbitration Act Cap 143A of Singapore

The origin of Singapore statutory law on arbitration is the Arbitration Ordinance of 1809, which was replaced by the Arbitration Ordinance 1953. The Arbitration Ordinance 1953 was renamed as the Arbitration Act 1953 (hereinafter as “the AA 1953”). The AA 1953 was the first Singapore statute and it was largely based on the U.K. Arbitration Act of 1950.²² The AA 1953 included the judicial power to:

- (1) revoke the arbitrators’ authority or retain arbitral proceedings on the ground of arbitrators’ impartiality,²³

- (2) order that the arbitration agreement cease to have effect where the dispute involved question of fraud,²⁴
- (3) remove the arbitrator for delay in entering on the reference or making the award and;²⁵
- (4) set aside, confirm, or very award on appeal on question of law.²⁶

There was no distinction between domestic and international arbitration until 1994. The International Arbitration Act 1994 (hereinafter as “the IAA 1994”) was enacted primarily to govern international arbitrations in Singapore and relied on the framework of the UNCITRAL Model Law and came into force on 27 January 1995. Domestic Arbitration, however, remained untouched by the Model Law, and still subject to the AA 1953. The AA 1953 was replaced by the Arbitration Act 2001(hereinafter as “the AA”), which based on the framework of the Model Law and the provisions of the 1996 Act of the U.K. Then, the IAA 1994 was replaced by the International Arbitration Act 2001 (hereinafter as “the IAA”). The IAA 2001 was amended recently to achieve consistency with the Arbitration Act and also in response to recent case law. These amendments came into effect on 1 November 2001.²⁷

The distinction between the two legal regimes primarily lies in the degree of court intervention in the arbitral process and respect for party autonomy. The domestic regime almost always provides for a greater degree of court supervision than the international regime. The operation of the dual-track arbitration regime in Singapore allows the parties the facility of opting into or out of a particular regime as agreed by them. If the parties to an international arbitration who wish for a greater degree of court supervision, they could “opt out” of the IAA by stipulating in the arbitration agreement that the AA applies. Similarly, where the parties in domestic arbitration wish to have less court supervision over the arbitration, they could “opt-in” to the IAA regime.²⁸ The parties may opt-out of the international regime either before or after the dispute has arisen. However, the legislation is silent as to the timing of an election to adopt the international regime.²⁹

III. Recent Trends of Judicial Supervision on Commercial Arbitration under the 1996 Act of the United Kingdom, the FAA of the United States and, the AA and the IAA of Singapore

The modern arbitration statutes provide for the fundamental precepts which are party autonomy, judicial assistance and cooperation, the requirement of basic procedural fairness, and the need for finality

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and arbitral autonomy. The focus of arbitration law is the relationship between the court and the arbitral process. The modern arbitration laws are intended to extend the powers of arbitral tribunal and reduce the courts' involvement in the arbitral process.³⁰

3.1 The conduct of arbitral proceedings

An arbitral tribunal derives its authority solely from the parties' agreement to arbitrate. The obligations of the tribunal are to act fairly and impartially between the parties and to adopt procedures suitable to the circumstances of the particular cases. In modern arbitral proceedings, the principle of party autonomy is predominant. Under this principle, the parties are free to agree on the number of arbitrators, comprising the arbitral tribunal, the appointment procedure of arbitrators, the place of arbitration, the power of arbitral tribunal and the applicable law in the dispute.³¹

There are other principles which are separability and *Kompetenz-Kompetenz*.³² Under the separability principle, the main contract is distinct and separated from the arbitration agreement while the principle of arbitrability simply means that not all disputes can be resolved through arbitration.³³ Under the doctrine of *Kompetenz-Kompetenz*, arbitral tribunal has the power to decide its own jurisdiction. It is based on the autonomy of the arbitration clause. Such power is necessary, particularly in international arbitrations, to prevent recalcitrant parties from evading their arbitral obligations by merely asserting that the contract, which contains the arbitration clause, is invalid.³⁴ The Model Law, the 1996 Act, and the AA and the IAA provide that arbitral tribunal has the power to decide own jurisdiction.³⁵

3.2 The courts' role in the arbitral process

There are two major points of the court's role in arbitral process: judicial supervision of the arbitral process and judicial assistance to the arbitral process. Although arbitration is a process outside of the court structure, it needs strong legislation and court assistance for its effective functioning. There are various situations where the arbitrators require the supervision and assistance of the court in the arbitral proceedings. Arbitration agreements and arbitral awards are not fundamentally enforceable by the arbitrator. The courts are bound to enforce arbitration agreement by compelling arbitration, staying proceedings and affirming arbitral awards. Furthermore, the courts have various powers in relation to the conduct of proceedings. The national laws of some countries allow arbitrators to take various actions in response to default by a party, in particular, to appoint and remove the arbitrator, to proceed on an *ex parte* basis, and to make orders for the

interim protection of property. Arbitrators also have some power to give directions and to make orders with regard to the conduct of proceedings, for example, orders for a party to discover documents. However, they generally lack the power to enforce such orders. In some circumstances, they may be able to enlist the coercive powers of the courts to fulfil their objectives. The arbitrators do not have the coercive powers for enforcing their orders. Often, arbitrators are not able to act swiftly, particularly for the purpose of granting interim reliefs. And then, the arbitrators have no jurisdiction over third parties, even where third parties may be in possession of property or money which is the subject matters of the dispute. In these circumstances, therefore, the supervision of the courts becomes necessary.³⁶

3.2.1 Enforcement of arbitration agreement

The arbitration agreement is the principal basis of international and domestic commercial arbitration. The agreement means the consents of the parties to refer the matter to arbitration. In the field of national and international arbitration there are two types of arbitration agreements. The first and common type is the agreement that takes the form of an arbitration clause. The second type is the agreement to submit existing disputes to arbitration. An arbitration clause deals with disputes which may arise in the future and is not usually drafted in detail. A submission agreement, by contrast, deals with an existing dispute and may include all possible details.³⁷ Under the Model Law,³⁸ the 1996 Act,³⁹ the FAA⁴⁰ and, the AA⁴¹ and the IAA,⁴² arbitration is possible for both existing and future disputes.

Arbitration agreements and arbitral awards are not fundamentally enforceable by the arbitrator. Arbitration is effective as a dispute resolution process only because there is a comprehensive legal system of bilateral and multilateral conventions, treaties, national laws and arbitration rules which supports it.⁴³ National courts are bound to enforce arbitration agreement by compelling arbitration, staying proceedings and affirming arbitral awards. Where a party commences legal proceedings in breach of the agreement to arbitrate, the court's supervision may become necessary because it challenges the existence or validity of the arbitration agreement. Agreement to arbitrate need not be embodied in any single writing or document. The arbitrability of a dispute is determined after a court is satisfied that an arbitration agreement is valid. Thus, the court will determine that a valid arbitration agreement exists between the parties. Furthermore, if one party sues in court with respect to dispute covered by an agreement to arbitrate, the court must, on the request of the party, stay the court action.⁴⁴

The 1996 Act does not impose formal requirements which have to be satisfied for a valid

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arbitration agreement. The provisions of the 1996 Act apply only if the arbitration agreement is in writing.⁴⁵ An authorized recording by a third party of an oral agreement is sufficient, but only if authorized by both parties. Where proceedings are brought in the U.K. in breach of the terms of an arbitration agreement, the proceedings must be stayed if certain conditions⁴⁶ are satisfied. This stay is mandatory.⁴⁷

The FAA provides that agreement in writing sufficient for enforcement as an agreement to arbitrate disputes need not be signed or subscribed by parties.⁴⁸ An international agreement that is not enforceable under the New York and the Inter-American Conventions because of the absence of a signed agreement might still be enforceable under the FAA or the state laws.⁴⁹ The FAA contains no restrictions on arbitrating commercial disputes; to the contrary, it provides that agreement to arbitrate “shall be valid, irrevocable, and enforceable”. The FAA expressly authorises a party aggrieved by another party's refusal to abide by an arbitration agreement to bring an action in court and to obtain a court order compelling arbitration.⁵⁰

The AA and the IAA require that the arbitration agreement should be in writing and contained in a document signed by the parties or in an exchange of letters, telex, fax, or other means of communication which records the agreement.⁵¹ In the IAA of Singapore, there are no specific words or form required to constitute an arbitration agreement, but the intention to arbitrate must be clear and unequivocal. Where the proceedings are brought to the courts in Singapore in breach of the matter of the arbitration agreement, the courts must on the application of the party stay the proceedings. A stay of proceedings under the IAA is mandatory.⁵²

3.2.2 Powers of court to appoint and remove arbitrator

All arbitration statutes provide for the procedures for the appointment of arbitrators, by an arbitral institution or another appointing authority or the court, if the parties themselves fail to make the appointment.

Under the Section 16 of the 1996 Act, the parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire. The party in default can apply to the court to set aside an appointment under Section 17 and although this section does not set out the circumstances in which the court will exercise its discretion. If the arbitration agreement provides for the appointment of a single arbitrator, and one party defaults, a court application is probably necessary under Section 18.⁵³ There are two relevant provisions of the 1996 Act relating to the revocation of an arbitrator. Firstly, in the event of a failure of the procedure for the appointment of the tribunal, and absent

the contrary agreement of the parties, any party can apply to the court to exercise powers including the powers to give directions as to appointments, to revoke appointments or to make any necessary appointments.⁵⁴ Secondly, and more importantly, Section 24 sets out certain grounds on which an arbitrator may be removed by the court. The grounds for removal of arbitrator are the lack of impartiality, the lack of qualification, incapability of conducting the proceedings and substantial injustice. If the arbitrator is removed, the court can decide under section 24 (4) that the arbitrator shall not be entitled to any fees.⁵⁵

The FAA provides that if the agreement establishes a method for appointing arbitrators, that method shall be followed, but if it is silent, or any party fails to follow the agreement, the court will appoint the arbitrators by the application of the other party.⁵⁶ The FAA contains no further provisions specifying the procedures that the court must follow in appointing the arbitrators.⁵⁷ There FAA contains no provision for court intervention to remove arbitrators for interest or bias in the arbitration process.⁵⁸

There is no provision in the AA and the IAA of Singapore which enables the court to intervene in the selection of arbitrators. Under both the AA and the IAA, the statutory default appointing authority is the Chairman of the Singapore International Arbitration Centre (SIAC) or such person as the Chief Justice may appoint. Both the AA and the IAA of Singapore provide for the challenges and removal of arbitrators. Under the AA, a party can apply to court to remove an arbitrator who fails to conduct the proceedings properly or with reasonable dispatch.⁵⁹ Section 16(1) of the AA provides for specific grounds under which a party may request the court to remove an arbitrator.⁶⁰ Section 16 is adopted from the Section 24 of the 1996 Act. Section 16(2) of the AA further provides that the court will not exercise its power of removal unless parties have exhausted any available recourse to any institution or person vested by the parties with power to remove an arbitrator. The arbitrator is entitled to appear at the removal hearing and to be heard before the court makes any order and there is no appeal against any order by the court.

3.2.3 Power of court to order interim measures

The purpose of court-imposed interim reliefs is to make the ultimate decision of the arbitral tribunal more effective.⁶¹ Such measures are generally available under national court systems to support their adjudicative process and in some states also aid the arbitral process in such a manner. As such, they fall into three general categories based on their purposes which are to (1) facilitate the conduct of the arbitral proceeding, (2) avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (3) facilitate later enforcement of the award.⁶² These measures which facilitate the

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conduct of the arbitral proceeding include the taking of evidence, requiring attendance of witnesses, requiring oral and documentary discovery, determining the form of the hearing, inspection of goods, property and documents, securing the evidence of a witness, consolidating disputes, and securing confidentiality.⁶³

(a) Interim measures under the 1996 Act

Under the 1996 Act, one of the most important aspects of the court's support of the arbitral process is the power to grant provisional measures. The 1996 Act contains that the arbitral tribunal and the courts have the power to order provisional relief. Section 39 of the 1996 Act provides that the parties are free to agree that the tribunal should have the power to order on a provisional basis any relief which it would have power to grant a final award. There are various powers which the court may exercise unless otherwise agreed by the parties under the Section 44 of the 1996 Act.⁶⁴ These powers are the same as the powers of the court enjoys in legal proceedings. However, it is not intended that powers should be taken out of the hands of the arbitrator and exercised by the court. Accordingly, the court's powers to order interim measures under Section 44 are limited by the principles that the court shall act only if or to the extent that the tribunal has no power or is unable for the time being to act effectively.⁶⁵

There are three provisions of interim measures which confer upon the court powers exercisable in support of arbitral proceedings, including the preservation of evidence, the inspection of property, the granting of an interim injunction and appointment of a receiver. These three provisions are as follow:

- (i) if the case is one of urgency, the court may on the application of a party or proposed party to the arbitral proceedings make such order as it thinks necessary for the purpose of preserving evidence or assets;⁶⁶
- (ii) if the case is not one of urgency, the court will only act on the application of a party to the arbitral proceedings made with the permission of the tribunal or with the agreement in writing of the other parties;⁶⁷ and
- (iii) in any case, the court will only act if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.⁶⁸

(b) Interim measures under the FAA

The FAA is silent on the powers of the court and the arbitral tribunal to order preliminary relief

in arbitration. However, the courts have authority to grant injunctive relief pending arbitration. The court's power to grant interim reliefs in arbitration is justified as being an incident of the court's power to enforce the agreement to arbitrate.⁶⁹ The grant of interim relief by a court is entirely consistent with the desire of the parties to make recovery upon the arbitral award effective, as this is the main objective of interim relief.⁷⁰ The preliminary relief will sometimes be necessary to maintain the status quo in order that the arbitral panel, once constituted, may afford meaningful relief.⁷¹ There is a shared power between the courts and arbitral tribunal over security issues. Section 7 of the FAA grants arbitrators the power to subpoena⁷² witnesses within the jurisdiction either to appear to give evidence or to disclose relevant evidence in their possession. The arbitrators generally lack in the power to issue provisional relief in aid of a domestic arbitration unless the parties have expressly authorized them to do so.⁷³

(c) Interim measures under the AA and the IAA

The IAA provides that the arbitral tribunal has the powers to make order for the taking evidence by affidavit, the preservation, interim custody or sale of any property which is the subject-matter of the dispute, the securing the amount in dispute and an interim injunction or any other interim measure (such as appointment of a receiver).⁷⁴ Under the AA and the IAA, the arbitral tribunal also has the power to order security for costs of the arbitration. The court may also exercise the similar powers of the arbitral tribunal to order preliminary or interim relief in support of arbitral proceedings.⁷⁵ The tribunal may issue such orders for preliminary or interim relief without having to seek the court's assistance to do so. Parties are at liberty either to apply to the tribunal or direct to the court for interim measures.⁷⁶ If a party refuses to comply with an order or direction of the tribunal, application may be made to a court to enforce the order or direction in the same manner as a judgment.⁷⁷ In Singapore, the powers of the tribunal to order interim order or directions are concurrently exercised by the High Court.⁷⁸

IV. Enforcement of Arbitral Awards

The arbitral award does not require either judicial enforcement or confirmation when the parties are voluntarily complied with. Where a party refuses to abide by an award passed by the arbitrators, the recognition and enforcement is necessary in relevant national court.⁷⁹ Most national arbitration statutes establish two basic legal avenues: the winner may wish to have the award confirmed by the court and the

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loser may also attack the award either by a motion to set aside, vacate, or annul the award.⁸⁰

4.1 International Conventions

The enforcement of arbitral award in foreign countries is assured by multilateral conventions or bilateral treaties. There are two main International Conventions governing international arbitration and the enforcement of foreign awards. They are (i) the Protocol on Arbitration Clauses 1923 and Convention on the Execution of Foreign Arbitral Awards, 1927 (hereinafter as “the Geneva Protocol and Convention”) both signed in Geneva; and (ii) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 signed in New York (hereinafter as “the New York Convention”).

The New York Convention is the most important and the start of organized development process and it could facilitate the recognition and enforcement of international commercial arbitration agreements and awards in all contracting states. Although the Convention generally provides that arbitral awards made in any foreign state are to be recognized and enforced, it specifically allows ratification with reservations limiting recognition and enforcement to awards made in the territory of another contracting state the “reciprocity” reservation, and awards considered “commercial” under the national law of the contracting state.⁸¹

Article V (1) of the New York Convention identifies five grounds on which recognition and enforcement of a Convention award may be refused at the request of the party against whom it is invoked. According to Article V (1), if the opposing party can prove (a) the incapacity of the parties or invalidity of the arbitration agreement; (b) improper notice or other lack of due process; (c) an award beyond the scope of the agreement to arbitrate; (d) improper arbitral procedure or composition of the arbitral board; or (e) that the award has been set aside or suspended or is otherwise not binding, then recognition or enforcement may be refused. In addition, Article V (2) of the Convention provides that recognition or enforcement may be refused if the subject matter of the dispute is not capable of settlement by arbitration under the enforcing state’s laws or if recognition or enforcement would be contrary to the public policy of that state.⁸²

4.2 Enforcement of arbitral awards under the 1996 Act

The United Kingdom signed and ratified the Geneva Protocol and Convention and the New York Convention. In the United Kingdom, the Geneva Protocol and Convention was implemented in the part II of the 1950 Act and these awards are known as foreign awards.⁸³ Part II of the 1950 Act, setting out the enforcement regime applicable to the Geneva Convention, remains in force only for those Geneva

Convention countries which have not acceded to the New York Convention. The New York Convention was implemented by Part III of the 1996 Act (which replaced equivalent provisions of the 1975 Act).⁸⁴

The 1996 Act provides for the enforcement of foreign arbitral awards with the leave of the court. Where leave is obtained, the arbitration award may be in the same manner as a judgment or order of the court and where leave is given, judgment may be entered in terms of the awards.⁸⁵ The procedures for enforcing foreign awards are the same as those for enforcing domestic awards made by arbitrators of the United Kingdom, either by a cause of action on the award or by an application under section 66 of the 1996 Act.⁸⁶ An award must be in writing signed by all of the arbitrators and the reason must be contained in an award unless it is an agreed award.⁸⁷ Furthermore, an award must state the date and seat of arbitration when the award is made.⁸⁸ The enforcement of an award in the United Kingdom under the New York Convention needs only supply of the authenticated original award or a duly certified copy of it, the original or a duly certified copy of the arbitration agreement, and official or sworn translations.⁸⁹

4.3 Enforcement of arbitral awards under the FAA

The recognition and enforcement of arbitral awards in the United States is primarily governed by the federal law. Although United States did not ratify the Geneva Protocol and Convention, it ratified the New York Convention of 1958 in 1970. At the same time the U.S. Arbitration Act was amended to add a new chapter, namely, Chapter II, to implement the New York Convention.⁹⁰

The New York Convention is implemented in the United States by federal statute, 9 U.S.C. Sections 201-208. The provisions of the New York Convention are largely similar to the provisions of the FAA applicable to all arbitrations. Article (1) of the Convention provides that it applies to awards made in the territory of another state and awards not considered domestic in the enforcing states. The net result is that the Convention applies to any award rendered outside the United States. The importance of a distinction between the domestic and foreign awards, in the United States, at least, is questionable.⁹¹ An award made in United States in arbitration between foreign parties is enforceable under section 9⁹² and, if not a domestic concern, should be enforceable under section 207⁹³ and will undoubtedly be enforceable under section 9 as well.⁹⁴

The FAA contains no provisions concerning a time limit for rendering the award. Arbitrators in the US domestic arbitration do not write opinions stating the reasons for their awards.⁹⁵ The FAA requires that the award must be in writing. On the other hand, the FAA has no specific provision requiring that an award is

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signed.⁹⁶

The specific procedures and standards for enforcing an award rendered in the United States depends upon whether the award is a non-domestic award (an award arising from an arbitration involving a foreign party or some other significant connection with a foreign country) or a domestic award. A non-domestic award can be enforced in federal court under the New York Convention within three years of issuance.⁹⁷ Domestic awards can only be enforced within one year of issuance and must be enforced in state court unless there is an independent basis for federal jurisdiction.⁹⁸ The enforcement of an award in the United States under the New York Convention needs only supply of the authenticated original award or a certified copy of thereof, the original or certified copy of the arbitration agreement, and official or sworn translations, if appropriate, within three years after award.⁹⁹

4.4 Enforcement of arbitral award under the AA and the IAA

The AA and the IAA provide for the enforcement of domestic arbitral awards and foreign arbitral awards.¹⁰⁰ Singapore signed and ratified the New York Convention in 1986. The International Arbitration Act adopts and re-enacts the New York Convention in its Second Schedule.¹⁰¹

Both the domestic AA and the IAA follow the UNCITRAL Model Law as regards the legal requirements of an arbitral award. The award must be in writing and signed by all or the majority of the arbitrators, provided that the reason for any omitted signature of any arbitrator is stated.¹⁰² The award must state the reasons upon which it is based, unless the parties have agreed that no grounds are to be stated, or if the award is a consent award.¹⁰³ The date of the award and place of arbitration must be stated in the award, which is deemed to have been made at the place of arbitration.¹⁰⁴ Arbitration awards made in Singapore under the AA and the IAA may, by leave of the High Court, be enforced in the same manner as a judgment or order by the court and judgment may be entered in terms of the awards.¹⁰⁵

The procedure for enforcement of an arbitral award under the AA is set out in the rules of court. Application is made to the High Court by an originating summons, which must be supported by an affidavit exhibiting the arbitration agreement and the original award or, in either case, a copy of it.¹⁰⁶ The AA does not set out when an application for leave to enforce an award should be granted or refused, or when the award should be set aside or remitted to the tribunal.¹⁰⁷

There are two regimes of the enforcement of foreign arbitral awards under the IAA, namely one for arbitral awards made pursuant to an international arbitration conducted in Singapore, and the other for

foreign arbitral awards made in the territory of a Convention country under the New York Convention.¹⁰⁸ The second regime governing the enforcement of foreign arbitral awards made in a New York Convention country other than Singapore is set out in Part III of the IAA. A foreign award in any of the Convention countries of the New York Convention may be enforced in Singapore either by action¹⁰⁹ or in the same manner as an award of an arbitrator made in Singapore. Such awards are also recognized as binding for all purposes upon the persons between whom they are 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.¹¹⁰ Application for leave to enforce a foreign award made in any of New Convention countries must be made within six years after the issuance of awards.¹¹¹

V. Judicial Review of Arbitral Awards

The arbitration statutes of some countries expressly authorize the parties to change the scope of judicial review that would normally be applied to determine the enforceability of an arbitration award.¹¹² In modern arbitration, judicial review of arbitration awards has been very limited, in order to avoid undermining the settlement of disputes efficiently and to avoid long and expensive litigation. Most modern arbitration laws provide for the grounds for vacating awards that are quite narrow.¹¹³

5.1 Judicial review of arbitral awards under the 1996 Act

The U.K. arbitration law has historically permitted judicial review of the merits of arbitral awards, both in the context of domestic and international arbitrations.¹¹⁴ The 1996 Act also provides for judicial review of the merits of an arbitrator's award. The 1996 Act has established a right of appeal against awards either with both of the parties or with the leave of the court. However, if one of the parties is satisfied with the award and will not consent to an appeal, the party wishing to appeal must persuade the court to grant leave for the appeal to be filed.¹¹⁵ The right to appeal is subjected to exclusion by the agreement of the parties. Thus, the parties, in drafting their arbitration agreement, may determine whether the court will have the power to review the arbitral award. This provision implies the rights of the parties to exclude appeals in all instances.¹¹⁶ The scope of this right to exclude is broader in cases of international arbitration than in those of domestic arbitration.¹¹⁷

Under the provision of the 1996 Act, an arbitral award can be reviewed by the court on three

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different grounds: jurisdiction of arbitral tribunal, serious irregularity and appeal on point of law.¹¹⁸ The doctrines of *Kompetenz-Kompetenz* and separability allow the tribunal to decide whether or not a valid arbitration agreement exists and whether or not it has substantive jurisdiction. Nevertheless, it appears from logic that this decision cannot be a final one. As a result, the power of the arbitrator to decide on his own jurisdiction is subject to challenge in the courts under Section 67 (1).

Another basis for an appeal of an arbitral award is "serious irregularity" as stated in Section 68. It means that when a substantial injustice has occurred during the arbitration, it is possible to have the award reviewed in the court. Section 68 (2) contains a comprehensive list of the matters that amount to a serious irregularity.¹¹⁹ Under Section 68 (2) of the 1996 Act, the arbitral tribunal must exercise the duty of rendering decisions not only on matters of procedure and evidence but also in respect of the power that it has been given.¹²⁰ If matters do not fall within the Section 68 (2), an award cannot be challenged under Section 68.¹²¹ Section 33 of the 1996 Act reflects the common law duty on the tribunal to act in accordance with natural justice. Natural justice requires that each party should have an equal opportunity to present its case and the arbitral tribunal should act fairly and impartially in the conduct of proceedings.¹²² The court will view a breach of natural justice as a serious irregularity and grant an application under Section 68 (2) (a) of the 1996 Act where it causes the applicant substantial injustice.¹²³ The third ground for challenge of an award is appeal on a question of law arising out of the arbitration award. The aim of judicial review of arbitral award is to ensure that it is free of any error of law and that the tribunal applied all relevant rules of law. Under the 1996 Act, the right of appeal can be excluded by the agreement of the parties.¹²⁴

The grounds for setting aside of New York Convention award are provided for in Section 103 of the 1996 Act, which is largely based on the grounds contained in Article V of the Convention. In addition, Section 103 contains two further grounds for setting aside arbitral award: (1) award is contrary to public policy and (2) the subject matter of dispute is not arbitrable.¹²⁵

In the United Kingdom, the most effective method of challenge is to appeal to the court for varying or setting aside the award, or remitting it to the tribunal for reconsideration. The appellate system ensures a degree of judicial control over the decisions of arbitration tribunals, and an award that proves to be in clear violation of the law can be corrected in due course. The courts are generally reluctant to intervene in an arbitrator's decisions on procedure.¹²⁶

5.2 Judicial review of arbitral awards under the FAA

The United States has no statute to give the parties any autonomy for judicial review of arbitral awards. There is no indication anywhere in the provisions that the parties may alter the grounds on which the court can act. Under the FAA, a party cannot appeal an arbitration award to the court but can only request that a court set aside an award on the narrow grounds available. Several grounds to vacate and modify the awards are listed in Section 10 and 11.¹²⁷

The U.S. courts can only vacate the award on the grounds of fraud, partiality or misconduct or lack of fairness in arbitral process under Section 10 of the FAA.¹²⁸ The U.S. courts do not review arbitration awards for errors of fact or law.¹²⁹ There is considerable authority for the proposition that arbitral awards cannot be reviewed for errors of laws or evidence, unless the court finds that the award was in “manifest disregard of the law” or was inconsistent with some clear public policy.¹³⁰ Section 11 of the FAA establishes three grounds for modification or correction of an award.¹³¹ If the grounds are met, the court is authorized to “modify and correct the award” so as to effect the intent thereof and promote justice between the parties.¹³²

Then, the FAA also establishes that enforcement of an award may be refused only if the party resisting enforcement establishes one of the defenses set forth in Article V of the New York Convention. The grounds for refusing to enforce an award under the New York Convention are not identical to the grounds for vacating an award under Chapter 1 of the FAA which applies to domestic awards.¹³³

5.3 Judicial review of arbitral awards under the AA and the IAA

Appeals to a court against awards on the merits are permissible only in arbitrations under the domestic AA. Under Section 49(3) of the AA, a party may appeal to the court on a question of law arising out of an award with the agreement of all parties or with leave of the court. No prior agreement giving the right to appeal is required. However, the right of appeal can be excluded by the agreement of the parties.¹³⁴ There is no right of appeal on the merits from an award within the international regime of Singapore. Under the Section 48 of the AA, the awards may be set aside by the court. Grounds on which Singapore courts have refused enforcement or remitted or set aside the award include misconduct of the arbitrator or of arbitral proceedings, and the cases where the making of the award was uncertain, ambiguous or incomplete,¹³⁵ the award went beyond the terms of reference, or the subject matter of the arbitration and the award itself were tainted with illegality.¹³⁶

The aggrieved party's only option is to seek to have the court set aside the awards under the AA

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and the IAA. Certain limited and exclusive grounds for setting aside an award are set out in the IAA. Under Section 24 of the IAA, read together with Article 34 of the Model Law, the court may set aside an award on the same grounds as those set out in Section 48 of the AA. These additional grounds are that the award was induced or affected by fraud or corruption, or that a breach of the rules of the natural justice occurred in connection with the award by which the rights of any party have been prejudiced.¹³⁷ The court has no power to investigate the merits of the disputes or to review any decision of law or fact made by the tribunal under the IAA.¹³⁸

VI. The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985 and it was drafted by the world experts in the field of international commercial arbitration. The purpose of Model Law drafter is the unification and harmonization of international commercial arbitration.¹³⁹ The Model Law seeks to combine party autonomy in international arbitration with minimal judicial supervision in international arbitration as well as ensuring the independences of arbitral tribunal and fairness of procedure.¹⁴⁰ It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral awards and reflects a world wide consensus on the principles and important issues of international arbitration practices.¹⁴¹ It is acceptable to the states of all regions and the different legal or economic systems of the world. Many countries accepted the Model Law as a model legal framework for the fair and efficient settlement of disputes in international commercial relations and enacted as their national laws.¹⁴²

Court supervision is provided for at various stages of arbitral proceedings in Model Law. Article 6 allows states following their own judicial function to decide which court or other authority will act to the parties' autonomy in the appointment and challenge of arbitrator,¹⁴³ failure or impossibility of arbitrator,¹⁴⁴ determination of preliminary questions of arbitrators' jurisdiction¹⁴⁵ and setting aside of an awards.¹⁴⁶

The Model Law provides that an arbitration agreement shall be in writing, and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication.¹⁴⁷ It also establishes that when an action is brought before a court, the court will refer the parties to arbitrate whenever the requirements with respect to the validity of arbitration agreement are met.¹⁴⁸ The Model Law requires the courts in nations that have adopted that law as their national arbitration law to

enforce written agreements to arbitrate.¹⁴⁹ The Model Law does not include provisions authorising parties to bring lawsuits for orders to compel arbitration. This may mean that the courts have no powers under the Model Law to issue such orders.¹⁵⁰

Under Article 11 of the Model Law, the parties to an arbitration agreement are free to agree on how arbitrators are to be appointed. Typically, the arbitration rules agreed by the parties will specify how arbitrators are to be appointed, either by the parties or, to the extent the parties fail to make appointments, by an arbitral institution or other neutral appointing authority.¹⁵¹ If, however, the parties have failed to appoint arbitrators, and if any appointment procedure they have agreed have failed, then the courts are generally authorised by the national arbitration law to make the appointments.¹⁵² The courts are free to devise their own procedures for making appointments, and under Article 11(5) of the Model Law their decisions in this regard are not subject to appeal. The Model Law establishes that arbitrators may be challenged for the lack of independence or impartiality. Although many if not most arbitration statutes provide for the removal of arbitrators for interest or bias at an earlier stage of arbitration, the Model Law is silent on this point.¹⁵³

Then, in the provisions of the Model Law, there are some measures that may be ordered by an arbitral tribunal and others may be ordered only by the courts. Article 9¹⁵⁴ gives a party the right to seek for interim measures from court but does not expressly state whether or to what extent court measures are available. It sets out solely that the granting of the party-requested interim measure by the court is not incompatible with the arbitration agreement. Then, Article 17 of the Model Law¹⁵⁵ which empowers the arbitrators to order interim measures of protection at the request of a party, does not specify the type of measures which may be ordered. It also limits the provisional measures to those that are 'necessary' and that are 'concerning with the subject matter of disputes'. The Model Law requires national court to set an enforcement procedure, but it leaves the exact nature of this procedure to the laws of the jurisdiction where enforcement is sought.¹⁵⁶

Under Article 35 of the Model Law, an arbitral award is to be recognized by the adopting country and it must be enforced upon application to the competent court. Article 36 deals with the grounds on which a court can refuse the recognition and enforcement of an arbitral award. These grounds are similar to Article V of the New York Convention. Then, the Model Law sets out an exclusive list of grounds on arbitral awards, including various defects in arbitral process or scope and a finding by the court that the award contravenes the public policy.¹⁵⁷ The important point of Article 34 is the fact that a court may not review the award on the merits, which is not clearly expressed in the text.

VII. Conclusion

A growing number of trade, investment and commercial transactions are increasing and commercial discords arise among trading partners more than ever. As commercial arbitration is more preferred means of dispute resolution between the citizens, trading partners and governments, arbitration can indirectly render assistance and promotion of trade and investment in countries' economies. Thus, the states are updating or establishing dispute settlement mechanism in line with modern international arbitration trend. Many countries have enacted their arbitration laws based on the UNCITRAL Model Law and more and more countries are to follow. There are, however, some considerable problems which the Model Law does not deal with in recent trend of international commercial arbitration.

According to the Model Law and all three countries' arbitration laws targeted in this paper, courts play the fundamental role in the whole arbitral process. There are new features in international commercial arbitration, such as party autonomy, power of arbitral tribunal to order interim measures of protection and parties' agreement to appeal or review of the arbitral awards. The Model Law, the 1996 Act and, the AA and the IAA establish that the principle of party autonomy is respected and the arbitral tribunal has the authority of separability and *Kompetenz-Kompetenz*.

The courts of the United Kingdom and the United States are bound to enforce arbitration agreement by compelling arbitration and staying court proceedings. The Model Law and the IAA do not include the provision authorizing parties to bring lawsuits for order to compel arbitration. While the Model Law, the 1996 Act and the FAA give the court the power to appoint arbitrators and umpire in default appointing procedure, in Singapore, the statutory default appointing authority is the Chairman of the Singapore International Arbitration Center. The 1996 Act and the AA recognize the removal of arbitrator on the grounds of the lack of impartiality, and qualification, incapacity of conducting the proceedings and substantial in justice. The FAA, on the other hand, is silent on the removal of arbitrator for bias or interest. The Model Law only provides for the grounds of challenge for lack of independence or impartiality.

Furthermore, the Model Law and the arbitration laws of the United Kingdom and Singapore also provide the court and arbitral tribunal with the power to order interim measures on the request of the parties. There is no provision of the powers of the court and the arbitral tribunal to order interim order under the FAA. Unlike the 1996 Act and the IAA, the Model Law limits the power of arbitral tribunal and the court to

order such measures and it does not contain the exact nature of these measures, either. Accordingly, such measures are not generally enforceable by the national courts. Thus, a modern legislative trend can be seen in revised arbitration laws to extend some powers of arbitral tribunal and to give the powers of the courts to assist and supervise the arbitral proceedings.

The Model Law and all arbitration statutes referred to in this paper also establish that the vacating award will generally be granted only when there is a lack of fairness in the arbitral process, a problem with arbitrator bias or some evidence of fraud or corruption. Unlike the Model Law, the FAA and the IAA, the 1996 Act provides the judicial review of the arbitral award on the ground of error of law by the agreement of the parties. Then, appeal can be excluded by the parties' agreement under the 1996 Act. Although the provision of the FAA does not contain the judicial review on the merits of the award, some U.S. courts in practice permit the parties' agreement to expand judicial review of arbitral awards. Among the three countries' statutes and the provisions of the Model Law, the supervisory role of the U.K. courts over arbitration has been the most extensive, and the most detailed as well.

Arbitration is not autonomous and free standing mechanism with commercial disputes. The lack of the arbitral tribunal's enforcement mechanism and the absent of the appeal process are disadvantages of arbitration, and thus, the courts retain significant power to supervise the arbitral process and, in appropriate circumstances, to supervise in order to enhance the efficiency, effectiveness and fairness of the arbitral process. Based on the analysis of the countries' legislation, it can be said that the states make their arbitration laws in order to promote the arbitral proceedings effectively and to prevent consideration over the interests of the parties.

Endnotes

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- 24 Section 12(2) of the AA 1953.
- 25 Section 18(1) of the AA 1953.
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- 29 Michael Polkinghorne Darren Fitzgerald, "Arbitration in Southeast Asia: Hong Kong, Singapore and Thailand compared", *Journal of International Arbitration*, Vol.18 No.1, p.104, 2001.
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- 31 Thomas Carbonneau, "A Comment on the 1996 United Kingdom Arbitration Act", 22 Tul. Mar. L.J. 131, (1997), www.lexis.com/, accessed on 23.7.2007.
- 32 *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.
- 33 Paul Obo Idonuigie, "Relationship between Arbitral Tribunal and Court Proceedings in Nigeria", *Journal of International Arbitration*, Vol.1, No.19, p.443, 2002.
- 34 Mahir Jalili, "*Kompetenz- Kompetenz-: Recent U.S. and U.K. Developments*", *Journal of International Arbitration*, Vol.13 No.4, p.167, 1996.
- 35 Article 16(1) of the Model Law, Section 30 of the 1996 Act, Section 21 of the AA and Section 16 (1) of Model Law, the IAA.
- 36 Lira Goswami, *supra*, at p.111.
- 37 *Ibid*, at p.112.
- 38 Article 7 of the Model Law.
- 39 Section 6 of the 1996 Act.
- 40 Section 2 of the FAA.
- 41 Section 4(1) of the AA.
- 42 Section 2 (1) (3) of the IAA.
- 43 Gray B.Born, *supra*, at p.30.
- 44 Georgios Zekos, *supra*, at 99-100.
- 45 Section 5 (2) of the 1996 Act.
- 46 See Section 9 of the 1996 Act, These conditions are as follows: firstly, there must be an arbitration agreement between the parties; secondly, the arbitration agreement must be within the scope of the legislation; thirdly, there must be a dispute falling within the scope of the arbitration agreement; fourthly, the defendant must apply for a stay at the appropriate time; and fifthly, the arbitration agreement must not be null and void, inoperative or incapable of being performed.
- 47 Jonathan Hill, *supra*, at pp.630-631.
- 48 Section 2 of the FAA.
- 49 Howard M. Holtzmann & Donale Francis Donovan, *supra*.
- 50 Section 4 and Section 206 of the FAA.
- 51 Section 4 of the AA and Section 1(3) of the IAA.
- 52 Section 6 of the IAA.
- 53 Under Section 18 (1) of the 1996 Act, the parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.
- 54 Under Section 18(2) of the 1996 Act, if or to the extent that there is no such agreement may (upon notice to the other parties) apply to the court to exercise its power under this section. (3) Those powers are- (a) to give directions as to the making of any necessary appointments; (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made; (d) to make any necessary appointments itself. (4) An appointment made by the court under this section has effect as if made with the agreement of the parties. (5) The leave of the court is required

- for any appeal from a decision of the court under this section.
- 55 David Fraser, "English Arbitration Act 1996: Arbitration of International Commercial Disputes under English Law", 8 *Am. Rev. Int'l Arb.* 1, (1997), www.lexis.com/, accessed on 2.8 2007.
- 56 Section 5 of the FAA.
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- 58 Gray B. Born, *supra*, at p.649.
- 59 Lovells Lee & Lee, *supra*.
- 60 Section 16(1) of the AA provides the specific grounds under which a part may request the court to remove an arbitrator, including where: (a) the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; or (b) the arbitrator refuses or fails properly to conduct the proceedings or to use reasonable despatch to proceed with the reference and making the award, and this cause 'substantial injustice'.
- 61 Lira Goswami, *supra*, at p.113.
- 62 *Ibid*, at p.112.
- 63 Section 44 of the 1996 Act.
- 64 Section 44 of the 1996 Act, (1) [U]nless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) those matters are (a) the taking evidence of the witness; (b) the preservation of evidence; (c) making order relating to property which is the subject of the proceedings or to which any question arises in the proceedings (i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering of that samples to be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorizing any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of any goods the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver.
- 65 Jonathan Hill, *supra*, at p.621.
- 66 Section 44 (3) of the 1996 Act.
- 67 Section 44 (4) of the 1996 Act.
- 68 Section 44 (5) of the 1996 Act.
- 69 *Albatross S.S. Co v. Manning Bros Inc.* F. Supp 459, 1951 U.S. Dist. LEXIS 2612, (The court held that it had the power to compel arbitration and grant stay preservation the status quo during the pendency of the arbitration, despite the absence of a pending suit or proceeding), <http://www.lexis.com/research/>, accessed on 3.10.2007.
- 70 *Murray Oil Product v. Mitsui & Co* 146 F.2d 381; 1944 U.S. App. LEXIS 4223 (2nd Cir. 1944), (The court held that an arbitration clause does not deprive a promise of the usual provisional remedies under the FAA.), www.lexis.com/research/, accessed on 3.10.2007.
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- 72 "Subpoena" is an order of the court for a witness to appear at a particular time and place to testify and/or produce documents in the control of the witness.
- 73 *Swift Industries, Inc. v. Botany Indus., Inc.*, 1972 U.S. App. LEXIS 7918 (3rd Cir. 1972), (The dispute arose out the Stock Exchange agreement between the Swift and Botany corporations involving the transfer of stock of two corporations that Swift held. The court set aside the award of bond to Botany Industries Corporation because the arbitrator's authority to award was not within the scope of the arbitration agreement, but the court affirmed the award of counsel fees because the award was not in disregard of the agreement.), www.lexis.com/research/, accessed on 3.10.2007.
- 74 Section 12 (1) of the IAA.
- 75 Section 12 (7) of the IAA, (These powers are: (a) security for costs; (b) discover of documents and interrogatories; (c) giving of evidence by affidavit; (d) the preservation, interim custody or sale of any property which is or forms part of the subject matter of the disputes; (e) sample to taken form, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute; (f) The preservation and interim custody of any evidence for the purposes of the proceedings; (g) securing the amount in dispute; (h) ensuring that any award which may be made in the proceedings is not rendered ineffectual by the dissipation of assets by a party; and (i) an interim injunction or any other interim measure.).
- 76 Section 12 (7) of the IAA.
- 77 Section 12 (5) of the IAA.
- 78 Section 12 (6) of the IAA.
- 79 Lira Goswami, *supra*, at p.111.
- 80 Markham Ball, *supra*, at p.81.
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- 84 Section 100 of the 1996 Act.
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- 86 Section 66 (4) of the 1996 Act.
- 87 Section 52 (3) (4) of the 1996 Act.
- 88 Section 52 (5) of the 1996 Act.
- 89 Section 102 of the 1996 Act.
- 90 Section 201- 208 of the FAA.
- 91 James B. Hamlin, "Contractual Alteration of the Scope of Judicial Review: The US Experience", *Journal of International Arbitration*, Vol. 15, No.4, p.57, 1998.
- 92 If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Section 10 and 11 of this title.
- 93 Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.
- 94 Sections 9 and 207 of the FAA.
- 95 Howard M. Holtzmann & Donald Francis Donovan, *supra* at p.40.
- 96 *Ibid*, p.41.
- 97 *Ibid* p.48.
- 98 Sections 9 and 207 of the FAA.
- 99 Section 207 of the FAA.
- 100 Section 46 (1) of the AA and Section 19 of the IAA.
- 101 Section 27 (1), Part III of the IAA.
- 102 Section 38 (1) of the AA and, Article 31 (1) of the Model Law, first schedule of the IAA.
- 103 Section 38 (2) of the AA and, Article 31 (1) of the Model Law, first schedule of the IAA.
- 104 Lawrence Boo, *supra*.
- 105 Section 20 of the AA and Section 19 of the IAA.
- 106 Section 37 of the AA.
- 107 Section 38 of the AA.
- 108 Article 34 of the Model Law and Sections 19 and 24 of the IAA.
- 109 Alexander G Tsavlis & Sons Maritime Co v. Keppel Corp Ltd, Civil Appeal No 46 of 1994, Court of Appeal, (Where an action arises out of an award on a salvage award or a claim under a charterparty, it falls within the Admiralty jurisdiction of the High Court and an action in rem could be brought.), www.lexis.com/research/, accessed on 8.10.2007.
- 110 Section 29 of the IAA.
- 111 Section 30 of the IAA.
- 112 James B. Hamlin, *supra*, at 47.
- 113 Margret Moses, *supra*, at p.325.
- 114 Jonathan Hill, *supra*, at p.641.
- 115 Section 69 (2) of the 1996 Act.
- 116 Section 69(1) of the 1996 Act.
- 117 Okezie Chukwumerije, *supra*, at p.17.
- 118 Sections 67 and 68 of the 1996 Act, see also, Jonathan Hill, *supra*, at p.641.
- 119 Section 68 (2), (an award may be challenged if: the tribunal does not comply with its general duty under section 33; the tribunal exceeds its powers; the tribunal does not follow the procedure agreed upon by the parties; the tribunal does not deal with all issues put to it; the tribunal makes an ambiguous or uncertain award; the award is obtained by fraud or in a way contrary to public policy; the award does not meet the formal requirements; or an irregularity occurs in the conduct of the proceedings.)
- 120 Weldon Plant Ltd v. Commission for the New Towns, Queen Bench Division (Technology and Construction Court) (2000), (the court held that an error in the award that is unfair to one party is not enough to justify the court intervention.), www.lexis.com/research/, accessed on 8.10.2007.
- 121 Indian Oil Corp v. Coastal (Bermuda) Ltd, Queen's Bench Division (Commercial Court) (1990), (An award was remitted back to the arbitral tribunal to deal with an argument which had not been submitted to it in the pleadings or during the hearing.), www.lexis.com/research/, accessed on 8.10.2007.
- 122 Section 33 (1) (a) of the 1996 Act.
- 123 Warborough Investment Ltd v. S Robinson and Sons (Holdings) Ltd, Court of Appeal (2003), (The court had not set aside an award for a breach of the due process unless it caused the applicant substantial injustice.), www.lexis.com/research/, accessed on 8.10.2007.
- 124 Section 69 of the 1996 Act.
- 125 Section 103 (1), (2) of the 1996 Act.
- 126 Egmatra v. Marco Trading Corp, Queen Bench Division (Commercial Court) (1999), (The court held that the failure

- by the arbitral tribunal to permit the claimant to have the closing word at the substantive hearing was not a breach of Section 33 of the 1996 Act.), www.lexis.com/research/, accessed on 8.10.2007.
- 127 Georgios Zekos, *supra*, at pp.112-113.
- 128 Section 10 of the FAA states, review is only available when: the award was procured by corruption, fraud, or undue means; there was evidence partially or corruption in one of the arbitrators, or either of them; the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; and the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- 129 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jack Bobker, 1986 U.S. App. LEXIS 35123; (2d Cir. 1986), (The court held that arbitrator did not act in manifest disregard of law), www.lexis.com/research/, accessed on 8.10.2007.
- 130 Wedbush Morgan Securities Inc. v. Robert W. Baird & Co., U.S. Dist. LEXIS 10056, 2004, (“a mistake of law is not a ground on which to set aside an award”), www.lexis.com/research/, accessed on 8.10.2007.
- 131 (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not effect the merits of the controversy.
- 132 Hyle, JR. v. Doctor’s Associates, Inc., 1999 U.S. App. LEXIS 32549 (2nd Cir. 1999) (District court erred in making correction under FAA Sec.11, case remanded to arbitrators who retained limited jurisdiction to correct), www.lexis.com/research/, accessed on 6.10.2007.
- 133 Section 207 of the FAA.
- 134 Section 49 (2) of the AA.
- 135 Official Assignee v. Chartered Industries of Singapore Ltd (1978) Originating Motion No 59 of 1977, High Court, (The court set aside the award on the fact that arbitrator failed to decide all matters or issues referred to him), www.lexis.com/research/, accessed on 8.10.2007.
- 136 Section 48 of the AA.
- 137 Article 34 (3) (4) of the Model Law, First Schedule of the IAA.
- 138 Lawrence Boo, *supra*.
- 139 David Howell, Leigh Duthie & Mark Lim, “International Arbitration in Singapore- Opting out of the UNCITRAL Model Law”, *Journal of International Arbitration*, Vol. 19 No.1, p.39, 2002, www.kluwerarbitration.com, accessed on 6.3. 2007.
- 140 Vikram Raghavan, “Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on Some US Development”, *Journal of International Arbitration*” Vol. 15, No. 3, pp.123-124, 1998.
- 141 Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, www.uncitral.org, accessed on 3.6.2007.
- 142 David Howell, Leigh Duthie & Mark Lim, *supra*.
- 143 Article 11(3)(4), 13 (3) of the Model Law.
- 144 Article 14 of the Model Law.
- 145 Article 16(3) of the Model Law.
- 146 Article 34(2) of the Model Law.
- 147 Article 7 of the Model Law.
- 148 Article 8(1) of the Model Law.
- 149 Article 8 (2) of the Model Law.
- 150 Markham Ball, *supra*, at p.76.
- 151 Article 11 of the Model Law.
- 152 Article 6 of the Model Law.
- 153 Article 12 of the Model Law.
- 154 Article 9 of the Model Law states, [I]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
- 155 Article 17 of the Model Law states, [U]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.
- 156 Peter Binder, *supra*, at p.120.
- 157 Article 34 of the Model Law.

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