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Introduction to the KAAS

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For the academic development and institutional improvement of dispute settlement systems, the KAAS has held academic conferences and policy forums every year at home and abroad, in relation to arbitration. The theoretical and practical findings of such activities are shared through the quarterly magazine "Journal of Arbitration Studies".

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The Word is not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG

Ingeborg Schwenzer *
David Tebel **

Form requirements particularly for arbitration clauses are widely perceived as an obstacle for efficiently resolving disputes on an international level. The paper discusses the recent suggestion that the freedom of form principle under Art. 11 CISG extended to arbitration, forum selection, or choice of law clauses in international sales contracts and thus superseded any and all formal requirements in this regard. After analysing national and international form requirements with regard to said clauses, the authors elaborate that while dispute clauses are indeed encompassed by the CISG's scope of application, freedom of form under the CISG was neither intended to nor should it apply to dispute clauses. This result is further confirmed by the interplay of the CISG with other international conventions, first and foremost the 1958 New York Convention, as well as a careful analysis of the so called most-favourable-law-approach.

Key Words : CISG, Form Requirements, Writing Requirement, Freedom of Form, Arbitration Clauses, Choice of Forum Clauses, Forum Selection Clauses, Choice of Law Clauses, New York Convention, Most-Favourable-Law-Rule

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I. Introduction

Recently, it was stated by a renowned arbitrator that the requirement of an arbitration agreement in writing remains the biggest obstacle on the way to recognition of a foreign arbitral award.[1] In order to overcome this obstacle academics and practitioners have developed a wide array of approaches, one more creative than the other.[2] One of the more recent ideas is to override any and all international and domestic form requirements with regard to dispute resolution clauses by relying on the CISG, that – as most domestic legal system s[3] – lays down in its Art. 11 the principle of freedom of form.[4] In the

1) *Wolfgang Kühn,* Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche – Eine Betrachtung der deutschen Rechtsprechung, Zeitschrift für Schiedsverfahren 2009, 53, 55.

2) See e.g. *Zambia Steel v. James Clark,* [1986] 2 Lloyd's Rep. 225, 226 et seq. CA, where the court found that an oral agreement referring to a written document containing an arbitration clause was indeed a written agreement on said arbitration clause; comparably now s. 5(3) English Arbitration Act 1996: „Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing"; or *Sphere Drake Insurance PLC v. Marine Towing, Inc., et al.,* U.S. Ct. App. 5th Cir., 23.3.1994, 16 F.3d 666, where the court simply ignored the comma in Art. II(2) NYC and found that the signature requirement in said provision only referred to an arbitration agreement but not to an arbitration clause; such alleged unclarity is also perceived by C. *Ryan Reetz,* Recent developments concerning the "writing" requirement in international commercial arbitration: a perspective from the United States, 5 Spain Arbitration Review 2009, 29, 34. Cf. also *Richard Hill,* Note – 16 January 1995 – Supreme Court, 14 ASA-Bulletin (1996), 488, 492, who tries to circumvent the signature requirement of the NYC by purporting that exchanging a single document without the signatures of the parties constitutes an "exchange of letters" in the sense of Art. II(2) NYC if one party modifies the document and thereby creates a new document, accord *Christoph Reithmann/Dieter Martiny,* Internationales Vertragsrecht, 7th edition, Otto Schmidt (2010), para. 6680; see also the interpretation of the 1958 New York Convention in light of the 27 years younger 1985 UNCITRAL Model Law on Arbitration that is oftentimes advocated but questionable from a methodological point of view and probably solely result-oriented, see for this interpretation only *Reithmann/Martiny,* para. 6680.

3) See *Ingeborg Schwenzer/Pascal Hachem/Christopher Kee,* Global Sales and Contract Law, Oxford University Press (2012), para. 22.1.

4) In particular: Robert Koch, The CISG as the Law Applicable to Arbitration Agreements, in *Camilla B. Andersen/Ulrich G. Schroeter* (eds.), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmons & Hill Publishing (2008), 267–286; Pilar *Perales Viscasillas/David Ramos Muñoz,* CISG & Arbitration, in Andrea *Büchler/Markus Müller-Chen,* Private Law – national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag, Stämpfli (2011), 1355–1373; *Jeffrey Waincymer,* The CISG and International Commercial

following we will discuss possible areas of conflict with regard to this approach and present solutions giving due regard to said form requirements on the one hand and to the aims of the CISG on the other hand.

II. International and Domestic Form Requirements

Beyond any form requirements in relation to contracts in general and sales contracts in particular, form requirements can be found with regard to arbitration agreements, forum selection clauses and choice of law clauses. Similarly, problems may arise in the field of government procurement with regard to agents or representatives of public bodies whose power to validly bind the principal may be limited by a writing requirement.

1. Arbitration Agreements

Only a few select jurisdictions, such as France,[5] Sweden,[6] New Zealand[7] and the Canadian provinces of Alberta[8] and Ontario,[9] have abandoned any formal requirements for arbitration agreements.[10] Most domestic arbitration statutes to

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Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure, in *Camilla B. Andersen/Ulrich G. Schroeter* (eds.), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmons & Hill Publishing (2008), 582, 599; *Janet Walker,* Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement, 25 Journal of Law & Commerce (2005-06), 153-164.

5) Art. 1507 French CPC.

6) *Gary Born,* International Commercial Arbitration, Kluwer (2009), 614.

7) s. 7(1) Schedule 1 of the New Zealand Arbitration Act 1996.

8) Art. 5(1) Alberta Arbitration Act 1991.

9) Art. 5(3) Ontario Arbitration Act 1991.

10) See also the former version of § 1027(2) German CCP for contracts between merchants; s. 5(3) English Arbitration Act 1996 according to which an agreement on an arbitration clause otherwise than in writing by reference to terms which are in writing, constitutes an agreement in writing; s. 81(1)(b) of the English Arbitration Act 1996, which provides for the validity of oral arbitration agreements under common law, i. e. without the specific

the very day, however, contain a "writing" or "written form" requirement which is often combined with further requirements such as "signature" or "exchange of written communication".[11] For example § 1031(1) of the German Code of Civil Procedure provides:

> "The arbitration agreement must be set out either in a document signed by the parties, or in letters, telefax copies, telegrams, or other forms of transmitting messages as exchanged by the parties, and that ensure proof of the agreement by supporting documents."

Less demanding formal requirements are established by the Swiss Law on Private International Law in Art. 178(1):[12]

> "The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text."

The same approach was taken by the 1985 UNCITRAL Model Law on International Commercial Arbitration in Art. 7. However, under the 2006 revision to the UNCITRAL Model Law this position has been attenuated. Art. 7 UNCITRAL Model Law 2006 offers two options. The first still contains the writing requirement in Art. 7(2) – however the definition of writing has been broadene d[13] – , whereas the second option has done away with the writing requirement all together.

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protectory regime of the Arbitration Act. Also Dutch law until 1986 provided for the possibility to conclude arbitration agreements orally, see *Toby Landau,* The Requirement of a Written Form For an Arbitration Agreement – When "Written" Means "Oral", in *Albert Jan van den Berg* (ed.), International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series, 2002 London Volume 11, Kluwer Law International (2003), 19, 56. The same is true for Belgian Law before 1972, see *Jean-François Poudret/Sébastien Besson,* Comparative Law of International Arbitration, 2nd edition, Thomson Sweet & Maxwell et al. (2007), para. 191.

11) *Born* (Fn. 6), 580.

12) Whereas § 1031(2) German CCP is more liberal than Art. 178(1) Swiss PILS in explicitly allowing to rely on "customary standards", i.e. usages.

13) Notably, the 2006 version of this provision does not require a signature anymore.

An at least at first glance still rather strict writing requirement can be found in Art. II(1), (2) 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards:[14]

(1) : "Each Contracting State shall recognize an agreement in writing … "
(2) : "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

On a closer look, however, it has been convincingly argued that Art. II(2) NYC only sets a maximum and not a uniform standard.[15] In this context, it is also important to note that the NYC addresses the enforcement states, not the parties to an arbitration agreement. Thus, the NYC does not require arbitration agreements to be signed by the parties or contained in an exchange of letters or the like to be valid, but defines the maximum form requirement admissible for the domestic arbitration laws of its member states.

This understanding "that the circumstances described [in Art. II(2) NYC] are not exhaustive" was also adopted by UNCITRAL itself in a recommendation regarding the interpretation of the form requirement of the NYC.[16] Furthermore,

14) Very similar: Art. I(2)(a) 1961 European Convention on International Commercial Arbitration; Art. 1 1975 Inter-American Convention in International Commercial Arbitration.

15) *Gerold Herrmann,* Does the World Need Additional Uniform Legislation on Arbitration? – The 1998 Freshfields Lecture, (1999) 15 Arb. Int., 211, 217; Departmental Advisory Committee on Arbitration Law (DAC), Report on Arbitration Bill 1996, February 1996, para. 34; Walker (supra fn. 4), 163 et seq.; but see *Chloe Z Fishing Co., Inc., et al. v. Odyssey Re (London) Limited, et al.,* 26.4.2000, S.D. Cal., 109 F.Supp.2d 1236, with justifiable criticism by *Landau* (supra fn. 10), 68; *Albert Jan van den Berg,* The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation, Kluwer Law (1994), 178 et seq.; *Albert Jan van den Berg,* The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas, (1996) ASA Special Series No. 9, 25, 44 et seq. (although with significant doubts); *Gerhard Wagner,* Prozeßverträge – Privatautonomie im Verfahrensrecht, Mohr Siebeck (1998), 386; cf. also *BGer,* 5.11.1985, 111 Ib 253, 254 et seq. (with specific reference to Art. VII NYC, on which, however, the parties did not rely).

16) 2006 Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its 39th session.

it was recommended to apply the most-favourable-law-provision of Art. VII(1) NYC also with regard to the validity of arbitration agreements.[17] Combined, these two approaches provide that the NYC requires its member states to recognize and enforce all arbitration agreements complying with their respective domestic lex arbitri, which must not require more than written form as defined in Art. II(2) NYC. Consequently, an arbitration agreement is considered valid even if it does not fulfil the strict definition of writing in Art. II(2) NYC, but is valid under the law of the state the court ruling on the arbitration agreement's validity is located in, which generally is more favourable.[18]

2. Forum Selection Clauses

Generally, forum selection clauses in an international context are required to be in "writing or evidenced in writing" as long as there are no practices or usages establishing a less strict standard. These requirements can be found i. a. in Art. 23(1) of the Brussels I Regulation[19] and Art. 23(1) of the Lugano Convention.[20] Similarly, domestic German law requires in § 38(2) CPC that "[s]uch agreement must be concluded in writing or, should it have been concluded orally, must be confirmed in writing." Art. 5(1) sentence 2 Swiss PILS requires a forum selection clause to be "in writing, by telegram, telex, telecopier

17) Doubtful: *Landau* (supra fn. 10), 73. Cf. also Art. I(2)(a) 1961 European Convention on International Commercial Arbitration which provides that "the term 'arbitration agreement shall mean … in relations between states whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws".

18) *Emmanuel Gaillard/John F. Savage,* Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law (1999), para. 614; *Margaret L. Moses,* The Principles and Practice of International Commercial Arbitration, Cambridge University Press (2008), 24; but see *Poudret/Besson* (supra fn. 10), para. 74.

19) Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; see also the recast Regulation (EU) No, 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The content of Art. 23(1) was left unchanged by this recast, see Art. 25(1) of the recast.

20) 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

or any other means of communication which permits it to be evidenced by a text". Finally, the 2005 Hague Convention on Choice of Court Agreements[21] sets forth in its Art. 3(c) that an "exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference".

3. Choice of Law Clauses

Although, for choice of law clauses there rarely is a specific writing requirement, they are often required to be "expressly or clearly demonstrated by the terms of the contract or the circumstances of the case".[22] Further requirements may be established by the law chosen[23] or sometimes alternatively by the law of the country where the agreement was concluded if both contract parties were in the same country at the time of contract conclusion.[24] If the parties were in different countries at the time of contract conclusion, then the requirements may come from the law of either of the two respective countries where the parties were present at the time of conclusion, or the law of the country where either of the parties had its habitual residence at that time.[25]

4. Government Procurement Contracts and Agency

Oftentimes a writing requirement is established with regard to public officials acting as representatives of public bodies in public procurement contracts.[26]

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21) This convention has so far been signed by the European Union and the United States of America and ratified by Mexico, but has not entered into force yet.

22) Art. 3(1) Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I); Art. 116(2) sentence 1 Swiss PILS.

23) Art. 11(1), (2) Rome I Regulation; Art. 116(2) sentence 2 Swiss PILS.

24) Art. 11(1) Rome I Regulation.

25) Art. 11(2) Rome I Regulation.

26) E. g. various German Local Government Codes: § 54(1), (2) Baden-Württemberg; § 38(2) Bavaria; § 67(2)–(5) Brandenburg; § 71(2) Hesse; § 63(2)–(4) Lower Saxony; § 38(6) Mecklenburg-Vorpommern; § 64 North Rhine-Westphalia; § 49 Rhineland-Palatinate; § 62 Saarland; § 60 Saxonia; § 70 Saxony-Anhalt§ 51(2)–(4) Schleswig-Holstein; § 31(2) Thuringia;

Likewise, under most agency regimes the principal can limit the agent's authority by requiring all acts of the latter on its behalf to be in writing.[27]

Ⅲ. The CISG's Freedom of Form

In assessing whether the freedom of form principle under the CISG can override any of the aforementioned form requirements regard is to be had to the general scope of application of the CISG as well as the aims of its freedom of form principle and special provisions relating to the interplay of different international instruments on a global or regional level.

1. Scope of Application – Art. 4 CISG

According to Art. 4 sentence 1 CISG, the CISG governs "only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract".

From this provision some authors deduce that neither the formation of an arbitration agreement nor the rights and obligations of the parties arising from such an agreement are governed by the CISG.[28] The reason being that an arbitration agreement is not a contract of sale in the terms of Art. 4 sentence 1 CISG. Rather these authors subject all questions related to the arbitration agreement to the otherwise applicable domestic law. The same result sometimes is reached by authors relying on the doctrine of separability.[29]

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§ 23 Allgemeines Zuständigkeitsgesetz Berlin; § 46(2) Stadtverfassung Bremerhaven; the consequences of not adhering to these formal requirements are in dispute, see *Ingo Ludwig/Jérôme Lange,* Die Kompetenz der Länder zum Erlaβ kommunalrechtlicher Formvorschriften für Verpflichtungserklärungen, Neue Zeitschrift für Verwaltungsrecht 1999, 136–140. Cf. also § 7(1) UNCITRAL Model Law on Public Procurement, Official Records of the General Assembly, 66th Session, Supplement No. 17 (A/66/17), annex I.

27) *Ingeborg Schwenzer,* Schweizerisches Obligationenrecht Allgemeiner Teil, 6th edition, Stämpfli (2012), para. 42.10; cf. Münchener Kommentar zum BGB/*Jürgen Basedow,* edited by *Franz Jürgen Säcker/Roland Rixecker,* 6th edition, München (2012), § 305b BGB, para. 14.

28) *Koch* (supra fn. 4), 285; cf. also *Stefan Kröll,* Selected Problems Concerning the CISG's Scope of Application, 25 Journal of Law & Commerce (2005–06), 39, 45 (referring to Arts. 1–3 CISG).

29) *Kröll* (supra fn. 28), 44 et seq.; but see *Perales Viscasillas/Ramos Muñoz* (supra fn. 4),

Likewise, as regards forum selection and choice of law clauses some authors favour the application of the lex fori instead of the lex causae.[30)]

These approaches cannot convince.[31)] On the one hand, the CISG is not only suitable but also intended to apply to dispute resolution clauses. This is evidenced by the explicit mentioning of these clauses in Art. 19(3) CISG and the underlying purpose of this provision.[32)] According to this provision the addition of a dispute settlement clause is a material alteration of an offer. Characterising such addition as a material alteration only makes sense if this clause is considered part of the sales contract and thus governed by the CISG provisions on contract formation. Were such clause not governed by the CISG, acceptance

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1368 et seq.

30) Choice of forum: *Frank Vischer/Lucius Huber/David Oser,* Internationales Vertragsrecht, 2nd edition, Stämpfli (2000) para. 1188; Choice of law: *Vischer/Huber/Oser,* para. 158

31) Also applying the CISG to questions of formation of dispute resolution agreements: *Julius von Staudinger/Ulrich Magnus,* J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener Kaufrecht (CISG), Beck (2005), Vorbem. zu Art. 14 ff. CISG, para. 8; Peter *Schlechtriem/Ingeborg Schwenzer/Ingeborg Schwenzer/Pascal Hachem,* Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd edition, Oxford University Press (2010), Art. 4, para. 11; *Schlechtriem/Schwenzer/Ulrich G. Schroeter,* Intro to Arts. 14–24, para. 16 et seq.; arbitration: *District Court (Rechtbank) Arnhem,* 17.1.2007, CISG-online 1476; *Filanto S.p.A. v. Chilewich International Corp.,* U.S. Dst. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; choice of forum: *Ulrich G. Schroeter,* UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen, Sellier (2005), § 15, para. 24; *Supreme Court of France (Cour de Cassation),* 16.7.1998, CISG-online 344; *Appellate Court (Cour d'appel) Paris,* 13.12.1995, CISG-online 312; *Solea LLC v. Hershey Canada Inc.,* U.S. Dst. Ct. (D. Del.), 9.5.2008, CISG-online 1769; *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.,* U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767; *Appellate Court (Gerechtshof)'s-Hertogenbosch,* 19.11.1996, CISG-online 323, sub 4.4. et seq.; *Higher Regional Court (OLG) Oldenburg,* 20.12.2007, CISG-online 1644; *Higher Regional Court (OLG) Köln,* 24.5.2006, CISG-online 1232; *Higher Regional Court (OLG) Braunschweig,* 28.10.1999, CISG-online 510 *Regional Court (LG) Landshut,* 12.6.2008, CISG-online 1703, sub 31 et seq.; *Regional Court (LG) Gießen*, 17.12.2002, CISG-online 766 (obiter); cf. also *Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al.,* Superior Court of Justice Ontario, 28.10.2005, CISG-online 1139, sub 13; left unresolved by *Higher Regional Court (OLG) Düsseldorf,* 30.1.2004, CISG-online 821. But see Kröll (supra fn. 28), 44 et seq.; probably also *Cámara Nacional en lo Comercial,* 14.10.1993, 45626/1993, UNILEX (reasoning not published); *Thomas Rauscher,* Zuständigkeitsfragen zwischen CISG und Brüssel I, in *Stephan Lorenz/Alexander Trunk/Horst Eidenmüller/Christiane Wendehorst/Johannes Adolff,* Festschrift für Andreas Heldrich zum 70. Geburtstag, 933, 949 et seq.

32) *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Anne-Kathrin Schluchter,* Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht, Nomos (1996), 93.

with the addition of a dispute resolution clause would not be an alteration of the original offer, but the sales contract would be concluded in combination with an additional offer to conclude a dispute settlement agreement. Consequently, the mentioning of dispute resolution clauses in Art. 19(3) CISG evidences that the CISG generally governs dispute resolution clauses.[33] Some authors also rely on the wording of Art. 81(1) CISG in this regard, according to which avoidance of the contract does not affect dispute resolution clauses.[34]

On the other hand, special provisions regarding arbitration, forum selection and choice of law clauses regularly only address formal requirements. In particular, this applies to the lex arbitri, which generally is not concerned with questions of contract formation as such. If one were to apply the lex fori also with regard to the substantive validity of the respective clause one would have to turn to the general contract law. This, however, would contradict the international public law obligation to apply the CISG where according to its own provisions it wants to be applied.

Furthermore, it is widely recognized to apply the lex causae to questions of substantive validity of dispute resolution clauses.[35] This approach is i. a. followed by Arts. 3(5), 10 Rome I Regulation and Art. 116(2) sentence 2 Swiss PILS[36] with regard to choice of law clauses and by various authors with regard

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33) This outcome is not changed by the fact that during the drafting process of the CISG a proposal by Mexico, Panama and Peru to introduce an article on dispute settlement (A/CONF.97/L.19, Official Records, 174) was rejected as "outside the competence of the Conference", see Official Records, 228. The proposed article only addressed questions of jurisdiction and arbitral procedure. Contractual questions were neither addressed in the proposed article nor in the subsequent discussions.

34) *Schlechtriem/Schwenzer/Schroeter* (supra fn. 31), Intro to Arts. 14-24, para.17; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Walker* (supra fn. 4), 163; *Schluchter* (supra fn. 32), 91; but see *Alejandro M. Garro,* The U.N. Sales Convention in the Americas: Recent Developments, 17 Journal of Law & Commerce (1998), 219, 238.

35) For arbitration agreements: German Supreme Court (BGH), 3.5.2011, Neue Juristische Wochenschrift Rechtsprechungs-Report 2011, 1350, 1353; *German Supreme Court (BGH),* 20.1.1986, Neue Juristische Wochenschrift 1986, 1438, 1439; but see *Reinhold Geimer,* Internationales Zivilprozessrecht, 6th edition, Otto Schmidt (2009), para. 3789 (lex arbitri, but subsidiarily lex causae).

36) Basler Kommentar zum Internationalen Privatrecht/*Marc Amstutz/Nedim Peter Vogt/Markus Wang,* Hrsg. von *Heinrich Honsell/Nedim Peter Vogt/Anton K. Schnyder/Stephen V. Berti,* 2nd edition, Helbing Lichtenhahn (2007), Art. 116, para. 33; but see *Vischer/Huber/Oser* (supra fn. 30), para. 157 f.

to forum selection clauses.[37] Thus, it follows therefrom that if the CISG is the lex causae it also governs the substantive validity of such clauses as far as it is covered by the CISG.

Finally, one may not argue that the clauses discussed here are of a procedural nature[38] and that the CISG is only concerned with substantive but not with procedural matters.[39] It is now widely held that it is up to the CISG itself to autonomously decide which questions are covered by it, regardless of whether domestic laws characterize them as procedural and or substantive in nature.[40] Additionally, it has been convincingly argued that the strict distinction between procedural and substantive matters in general is "outdated".[41]

The application of the CISG in all of these cases is not confined to questions of consent as laid down in Arts. 14–24 CISG. It should also be applied to issues of interpretation[42] as well as breach and the respective remedies.[43]

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37) *German Supreme Court (BGH),*18.3.1997, Neue Juristische Wochenschrift 1997, 2885, 2886; BaslerKomIPRG/Pascal Grolimund (supra fn. 36), Art. 5, para. 39; but see *Geimer* (supra fn. 35), para. 1677.

38) See for the disputed question of the legal nature of arbitration agreements: *Wagner* (supra fn. 15), 578 et seq. (procedural); *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366 (substantive); *Vischer/Huber/Oser* (supra fn. 30), para. 1354 (mixed).

39) Cf. for this argumentation *Zapato Hermanos S.A. v. Hearthside Baking, Inc.,* 19.11.2002, U.S. Ct. of App. 7th Circuit, CISG-online 684: "The Convention is about contracts, not about procedure"; according: *Harry M. Flechtner/Joseph Lookofsky,* Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal, 7 Vindobona Journal of International Commercial Law and Arbitration (2003), 93, 97. With specific regard to dispute clauses see MünchKommBGB/*Westermann* (supra fn. 27), Art. 4 CISG, para. 7.

40) Cf. e. g. Art. 11 sentence 2 CISG. See also Bruno *Zeller,* Interpretation of Article 74 – Zapata Hermanos v.
Hearthside Baking – Where Next?, Nordic Journal of Commercial Law 2004, 1, 7.

41) CISG-AC Opinion No. 6 (Rapporteur *John Y. Gotanda*), Comment 5.2.

42) *District Court (Rechtbank) Arnhem,* 17.1.2007, CISG-online 1476; *Higher Regional Court (OLG) Stuttgart,* 15.5.2006, CISG-online 1414; *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.,* U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767; *Filanto S.p.A. v. Chilewich International Corp.,* U.S. Dst. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; *Schlechtriem/Schwenzer/Schlechtriem/Martin Schmidt-Kessel* (supra fn. 31), Art. 8, para. 5.

43) *Nils Schmidt-Ahrendts,* CISG and Arbitration, Belgrade Law Review 2011, 211, 218 et seq. For damages in case of breach of an arbitration clause, see *Olivier Luc Mosimann,* Anti-suit Injunctions in International Commercial Arbitration, Eleven (2010), 127 et seq.; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366.

2. Aim of the Freedom of Form Principle – Art. 11 CISG

The pre-emption of domestic law regarding formation, interpretation and breach of arbitration, forum selection and choice of law clauses by the CISG does, however, not necessarily extend to the exclusion of the application of special international or domestic form requirements for such clauses.[44] Whether this is the case is again autonomously decided by the CISG, in particular by Art. 11 CISG. Thereby, special emphasis is to be put on the aims and purposes of this provision.

Freedom of form was discussed from the very beginning of the endeavours to unify international sales laws as far back as the 1930s.[45] Throughout the drafting processes of ULIS,[46] ULF,[47] and CISG there was always fierce opposition against this principle.[48] This opposition was voiced by two groups of legal systems: On the one hand by the so called former socialist countries, which imposed direct form requirements in order to control international legal transactions,[49] on the other hand by many jurisdictions from the French and common law legal tradition containing an indirect form requirement based on the value of the transaction.[50] In contrast, form requirements relating to dispute resolution clauses or the like were – as far as perceivable – never mentioned during all the 50 years of discussion although they existed, and continue to exist, in most legal systems. This strongly indicates that Art. 11 CISG was never

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44) Cf. *Wagner* (supra fn. 15), 350 et seq. This distinction is ignored by *Perales Viscasillas/ Ramos Muñoz* (supra fn. 4), 1369.

45) *Ernst Rabel,* Der Entwurf eines einheitlichen Kaufgesetzes, RabelsZ 9 (1935), 1, 55 et seq.

46) Convention relating to a Uniform Law on the International Sale of Goods.

47) Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.

48) See the references in *Schlechtriem/Schwenzer/Schlechtriem/Schmidt-Kessel* (supra fn. 31), Art. 11, para. 1; *Hans Dölle/Gert Reinhart,* Kommentar zum Einheitlichen Kaufrecht, München: Beck (1976), Art. 15 EKG, para. 29; *Ulrich Huber,* Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, RabelsZ 43 (1976), 411, 434.

49) Cf. *Dölle/ Reinhart* (supra fn. 48), Art. 15 EKG, para. 14 et seq.

50) A contract above a certain amount under these systems cannot be evidenced by witnesses, i. e. unless it is in writing. In common law jurisdictions this rule derives from the 1677 Statute of Frauds. See for USA § 2-201(1) UCC, for France Art. 1341 CC. See also *Schwenzer/Hachem/Kee* (supra fn. 3), para. 22.09 et seq.

intended to apply to dispute resolution clauses. To the contrary, throughout the drafting negotiations of the CISG the delegates were particularly concerned to avoid "undesirable effect[s] of impinging upon national rules on jurisdiction".[51]

The possibility to make a declaration under Art. 96 CISG excluding freedom of form under Art. 11 CISG confirms this starting point. Some authors argue that, had it been intended to extend the freedom of form to the clauses discussed here, nearly all member states would have been forced to make a declaration under Art. 96 CISG[52] in order to preserve their form requirements in this regard.[53] However, as the development has shown, the declaration under Art. 96 CISG was made use of only by Eastern-European former socialist countries, China, and some Latin-American countries.[54] There are, however, doubts whether such reservation would be possible with regard to the form requirements for dispute resolution clauses since Art. 96 CISG requires that the domestic law of the reservation state submits contracts of sale in general to a writing requirement.[55] During the drafting process of said article a proposal of the Netherlands to make partial reservations with regard to certain categories of contracts possible was rejected with 11 to 16 votes.[56] Yet, the fact that during the extensive discussions on this proposal neither of the clauses discussed here were mentioned, underlines that the drafters did not intend dispute resolution clauses to be encompassed by the CISG's freedom of form: Considering the importance the formal requirements for dispute resolution clauses had in most countries, it is reasonable to assume that otherwise there would have been at least some discussion on the question whether it should be possible for states to preserve those writing requirements via a reservation under Art. 96 CISG. This

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51) As stated by the Indian delegate *Kuchibhotla,* Official Records, 369, para. 33; similarly, the Argentinian delegate *Boggiano,* Official Records, 369, para. 31; cf. *Schroeter* (supra fn. 31), § 6, para. 32, note 61. See also the discussions on the proposal mentioned in fn. 33, Official Records, 228.

52) In favour of this possibility *Burghard Piltz,* Internationales Kaufrecht, 2nd edition, Beck (2008), para. 2-130.

53) *Schroeter,* (supra fn. 31), § 6, para. 32.

54) Argentina, Armenia, Belarus, Chile, China (withdrawn), Estonia (withdrawn), Hungary, Latvia (withdrawn), Lithuania, Paraguay, Russian Federation, Ukraine.

55) *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem* (supra fn. 31), Art. 96, para. 2.

56) See Official Records, 271 et seq.

confirms that it was never intended that the freedom of form under Art. 11 CISG should affect international and domestic form requirements for dispute resolution clauses and the like.[57)]

It has been submitted that the principle of lex specialis militates in favour of an application of Art. 11 CISG to the formal validity of dispute resolution clauses over the formal requirements of the lex fori.[58)] The opposite, however, is true: The specific characteristic of a dispute resolution clause is the effect it has on the way a dispute between the parties is resolved.[59)] This does not change if the clause is included in an international sales contract. Consequently, provisions of the lex fori more specifically deal with the formal validity of a dispute resolution clause in an international sales contract than provisions dealing with international sales contracts in general.[60)]

The intention of the drafters of the CISG as well as the precedence of the lex fori's formal requirements make it sufficiently clear that freedom of form under Art. 11 CISG does not extend to dispute resolution clauses in international sales contracts.[61)]

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57) But see *Koch* (supra fn. 4), 281 (although tentative).

58) *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1370 (with regard to arbitration agreements).

59) For arbitration agreements: *Bernhard Berger/Franz Kellerhals,* International Arbitration in Switzerland, 2nd edition, Sweet&Maxwell (2010), para. 296.

60) Cf. *Schroeter* (supra fn. 31), § 14, para. 45; *Rauscher* (supra fn. 31), 950.

61) See *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem* (supra fn. 31), Art. 90, para. 9; *Staudinger/Magnus* (supra fn. 31), Art. 90 CISG, para. 11; for arbitration agreements *Schlechtriem/Schwenzer/Schlechtriem/Schmidt-Kessel* (supra fn. 31), Art. 11, para. 8; *Schlechtriem/Schwenzer/Schroeter* (supra fn. 31), Intro to Arts. 14-24, para. 18 et seq.; MünchKommBGB/*Westermann* (supra fn. 27), Art. 11 CISG, para. 4; *Higher Regional Court (OLG) Stuttgart,* 15.5.2006, CISG-online 1414; *Schmidt-Ahrendts* (supra fn. 43), 216; see also *Koch* (supra fn. 4), 285 (relying on Art. 4 CISG); for choice of forum clauses *Appellate Court (Cour d'appel) Paris,* 13.12.1995, CISG-online 312; *Appellate Court (Gerechtshof)'s-Hertogenbosch,* 19.11.1996, CISG-online 323, sub 4.5.; *Appellate Court (KG) Zug,* 11.12.2003, CISG-online 958; *Appellate Court (Audiencia Provincial) Navarra,* 27.12.2007, CISG-online 1798; *Higher Regional Court (OLG) Oldenburg,* 20.12.2007, CISG-online 1644; *Higher Regional Court (OLG) Köln,* 24.5.2006, CISG-online 1232; *Higher Regional Court (OLG) Köln,* 21.12.2005, CISG-online 1201; *Higher Regional Court (OLG) Düsseldorf,* 30.1.2004, CISG-online 821; *Regional Court (LG) Landshut,* 12.6.2008, CISG-online 1703, sub 31 et seq.; *Regional Court (LG) Gießen,* 17.12.2002, CISG-online 766 (obiter). But see for arbitration agreements *Piltz* (supra fn. 53), para. 2-130; *Walker* (supra fn. 4), 163; *Stefan Kröll/Loukas Mistelis/Pilar Perales Viscasillas/Perales Viscasillas,* UN-Convention on the International Sales of Goods (CISG), Beck (2011), Art. 11, para. 13; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Waincymer* (supra fn. 4), 588; MünchKommBGB/*Westermann* (supra fn. 27), Art. 4

Although the discussion focusses on arbitration, forum selection and choice of law clauses, these considerations must equally apply to form requirements that can be found in connection with government procurement contracts or agency. Form requirements for government procurement contracts that are stricter than for comparable private contracts are linked to the contractual party as such and not to the contract of sale. Therefore, they are outside of the CISG's scope and thus unaffected by Art. 11 CISG.[62] This position may be supported by the idea that from the perspective of the CISG such form requirements are closely connected to agency issues which are clearly not addressed by the CISG.[63]

3. Interplay With Other International Instruments – Art. 90 CISG

According to Art. 90 CISG the CISG does not prevail over any international agreement that contains provisions concerning the matters governed by it. Thereby, it is of no relevance whether the international agreement in question lays down substantive, procedural or conflict of laws rules. It is unanimously held that at least the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, the 1968 Brussels Convention on Jurisdiction and the Enforcements of Judgements in Civil and Commercial Matters, the 1975 Inter-American Convention in International Commercial

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CISG, para. 7; *Tribunal Supremo,* 17.2.1998, CISG-online 1333, sub 9; *Filanto S.p.A. v. Chilewich International Corp.,* U.S. Dst. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; for choice of forum clauses *Kröll/Mistelis/Perales Viscasillas/Perales Viscasillas* (supra fn. 61), Art. 11, para. 12, note 29; *Solea LLC v. Hershey Canada Inc.,* U.S. Dst. Ct. (D. Del.), 9.5.2008, CISG-online 1769; *Chateau des Charmes Wines Ltd.v. Sabate USA Inc., Sabate S.A.,* U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767 (both courts referring to Arts. 11, 29(1) CISG); cf. also *Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al.,* Superior Court of Justice Ontario, 28.10.2005, CISG-online 1139, sub 13.

62) But see *Schluchter* (supra fn. 32), 93 et seq.; *Huber* (supra fn. 48), 435; *Jacob Ziegel,* The Scope of the Convention: Reaching Out to Article One and Beyond, 25 Journal of Law & Commerce (2005-06), 59, 62 (not entirely clear).

63) *John O. Honnold/Harry M. Flechtner,* Uniform Law for International Sales under the 1980 United Nations Convention, 4th edition, Wolters Kluwer (2009), Art. 11, para. 127; but see *Schluchter* (supra fn. 32), 93 et seq.

Arbitration, the 1980 Rome Convention on the Law Applicable to the Obligations, and the 1988/2007 Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters are international agreements that prevail over the CISG as far as they conflict with the latter. Thus, the form requirements of these conventions certainly apply.[64]

It is disputed whether Art. 90 CISG can also be applied with regard to legal instruments of the European Union, such as regulations and directives.[65] Of special interest for form requirements are the Rome I Regulation with regard to choice of law clauses and the Brussels I Regulation with regard to forum selection clauses. Although both of them are successors to international agreements that hitherto clearly fell into the sphere of application of Art. 90 CISG, nowadays it is at least doubtful whether these instruments prevail over the CISG.

Certainly, the application of any domestic form requirements that have been discussed above could never be based on Art. 90 CISG.

Ⅳ. The Most-Favourable-Law-Approach

In relation to arbitration clauses recently it has been argued that the application of Art. 11 CISG is called for by the so called most-favourable-law-approach.[66] This approach is developed from Art. VII(1) NYC, which provides that any party seeking enforcement of an arbitral award can rely either on the provisions of the NYC or on any other treaty or even the domestic law of the country where the award is to be enforced, whichever is more favourable. It seems to be the opinion of the authors favouring this approach, that Art. VII(1)

64) This is even admitted by supporters of the view that Art. 11 CISG covers dispute resolution clauses: *Walker* (supra fn. 4), 163: „admittedly"; *Waincymer* (supra fn. 4), 588; *Piltz* (supra fn. 53), para. 2-130; MünchKommBGB/*Westermann* (supra fn. 27), Art. 4 CISG, para. 7.

65) See *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem* (supra fn. 31), Art. 90, para. 4 et seq.; *Kröll/Mistelis/Perales Viscasillas/Johnny Herre* (supra fn. 61), Art. 90, para. 8.

66) *Walker* (supra fn. 4), 164; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1372. Similarly, *Herrmann* (supra fn. 15), 216 suggests "to allow an oral arbitration clause if the applicable law does not impose any form requirement on the main contract", without, however, referring to Art. VII(1) NYC.

NYC allows for the application of the CISG to the question of formal validity of the arbitration agreement. However, a thorough interpretation of Art. VII(1) NYC reveals that this approach proves to be untenable.

Art. VII(1) NYC addresses two different issues: The first half sentence relates to the relationship between the NYC and other international agreements concerning the recognition and enforcement of arbitral awards.[67] The second allows the party seeking enforcement to rely on the most favourable treaty or law. Both of them are only concerned with treaties or laws specifically relating to recognition and enforcement of arbitral awards.[68] They are, however, not concerned with sales law or general contract law. Therefore, whether the law applicable to the underlying contract between the parties, allows for freedom of form is of no relevance for the formal validity of the arbitration agreement.[69] The same holds true for the question whether or not the substantive general contract law of the enforcement state grants freedom of form.

For example, if an award rendered in Switzerland based upon an oral arbitration clause is sought to be enforced in France, where Art. 1507 CPC allows arbitration clauses in international contracts to be concluded orally, Art. VII(1) NYC enables the party seeking enforcement to rely on French arbitration law. Thus, the arbitration clause was validly concluded despite the fact that it does not comply with the definition of writing in Art. II(2) NCY.[70] If, however,

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67) In this regard, Art. X(7) 1961 European Convention on International Commercial Arbitration is comparable.

68) Cf. *van den Berg* (supra fn. 15, 1994), 81, 118 et seq.; *van den Berg* (supra fn. 15, 1996), 44 et seq. („this solution will only work if the forum has its own rules for referral to international arbitration and enforcement of foreign arbitral awards"); unclear *Karl Heinz Schwab/Gerhard Walter,* Schiedsgerichtsbarkeit, 7th edition, Beck (2005), chapter 44, para. 12 (referring to "contract law" as well as to § 1031(1) German CPC).

69) Art. 9(6) Spanish Arbitration Act (English translation available by *David J. A. Cairns/Alejandro López Ortiz,* Spain's New Arbitration Act, 22 ASA-Bulletin (2004), 695, 701) provides that in international arbitration an arbitration agreement is valid if it complies either with the rules of law designated by the parties with regard to the arbitration agreement, Spanish law or the rules of law applicable to the merits of the dispute. Although not entirely clear, it appears that this rule also encompasses the formal validity of the arbitration agreement. Yet, this provisions has – as far as perceivable – remained an exception, and rightly so. Art. 178(2) Swiss PILS, on the other hand, also provides for the validity of the arbitration agreement if it complies either with the lex causae or Swiss law, but is restricted to the substantive validity ("im Übrigen").

70) The follow-up question, whether relying on a more favourable formal requirement under

the party were to seek to enforce the award in Germany, where § 1031(1) CCP requires arbitration agreements to be in writing, the mere fact that under general contract law no form requirements apply could not be relied upon and thus enforcement would be denied. The result cannot be different if the CISG is governing the contract or is part of the domestic law of the enforcement state.

The CISG is not concerned with recognition and enforcement of arbitral awards.[71] Therefore, the CISG's application is not envisaged by Art. VII(1) NYC. Consequently, it cannot be the most favourable law applicable to the question of form of the arbitration agreement.

With regard to formal requirements, this result is also confirmed by the mandatory nature of formal requirements of the lex arbitri.[72] These requirements cannot be derogated from by the parties by agreeing on a law applicable to the arbitration agreement. If the parties are unable to specifically designate the CISG as the law governing the formal validity of the arbitration agreement, the CISG should a majore ad minus not apply to this question just because it is the lex causae.

At first sight with regard to choice of law clauses Arts. 3(5), 11 Rome I Regulation also seem to follow a most-favourable-law-approach. This, however, does not extend to the specific requirement of Art. 3(1) Rome I Regulation, that calls for the choice to be made expressly or clearly demonstrated by the terms of the contract.[73] As concerns forum selection clauses or government procurement contracts or the like there are no indications of any most-favourable -law-rules.

Art. VII(1) NYC excludes the regime of the NYC in toto (see *van den Berg* (supra fn. 15, 1994), 85 et seq,) or merely constitutes an exception from the formal requirement in Art. II(2) NYC (see *Gaillard/Savage* (supra fn. 18), para. 271), is in dispute, but of no relevance for the issues discussed at hand.

71) *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem* (supra fn. 31), Art. 90, para. 11; *Staudinger/ Magnus* (supra fn. 31), Art. 90, para. 11; Münchener Kommentar BGB/*Peter Huber* (supra fn. 27), Art. 90 CISG, para. 5; *Schroeter* (supra fn. 31), § 9, para. 85 et seq.

72) *Poudret/Besson* (supra fn. 10), para. 294; *Wagner* (supra fn. 15), 376; *Geimer* (supra fn. 35), para. 3795; *Berger/Kellerhals* (supra fn. 59), para. 393; but see Art. 9(6) Spanish Arbitration Act, which allows parties to choose the law applicable to the arbitration agreement with regard to its validity.

73) *Staudinger/Magnus* (supra fn. 31), Art. 3 Rom I, para. 66.

V. Conclusion

It has been argued that at least in B2B-contracts the law in general is moving towards freedom of form.[74] This is most prominently brought forward with regard to arbitration clauses.[75] Some authors submit that businesspersons are "puzzled" by being able to orally conclude a contract for sale regardless of its value but having to lay down the accompanying arbitration clause in writing.[76] While this observation might be accurate, it must be emphasised that doing away with overly strict form requirements must be done by abolishing or adjusting these very form requirements and not by having recourse to the CISG or other contract laws to circumvent them.

The same holds true with regard to forum selection and choice of law clause, albeit the necessity to lower formal requirements for these clauses might not appear as urgent since already today they are less strict than with regard to arbitration clauses. Likewise, if a need is felt to ease contracting with

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74) *Schwenzer/Hachem/Kee* (supra fn. 3), para. 22.7; *Walker* (supra fn. 4), 155; *Landau* (supra fn. 10), 48 and 58 (for forum selection clauses).

75) *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1367; *Walker* (supra fn. 4), 165; *Neil Kaplan,* Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice? (Sixth Goff Lecture), (1996) 12 Arbitration International, 28, 44; *Gerold Herrmann,* The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts, in *Albert Jan van den Berg* (ed.), International Arbitration in a Changing World, ICCA Congress Series, 1993 Bahrain Volume 6, Kluwer Law International (1994), 41, 45; *Herrmann* (supra fn. 15), 215 et seq.; *Landau* (supra fn. 10), 41 et seq.; *Alan Redfern/Martin Hunter,* Law and Practice of International Commercial Arbitration, Sweet&Maxwell (2004), para. 2.13. See also the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (Miami Draft) by *Albert Jan van den Berg* (available at http://www.newyorkconvention.org/draft-convention), which does not contain a writing requirement anymore. But see *Berger/Kellerhals* (supra fn. 59), para. 413a; Art. 1021 Dutch Draft Arbitration Law, that intends to convert the current formal requirement from an evidentiary requirement into a requirement of validity, see *Albert Jan van den Berg,* Toelichting op voorstel tot wijziging van de arbitragewet (available at http://www.arbitragewet.nl/downloads/ToelichtingDec2006.pdf), 13; *Vesna Lazic,* Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement, 11.1 Electronic Journal of Comparative Law 2007, 1, 7 (available at http://www.ejcl.org/111/art111-16.pdf).

76) *Walker* (supra fn. 4), 155; *Koch* (supra fn. 4), 276; cf. also *Landau* (supra fn. 10), 46 et seq. ("defeating legitimate commercial expectations"); *Kaplan* (supra fn. 75), 29 („absurd result"); *Herrmann* (supra fn. 75), 44 et seq.

government bodies, the respective form requirements have to be changed themselves. In all these cases, however, the CISG is not the adequate instrument to reach this result. In a nutshell: The end does not justify the means.

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The Principle of Confidentiality in Arbitration: A Necessary Crisis

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Rodrigo Cortés**

Confidentiality has always been considered one of the most important aspects of arbitral proceedings and until recently a principle that could never be ignored. However, under the shadow of the increasing number of arbitral cases in which States are involved, there has recently been a tendency towards publicity, not only in investment protection arbitrations but also in commercial arbitrations. That said, many questions arise: in the event of a conflict between confidentiality and publicity, which should prevail? What role does the arbitrator play in this conflict? Does confidentiality provide more benefits than harm.

Key Words : Arbitration, Confidentiality, Publicity, Award, Commercial Arbitration, Investments Arbitration

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I. Introduction to Confidentiality in Arbitration

There is an old Latin saying that "aliud est tacere, aliud celare" (to conceal is one thing; to be silent another), that, whilst applicable to any aspect of life and the Law, acquires particular relevance in arbitration where privacy and confidentiality have, since its inception, played a very important role.

There is consensus amongst all the participants in arbitration (be they arbitrators, institutions or the litigating parties) as to the reasons why arbitration is chosen over the traditional judicial dispute resolution practices. If a survey were to be conducted amongst these participants the result would probably be a list enumerating the advantages: the speed and flexibility of the process; lower cost; greater guarantee of settlement due to the specialisation of the arbitrators (as opposed to civil judges); the possibility of continuity of the commercial relationship between the disputing parties; etc., but without doubt they would highlight confidentiality as one of the most salient aspects of arbitration. Arbitration has always been characterised, amongst other things, by this singular essential, yet alluring, characteristic[79].

It is well known that in the vast majority of judicial systems around the world the information and results of proceedings in courts of ordinary jurisdiction are, with very few exceptions, in the public domain[80]. In such a globalized and interdependent society as ours it is practically impossible to maintain privacy in the court cases and judicial matters which are brought before judges and State courts. On the other hand, arbitral proceedings, except for investor-State arbitration, are almost always confidential and publicity is only to be found exceptionally.

Confidentiality in arbitration is based on the private nature of the dispute:

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79) UNCITRAL notes on the organization of arbitratral procedure; José Rosell, *Confidentiality and arbitration,* Croatian Arbitration Yearbook, Vol. 9 2002; Francisco González de Cossío, *Arbitraje,* México, D.F.: Editorial Porrúa, 2004.; Hans Bagner, *The Confidentiality Conundrum in International Arbitration,* ICC international Court of arbitration bulletin, vol. 12 num. 1, 2001; Eric Loquin, *Les Obligations de confidentialité dans l'arbitrage,* Revue de l'Arbitrage, 2006; *A. Edwards, Confidentiality in Arbitration, fact or fiction?,* International arbitration law review, 2001.

80) Xavier Andrade Cadena, *Las Ventajas del Arbitraje Internacional: una Perspectiva Ecuatoriana,* http://www.servilex.com.pe/arbitraje/colaboraciones/ventajas_internacional.php#_Toc52207605.

private relationships mean private disputes[81]. Added to this is the logical desire of the parties not to make their differences public[82]. Recourse to the ordinary courts traditionally impedes privacy whereas arbitration allows the parties to sidestep the publicity of official court proceedings in matters that are very sensitive both in terms of public opinion as well as competitors. Furthermore, the parties reach an understanding more readily when there are no external interferences.

Whilst confidentiality is the predominating characteristic in commercial arbitrations where both parties are companies, it is a different matter altogether when the State is involved. Since the State is submitted to public law and control, its arbitrations must be public. This will be discussed later in this paper.

If, as we have said before, in arbitration the general rule is privacy and confidentiality, there is now a current of opinion calling into question that privacy and confidentiality are intrinsic attributes of arbitration. This can be explained mainly by the exponential growth of investment arbitrations and those in which the State is party to the proceedings.

This question mark as to confidentiality is indeed extending to commercial arbitrations, hitherto considered eminently private and thus confidential. This confidentiality may be rooted in the express desire of the parties, by reason of an express provision in the procedural rules applicable to the arbitration or by mandate of the applicable substantive law.

Needless to say, as a matter of private justice, it is confidentiality which sets arbitration apart from other systems of public justice. This has, till now, practically always been the case. The private nature of the dispute naturally justifies confidentiality in the majority of cases. However, in today's globalized world and market, the increasing demand for transparency in commercial activities is beginning to undermine this hitherto virtually untouchable principle of confidentiality.

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81) A. Redfern, M. Hunter, N. Blackaby and C. Partisades: *Law and Practice of International Commercial Arbitration,* Sweet & Maxwell (2004).

82) Emanuel Gaillard, *Le Principe de Confidentialité de l'Arbitrage Commercial International,* Recueil Dalloz, 1987

II. Historical Evolution of the Principle of Confidentiality

The jurisdictional supervision of awards in the ordinary courts, on the one hand, and the public disclosure of information provided in commercial and international arbitrations in which the State or a State entity is a party, are now made public globally through the internet. This, accordingly, has led to an unprecedented crisis for confidentiality in arbitration.

Up to the end of the nineteen eighties there was an almost indisputable, though unwritten, assumption that the private nature of the arbitral proceedings obliged the participants to maintain confidentiality.[83] This assumption was affirmed without consideration of whether private or public interests were involved. At the end of the nineties, however, a growing number of people involved in arbitration began to question this tradition. The mere fact that the arbitration was private did not necessarily mean that it was confidential as a matter of course. The fact that the parties involved in an arbitral proceedings could stipulate, modify, or, where called for, suppress confidentiality naturally implied that confidentiality does not have to be an inherent characteristic of arbitration present in every single case. The syllogism is clear: if confidentiality can be agreed, then there is no presumption of confidentiality, ergo if there is no presumption of confidentiality then it is not essential.[84]

Privacy is usually present in commercial arbitrations the world over. For a long time it was commonly held that where privacy was recognized, confidentiality was automatically guaranteed. This, however, has ceased to be a commonly shared belief and is now being replaced by new way of thinking.

Nowadays, examples of this break from the idea of confidentiality as an inevitable element of arbitration are appearing principally in Anglo-Saxon countries (the US, the UK and Australia)[85], and more clearly in international

83) Enrique Chavez Bardales, *Nuevas Perspectivas sobre la Privacidad y Confidencialidad en el arbitraje Internacional,* Lima Arbitration no. 3 - 2008 / 2009.

84) Jan Paulsson and Nigel Radwing, *The Trouble with Confidentiality,* Arbitration International, vol. 11, no. 3, 1995

85) José F. Merino Merchán, *Confidencialidad y Arbitraje,* Spain Arbitration Review 2/2008.

commercial arbitrations than in domestic arbitrations. However, it is not exclusively an Anglo-Saxon phenomenon. The Supreme Court of Sweden[86], for example, has recently asserted that confidentiality cannot be deemed inherent to arbitration[87] [88] and that if the parties want confidentiality then it can be expressly agreed[89].

In general terms, domestic legislators and international treaties have not expressly recognized the right to confidentiality in arbitration. Is explicit statutory recognition of confidentiality necessary? We believe that it is not. Arbitrators, parties, counsel, etc., are strictly bound not to disclose any information gained throughout the proceedings. The basis of the principle of confidentiality is to be found at the very core of arbitration and, in general, of alternative dispute resolution. Historically, the majority of these extrajudicial forms of dispute resolution have been played out within a clearly private context and where privacy has occupied the centre stage. This contrasts sharply with the imperative of publicity in judicial proceedings.

III. Commercial vs. Investment Arbitration

Although confidentiality is accepted as a characteristic and indisputable aspect of commercial arbitration, this unshakeable belief is now beginning to shatter: publicity is gaining ground in certain sectors of arbitration. Such is the case with investment arbitration.

Investment arbitration has experienced a marked evolution in recent years. A significant number of States with emerging economies have sought to take

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86) Swedish Supreme Court award of October 27, 2010 *(Bulgarian Foreign Trade Bank Ltd vAl Trade Finance Inc.).*

87) José Carlos Fernández Rozas, *Crisis del Paradigma de la Confidencialidad en el Arbitraje Comercial,* http://www.legaltoday.com/practica-juridica/civil/arbitraje/crisis-del-paradigma-de-la-confidencialidad-en-el-arbitraje-comercial

88) José Carlos Fernández Rozas, *Trayectoria y Contornos del Mito de la Confidencialidad en el Arbitraje Comercial,* Revista de Arbitraje Comercial y de Inversiones, vol. II (2).

89) Edouard Bertrand, *The Confidentiality of Arbitration: Evolution or Mutation Following ESSO/BHP v. Plowman,* Revue de Droit International des affaires, no. 2 1996; Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality,* Arbitration International, vol. 15, no. 2 1999.

advantage of the global market. These States have required immense public works to develop their economy. Similarly, new ways to tap natural resources have brought about a steep rise in the number of States which have found themselves immersed in arbitrations.

This rise of investment arbitration has created tension between privacy and confidentiality (two elements deeply rooted in commercial arbitration) and the public interest and transparency required in actions in which a State is involved. As we have said, the confidentiality of commercial arbitrations between companies must give way when a public element comes to the fore; for example in the renowned ESSO AUSTRALIA RESOURCES vs. PLOWMAN[90] case where the conclusion which the Australian court reached was that because the Australian State was involved in the arbitration "confidentiality could not be deemed a fundamental attribute and the legitimate interest of the public in obtaining information with regard to public authority matters must prevail". The defence of public interest thus becomes a boundary which the confidentiality of the arbitration may not surpass. In arbitrations in which the State and its public bodies intervene, confidentiality ceases to be an absolute value and consideration is given to the concerns public interest.

As the State is under compulsion by public law and control, its arbitrations must, necessarily, be public (at least in part). This is the case with the Peruvian OSCE (Supervisory Body for State Contracting)[91]. This Council establishes that those arbitrations in which disputes concerning public contracting are settled will be in the public arena and published on the institution's webpage. The ICC, for its part, publishes a guide to arbitral awards for lawyers and arbitrators.

With investment arbitrations, the secrecy and confidentiality of commercial arbitration is no longer a prerogative (usually for reasons of domestic parliamentary control)[92] and arbitrators' decisions have a potentially great impact

90) José F. Merino Merchán, *Confidencialidad y Arbitraje,* Spain Arbitration Review 2/2008.

91) Mariela Guerinoni, *Hacia un arbitraje transparente,* http://edicionespropuesta.blogspot.com.es/2011/08/hacia-un-arbitraje-transparente.html

92) Rodolfo Dávalos, *La Proyectada Corte de Arbitraje de la OHADAC,* Revista de Arbitraje comercial y de Inversiones, vol. 4, 2011; Bernardo M. Cremades, *La participación de los estados en el arbitraje internacional,* conference paper for the Latin American and Caribbean conference on commercial arbitration, La Habana, 2010.

on public opinion. When a State intervenes, the traditional right to confidentiality in commercial arbitration is eliminated when publicity is legally required.

When arbitrations involve State parties, confidentiality is relative to the outcome of the arbitration, that is, the award. It is logical that, whereas the different stages of the arbitral proceedings may be confidential, the result of the arbitration must necessarily be public. And this is why a tendency is emerging towards publication of the award both in the international arena and within the domestic context of States.

As stated above, when sovereign States are involved, arbitrators' decisions have a very significant impact on public opinion. The atmosphere of confidentiality or secrecy surrounding international commercial arbitration disappears. Their determinations must be made known to public opinion and must be subject the parliamentary control of their respective countries.

Transparency in public contracting is essential because of the public interest and public resources involved. Transparency, nonetheless, goes far beyond the publication of awards. In some cases, even, the participation of so-called amici curie in deliberations before the arbitrators has been admitted[93].

It is important to manage transparency in arbitral proceedings in which States are involved, not just for the management of arbitral processes per se, but also to ensure that the execution of those contracts to which the State is party is more efficient.

IV. Confidentiality in Different Systems

In spite of the importance of confidentiality in arbitration, a report by the ICC Commission on International Arbitration published in 2002 revealed that only Hong Kong, Spain, Nigeria, Romania, Taiwan, Zambia and Bermuda contained

93) José Carlos Fernández Rozas, *Crisis del Paradigma de la Confidencialidad en el Arbitraje Comercial,* http://www.legaltoday.com/practica-juridica/civil/arbitraje/crisis-del-paradigma-de-la-confidencialidad-en-el-arbitraje-comercial; Iñigo Iruretagoiena, *Atenuación de los Rasgos de Confidencialidad y Privacidad del Arbitraje de Inversión,* Revista de Arbitraje comercial y de Inversiones, vol.1, 2008.

specific regulations in their respective legislation for the principle of confidentiality[94].

In light of the crisis in the principle of confidentiality in arbitration mentioned already, and in order to preserve confidentiality as a distinctive element of arbitration, some institutional rules previously silent on confidentiality have been amended for the purposes of imposing on the parties the obligation of confidentiality that guarantees the privacy of all data and information presented in the arbitration.

As already noted, as a general rule, international commercial arbitrations are confidential, either by virtue of the lex arbitri, express stipulation by the parties or by virtue of the arbitral rules chosen. In spite of the lack of uniformity the importance of confidentiality is evident in that the majority of arbitration rules (ICC, LCIA, ICSID, UNCITRAL, etc.)[95], make express reference to this.

Confidentiality is traditionally considered almost part and parcel of arbitration. In light of this, one would expect the arbitral regulation (state legislation or institutional regulations) to be quite clear in this regard. However, the reality is far from being as widespread as one would expect.

There is no denying, however, the importance of confidentiality. The majority of arbitral regulations make express mention (in a greater or lesser degree) of it. For example, the ICC in the new 2012 Rules (the previous one in force since 1998 was somewhat vague) regulates, amongst other issues, the possibility that, at the request of either of the parties, the arbitral tribunal issues orders with regard to confidentiality of the arbitral proceedings or the protection of commercial secrets and confidential information; the hearings will not be open to third parties to the proceedings; the work of the ICC's International Court of Arbitration is confidential; the award is not of a public nature, etc.

The LCIA, for its part, establishes that meetings and hearings will be private unless the parties agree or the Tribunal decides otherwise; it establishes a

94) Fernando Canturrias Salaverrry y Roque Caivano, *La nueva ley de arbitraje peruana,* Revista Peruana de arbitraje, 2008; ICC Commission on international arbitration "Report on confidentiality as a purported obligation of the parties in arbitration", en document 420/20-009 Rev, 2009.

95) Tomás Leonard, *Transparencia en arbitraje internacional de inversiones,* Winston & Strawn LLP, www.pge.gob.ec/es/documentos/doc.../281-tomas-leonard.html

presumption of confidentiality on the parties and the arbitrator; and, except by written express agreement of the parties, it establishes that confidentiality extends to the award. The UNCITRAL Rules, whilst not setting forth a general duty of confidentiality of the parties, do set forth that hearings are not open except when the parties agree to the contrary; the arbitral tribunal may require each witness or expert to withdraw during the statement of other witnesses, except, in principle, it should not be required of a witness or expert party to an arbitration to withdraw; the rules submit the publication of the award to the consent of the parties; the award will become public when one of the parties has the legal obligation to make it known to protect or exercise a right; The ICSID prohibits the publication of awards without the consent of the parties. 96)

It is thus that the majority of arbitration regulations today contain references to confidentiality in one way or another.

V. The Appropriateness of Confidentiality and its Potential Risks

Maintaining confidentiality as a characteristic and inviolable feature of the arbitral proceedings is not without its detractors.

1. The Risk of Excessive Confidentiality

As stated at the beginning of this article, there exists a Latin saying that asserts "aliud est tacere, aliud celar" (to conceal is one thing; to be silent another). Whilst it is true that confidentiality is a very important element in arbitration, raising this confidentiality to a kind of indispensable and inviolable element of the institution, to a dogma of faith, can be accompanied by certain dangers. Confidentiality should not, in any event be synonymous with secrecy.

There is a risk of seeing confidentiality as an instrument to mask the

96) However, ICSID must publish excerpts of the ICSID Tribunal's legal reasoning since the year of 2006 when the ICSID Arbitration Rules have been amended.

arbitrators' incorrect or unethical decisions[97], or decisions that violate the principles that should govern the course of the arbitral proceedings.

There is also the risk of arming the arbitrators with a "shield" that has the effect of making it impossible to review the merits of the award. Certainly, on occasion, faced with an application for annulment, the award becomes knowledge of the courts of justice and thus acquires publicity[98]. However, the fact that the merits of the cause cannot be "rearbitrated" leads to a situation where awards that may be formally impeccable but blatantly unjust or containing misguided interpretations of substantive law are beyond jurisdictional control

If confidentiality were absolute and inviolable, the guarantee that the publicity of the ordinary courts implies for the parties would be lost. The secrecy of the proceedings could not only cover up inappropriate conduct by the arbitrators, it could also lead to the conduct of the litigants being categorized as illegal or at least "extralegal" (tax fraud, agreements contravening free competition, etc.). Sensu contrario, indiscriminate publicity may imply that the parties may make public competitor information which should never come to light, thus prejudicing the position of the opposing litigating party.

The standards of professional ethics, understood as principles that should guide the actions of all professionals and be present in the exercise of any duty, take on special relevance when dealing with the work performed by the arbitrators. Confidentiality occupies a prominent position.

Up to what point can an arbitrator assess the existence of this type of abuse? The good arbitrator stakes his professional prestige as an arbitrator on the performance of his duties and accordingly should impose his ethical values, never bowing down to the demands of a specific case. In this way correct arbitral conduct is essential from three standpoints: the arbitrator, the staff of the arbitration centre managing the proceedings, and the arbitral institution itself. The arbitrator, as a decision maker, assumes a responsibility. Were this not so,

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97) José Carlos Fernández Rozas, *Crisis del Paradigma de la Confidencialidad en el Arbitraje Comercial,* http://www.legaltoday.com/practica-juridica/civil/arbitraje/crisis-del-paradigma-de-la-confidencialidad-en-el-arbitraje-comercial

98) Christoph Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil? On est souvent satisfait d'être trompé par soi-même,* ASA Bulletin, vol. 23, no. 2, 2005.

entering into an arbitral proceedings would be equivalent to suffering silently the consequences of an award, however absurd the award may be.

2. Arbitral Decisions as a Contribution to Jurisprudence

On a different note, when confidentiality is viewed as an insurmountable barrier to outside knowledge this is without doubt an obstacle to the development of the Law in areas in which there is more frequent recourse to arbitration. If the publication of legal settlements constitutes a fundamental part of Law, such as jurisprudence, why is it not the same case with arbitral decisions? Why prevent jurisprudence benefiting from the awards?

Generally, the role of the arbitrator is undertaken by highly qualified jurists with experience in the matters under consideration[99]. To condemn arbitral decisions to oblivion (very often of great juridical content)[100] would imply leaving important doctrinal reflections that would shed great light on future cases in limbo. The vast intellectual effort of the arbitrators would thus have a very limited life.

Awards constitute, in many cases, highly noteworthy juridical works[101] and keeping them private deprives the Law of the opportunity to benefit from their content. The publication of awards could provide an incentive to ordinary courts to taking greater care in the drafting of their decisions. A large number of arbitral awards are characterized by their very high quality and their publication would also encourage the arbitrators, similarly, to make the extra effort in the knowledge that they will be in the public domain.

In our view, then, awards should be published once the arbitral proceedings are concluded, unless the parties have agreed otherwise. This is for the sake, apart from what we have just mentioned, of transparency of public management

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99) Juan Monroy Gálvez, *¿Confidencialidad del Proceso Arbitral?* http://www.estudiomonroy.com/articulos/art_per_confid_proc_arbi.htm

100) Derik Latorre Boza, La Privacidad del Arbitraje, http://blog.pucp.edu.pe/item/48525/la-privacidad-del-arbitraje

101) Mario Castillo Freyre, *Confidencialidad en el Arbitraje,* http://www.castillofreyre.com/biblio_arbitraje/vol8/cap13.pdf

(in those arbitrations in which a State is party) and for reasons of transparency of the arbitral tribunals themselves (understood as arbitrators and institutions) and of those who comprise them.

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The Use of the UNIDROIT Principles as Neutral Law in Arbitration

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This article discusses the use of the UNIDROIT Principles of International Commercial Contracts in international commercial arbitration. Because the Principles are designed specifically for cross-border commercial transactions, the use of the Principles avoids many of the legal rules that would govern from otherwise applicable domestic law that do not reflect the expectations of parties in international trade.

Key Words : UNIDROIT Principles, Arbitration, Applicable Law, Neutral Law, CISG

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I. Introduction

We may start with the question of whether lawyers seriously consider the issue of the operative substantive law when drafting the documents for aninternational commercial transaction. It is common wisdom when lawyers discuss this to assert that the substantive law is always a major consideration. Yet, a study of actual transactional documents and the disputes that arise in international commercial transactions suggest otherwise.

This may be due to a large extent to where the question of the substantive law fits within the list of concerns that counsel must address. The first and primary concern is always the substantive obligations of the parties. The second consideration is the question of regulatory and administrative requirements, such as customs and government mandated standards of quality and performance. Having dealt with these issues, which are the heart of the transactions, the issues of dispute resolution (choice of court or arbitration clause) and substantive law (choice of law) are secondary concerns that lawyers often do not address or address perfunctorily. To the extent that the parties use form contracts that provide for dispute resolution or choice of substantive law, the problem may be exacerbated because of the veneer of thoughtful choice when there is probably no real choice actually being made for the particular transaction.

It may be argued that the underlying substantive law may not be of great importance because parties usually are able to contract for specific terms and contract around otherwise applicable rules in the underlying substantive law. This is, of course, true to an extent. However, this assumes that the parties are able an anticipate the potential problems at the time of contracting and provide for these contingencies, and therefore do not need to rely on the default rules of the underlying substantive law. This would seem to be a risk that a lawyer thoughtful enough to negotiate the substantive obligations and the rules to govern these obligations would not want to take.

With this background in mind, I would like to examine the reasons why and the methods by which parties in arbitration might choose the UNIDROIT Principles of International Commercial Contracts (“Principles”) as the substantive

law for transactions or the part of transactions that come within the scope of the Principles.

Ⅱ. UNIDROIT and the Principles

The Principles are the product of the International Institute for the Unification of Private Law ("UNIDROIT"). UNIDROIT is an independent intergovernmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was reestablished in 1940 on the basis of a multilateral agreement. This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to states that have acceded to the statute. There are presently sixty-three member states including the Republic of Korea.

The UNDROIT Governing Council approved the project to draft the contract's Principles in 1971, but a working group was not set up until 1980. The first set of the Principles was approved in 1994. These are composed of a Preamble and 119 articles divided into seven chapters: "General Provisions" (Chapter 1); "Formation" (Chapter 2); "Validity" (Chapter 3); "Interpretation" (Chapter 4); "Content" (Chapter 5); "Performance" (Chapter 6); and "Non-Performance" (Chapter 7). Chapter 6 has two sections dealing with "Performance in General" and "Hardship," respectively, while Chapter 7 has four sections: one concerning "Non-Performance in General," one on the "Right to Performance," one on "Termination," and one on "Damages."

The second set of Principles was promulgated in 2004. The 2004 Principles do not replace the 1994 Principles but supplement them with new additional chapters on "Set off" (Chapter 8); "Assignment of Rights, Transfer of Obligations, Assignment of Contracts" (Chapter 9); and "Limitation Periods" (Chapter 10); as well as a new section 2 to Chapter 2 on the "Authority of Agents".[1)]

1) The only substantive change made from the original 1994 text is an amendment to article

A third set of Principles was completed in 2010. The 2010 edition adds new sections on illegality, conditions, restitution in failed contracts, and plurality of obligors and obliges, and amends some of the sections in the general provisions, the grounds for avoidance, and termination. In addition, some reordering of the Principles have been made.

The Principles are intended to enunciate rules that are common to most legal systems.[2] To the extent that the rules do not reflect these principles, they are designed to accommodate the special requirements of international trade.[3] The "black-letter rules" are accompanied by extensive and detailed comments, including illustrations, which form an integral part of the Principles.

The stated purposes of the Principles are enumerated in the preface:

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

The Principles should be placed within the broad family of nonbindinglegal rules that are often referred to as "soft law".[4] These include model laws,[5]

2.8(2) on the effect of holidays occurring during or at the expiration of the period of time fixed by an offeror for acceptance. This section is now a new Article 1.12.

2) Bonell, M.J., (2005) An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts, 3d. ed. at p. 46. The primary influences were codifications that had recently been drafted or amended. These include domestic legislation, such as American Uniform Commercial Code and Restatement 2d of Contracts, the Algerian Civil Code, the Dutch Civil Code, the Civil Code of Quebec, and the law of obligations of the German Civil Code. The CISG also was a major influence. *Ibid.* at pp. 48-49.

3) *Ibid.* at 46-47 and 50-52.

4) Defined by one commentator, "'soft law' is understood as referring in general to instruments

codifications of customs and usages,[6] and the promulgation of international trade terms.[7]

The official versions of the 2010 Principles have been published in English, French, German, Italian and Spanish. Unofficial versions have been published in Chinese, Greek, Hungarian, Japanese, Portuguese, Russian and Ukrainian. Versions of the 2004 Principles are also available inArabic, Korean, Romanian, and Vietnamese.

Ⅲ. The Principles and the CISG

To the extent that an international commercial transaction is concerned with the sale of goods, the governing law is often the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),[8] and therefore any discussion of the Principles will logically start with a comparison of the Principles with the CISG. The Principles may work with the CISG in one of three ways: to supplant the CISG, to interpret the CISG and to supplement to CISG.

Although the CISG will apply by default to those transactions that come within its scope, the parties may freely choose to exclude the application of CISG.[9] When parties exclude the CISG, the operative substantive law in an international commercial contract will be the law either chosen by the parties with a choice of law clause or the law that will apply by the conflict of law rules of the jurisdiction that would otherwise governthe transaction absent the CISG. As will

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of normative nature with no legally binding force and which are applied only through voluntary acceptance". Bonell, M.J., (2005) "Soft Law and Party Autonomy: The Case of the UNIDROIT Principles", Loyola Law Review, Vol 51 p. 229.

5) See, e.g., UNCITRAL Model Law on International Commercial Arbitration (1985).

6) For example, the International Chamber of Commerce (ICC) has promulgated the Uniform Customs and Practice for Documentary Credits which set out the rules and principles that govern international letters of credit.

7) See, e.g., International Chamber of Commerce, Incoterms 2010.

8) Seventy-nine nations have ratified the CISG, including the Republic of Korea and the Republic of Korea's three largest trading partners- China, Japan and the United States. The forth largest trading partner with the Republic of Korea is the European Union, of which every major country except the United Kingdom has ratified the CISG as well.

9) CISG art. 6.

be discussed below, because the Principles may not be considered "law" as that law is understood under conflict of law rules, if the parties choose to exclude the CISG, the Principles will apply only if the parties expressly choose the Principles as the operative law in the agreement.[10)]

The Principles might also be used to interpret the CISG to the extent that the CISG already applies to the transaction. Because the Principles were written with a focus on international commercial contracts, an arbitral tribunal may on its own find both the principles as well as cases and arbitral awards interpreting the Principles as useful guides to interpret a transaction. This seems more of a theoretical than practical result, though, because, given the substantial case law and arbitral decisions interpreting the CISG already, it is unlikely that a tribunal would look beyond that body and independently choose the Principles to interpret the CISG. The parties could also actually specify that within a transaction governed by the CISG, that that the Principles are to be used to interpret the CISG.[11)]Even in this situation, though, it is unclear how a tribunal would use the Principles to interpret the CISG in the face of the current substantial volume of interpretation on the CISG.

In the case where the CISG is the applicable law, the third possible, and most likely, use of the Principles is to supplement the CISG. This could occur either by express party agreement[12)] or by an arbitral tribunal that determines that the Principles reflect the understandings of the transacting parties. Given the relatively narrow scope of the CISG,[13)] the Principles could easily be used as a

10) Recently UNIDROIT published a series of Model Clauses for the use of the Principles. http://www.unidroit.org/english/principles/modelclauses/modelclauses-2013.pdf. The Model Clauses specifically provide for choosing the Principles as the Governing Law. The suggested language for designating the Principles the governing body of law is: "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2010)" or "This contract is governed by the UNDROIT Principles of International Commercial Contracts (2010) and, with respect to issued not covered by such Principles, by the law of [State X]. Whether this language would meet the requirements of a valid choice of law clause could be in doubt under some legal systems, and is discussed *supra.*

11) The UNIDROIT Model Clauses for the use of the Principles suggests that following language: "This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)." Ibid. at 17.

12) Ibid.

13) See, e.g., Henry D. Gabriel, The CISG: Raising the Fear of Nothing, 9 Vindobona J. Int'l

source of law for questions not answered by the CISG.[14] This includes set-off rights, assignment of rights and transfer of duties, third party rights, illegality, conditions, and plurality of obligors and obligees.

Ⅳ. Are the Principles Law?

A significant question is whether the Principles constitute "law" as that is understood under the rules of private international law because the Principles have not been adopted as positive law by any jurisdiction. This raises the possibility that the parties' choice of the Principles under a choice of lawprovision may not be considered a valid choice of law.[15] Although one might assume an arbitral tribunal may give the parties more latitude on this than a court might, this is still a concern that with careful lawyering can be avoided.

By choosing the Principles as "terms" to the agreement as opposed to the actual choice of the underlying substantive law, the parties should not create a legal question of what is 'law" for the tribunal. Acknowledging this potential problem,[16] UNIDROIT has provided a model clause to insert in the agreement

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Com. L. & Arb. 219, 219 (2005).

14) It is worth noting that UNCITRAL itself has already accepted the UNIDROIT Principles as the proper source of law in those areas where the scope of the CISG does not extent. See e.g., Report of the United Nations Commission on International Trade Law, fortieth session (25 June – 12 July 2007), UN Doc. A/67/17 (Part I), para. 213:

> 'The UNIDROIT Principles] shall be applied when the parties have agreed that their contract be governed by them,
>
> 'They may be applied when parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like, . . . [and] when the parties have not chosen any law to govern their contract,
>
> 'They may be used to interpret or supplement international uniform law instruments, . . . [and] to interpret or supplement domestic law,
>
> 'They may serve as a model for national and international legislators.'

15) Thus, for example, the American Uniform Commercial Code requires, for purposes of choice of law, that the parties choose the law of a country that bears a reasonable relationship to the transaction. Uniform Commercial Code § 1-103(a). This has been interpreted as requiring an enacted law of the jurisdiction, and thereby may exclude the Principles as a choice of law.

16) "Parties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. Domestic courts are bound by

to provide for the Principles to be terms of the agreement.[17]

V. When Will The Principles Be Used in Arbitration

The Principles can apply in an arbitration in one of fourcircumstances.[18] First, the parties may expressly choose the application of the Principles as a choice of law or as incorporated terms in the agreement.[19]

Second, an arbitral tribunal may choose the Principles as the appropriate law in the absence of a choice of law provision. In the absence of a choice of law provision, a courtwould normally apply its conflict of laws rules, which would almost inevitably result in the application of a domestic law and not soft law

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the rules of private international law of the forum, which traditionally and still predominantly limit the parties' freedom of choice to domestic laws, so that a purported choice of non-state rules such as the UNIDROIT Principles will be considered not as a choice of law but, rather, as an agreement to incorporate them into the contract." Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, (2013), p.4.

17) "The UNIDROIT Principles of International Commercial Contracts (2010) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract." Ibid. at 14.

18) Although not of direct relevance to arbitration, it is worth noting that he Principles have been and will likely continue to be the basis of legislation. For example, in the preparation of the new Civil Code of the Russian Federation – theUNIDROIT Principles have been chosen as one of the sources of inspiration even before the publicationof their first edition in 1994. In the following years the UNIDROIT Principles were chosen as a model for the new Civil Codes of Estonia and of Lithuania, both of which entered into force in 2001. Other significant examples are the proposals for the reform of the rules on interpretation of legal acts published in 1996 by the Scottish Law Commission and the proposal for the reform of the general rules on commercial contracts in the Spanish Commercial Code published by the *Comisión General de Codifición* in 2004. The German legislature, in preparing the reform of the law of obligations of the German Civil Code (BGB) which entered into force in 2002, took into account, thougheventually only to a limited extent, the UNIDROIT Principles. Most recently, the French reform of thelaw on limitation periods in private law relationships of 2008 was inspired by the provisions onlimitation periods in the UNIDROIT Principles. The Chinese Contract Law of 1999, widelyinspired not only by the CISG but also by the UNIDROIT Principles and the projects for the modernization and harmonization of contract law in Mongolia, Vietnam and Georgia.

19) The difference between the Principles applying by a choice of law provision or by incorporation into the agreement, and the reasons why parties would choose one or the other is discussed below.

such as the Principles. Arbitral tribunals, however, have greater flexibility in choosing the appropriate law, and to the extent that the tribunal concluded that the Principles reasonably reflect party expectations, a tribunal may choose the Principles as appropriate to the transaction.[20]

A third situation is when the parties have designated that the agreement be interpreted by "general principles of law" or "general principles of international commercial law", the "lex mercatoria" or similar language.[21] Although the choice of a tribunal to apply the Principles as general principles of international commercial law is quite sensible, as I will discuss below, I do not think it normally is a sound idea for parties to leave the choice of law this vague.

A fourth situation is where the Principles might be used is as a basis to interpret an agreement that is otherwise subject to domestic law. Although this has been lauded by academics as a means to reflect common expectations of parties to an international commercial transaction,[22]it is unikely that a tribunal that is charged with intepreting domestic law will see its mandate as going beyond that an using extrensic law as an interpretive aid.

Ⅵ. The Principles as Neutral Law

Having the power to choose the Principles does not address the question of why parties might make this choice. Specifically, the question is what do the Principles offer that would not be available in the otherwise applicable law. Here, I would like to outline what I believe are some of the possible benefits.

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20) This has been the case in several ICC Arbitration awards. See e.g., ICC International Court of Arbitration 9771 (http://www.unilex.info/case.cfm?id=1060) (2001); ICC International Court of Arbitration 11601 (http://www.unilex.info/case.cfm?id=1421) (2002); ICC International Court of Arbitration 12698 (http://www.unilex.info/case.cfm?id=1396) (2004); ICC International Court of Arbitration 12193 (http://www.unilex.info/case.cfm?id=1365) (2004).

21) See e.g., Award of International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (http://www.unilex.info/case.cfm?id=857) (2002).

22) See e.g., A.S. Komorov, "Remarks about the Application of the UNIDROIT Principles of International Commercial Contracts in International Commercial Arbitration", in Institute of International Business Law and Practice, UNIDROIT Principles for International Commercial Contracts: A New Le Mercatoria? ICC Publication No. 490/1 (1995), p. 155 *et. seq.*; A. Boggiano, "La Convention interamericaine sur la loi applicable aux contracts internationaux et Principes d'UNIDROIT", (1996 Uniform L. Rev. 226).

a. Knowing the Law In Advance

As I mentioned earlier, often what is perceived by counsel as more important is not what the substantive law is that will govern the transaction, but knowing what this law is in advance. With this knowledge, counsel knows what default rules need to be contracted around.

With that in mind, it may appear that there is no particular advantage to any specific default rules of contract, be it a domestic law or the Principles, as wise counsel will simply draft the agreement with the necessary alterations to avoid any default rules that do not reflect the parties intent.[23] But this is not necessarily so. For in any international commercial transaction, one runs the risk of uncertainty as to whatsubstantive law will govern under applicable conflict of laws rules unless the agreement has a specific choice of law clause.

Because, for purposes of this article, we are assuming the parties have already chosen arbitration as the dispute resolution mechanism, one can assume counsel is thoughtfully working through the agreement. Choosing arbitration is a statement of control. Arbitration allows party choice in many ways that a judicial proceeding does not, such as the choice of who will decide the dispute and under what terms the dispute will be resolved. It is unlikely and unwise that, having exercised this level of control, the parties would leave open the question of what law applies, and hence an arbitration clause should also provide an appropriate choice of law provision.

A thoughtful choice of law clause should focus on the what rules will govern absent a specific negotiated term to the contrary: in other words, what default rules will govern. It is to this question that knowing the law in advance is important, for parties should have certainty not only to knowing what rules need to be contracted around, but also what rules will govern absent a specific negotiated term. As is discussed below, it is here that the UNIDROIT Principles may provide a better choice than an otherwise applicable law.

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23) I am assuming some level of cooperation and agreement between the parties. If one party has the bargaining position to impose its terms irrespective of the wishes of the other party, that party will be less concerned with the intent of both parties, and more concerned with that party's own respective self-interest.

b. Mandatory Rules

Underlying the Principles is a broad recognition of freedom of contract and party autonomy.[24]Whether this is a broader mandate than that which would be provided under other possible applicable law, this is somewhat restricted as the Principles are constrained, as is other law, by mandatory rules that limit party choice under the governing law of the jurisdiction.[25]

Moreover, even absent the express provision in the Principles that limit the application of the rules by otherwise applicable mandatory rules, the mandatory rules would inevitably govern over the Principles as rules of freedom of contract do not generally provide for the exclusion of mandatory rules.

To the extent that the parties may wish to provide some leeway in the application of the mandatory law that the Principles will be subject to, it is worth noting that although in a judicial proceeding the agreement is generally governed by the 'lex fori"; the place where the court sits, in an international commercialarbitration, the law is often governed by the 'lex arbitri"; the law of the place of the arbitration as determined by the parties. Thus, with thoughtful planning, parties can maximize the effectiveness of the Principles by minimizing the mandatory rules that would otherwise govern the agreement by choosing the "lex arbitri" most favorable to the transaction.[26]

c. Reasons for Choosing the Principles as the Applicable Law

i. Balancing Party Expectations in International Commercial Law

For hundreds of years it has been recognized that international commercial

24) UNIDROIT Principles art. 1.1 "The parties are free to enter into a contract and to determine its content."

25) UNIDROIT Principles art. 1.4 "Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."

26) Although beyond the scope of the discussion of this article, it should be noted that the very mandatory rules that the parties seek to avoid may be applicable if one of the parties seek to enforce the arbitral award in the jurisdiction in which the parties had sought to avoid by choosing another jurisdiction as the lex arbitri.

contracts have been driven by an implicit "lex mercatoria"; an international commercial law, that is based on the practices and expectations of parties in international trade. These practices have evolved from the practical experience of businesses that reflect how international trade is conducted. Moreover, these business practices tend to be universal, and thus not grounded in any particular domestic law. It is often the case that business parties in international commercial transactions have these expectations in mind whether explicit or implicit.[27)]

In addition, in contemporary international trade, a substantial number of trading partners will be from disparate legal systems. This provides transactions with widely varying standards of contract formalities, performance requirements and remedial structures.[28)]

The Principles are intended to address both of these concerns. First, the Principles are drafted to addressthe particular needs of international commercial transactions. Moreover, the Principles are meant to be universal,[29)] and therefore avoid the particular requirements of what may be an unknown foreign legal system.

ii. Avoid Legal Parochialism

Most domestic law will be based broadly on either the Common Law or the Civil Law. While both legal families provide ample latitude to craft contractual agreements, counsel who are used to practicing in one of the traditions may be uncomfortable working in the other legal family, much less another domestic law

27) It is worth noting that in many jurisdictions, there are separate laws to govern domestic and international arbitrations. This is in recognition that the expectations of the parties are different depending on whether the transaction is domestic or international.

28) A primes example of this is Principles art.2.1.1, which provides that a "contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement." The import of this provision is clear: if the parties have begun or completed performance or made substantial preparations for performance, a contract will be assumed. In other words, when the parties act as if they have a contract, formalities of formation are not necessary.

29) Of course, one of the potential drawbacks of a universal set of rules is the inability to be too specific on some points. For example, the Principles do not attempt to define "commercial". Any attempt would have to result in failure as the domestic standards that delineate between commercial and consumer are too varied to accommodate.

within the same legal family.[30] The Principles avoid this problem to a substantial extent by having been drafted to be independent of, rather than to work in conjunction with, any particular domestic law or legal tradition.[31] Moreover, the Principles assume an international, and not a domestic, transaction, and therefore are designed to reflect the expectations of international commercial contracts.

It is worth noting that the unified rules of contracts contained in the Principles avoids a specific problem that could arise if one of the parties is unfamiliar with the intricacies of a specific jurisdiction's law of contracts in a Common Law jurisdiction. Specifically, it is typical for the rules of contract in a common law jurisdiction to be a combination of both statutory and case law. This creates a potential trap to anyone unfamiliar the law of a particular jurisdiction.[32] Conversely, by choosing the Principles, there is a unified body of rules and interpretations.

The Principles also avoid some specific legal concepts and terms that are

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30) There is a natural tendency to prefer one's own domestic law, if for no other reason than familiarity. This should not necessarily be determinative. For instance, as pointed out by the President of the International Court of Arbitration of the Russian Federation,

> [a] reason which may militate in favor of the wide use of the Unidroit Principles is the fact that Russian lawyers and business people do not seem to be as reluctant as their foreign counterparts to contemplate references to the Principles in place of the application of their domestic law on the ground that the former would not confer on them the advantages which parties to foreign trade contracts usually expect from the application of their own domestic law, namely the well-known and detailed regulation of business transactions to which they are accustomed."

(A. KOMAROV, "The UNIDROIT Principles of International Commercial Contracts: A Russian View", 1996 Uniform L. Rev. 247, 250).

31) See F. FERRARI, "Universal and Regional Sales Law: Can They Coexist?", 8 Unif. L. Rev. / Rev. dr. unif. (2003), 177; G. PARRA-ARANGUREN, "Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts", 69 Tulane Law Review (1995), 1239; A.M. GARRO, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods", 23 International Lawyer (1989), 443, 480-83.

32) This can be particularly daunting in a federal system. Thus for example, , to speak of an American law of commercial contracts is somewhat misleading because commercial law is for the most part state, and not federal law, there are fifty separate state (and several district and territory) laws that govern commercial transactions, each with its own contract and commercial law. The same problem exists in Canada and Australia.

specific to certain legal families or domestic laws. Thus, for example, in the formation provisions, the Principles eschew concepts such as "consideration" and "cause"and focus instead on the process of contract formation. Likewise, the Principles avoid terms such as "warranty" whose meanings are not consistent even among Common Law jurisdictions, much less between Common Law and Civil Law jurisdictions.

iii. Freedom of Contract/Party Autonomy

Consistent with the general expectations of international commercial contracts, the Principles embody a strong policy favoring freedom of contract and party autonomy.[33]The concepts of freedom of contract and party autonomy are the hallmarks of contract law, and thus it might be thought that thestatement of these bedrock concepts in the Principles adds nothing that would not be assumed in an otherwise applicable domestic law.[34] This may not be the case, however, in some developing economies where there is not a strong tradition of enforceable contract rights, particularly where contract and property rights are subject to some level of government regulation and interference.

By choosing the Principles as the substantive law of the agreement the parties signal to an arbitral tribunal the fact that they intend the broadest latitude in their allocation of their rights and duties. This includes the right of the parties to specify with particularity the basis for performance and non-performance,the standards for default as well as the structure of remedies and damages upon non -performance.

iv. Favoring Contract Validity

Through various provisions, the Principles provide a strong preference for contract validity.[35]Therefore, by choosing the Principles, the parties signify their

33) In effect, the Principles support a free market economy. See, M.J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: the UNIDROIT Principles of International Commercial Contracts, 3d. ed. (2005). at p. 88.

34) For purposes of an international contract for the sale of goods, the concepts of party autonomy and freedom of contract are well embedded in the CISG.

35) Principles ch.3. sec. 2 .

intent to maintain the agreement irrespective of some technical legal impediments.

Significantly this includes the absence of any requirements of "consideration" or "cause' as a predicate to formation. This avoids technical arguments against contract formation after the performance of the agreement has begun.

Reflecting actual business practice, the Principles also provide for the possibility of open terms: "If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent the contract from coming into existence."[36]

A particularly important set of provisions, especially for arbitration, are the provisions providing for hardship.[37]By providing the arbitral tribunal the power to adapt the contract or to require the parties to renegotiate the contract, the Principles encourage the maintenance of the agreement irrespective of changed circumstances that might otherwise force a contract termination. Likewise, in the case of "gross disparity" the Principles provide for adaptation to allow the contract to continue under more reasonable terms as opposed to an avoidance of the agreement.[38]

Another important provision in the Principles that encourages the continuation of agreements when there has been a breach is the right of the defaulting party to cure the defect.[39] Because minor breaches are common in major internationalcommercial transactions, this provision prevents the non-defaulting party from avoiding an agreement for minor but curable problems.

Another aspect of the Principles that favors contract validity and continuance is the standard for termination. Although under some domestic laws a minor breach may give the non-breaching party the right to terminate the agreement,[40] under the Principles, a non-breaching party can terminate the agreement and suspend its performance onlywhen the breach constitutes a "fundamental non-

36) Principles art. 2.1.14.
37) Principles arts. 6.2.1, 6.2.2, 6.2.3.
38) Principles art. 3.10.
39) Principles art. 7.1.4.
40) See e.g., the American Uniform Commercial Code § 2-601.

performance".[41] This higher standard of non-performance for termination provides a means to continue the agreement when there is a minor breach.

v. Policy Favoring Trade Usage

Another important aspect of the Principles, and consistent with international practice,[42] is their encouragement of the trade usages as terms to the agreement. Thus the parties are bound not only to "[a]ny usage to which they have agreed and … any practices which they have established between themselves,"[43] but also "a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned, except where the application of such a usage would be unreasonable."[44] It is important to note that this standard provides an objective basis for trades usages; in other words, not what the parties actually knew, but what a party in that business should have known in international trade. This provides an objective standard that avoids one party being subject to the subjective understanding of the other party who might come from another country where the usages are not the sam e.[45]

It is important to note that trade usage under the principles includes both usages that define basic contract rules as well as the underlying substantive obligations. For example, evidence of trade usage may be used to show basic contract rules regarding formation[46] and the time and order of performance.[47] It may also be used to show the substantive obligations such as the quality of the contracted goods or services.

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41) Principles art. 7.3.1. This, of course, is the default rule, and under the Principles the parties are free to set any good faith standard for non-performance that will constitute a breach.

42) CISG art. 9.

43) Principles art. 1.9(1).

44) Principles art. 1.9(2).

45) Obviously, if both parties have the same subjective understanding, the parties " had reason to know" what the other party understood. In other word, the Principles to not supplant a subjective standard with an objective standard; the objective standard subsumes the subjective standard.

46) Principles, arts. 2.1.6(3) and 2.1.7.

47) Principles arts. 6.1.1 and 6.1.4.

vi. Realistic Treatment of Form Contracts

An anomaly in contract law is the treatment of conflicting form contracts. In the case of inconsistent forms (such as a purchase order and an invoice), rules have evolved based on the twin assumptions that parties must actually agree upon the terms of the contract as well as assumption that a form with inconsistent terms to a prior form is a counter offer.[48] Thus, many legal systems will treat the last form as the final counter offer with performance being deemed acceptance. What this effectively does is artificially treat the terms on the final form as binding on both parties when it is clear that the party whose form is not the final form did not really agree to the terms of the final form.

The Principles embody a significant variation from this formation rule for standard term contracts. "Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party."[49] In the case of standard terms, "[w]here both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract."[50] Thus, when the parties use standard terms, the conflicting terms cancel each other out and do not become part of the agreement. If the terms cancel out so much of the agreement that there is no basis for finding a contract, the agreement fails for lack of assent. In this regard, the Principles set out rules that reflect those terms that the parties have actually agreed upon, and by doing so, limit agreements to those terms that have in fact been agreed to by the parties.

vii. Broad Requirements of Good Faith

The Principles embody a broad concept of good faith: "Each party must act in accordance with good faith and fair dealing in international trade."[51]This

48) This is the basic rule of the CISG. See CISG art. 19.
49) Principles art. 2.19(2).
50) Principlesart. 2.22.

seemingly innocuous statement provides a basis to avoid local concepts of good faith, and instead emphasize that the focus is on international norms of behavior.

Unlike some common law jurisdictions where good faith is required only in the performance of the contract,[52] the obligation of good faith in the Principles cover all aspects of the transaction including the negotiations and formation.

Ⅶ. Possible Shortcomings with the Use of the Principles

A present shortcoming of the Principles that has to be appreciated is the current lack of definitive interpretations of its provisions. There have only been 142 published court decisions indexed in the UNILEX database[53] that involve the Principles,[54]and a substantial number of these decisions only mention the Principles in passing without analysis. There are less than 200 reported arbitral decisions in the UNILEX data base as well.[55]For this reason, unlike many domestic laws as well as the CISG, there is not a substantial body of cases interpreting the Principles to allow the comfort of a definite meaning for many of the provisions. Moreover, as mentioned above,[56]in order to draft the Principles as universal rules of international commercial transactions, a level of specificity had to be avoided. Without this level of generality, consensus would not have been possible.

In some areas of international commercial law, certainty of the law and the enforcement of the specific rules is a necessity. Because international

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51) Principles art. 1.7.

52) See e.g., American Uniform Commercial Code § 1-304: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."

53) The UNILEX database is edited by UNDROIT, and it is currently the best resource for a comprehensive list and analysis of all published court cases and arbitral decisions that deal with the Principles.

54) This number is current as of July 8, 2013. See UNILEX Database, http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619&x=1.

55) Ibid.

56) Endnote 29, supra.

conventions and domestic laws are binding, they have the advantage of instant uniformity and enforceability. To the extent that parties have some concern about the enforceability of the Principles, either by choice of law or by incorporation into the agreement, the Principles, as with any soft law instrument raises the concern about its enforceability.

Ⅷ. Conclusion

The norms and expectations in international commercial contracts are not necessarily reflected in domestic contract law. The UNIDROIT Principles of International Commercial Contracts were drafted to reflect these expectations. The Principles also provide the widest latitude of freedom of contract to allow parties to craft agreements with as much flexibility as is necessary. Widely viewed as balanced and neutral, the Principles provide a very rational choice of law for international commercial contracts.

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The Legal Characteristics of Consumer Arbitration Clause and Defenses in the U.S. Contract Laws*

Choong-Lyong Ha**

The U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion, which confirmed the contractuality of a defense as a threshold to distinguish between what is a viable defense for invalidation of consumer arbitration agreement and what is not. In this paper, the adhesiveness of arbitration clause, which is a unique character for consumer arbitration, is investigated in the U.S. as a legal defense to invalidate the consumer arbitration agreements, and its contractualityand related legal doctrines are analyzed. The legal issues of consumer arbitration have been analysed in several legal perspectives including the voluntary, knowing and intelligent doctrine, doctrine of separation, contract of adhesion and the contractuality of defenses. Among all of these, the first three issues are related with arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

Key Words : Consumer Arbitration, Arbitration Agreements, Contract of Adhesion, VKI Doctrine

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I. Introduction

Consumer arbitration agreement, which refers to an agreement to arbitrate between the individual consumer and the business corporation, has been popularized to resolve disputes between consumers and businesses in the United States. Recently, deep interest has been evoked to promote consumer arbitration in Korea and several studies have been conducted to introduce consumer arbitration practices into Korea.[1)]

Although consumer arbitration is a popular way to resolve consumers' disputes with businesses, it still remains unsettled whether consumer arbitration is superior to litigation in terms of protecting consumers against a business.[2)]

Two aspects of consumer arbitration have made it riskier to consumers than consumer litigation. First, the consumer arbitration agreement is generally formed with an adhesion contract. If an arbitration clause is provided with a number of other terms in the contract, the consumer may overlook the legal effects of the arbitration clause entailed by the main contract. The second risk of consumer arbitration is that the individual consumer tends to be put into a weak bargaining position due to lack of experience in arbitration with the business that usually has more financial and legal resources to deal with their consumers.[3)]

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1) Choong-Lyong Ha, "Contract Defenses in Consumer Arbitration Agreements", 「Journal of arbitration studies」, v.20, n.1. 2010, pp. 151-171.; Choong-Lyong Ha, "The VKI Doctrine in Consumer Arbitration Agreements", 「Journal of arbitration studies」, v.21, n.3, pp. 165-187 (2011).; Also working paper, Review on the Adhesiveness of Consumer Arbitration Agreements - The U.S. Laws, 2012.; Suk-Chul Kim, "A Study on Consumer Arbitration System by Empirical Analysis on Redemption for Consumer's Claim", 「Journal of arbitration studies」, v12, n1, 2002, pp. 207-239,; Sung-Yong Park, "A Study on the Possibility of Introducing Arbitration Program to Consumer Dispute Resolution System", 「Journal of arbitration studies」, v.19, n.2, 2009, pp. 73-94.

2) Meredith R. Miller, "Contracting out of Process, Contracting out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process". 75 Tenn. L. Rev. 365, 2008, p.404. Richard M. Alderman, "Consumer Arbitration: The Destruction of The Common Law", 「Journal of American Arbitration」, v.2,n.1, 2003, p.2 (Stating that "the recent movement to impose mandatory predispute arbitration in an increasingly large number of consumer contract, however, threatens to eliminate this "fundamental" branch of government, substituting a system of private, often secret, justice, not bound by precedent and unable to create it.";)

3) Sun-Joo Jung, "Protection of Consumer in Consumer Arbitration", 「Seoul National University Law Review」, v.49, n.1, The Legal Research Institute of Seoul National University, 2008,

Several papers have addressed the issues of protection of consumers in arbitration agreements.[4] Jung (2008) raised the issue of protection of the individual consumer in consumer arbitration, suggesting that the duty to explain the meaning of arbitration clauseshould be imposed to the business. Most recently, Ha (2010) investigated the contract law defenses on consumer arbitration agreements in the U.S. However, all of these papers have not led to a firm conclusion on what would be a converging legal issue to protect individual consumers through the invalidation of consumer arbitration agreements.

Meanwhile, the U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion,[5] which confirmed the contractuality of a defense as a threshold to distinguish between what a viable defense for the invalidation of consumer arbitration agreement was or was not. In this paper, the adhesiveness of the arbitration clause in the U.S., which is a unique characteristic for consumer arbitration, is investigated as a legal defense to invalidate the consumer arbitration agreements, and its contractuality and related legal doctrines are analyzed.

Ⅱ. Legal Characteristics of the Consumer Arbitration Clause

1. General Characteristics

Arbitration is a process through which a dispute is resolved by arbitrators as agreed on by the parties. The most well-known advantages of arbitration include the speedy resolution of a dispute and the flexibility of the dispute resolution

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p.237.

4) Byung-Jun Lee, "The Function and Task of Collective Dispute Mediation in the Framework Act on Consumer", 「Journal of arbitration studies」, v18, n3, 2008, pp. 139-163.; Sun-Joo Jung, "Protection of Consumer in Consumer Arbitration", 「Seoul National University Law Review」, v.49, n.1, The Legal Research Institute of Seoul National University, 2008, pp.231-248; Choong-Lyong Ha, "Contract Defenses in Consumer Arbitration Agreements", Arbitration Review, v.20, n.1. 2010, pp. 151-171.

5) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

process. In order to initiate the arbitration process, there must be a written arbitration agreement between the two parties involved in disputes.[6] The arbitration agreement is classified into two types.[7] One is the pre-arbitration agreement, which is a typical agreement for consumer arbitration and should be made before the disputes arise between the parties. The other is the post-arbitration agreement which should be concluded after the disputes arise.

Consumer arbitration is a procedure to settle any dispute between consumers and businesses by the award of arbitrators as agreed on by the parties. When an individual consumer and a business enter into an arbitration agreement through the adoption of an arbitration clause into the contract terms, the consumer may be faced with a lack in bargaining power and legal knowledge in the fulfillment of the contract or may not be aware of the existence and legal effects of the arbitration clause.

Most of the risks to consumers in consumer arbitration originate from the legal characteristic of its adhesion contract.[8] As stated before, a typical consumer arbitration agreement is formed in a way that the agreement is included as an arbitration clause in the main contract between the consumer and the business. In other words, the consumer arbitration clause is a type of pre-dispute arbitration agreement. When the arbitration agreement is formed as a "clause" included in the main contract, such a pre-dispute clause may precipitate the legal damages to individual consumers, which are usually found in the contract of adhesion.

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6) 9 USCA § 2 (A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.); Arbitration Act of Korea Art.8 cl.2 (An arbitration agreement shall be in writing.)

7) 9 U.S.C.A. § 2; Arbitration Act of Korea Art.8 cl.1 (An arbitration agreement may be in the form of a separate agreement or in the form of an arbitration clause in a contract.)

8) Black's Law Dictionary (6th.ed, 1990), "Standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract."

2. Adhesiveness of Consumer Arbitration Clause

One of the major elements to lead to a valid contract is that the parties should have genuine intent to enter into the contract. The contract law in the U.S. regulates the formation of a contract to make sure that both parties enter into it from their genuine intents. The contracts that are short of genuine intents may be formed due to negligent and fraudulent misrepresentation, mistake, duress, and undue influence, resulting in voidable contracts.

When an arbitration agreement is included and dumped with a number of clauses in the agreement between businesses and consumers, the consumer arbitration clause may not be recognized by the individual consumers, which may lead to an unintentional agreement. Such consumers have been traditionally protected by the legal doctrine of the contract of adhesion.

Due to the adhesiveness of the consumer arbitration clause, consumers may suffer several legal damages. First, consumers may have to agree with an arbitration clause though they are reluctant to enter into an arbitration agreement with the business. An option to contract out of the arbitration is not available to individual consumers, which is contrary to the philosophy of freedom of contract.

The second damage may occur if individual consumers are not aware of the inclusion of the arbitration clause in the main contract they concluded with the business. The lack of arbitration clause awareness may be caused by several reasons including time to read and complexity of the terms. Consumers' ignorance of the arbitration clause will make the assent for arbitration agreement involuntary, which is a common law defense for the validity of a contract.

The third damage may arise from one of the legal characteristics of arbitration. Among other things, the key legal trait for arbitration is that access to litigation is denied for the merits of disputes between the arbitration parties.[9] Individual

9) 9 USCA § 3. Stay of proceedings where issue there in referable to arbitration: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms

consumers who are not usually trained about arbitration are likely to be surprised by the denial of access to jury trial when legal complaints are brought into courts. Significant controversies have erupted about the legality of a waiver of right to jury trial by arbitration agreement as discussed in the next section.

Ⅲ. Defenses Originating from the Nature of the Consumer Arbitration Clause

1. Defenses from the Consumers

(1) The Voluntary, Knowing, and Intelligent Doctrine

The denial of right to jury trial by arbitration agreement has become one of the main rationales for the cases supporting the doctrine that waivers of constitutional rights must be voluntary, knowing, and intelligent (hereinafter called "VKI Doctrine").[10] As noted previously, once a consumer arbitration agreement is concluded between two parties, any of the two parties cannot take the merits of disputes to courts, which is why the parties should be voluntary, knowing, and intelligent in making the decision to enter into the consumer

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of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. Korea Arbitration Act Article 9 Arbitration Agreement and Substantive Claim before Court: (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, when the respondent raises a plea for the existence of an arbitration agreement, reject the action: Provided, that this shall not apply in case where it finds that the agreement is null and void, inoperative or incapable of being preformed.

10) Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148 (1992) ("Adhesion contract which had required patient receiving abortion services to arbitrate medical malpractice disputes was unenforceable as falling outside patient's reasonable expectations where there was no conspicuous or explicit waiver of fundamental right to jury trial or any evidence that such rights were knowingly, voluntarily, and intelligently waived, clinic failed to explain to patient that agreement required all potential disputes to be heard only by arbitrator who was a licensed obstetrician/gynecologist, and patient was under a great deal of emotional stress, had only high school education, and was not experienced in commercial matters."); Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont., 2002) (holding that "that: 1) arbitration clauses were contracts of adhesion; 2) broker owed fiduciary duty to investor to explain the consequences of arbitration clauses; 3) the State constitutional right of access to the courts is a fundamental right; and 4) investor did not knowingly and intelligently waive her fundamental constitutional rights to jury trial and to access to courts.")

arbitration agreement.

Due to the US constitutional guarantee of the right of jury trial in criminal and civil cases,[11] the waiver issue has been frequently reviewed in the criminal and civil courts,[12] while the courts have applied stricter standards to criminal cases than civil cases. In line with the courts' attitudes, the procedural rules for right to jury trial are stipulated differently between the Federal Rule of Criminal Procedure[13] and Federal Rules of Civil Procedure.[14] The basic difference between the two procedural rules is that the former rule takes it granted that the right to jury trial is given to the defendant even without demand, but the latter requires the party to demand jury trial to exercise constitutional right.

The VKI doctrine in the consumer arbitration agreement has its foundations from the conditions required for waiver of the right to jury trial in criminal litigation. In order for the waiver of jury trial to be effective, the federal rule requires three conditions to be met: 1) the defendant waives a jury trial in writing 2) the government consents 3) the court approves.[15]Although any of the conditions are not directly matched with the VKI doctrine, the conditions lead a federal circuit court to deliver fine-tuned standards for the waiver of the right to jury trial.

In U.S. v. Duarte-Higareda,[16] the court provided the principle of voluntary, knowing, and intelligent intent for the defendant to validly waive the right to jury trial, which made sure the parties' real intent to discard their constitutional

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11) U.S.C.A. Const. Amend. VI; U.S.C.A. Const. Amend. VII

12) Patton v. U.S, 281 U.S. 276 (1930); U.S. v. Cochran, 770 F.2d 850, (Cal. 9th circuit, 1985); United States v. Christensen, 18 F.3d 822, 826 (9th Cir.1994).

13) Federal Rules of Criminal Procedure, Rule 23 a. "If the defendant is entitled to a jury trial, the trial must be by jury unless: 1) the defendant waives a jury trial in writing; 2) the government consents; and 3) the court approves.3)

14) Federal Rules of Civil Procedure Rule 38 (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:1) serving the other parties with a written demand--which may be included in a pleading--no later than 14 days after the last pleading directed to the issue is served; and 2) filing the demand in accordance with Rule 5(d); (d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.4)

15) Federal Rules of Criminal Procedure, Rule 23 a.

16) U.S. v. Duarte-Higareda, 113 F.3d 1000, (Cal. 1997)(stating "Right to jury trial may only be waived if following conditions are met: waiver is in writing; government consents; court accepts waiver; and waiver is made voluntarily, knowingly, and intelligently.")

rights. It is noticeable that the California circuit court added the VKI Doctrine to the requirement of writing for waiver of right to jury trial, which is stipulated in the Federal Rule of Criminal Procedure Rule 23 a. It is unquestionable that the purpose of such addition is to actively protect the defendant.

(2) Contract of Adhesion as a Contract Defense

In the U.S., the legal purpose of contract of adhesion was founded on the prevention of unfair contract that was standardized, non-negotiated, and pre-drafted by the business. Even though the courts had relied on the object theory of contracts in interpreting the intent of the parties, they had been somehow negative to the legal effects of adhesion contracts, because the individual consumers may be put into an inequitable position by being forced to choose clauses included in the standardized contracts.

In Henningsen v. Bloomfield Motors, Inc. the court stated that due to the advent of standardized mass contract by enterprises with strong bargaining power and position, "the weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."[17]

In order to utilize the principle of adhesion contract as a contract defense there are two steps to be taken for the analysis of its applicability: that the contract itself is an adhesion contract and that the contract (or the clause complained of) either ⅰ) violates the reasonable expectations of the weaker party or ⅱ) is unconscionable.[18] The two tier test was applied in several cases arguing for the validity of arbitration clauses. In Zigrang v. U.S. Bancorp Piper Jaffray, Inc., the defendant appealed to the Supreme Court of Montana when the motion to compel arbitration was denied, asserting that there existed a valid

17) 32 N.J. 358, 389 (1960) (delivering a decision that "manufacturer's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom was so inimical to public good as to compel an adjudication of its invalidity").

18) Robert S. Summers & Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice,* West Group, pp.615-627, 2001,; Bixler v. Next Financial Group, Inc., 2012 WL 877109, p9, D.Mont., 2012.

arbitration agreement. The Supreme Court of Montana in the case stated that "contracts of adhesion arise when a party possessing superior bargaining power presents a standardized form of agreement to a party whose choice remains either to accept or reject the contract without the opportunity to negotiate its terms."[19]

In addition to the materialization of the first requirement, in Iwen v. U.S. West Direct, the Montana court clarified the second prong of the requirement by noting that "doctrine of adhesion itself does not constitute a sufficient basis for invalidating a contract...."[20] instead, a contract of adhesion becomes unenforceable against the weaker party "if it is 1) not within their reasonable expectations or 2) within their reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable, or against public policy."[21]

The first prong of adhesiveness of a contract seems to be relatively easy to be proven because it is physically and objectively confirmable whether a weaker party in the contract negotiation is provided a standardized form on a "take it or leave" basis. On the other hand, it does not seem to be simple to prove the second prong of reasonableness or unconscionability due to case-specific volatility. In Brown ex rel. Brown v. Genesis Healthcare Corp. the West Virginia Supreme Court stated that the adhesive arbitration clause required as a prerequisite to agreement "unconscionableness" and that the waiver of right to civil suit caused by the arbitration agreement be "beyond reasonable expectation."[22]

However, such recognition of unconscionablity of an adhesive arbitration clause as shown in the Brown case would not be found in the recent AT&T Mobility LLC case.[23] In AT&T Mobility LLC v. Concepcion, a group of consumers brought putative class action against AT&T, while the defendant moved to compel the consumer arbitration. The district and circuit courts of

19) Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 329 Mont. 239 (2005).
20) Iwen v. U.S. West Direct, a Div. of U.S. West Marketing Resources Group, Inc., 293 Mont. 512, 520 (1999).
21) Id. at 243.
22) Brown ex rel. Brown v. Genesis Healthcare Corp., 2011 WL 2611327 (W.Va.,2011).
23) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

California denied the defendant's motion noting that the consumer arbitration clause excluding class action was unconscionable, relying on the case brought up between Discover Bank v. Superior Court.[24]

In Discover Bank v. Superior Court, the Supreme Court of California stated that "Waiver of class arbitration in a consumer contract of adhesion is unconscionable under California law and should not be enforced, when it occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud or willful injury to the person or property of another."[25]

However, the U.S. Supreme Court reversed the lower federal courts' decision and rejected the unconscionability of waiver of class action by mobile phone customers against AT&T Mobility LLC, promoting the genuine purpose of the Federal Arbitration Act. It is notable that the Supreme Court's decision favoring AT&T was delivered on the theory that the lower federal courts' application of the California Law was not rooted on the contractual discussion, rather regulating the arbitration practices to protect consumer interests.

The adhesiveness of pre-dispute arbitration clause in any form is getting more difficult to be recognized as "unconscionable" or "beyond reasonable expectation" because the U.S. courts have been active to promote the purpose of Federal Arbitration Act at the cost of protection of individual consumers.[26]

In order for an arbitration clause to be invalidated due to the adhesiveness, it

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24) Discover Bank v. Superior Court, 36 Cal.4th 148, (Cal.,2005).

25) id.

26) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating "a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot.); Fouts v. Milgard Mfg., Inc., N.D.Cal., 2012 (stating "Plaintiff does not contend that he was unable to read the Agreement before signing it, or that he could not understand its terms. Although the plaintiff did have to sign the contract as a condition of employment, this does not render the contract unconscionable. Accordingly, there is no evidence of procedural unconscionability in the execution of the Agreement.").

should be found unconscionable for the arbitration agreement to be enforced. In Mayers v. Volt Management Corp., the California court identified two sources of law for contract to clarify the unconscionability prong, common law, and Uniform Commercial Code.[27] In Mayers, the court provided the common law-based clarification for the unconscionablity requirement that a) the contract term was outside the reasonable expectations of the weaker party or b) was unduly oppressive or unconscionable."[28]

The UCC-based concept of unconscionability materialized from two different angles including procedural and substantive elements.[29] In A & M Produce Co. v. FMC Corp., the California court provided a specified description of the "procedural angle" of unconsionability where "unconscionability focuses on oppression, which results from an inequality of bargaining power, and surprise and which involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix form drafted by the party seeking to enforce the disputed terms," together with the substantive description of the unconscionability that "a contractual term may be substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner."330) id.0)[30] However, the procedural and substantive elements are not required to be met to the same degree, but may be compensated with each other on a sliding scale basis that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa."[31]

The Second Restatement of Contract §211 prescribes that standardized contract terms should be recognized "as an integrated agreement with respect to the

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27) Mayers v. Volt Management Corp., 203 Cal.App.4th 1194, 1205 (2012)(citing "In California, two separate approaches have developed for determining whether a contract or provision thereof is unconscionable. One, based upon the common law doctrine, … A separate test, based upon cases applying the Uniform Commercial Code unconscionability provision[,] views unconscionability as having 'procedural' and 'substantive' elements…", Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305,1317 (2005)).

28) Mayers supra at 1205 (citing Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305, 1317 (2005)).

29) A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473 (1982).

30) *id.*

31) Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305, 1317 (2005).

terms included in the writing" irrespective of whether the individual party is specifically aware of the terms of agreement or not.[32] In addition to the general acceptability of the adhesion contract, Section 211 also recognizes the exclusion of disputed terms as an exception in case where "the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term."[33] This exception is likely to give a significant defensive platform to the weaker party if the weaker party is successful in proving that the other party was informed of the unwillingness of the assenting party to keep a particular term in the adhesion contract.

2. Defenses from the Businesses

1) The Doctrine of Separability

The issue of contract of adhesion is further complicated with consideration of the separability doctrine of the arbitration clause. The doctrine of separability is a legal principle that the legal effect of an arbitration clause should not be affected by the underlying contract in which the arbitration clause is embedded if an independent challenge is not made against the arbitration clause itself.[34]

However, the applicability of the separability doctrine is contingent upon the types of reasons of the invalidation of an underlying contract. If the reasons of invalidation are based on the existence of arbitration agreement, not just avoidance or rescission, then the separability doctrine may not be applied to sever the arbitration clause from the underlying contract.[35]

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32) REST 2d CONTR §211: "(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing. (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

33) id.

34) Tanya J. Monestier, "Nothing Comes of Nothing ...", American Review of International Arbitration, Vol.12, 2001, p.223.

In relation with the applicability of the separability doctrine, it seems that the courts' attitudes are split among several cases. For example, in Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., the court commented that the separability doctrine applies to only voidable contract "where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract."[36] This court further stated that a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate."

However, in Standard Coffee Service Co. v. Babin, the court found there was no evidence that the consent from the defendant was made voluntarily; rather, he was forced into singing the employment contract in which an arbitration clause was embedded, applying duress to the underlying contract for the invalidation of the arbitration agreement.[37] In this case, the court denied to adopt the separability doctrine to save the arbitration agreement because the underlying contract was made under duress which made the contract voidable. In Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc. the court accepted the separability doctrine for the contract that was voidable by reason of duress.

The legal characteristic of the contract of adhesion for consumer arbitration clause is contrary to the legal nature of the separability doctrine. The basic legal trait of the contract of adhesion is that the arbitration clause should be taken as a part of the underlying contract with the same legal effect in the other clauses, while the separability doctrine pursues a different legal effect of the severance from the underlying contract. In other words, if the consumer arbitration clause is viewed from the side of the adhesion contract, it should share its vitality with other terms in the underlying contract, which is not the case for the separability doctrine.

It may be ironic that the federal court's attitudes seem to be ignorant of such

35) Choong Lyong Ha, "A Study on the Doctrine of Separability-Focused on the U.S. Federal Arbitration Act and Cases-", International Commerce Review, Vol. 21, 2005, p168.

36) Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1140 C.A.9 (Cal.),1991.

37) Standard Coffee Service Co. v. Babin, 472 So. 2d at 124, 127 (1985).

contradictory logicality between the adhesiveness of consumer arbitration clause and the separability doctrine. In AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court indirectly agreed that the consumer arbitration agreement is created in the form of an adhesion contract by stating that "The Federal Arbitration Act (FAA) preempts California's judicial rule stating that a class arbitration waiver is unconscionable under California law if it is found in a consumer contract of adhesion … because that rule stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, which include ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. "[38]

On the other hand, in Buckeye Check Cashing, Inc. v. Cardegna, the U.S. Supreme Court reconfirmed the separability doctrine by stating that "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract, and such law applies in either state or federal courts."[39] Both of the cases have in common that the parties made pre-dispute arbitration agreement. However, the U.S. Supreme Court did not draw the line between the legal trait of contract of adhesion and the separability doctrine.

2) Contractuality

In some respects, litigation has been recognized as a more equitable way to resolve disputes between consumers and businesses than consumer arbitration due to individual consumers' lack of experience in arbitration procedure. As a result many individual consumers have tried to vacate the arbitration clause in the contract to take the dispute to court, using a variety of contract and non-contract defenses available to the underlying and arbitration agreements.[40]

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38) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

39) Buckeye Check Cashing, Inc. v. Cardegna, 126 S.Ct. 1204, 2006.

40) Kloss v. Edward D. Jones & Co. 310 Mont. 123 (2002) ("Investor brought action against securities brokerage firm and its securities broker, alleging violations of state securities statutes, negligence, unfair and deceptive business practices, breach of fiduciary obligations, and fraud" and the Supreme Court of Montana delivered the conclusion that "(1) arbitration clauses were contracts of adhesion; (2) broker owed fiduciary duty to investor to explain

The U.S. Supreme Court's attitudes toward the defenses to vacate arbitration clauses have consistently shown that such defenses should not be based on arbitration-specific regulation or state policies but on contract laws, which is called in this paper as "contractuality" of the defenses.[41] In Doctor's Associates, Inc. v. Casarotto, the Supreme Court held that "FAA preempted the Montana statute which conditioned the enforceability of the arbitration clause in compliance with special notice requirements"[42] that were provided by the Montana Arbitration Law.[43]In this case, the Supreme Court stated that the Montana arbitration requirement was not applicable to contracts generally; but was to only arbitrate contracts, thereby being preempted by the FAA.[44]

In Harris v. Green Tree Financial Corp., the Third Circuit Court stated that "the generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act" reversing the District's decision to deny the defendant's motion to compel arbitration.[45] Another case supporting the "contractuality" of defense to arbitration agreement is found in Fosler v. Midwest Care Center II, Inc. In this case, the Illinois Appellate Court held that the "Provisions of Nursing Home Care Act invalidating any waiver by anursing home resident of the right to bring a lawsuit under the Act or the right to jury trial were preempted by Federal Arbitration Act (FAA), and thus a nursing home resident whose admission agreement contained

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the consequences of arbitration clauses".); Foss v. Circuit City Stores, Inc., 477 F.Supp.2d 230, 2007 (Due to infancy, "the Court finds that without written ratification, the Agreement never came into existence between Foss and Circuit City.FN4 33 M.R.S.A. §52. Therefore, there is no agreement to arbitrate the dispute, and the Motions to Compel Arbitration and Stay the Proceedings are DENIED."); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011 (the Court stated that the assertion made by Concepcion was not based on the contract defense, thus the California court's decision to vacate the arbitration clause was groundless).

41) Contractuality of the defenses to arbitration agreement refers to whether or not the defenses to vacate the arbitration agreement reflect the common law based contract laws; if it does, the defense is contractual, otherwise it is not.

42) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 1996.

43) The requirement for arbitration clause in Montana's law was that "notice that the contract is subject to arbitration" should be "typed in underlined capital letters on the first page of the contract." Mont.Code Ann. § 27-5-114(4) (1995).

44) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 1996.

45) Harris v. Green Tree Financial Corp., 183 F.3d 173, C.A.3 (Pa.),1999.

arbitration provision was obligated to arbitrate her Nursing Home Care Act claims against the nursing home," and delivered an opinion that the Act should not give a more favorable right to nursing residents than the contract laws generally provide them.[46)]

Recently, in AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court has reaffirmed that generally applicable contract defenses such as duress, fraud, and unconscionability were the only legal bases for invalidating arbitration agreements, negating the viability of the defenses specially targeted to arbitration agreements.[47)] It seems clear that the U.S courts have been consistent in maintaining the minimum guideline that the defense to invalidate arbitration agreements should not be found from the regulatory measures on consumer arbitration but in the legal frame of contract law. It is well-known that such trends in the cases in consumer arbitration were motivated by the Federal Arbitration Act to promote the arbitration system.[48)]

Ⅳ. Conclusion

In this paper the legal issues of consumer arbitration have been analyzed in several legal perspectives including the voluntary, knowing, and intelligent doctrine, doctrine of separation, contract of adhesion, and contractuality of defenses. Among all of these, the first three issues are related with the arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

The VKI doctrine and contract of adhesion principle have some common factors in their legal nature. Firstthe validity of consumer arbitration clause is checked with that of other clauses in the principal contract. Second, the visibility

46) Fosler v. Midwest Care Center II, Inc., 398 Ill.App.3d 563, 2009.

47) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) (stating "arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

48) 9 U.S.C.A. §2.

of arbitration clause has been an important factor in considering the validity of the arbitration clause. Third, it is an important issue whether the consumer has an equal degree of intent to agree with the arbitration clause compared with other clauses in the contract.

In recent years not only the VKI doctrine but adhesion contract has been losing its viability in the litigation to invalidate consumer arbitration agreements arguably due to the federal courts' inclination to promote consumer arbitration. The federal courts began to apply stricter standards to activate the doctrine of adhesion contract including procedural and substantive conscionability to complete pleadings by adhesion contract.

The doctrine of separability aims to segregate the legal effect of arbitration clause from that of the principal contract. It may be said that the separability doctrine pushes forward the arbitration clause to survive in the disputes of its validity because the grounds for nullity of the principal contract cannot be spilled over to the arbitration clause. The U.S. courts' support for the doctrine reflects the future diffusion of consumer arbitration.

However, the doctrine of separability seems to be conflicting with the Supreme Court's contractuality doctrine for the invalidation of the consumer arbitration clause. The contractuality doctrine means that defenses for the invalidation of arbitration agreements should not be based on the state government's regulation targeted to arbitration, but wholly on contractual defenses. The contractuality doctrine implies that the validity of arbitration agreement should be litigated within the scope of contract law not controlled by the government. The doctrine of separability may be a case the Supreme Court itself fell into a regulative support targeted to arbitration, which is a contradiction between the separability doctrine and the contractuality doctrine.

It seems that the legal discussions of consumer arbitration are not mature enough to even further analyze the consumer protection issues in Korea. It is only up to the business parties whether they enter into an arbitration contact. Therefore, it is not necessary to build a separate law to establish consumer arbitration, yet it is necessary to capture a measure to protect a weak party in the arbitration agreement in the context of a contract law system in Korea.

The U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion, which confirmed the contractuality of a defense as a threshold to distinguish between what is a viable defense for the invalidation of a consumer arbitration agreement and what is not. In this paper, the adhesiveness of arbitration clause, which is a unique characteristic for consumer arbitration, is investigated in the U.S. as a legal defense to invalidate the consumer arbitration agreements, and its contractuality and related legal doctrines are analyzed. The legal issues of consumer arbitration have been analyzed in several legal perspectives including the voluntary, knowing, and intelligent doctrine, doctrine of separation, contract of adhesion and contractuality of defenses. Among all of these, the first three issues are related with the arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

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Time Limits in Challenging a Tribunal's Jurisdiction

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One of the most defining characteristics of arbitration is that an arbitral tribunal's jurisdiction is established by parties' mutual agreement. If a party to the arbitral proceedings believes that a tribunal constituted lacks jurisdiction to conduct the arbitral proceedings, it may challenge the jurisdiction of the tribunal in different ways. Although the concept of kompetenz-kompetenz and the grounds to challenge the Tribunal's jurisdiction are readily accepted in the arbitration community, what parties often fail to observe is the time limit imposed by the relevant laws in bringing such objections. This article aims to examine several main ways of challenging the tribunal's jurisdiction and the applicable time limits in each scenario. The article will then focus on the consequences of a party's failure to adhere to the strict time limits and its effect at the post-award stage. These issues will be considered in the light of case law from different Model law jurisdictions with particular illustrations from the arbitration law of Singapore.

Key Words : Time Limits, Challenging the Tribunal's Jurisdiction, *Kompetenz-Kompetenz*

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Ⅰ. Introduction

Benjamin Franklin once said: "*Lost time is never found again.*" Recent arbitration cases concerning objections to a tribunal's jurisdiction tend to suggest that this quote is also applicable in arbitration proceedings. This article aims to examine important time limits in challenging the tribunal's jurisdiction and the consequences of a party's failure to object to the tribunal's jurisdiction in a timely manner. It is now almost trite that an arbitral tribunal has the power to rule on its own jurisdiction, the principle commonly known as *kompetenz-kompetenz.* However, parties often overlook the importance of the time limits imposed by the applicable arbitration laws and encounter obstacle to their right to invoke a jurisdictional challenge even they otherwise have a good basis for it. This article looks at case law from different jurisdictions, with particular illustrations from Singapore. This article will also consider a recent Singapore High Court decision that is currently pending the Court of Appeal's judgment, which addresses the interplay between various statutory options available to a party in relation to jurisdictional challenges.

Ⅱ. Basic Principle - *Kompetenz-Kompetenz*

In today's international arbitration context, the tribunal's right to rule on its own jurisdiction is a well-recognised doctrine. Practically, all countries recognise the right of the tribunal to decide on their jurisdiction, subject to the subsequent court control. The Singapore legislation, also adopts the concept known as *kompetenz-kompetenz* or competence de la competence, which refers to the ability of the tribunal to rule on its own jurisdiction.[1] This is captured in Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law"), which reads as follows:

1) Chan Leng Sun, SC, *Singapore Law on Arbitral Awards* (2011), Academy Publishing, p 14.

Article 16

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

The following articles, Articles 16(2) and 16(3), regulate the operation of this doctrine:

Article 16

….

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The inclusion of time limits in Article 16(2) is intended to ensure that

objections to the arbitral tribunal's jurisdiction will be raised promptly, although it will be seen as explained below that there are two types of time limits within Article 16(2), one each for a different type of jurisdictional challenge.[2] In relation to Article 16(3), the first part relates to the tribunal's discretion to rule on an objection to its jurisdiction in a preliminary phase or together with the award on the merits. The second part of 16(3) governs the judicial review of interim jurisdictional decisions rendered by the arbitral tribunal.

The Model Law (1985 version, with some modifications) is given the force of law in Singapore by section 3 of the International Arbitration Act (Cap 143A) ("IAA").[3] It should be noted that section 10(3)(b) of the IAA has modified Art 16(3) of the Model Law to permit an appeal from a tribunal's negative jurisdictional ruling. Section 10(3) IAA provides as follows:

> *"10.*
> *….*
> *(3) If the arbitral tribunal rules -*
> *(a) on a plea as a preliminary question that it has jurisdiction; or*
> *(b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,*
> *any party may within 30 days after having received notice of that ruling, apply to the High Court to decide the matter."*

Ⅲ. Options Available to the Respondent

Respondents who intend to challenge a tribunal's jurisdiction are known to have tried the following options, sometimes more than one in the same proceedings:[4]

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2) For further discussions, see also Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, 3rd ed), Thomson Reuters, pp 217-218.

3) s3 of the IAA provides as follows:
"(1) Subject to this Act the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

4) The four options are well summarized in *Law and Practice of International Commercial*

1. Boycott the arbitration;
2. Raise the Objection with the Tribunal;
3. Apply to the national court to determine the issue; or
4. Challenge at the setting aside or enforcement stage.

Sometimes, a Respondent will submit to an arbitral institution to not even accept a reference, in which case the arbitral institution is asked to determine the validity of an arbitration agreement on a *prima facie* basis. This option will be considered briefly in this article.

(1) Boycotting the Arbitration

If a party decides to boycott the arbitration, the arbitration will proceed anyway. A tribunal does not give an award automatically to the Claimant in default of a defence or the absence of the Respondent. This means that the Tribunal must still proceed to consider the claim on the submissions and evidence of the Claimant, even in the absence of submissions from the Respondent.[5] It is not unusual for the boycotting party to try to set aside or resist enforcement of the award that is subsequently rendered if it is made against it, which is likely though not inevitable in the absence of submissions from it. A common ground is lack of jurisdiction by the tribunal.[6] If the seat of the arbitration is in a Model Law country, a dissatisfied party has three months from receipt of the award[7] to bring its application to set aside the award. Singapore cases have treated this time limit as mandatory. In *ABC Co v XYZ Co Ltd,*[8] Justice Prakash emphasised the strict application of this time limit as

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Arbitration A. Redfern and M. Hunter, 4th Edition, Sweet & Maxwell. 2004, p259.

5) See Art 25 Model Law.

6) The grounds for resisting enforcement, which are similar to those for setting aside an award, are set out in a later part of this article.

7) The relevant time limit is available at Article 34(4) of the Model Law of the IAA which reads as follows:
"(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."

8) *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 at [9]; see the discussions in Chan Leng Sun,

follows:

> *"..[i]t appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time."*

The same decision was made by Justice Lee Seiu Kin in *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another.*[9)]

A contrasting approach was taken by the Malaysian Court of Appeal in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd*[10)] where an application was made to set aside an award 9 months after the expiry of the 90 days deadline provided for such an application to be made. The Court of Appeal held that it had an unfettered general discretion to extend time under its Courts of Judicature Act 1964 even though its arbitration statute did not expressly provide for extension of the setting aside deadline. In determining whether extension of time should be allowed, the court would consider the following factors:

(1) the length of the delay;
(2) the reason for the delay;
(3) the prospect of success; and
(4) the degree of prejudice to the Respondents if the application is granted.[11)]

SC, *Singapore Law on Arbitral Awards* (2011), Academy Publishing, pp 148-149.

9) *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] SGHC 187.

10) *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd,* Civil Appeal 2 - 02 (NCC) - 1286-2011, July 26, 2011. Note the award was subsequently set aside by the Kuala Lumpur High Court.

11) *Ibid, at* [16].

Taking these factors into account, the Court of Appeal granted extension of time to the Respondent in the arbitral proceedings to set aside the award on the jurisdictional ground. The Court of Appeal went further to say that although Malaysia has adopted the Model Law (which promotes minimum intervention of the court), this does not in any way take away the powers of the court in dealing with any application for extension of time.

The lesson from these contrasting approaches is that parties must take advice on the approach and procedural laws of a particular jurisdiction. The Model Law is not applied in the same way in all Model Law countries.

Some countries have express statutory provisions giving power to the courts to extend time in relation to arbitration proceedings. In England, which is not a Model Law country, section 80(5) of the Arbitration Act 1996 ("the UK 1996 Act") empowers the court to extend or abridge time for an application or appeal to the court. The exercise of this power is in the discretion of the court.[12)]

Boycotting an arbitration, however, is a risky tactic. It raises questions whether the absent party has lost its right to raise objections on jurisdiction. This is elaborated in the section below on the time for raising objections with the tribunal. Advice should be taken on the laws of at least two jurisdictions. First, the seat of arbitration, as this is where any application to set aside an award should be heard and determined. Secondly, the forum of enforcement, where the courts will hear any application for or against enforcement.

(2) Raise the Objection with the Tribunal

A safer alternative to boycotting the arbitral proceedings is to raise the jurisdictional objection before the tribunal within the stipulated timeframe. As discussed above, Article 16(1) gives the tribunal the power to rule on its jurisdiction and Article 16(3) provides the Tribunal the discretion to rule on such pleas either "as a preliminary question or in an award on the merits".

Article 16(2) places time limitations on a party's ability to raise a plea that "the arbitral tribunal does not have jurisdiction" or that "the arbitral tribunal is

12) See *Ranko Group v Antarctic Maritime SA* (Com Ct, NLD, June 23 1999) where an extension of time was not granted.

exceeding the scope of its authority". The former type of plea must be raised *no later than the submission of the statement of defence.* With respect to a counter-claim, the relevant cut-off point would be the time at which the Claimant submits his reply thereto.[13] A plea that the tribunal is exceeding the scope of its authority must be raised *as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.* The full clause reads as follows:

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

Numerous jurisdictions including Hong Kong, Singapore, Malaysia, India, Korea, Australia and New Zealand have adopted Article 16(2) of the Model Law without any substantive modification.[14] The time limits imposed in Article 16(2) for the two types of jurisdictional challenge (no jurisdiction and exceeding authority) encourage a party to promptly raise the jurisdiction objection, if any. Although these time limits should be strictly adhered to by a party, the tribunal may, at its discretion admit a later plea if it considers the delay justified in either case. The tribunal has freedom to assess on the facts of each case whether a belated challenge to the tribunal's jurisdiction should be entertained. In *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd,* the New Zealand court held that a challenge to jurisdiction does not have to be in any

13) *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess, UN Doc A/CN.9/264 (1985), Art 16, [5].

14) Greenberg/Kee/Weeramantry, *International Commercial Arbitration* (2011), Cambridge University press, at [5.21].

particular form, and if an out-of time challenge is brought and determined by the tribunal without objection from the other party on the lateness of the challenge, this delay can no longer be a ground for complaint before the court when the tribunal's ruling is being appealed.[15] Article 16 does not enumerate the circumstances under which a delay is considered justified. The Report of the Secretary-General of the revised draft of the UNCITRAL Rules suggests that "*a plea based on facts newly discovered*" might be admitted being raised late.[16]

One must also consider Article 4 of the Model Law, which reads as follows:

> *A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.*

The question is whether a party who does not raise any objection to the tribunal's jurisdiction is deemed to have waived its objection. Some English judges have taken the view that a party who has not submitted to the arbitrator's jurisdiction is entitled to raise it before an English court.[17] On the other hand, the UNCITRAL Working Group has taken the view that a party who does not raise a challenge to jurisdiction "should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings."[18] If a party participates in an arbitration and does not expressly

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15) *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* (HC Auckland CIV 2004-404-4488, 26 October 2004) at [54].

16) Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNICTRAL, 9th Session, Addendum 1(Commentary), UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 174 (Draft Article 18(2)).

17) *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, per Lord Mance; distinguishing *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA 1529 at [26].

question the jurisdiction of the tribunal, it may find later that it can no longer invoke this ground to challenge the award.

If a challenge is mounted before the tribunal, two further observations can be made. First, although the Model Law provides only for appeals to a national court (of the seat) from a tribunal's ruling that it has jurisdiction, some countries like Singapore and New Zealand have provided in their arbitration statutes that appeals can also be made to the courts where a tribunal rules that it has no jurisdiction. Secondly, it should also be noted that the tribunal has discretion whether or not to rule on the jurisdictional challenge as a preliminary issue which would be subject to instant court control by way of appeal or defer it to be decided with an award on the merits which is subject only to a challenge by way of setting aside or refusal of enforcement. The *travaux préparatoires* of the Model Law indicate that this was to let the tribunal weigh two conflicting concerns, i.e. "fear of dilatory tactics and obstruction versus waste of time and money."[19]

If the tribunal decides to defer the question of jurisdiction to its final award on the merits, there is no right to separately appeal against the tribunal's finding on its jurisdiction which is contained within the award. This assumes it finds that it has jurisdiction. The only recourse is to apply to set aside the award or resist enforcement. As mentioned, Singapore which allows an appeal even if the tribunal finds it has no jurisdiction, also allows an appeal even if the tribunal does not make a preliminary ruling but only makes a finding that it has no jurisdiction at the close of the hearing on the merits.[20] The rationale for this is that a tribunal might not make any award if it finds it has no jurisdiction, which

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18) *Report of the Working Group on International Contract Practices on the work of its seventh session (New York, 6-17 February 1984),* UN Doc A/CN.9/246 at [51]; *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess, UN Doc A/CN.9/264 (1985), Art 16, [8]. See also Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, 3rd ed), Thomson Reuters, pp 217-218.

19) *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess,UN Doc A/CN.9/264 (1985), Art 16, [14].

20) Section 10(3)(b) IAA allows any appeal "at any stage of the arbitral proceedings" if the tribunal rules that it has no jurisdiction.

makes it impossible to apply to set aside a decision of the tribunal that it has no jurisdiction unless there is a right of appeal. An appeal must be brought within 30 days of receipt of notice of the tribunal's ruling on jurisdiction.[21]

When the Tribunal decides the jurisdictional issue as a preliminary issue, a party dissatisfied with the ruling may consider two options:

(a) it can appeal to the supervisory court (namely the court at the seat of arbitration) under Art 16(3) within 30 days if the tribunal affirms its jurisdiction; or
(b) it may choose not to appeal to the curial court under Art 16(3), but continue within the arbitral regime by fully participating in the hearing with an express reservation of its rights.

If the party chooses option (a) above, any party may request, within thirty days after having received notice of the tribunal's ruling, before the relevant court, to decide the matter. The importance of adhering to the stipulated time limit was emphasized in an Australian case in which the court held that it could not intervene under Art 16(3) on the question of the tribunal's jurisdiction after expiry of the 30-day period.[22] In Singapore, a party who is dissatisfied with the High Court's decision on an appeal from the tribunal's ruling on jurisdiction can appeal further to the Court of Appeal with the leave of the High Court.[23]

Option (b) is risky and controversial, as it is not yet clearly determined in many jurisdictions whether a party who chooses not to appeal to the supervisory court has lost his right later to challenge the award on the same jurisdictional ground. This is discussed under the section on setting aside and enforcement below.

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21) Article 16(3) Model Law; section 10(3) IAA.

22) *TeleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365 (11 November 2011). The importance of making applications within time limits set down by the arbitration law at the chosen seat was again emphasized in the case *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 (29 June 2012).

23) Section 10(4) IAA.

(3) Apply to the national court to determine the issue

Sometimes, parties are tempted to approach the court directly instead of applying to the Tribunal first. Legislation and judicial attitude towards such an attempt vary from country to country. Jurisdictions like the USA[24], Germany[25] and the UK[26] allow the parties to bring a jurisdictional question to the court at any time. In contrast, the Singapore statute is silent on whether an application can be made directly to the Court on the question of the tribunal's jurisdiction. It is unlikely that this can be done. Section 12A IAA permits an application to the court for interim relief if the arbitral tribunal has no power or is unable for the time being to act effectively. No statutory provision exists to permit bypassing the operation of *kompetenz-kompetenz* in Art 16 or section 10 of the IAA. Article 5 of the Model Law provides that *"[i]n matters governed by this Law, no court shall intervene except where so provided in this Law."*

Application before an arbitral institution

With constant developments in rules of arbitral institutions, parties nowadays have another mode of challenging the jurisdiction of the tribunal by asking the institution concerned in an institutional arbitration to determine the existence of

24) U.S. courts have frequently held that interlocutory judicial consideration of jurisdictional issues could proceed prior to a jurisdictional award by the arbitral tribunal and that jurisdictional disputes were ultimately issues for judicial (not arbitral) resolution; *China Minemetals Materials Imp. & Exp. Co. v. Chi Mei Corp.,* 334 F.3d 274, 288 (3d Cir. 2003); *Dean Witter Reynolds, Inc. v. Mc Coy,* 995 F.2d. 649, 650 (6th Cir. 1993). For full list of case law, see Footnotes 317 and 318 of Gary Born's *International Commercial Arbitration,* Wolters Kluwer (2009) p912.

25) Section 1032(2) of the German Zivilprozessordnung (Tenth Book on the Code of Civil Procedure) (German) ("the ZPO") allows an action for a declaration of the admissibility of non-admissibility of arbitral proceedings until the arbitral tribunal has been constituted, which limits the risk of contradictory decisions.

26) The UK 1996 Act expressly provides for an application to be made to the court on a question as to the substantive jurisdiction of the tribunal. Section 32 of the Act permits a party to the arbitration to apply to the court for a decision on jurisdiction either with the written consent of the other parties or with that of the arbitrators. However, even with the Tribunal's consent, the court needs to be satisfied that the determination of the question is likely to save costs, that the application was made without delay and that there is good reason why the matter should be decided by the court.

an arbitration agreement on a *prima facie* basis. This usually happens right at the beginning when the reference is submitted to the institution. For example, Rule 25.1 of the SIAC Rules 2013 reads as follows:

> *If a party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration before the Tribunal is appointed, the Registrar shall determine if reference of such an objection is to be made to the Court [of Arbitration of SIAC]. If the Registrar so determines, the Court shall decide if it is prima facie satisfied that a valid arbitration agreement under the Rules may exist. The proceedings shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court is without prejudice to the power of the Tribunal to rule on its own jurisdiction.*

Under the ICC Rules 2011, if any party raises a challenge to the arbitration agreement or on jurisdiction, the plea shall be decided by the tribunal unless the Secretary General refers the matter for decision to the ICC Court.[27] The ICC Court shall decide whether the arbitration shall proceed. If the Court is *prima facie* satisfied that an arbitration agreement exists (namely there is jurisdiction), the arbitration shall proceed.[28] The question of jurisdiction will still be taken up by the tribunal if the ICC Court makes a *prima facie* finding on the existence of jurisdiction.[29]

(4) Challenge at the Setting Aside or Enforcement Stage

An application to set aside an award is a proactive step that is taken to the national court of the seat of arbitration. The grounds for setting aside are defined by the laws of that seat. If it is a Model Law country, Article 34 of the Model Law stipulates the grounds for setting aside an award. This includes a

27) Article 6(3) ICC Rules 2011.
28) Article 6(4) ICC Rules 2011.
29) Article 6(5) ICC Rules 2011.

jurisdiction-based challenge under Article 34(2)(a)(i) or Article 34(2)(a)(iii). An application must be made within three months from the date of receipt of the award.[30] This time frame and the question whether it can be extended have been discussed above.

Resisting enforcement takes place at the forum where enforcement is sought. This can be either at or outside the seat of arbitration. Enforcement within the seat of arbitration is subject of course to the laws of the seat. Enforcement outside the seat of arbitration is governed by the law of the forum, which in many States (148 to be exact) is based on the New York Convention. The grounds for resisting enforcement under the New York Convention are similar to the grounds for setting aside under the Model Law. Art IV of the New York Convention reads as follows:

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —

(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

30) Article 34(3) Model Law.

on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that —

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

The sections above have discussed the risk of a party not raising a jurisdictional challenge before the tribunal. What if the party did raise and lose a challenge before an arbitral tribunal, but does not bring an appeal against the tribunal's ruling or apply to set aside the award? Does he lose the right to resist enforcement of the award on the jurisdictional ground?

Many of the finer issues regarding treatment of a jurisdictional challenge, including the question when such a right is lost, have not been ventilated in national courts.

In England, the well-known case of *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan,*[31] touched on this issue. Lord Collins thought that a party who chose not to bring the jurisdictional challenge to the court of the seat may still have a right to rely on the same ground at the court of enforcement:[32]

> *Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court.*

Whether this view finds favour elsewhere has to be assessed country by country. In the Singapore High Court decision of *Astro Nusantara v PT Ayunda Prima Mitra*[33] (*Astro* case), the question arose in the context of enforcement of a Singapore award in Singapore.

In the *Astro* case, a dispute arose out of a failed joint venture between Astro Group of companies and the Lippo Group of companies. This case involved multi-party proceedings, in which three of the Respondents denied that they were parties to the agreement in dispute. The Tribunal then decided this objection as a preliminary issue and affirmed its jurisdiction over all the Respondents. The Respondents did not appeal the Tribunal's decision within the

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31) *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

32) D*allah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [98], see also *per* Lord Mance at [10]–[11]; *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, *per* Moore-Bick LJ at [56], *per* Rix LJ at [90].

33) *Astro Nusantara v PT Ayunda Prima Mitra* [2012] SGHC 21.

stipulated time in Article 16(3) of the Model Law but participated in the arbitration while expressly reserving its rights. The Tribunal subsequently issued its final awards (in total 5 awards) in favour of the Claimant. *PT Ayunda* did not apply to set aside the awards either under Article 34 Model Law. When the Claimant sought to enforce all five awards in Singapore, the *PT Ayunda* resisted enforcement of the awards on the basis that the Tribunal lacked jurisdiction to join it to the arbitration. At first instance, Justice Belinda Ang held that *PT Ayunda* could no longer resist enforcement on the ground that the tribunal lacked jurisdiction. Submissions based on the *Dallah* case did not find favour with the Judge who noted that England is not a Model Law country like Singapore is, and moreover, the Singapore Court in that case was considering not enforcement of a foreign award under the New York Convention but enforcement of an award made in Singapore under specific provisions of the IAA. The appeal to the Court of Appeal has been argued at length and the decision of the Court of Appeal is pending.

The *Astro* case was in relation to enforcement in Singapore of a Singapore award. Another Singapore case demonstrates the approach used in relation to enforcement of a foreign award under the New York Convention. In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another*[34] the second Defendant ("Chiew") objected to a Tribunal's finding that he was a party to the arbitration agreement and took no further part in the arbitration which was seated in Arizona, USA. An award was made against him. Chiew did not apply to set aside the award in the USA. When the Claimant tried to enforce the award in Singapore against Chiew, Chiew resisted enforcement on the ground that the Tribunal did not have jurisdiction over him. Justice Prakash acknowledged that the failure of Chiew to apply to set aside the award in Arizona did not preclude him from resisting enforcement in Singapore. However, to resist enforcement, Chiew had to satisfy the court of one of the specified grounds for resisting enforcement under the New York Convention (re-enacted as section 31(2) of the IAA). Chiew failed to do so on the facts of that case.

34) [2006] SGHC 78.

Ⅳ. Conclusion

The case law illustrations in this article must be read with the understanding that what is decided in one jurisdiction may not be adopted in another. They do, however, bring home an important message. That is the importance of complying with the time lines imposed by applicable laws and considering carefully the risks of not raising jurisdictional objections at the first opportune moment. There may be reasons why a party chooses to bring its challenge before one forum or another. It does, however, have to consider carefully whether refraining from promptly objecting to jurisdiction might result in the loss of this right. The laws of every potential forum where this issue might be argued have to be considered carefully. We started this article with a quote from Benjamin Franklin. Perhaps we can end it with a phrase that is often uttered in a happier setting: "*Speak now or else hereafter forever hold your peace.*"

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The Development of International Sports Arbitration Bodies and Challenges of Legislative Policy for Reestablishment of Sports Arbitration Agency in Korea

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As the Korea Sports Council and The Korean Olympic Committee (KOC) were integrated in June 2009, the Amended Articles expunged the applicable provisions of the e Korea Sports Arbitration Committee (KSAC), which was established in Markch 2006. To successfully host international sports events, such as 2014 Incheon Asian Games and PyeongChang 2018 Winter Olympics, the Korea Sports Arbitration Committee (KSAC) must be restored immediately. In this sense, this thesis places emphasis on the necessity of precise legal basis with the purpose of the revitalization of sports dispute settlement as well as the enhancement of the Korea Sports Arbitration Committee.

Key Words : Court of Arbitration for Sport(CAS), Korea Sports Arbitration Committee (KSAC), Sports Arbitration, Sports Mediation, Med-Arbitration

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I. Introduction

At the turn of the 21st century, the establishment of the Sports Arbitration Agency is being actively promoted based on research results of the sports law circle.[1] With the purpose of fulfilling sports autonomy, the International Olympic Committee (IOC) has already accepted public opinion that the Sports Arbitration Agency is necessary and founded the Court of Arbitration for Sport (CAS) in 1984. In 1994, the IOC guaranteed the independence and neutrality of the organization; it institutionalized activation plans and made it public to all nations that the Sports Arbitration Agency is needed. Furthermore, Korea started paying attention to the Sport Dispute Institution as Korean athletes were directly disadvantaged at the 2002 Winter Olympics in Salt Lake City and the 2004 Olympics in Athens. Taking these events of misjudgments of sports refereeing as an opportunity, the damage to "fairness" - the ground rule of the Olympic Charter - was considered pitiable and we all realized the significance of the Court of Arbitration for Sport, including the settlement body of sports entanglement. [2] In 2003, Japan established the Japan Sports Arbitration Agency (JSAA) and operated it as a general corporate body starting in April 2009. The JSAA started operating as a public corporate body after receiving recognition as one in April 2013.[3]

By fairly and rapidly solving conflict between the contestants and sports groups through adjustment or arbitration, the Korea Sports Council (KSC)

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1) Detailed contents can be found in: YEUN Kee-Young, "Establishment and Activities of Korea Sports Arbitration Committee", *The Korean Journal of Sports and Law,* Vol. 5, The Korean Association of Sports and Entertainment Law(KASEL), 2004, pp. 65-82; YEUN Kee-Young, "Proposal for Establishment of Sports Arbitration Organization" *The Korean Journal of Sports and Law,* Vol. 10 No.4,The Korean Association of Sports and Entertainment Law(KASEL), 2007, pp. 415-433.

2) On these two incidents, see YEUN Kee-Young, Id, pp417-418; on Dong-Sung Kim incident, see especially Arbitration CAS ad hoc Division (OWG Salt Lake City 2002) 007 Korean Olympic Committee(KOC) v. International Skating Union(ISU), award of 23 Feb. 2002, Matthieu Reeb(eds), Digest of CAS Awards III 2001-2003(2004),6.1.1; on Yang Tae Young incident, see CAS 2004/A/704 Yang Tae Young v. FIG, para 1.1.1.-1.1.5.

3) On JSAA, see http://www.jsaa.jp/doc/gaiyou.html (visited 2013. 8. 5); Dogauchi, Masato , "The Activities of Japan Sports Arbitration Agency" *The Korean Journal of Sports and Law,* Vol. 5, 2004.

specified a foundation in March 2006 in Art. 54 in Articles of KSC, and established and operated the Korea Sports Arbitration Committee (KSAC), with the means of contributing advancement of Korean sports. After the consultation, between the Ministry of Culture, Sports and Tourism and the KSC, which, to persuade the IOC members, have shared the understanding that the KSAC is necessary to attract attention to the PyeongChang Olympic Winter Games and other international competitions, the KSAC was founded. Nonetheless, in June 2009, as the KOC and the Ministry of Culture, Sports and Tourism have combined, Amended Articles have expurgated the regulation that is the basis of the KSAC and led to the discontinuation of budget support since 2010. These decisions are ignoring the foundation's purpose. In particular, it will likely act as an obstacle to hosting Asian Games Incheon 2014 and the 23rd Olympic Winter Games in PyeongChang, as well as many other upcoming international competitions. This will retrogress international trend and sports advancement, so either the KSAC should be reestablished or a new sports arbitration agency should be established.

In this paper, legal strategies to properly conduct the functions of the Korea Sports Arbitration Agency, which will be newly founded in the future, are proposed. The paper will discuss the measures to settle the arbitration agency as an activated organization. These kinds of theoretical and institutional bases are to be found in the foundation background and system reform process of the CAS.

II. The Distinctive Characteristics of the Sports Arbitration Agency and the Present Condition of International Sports Arbitration Bodies

1. Conception and the Process of Arbitration in the Arbitration Act

The Korean Arbitration Act (KAA) was revised in 1966 and was partly

modified in 1973; however, it has been criticized for its inadequacy to adapt to the international legislation environment. Thus, the current Arbitration Act (Law No. 6083), revised entirely in 1999, drastically embraced the content of UNICITRAL's Unicitral Model Law with the purpose to correspond to international tendencies. Such effort can be acknowledged to have restored trust from the international community and is still attempting to secure universality of dispute settlements. In other words, the KAA has procured international clarity, fairness, and legal stability.[4] In 2010, conforming to the 'easy-to-understand law making project' of the Legislative Office, the Arbitration Act was revised into a simpler and easier wording and has been operating since.[5]

The Arbitration system is an autonomous dispute settlement system which solves conflicts by selecting a third party arbitrator following the terms of the Arbitration Agreement.[6] It acknowledges the adjudication of the arbitrator, not the verdict of the court.[7] It is one type of ADR system which can rationally and rapidly settle conflicts in professional and technical areas. Although this is an independent legal system, the national governmental authority's right to execute with force is guaranteed by Arbitrary Act (Art. 1, 8, 9, 13, 35, 37 KAA).

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4) To see international trend of arbitration act, centering around UN, the reality of arbitration and issues of arbitration act and harmony of each country was rendered; in 1958, New York Convention for approval and execution of foreign arbitral award was held (Korea ratified in 1973. 5. 9). UNCITRAL adopted Model Law in 1985. 6.21 And advised each nation to apply the amendment to the arbitration act and accelerated international unification of arbitration act. Accordingly, since 1986 numbers of nations around the world established and reorganizing arbitration agencies with the purpose to attract international arbitration while reforming and enacting arbitration act. Korea was also influenced by this international tendency; the necessity for reforming arbitration act was raised from academia and business circles; there was also a need to quickly amend the arbitration act in a circumstance where international arbitral environment were radically changing. Eventually in 1999 arbitration act was entirely revised with the purpose to arrange international-level arbitration act, accommodating advanced foreign countries' examples of legislation and international standards to invite international arbitration.

5) http://www.law.go.kr/lsInfoP.do?lsiSeq=103956&lsId=&viewCls=lsRvsDocInfoR&chrClsCd=010102#0000 (visited Aug. 3, 2013).

6) Kim Yong-Kil, "A Study on the Scope of Effect in Arbitration Agreements" *The Journal of Arbitration,* Vol. 23 No 2, The korean Association of Arbitration Studies, 2013, pp.11-12;Sohn Kyung-Han /Shim Hyun-Joo "A New Approach on the Arbitration Agreement" *The Journal of Arbitration,* Vol. 23 No1, The korean Association of Arbitration Studies, 2013, p. 57.

7) Takeshi Kojima, *Civil Procedure and ADR in Japan,,* Series of the Institute of Comparative Law in Japan 65, Tokyo: Chuo University Press, 2004, pp. 265~344, especially see pp. 321~344.

The "Arbitration Agreement," disregarding whether it is a contractual dispute or not, is a consent between the concerned parties to solve all the conflicts, or partial consent that has already occurred or will occur in the future by arbitration (Art. 3, No. 2 KAA).

The Arbitration Agreement can either be an isolated agreement or a form that includes an arbitration clause in the contract. It is the principle to complete the Arbitration Agreement in document. However, if the signed documents from the concerned parties contain the Arbitration Agreement, or if the Arbitration Agreement is included in the documents exchanged by letter, telegram, telegraph, fax or any other means of communication, or if one party claims that the party has the Arbitration Agreement and the other party does not argue about the claim, it ought to be considered as a settled arbitration (Art. 4 KAA). Arbitration is the concerned parties' expression of will to obey the decision made by the arbitrator. Arbitral Award is recognized to hold the same effect as the final ruling of the court.

The Arbitration procedure includes progress from the incident being charged to the incident being resolved by settled decision. When no negotiation appears during the process, the Arbitration agency applies the KAA's Arbitration Act and proceeds with proper procedure and methods of arbitration. In this case, the tribunal holds the right to judge the admissibility, relevance, and credibility of evidence (KAA Art. 20). When there is no separate negotiation or firm declaration of will from the concerned party, the procedure is decided upon the Arbitration Rules which the arbitration body had enacted.

2. Right of Sports Autonomy and the Distinct Characteristics of a Sports Arbitration Body

Sports hold distinct characteristics and professionalism of autonomy law in accordance to the game rules and regulations of the game group. To sports, autonomy law is the product of exercising self-determination. The rights to decide a sport group, to legislate self-regulating rules, and to operate them are guaranteed. Sports work independently, holding internationally agreed upon

game rules. The legitimacy and binding power of sports rules are acknowledged in that they are followed in regional tournaments, international games, and even in the Olympics; as such, sports can be shown to be organized.

Each sports organization works for the benefit of the sports people which belong to it, as well as for the development of the sport. However, in verified competitions occur collisions of interest among different sports people and organizations; speedy and amicable resolutions are required.[8)]

In order for a sensible resolution of sports disputes, it is ideal for the disputes to be resolved within the self-autonomy of sports and avoid the intervention of nations. Therefore, the best option for resolving sports disputes is to establish an independent arbitration organization and not to file a lawsuit to a court that is a governmental institution.[9)]

3. International Sports Arbitration Organization

(1) The Disciplinary Committee and Appeal Panel of FIFA

The disciplinary committee and appeal panel of FIFA is comprised of a chairperson, a vice-chairman, and a set number of members; the chairperson must have a qualification in law. The disciplinary committee applies the rules that the executive committee has set and decides on detailed bylaws. The disciplinary committee withholds the right to take disciplinary action when each nation's soccer associations and organization, executives and staff, coaches, and athletes violate FIFA's regulation and game rules, orders and decisions. However, it does not hold the right to take part in the athlete's qualifications transfer or halt memberships for soccer associations.

Conflicts among FIFA, national soccer associations, soccer clubs, and the members of the clubs are bound to the obligation not to file a lawsuit to a court that is a governmental institution but to let the autonomic arbitration body (internal organizations such as disciplinary committees) handle arbitrations. If

8) Kim Yong-Kil, "A Study of Alternative Dispute Resolution for Sports Dispute - Focus on Arbitration System -" *The Journal of Arbitration,* Vol. 21 No 1, The korean Association of Arbitration Studies, 2011, pp.111-112.

9) Kim Yong-Kil, Id,. *The Journal of Arbitration,* Vol. 21 No 1, 2011, pp.113-114.

conflict arises between two or more associations and thus agreement on organizing a tribunal, the FIFA executive committee is to decide on the matte r.[10] It is regulated in FIFA rules not to request arbitration to the CAS.

(2) International Olympic Committee

The IOC is an NGO by international law; however, it is also acknowledged as a corporation in accordance with convention with the Swiss government November 1, 2000.[11] The headquarters are located in Lausanne, Switzerland.[12]

The IOC Executive Board assumes general overall responsibility for the administration of the IOC and the management of its affairs. In particular, it performs the following duties: it monitors observance of the Olympic Charter; it submits to the Session the names of the persons whom it recommends for election to the IOC; it establishes and supervises the procedure for accepting and selecting candidatures to organize the Olympic Games; it takes all decisions, and issues regulations of the IOC, which are legally binding, in the form it deems most appropriate; for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the proper implementation of the Olympic Charter and the organization of the Olympic Games.[13] The IOC Executive Board may delegate powers to one or more of its members, to IOC commissions, to members of the IOC administration, to other entities or to third persons.[14]

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10) FIFA Rule Art. 40 defines the list of disciplinary actions; in occasion of insubordination, the club cannot participate in title match nor goodwill match and every international match sponsored by national associations and/or clubs.

11) Olympic Charter Rule 15.1. "The IOC is an international non-governmental not-for-profit organization, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000".

12) Olympic Charter Rule 15.2.

13) Olympic Charter Rule 19.3.

14) Olympic Charter Rule 19.4.

4. The Development Process of the Court of Arbitration for Sport (CAS)

(1) Foundation Background

The Court of Arbitration for Sport (CAS) was founded as an ADR Organization by the IOC in 1984.[15] In 1981, Antonio Samaranch was elected as IOC chairman; he drew up an arbitration body, insisting on the necessity of a specialized body for Sports Arbitration.[16]

The history of the CAS dates back to the 1982 Session of the IOC in Rome. At this session, at the instigation of President Antonio Samaranch, the IOC accepted the idea of creating a court of arbitration, the jurisdiction of which would encompass activities linked more or less directly with sports. Thereafter, a draft of a statute was elaborated by three jurist members of the IOC, among them Keba Mbaye (Senegal), at that time a judge of the International Court of Justice (ICJ) at the Hague. This draft statute was subsequently adopted by the IOC on the recommendation of its Executive Board at its New Delhi Session in March 1983. The Statute entered into force on June 30, 1984.[17]

(2) The Independence and Reform

Since its establishment in 1984, the independency and fairness of the CAS as an arbitration body has been questioned. The chairman of the CAS doubled as an IOC member; the IOC elects 30 out of the 60 committee members of the CAS while 15 people among those 30 members doubled as IOC member. Also, they artificially made two-thirds of the CAS committee members approve of the reformation of CAS regulations through the instruction of the IOC executive committee during an IOC session.[18] Although the CAS was under the direct

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15) http://www.tas-cas.org/en/histoire/frmhist.htm(visited Aug. 3, 2013).

16) http://www.tas-cas.org/en/histoire/frmhist.htm(visited Aug. 3, 2013).

17) Bruno Simma, "The Court of Arbitration for Sport", in: *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press, 2006, p. 21.

18) Matthiew Reeb, "The Role and Functions of the CAS", *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press,

control of the IOC at the time of its establishment, the necessity for the body to turn into a more neutral organization was addressed since there was a possibility of a situation in which the IOC would file a case. However, it reached the point where a consensus that the CAS should be reformed as an independent organization from the IOC.[19)]

On the other hand, in February 1992, a German horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS on the basis of the arbitration clause in the International Federation for Equestrian Sports (FEI) statutes, challenging a decision pronounced by the federation. This decision, which followed a horse doping case, disqualified the rider, and imposed a suspension and fine upon him. The award rendered by the CAS on October 15, 1992 founded partly in favor of the rider (the suspension was reduced from three months to one month).[20)] Then, Elmar Gundel filed a public law appeal with the Swiss Federal Court. He disputed the validity of this award; the fact that his claim was rendered by a court did not meet the condition of impartiality and independence needed to be considered a proper arbitration court. In its judgment of March 15, 1993, the Swiss Federal Tribunal (Court) recognized the CAS as a true court of arbitration. However, the Swiss Federal Tribunal (Court) drew attention to the numerous links which existed between the IOC and the CAS: the CAS was financed almost by the IOC; the IOC was able to modify the CAS Statute; and the real power given to the OOC and its president to appoint members of the CAS. In the opinion of the Swiss Court, the CAS had to be made more independent of the IOC both organizationally and financially[21)].

This Gundel judgment led to the reform of the CAS.[22)] Accordingly, CAS rules were drastically reformed in 1993. First of all, the CAS Statute and Rules were completely revised to make it independent of the IOC.[23)] After the International

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2006, p. 33.

19) James Nafziger, *International Sports Law* 2nd ed., Transnational Publishers Inc., 2004, p.43.

20) Matthiew Reeb, Id.,p.33.

21) Matthiew Reeb, Id.,pp.33~34; Jan Paulssion, "Arbitration of international Sport Disputes", *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press, 2006, p. 47.

22) Matthiew Reeb, Id.,p. 34; Jan Paulssion, Id., 47.

23) Matthiew Reeb, Id.,p. 34.

Conference 'Law and Sport' in Lausanne, the International Council of Arbitration for Sport (ICAS) was created by the Paris Agreement.[24] Practically speaking, the operating fund of the ICAS is provided by three organizations: the IOC; the Ifs, including the Association of Summer Olympic International Federations (ASOIF) and the AIWF; and finally the Association of National Olympic Committees (ANOC). There are 20 committee members in the ICAS.

The purpose of the ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties involved. It is also responsible for the administration and financing of the CAS.[25]

The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of the bodies or a specific agreement so provide.[26]

The seat of both the ICAS and the CAS is Lausanne, Switzerland.[27]

The term of ICAS members is four years and reappointment is allowed. Upon their appointment, the members of the ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43 of the CAS. Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.[28]

The ICAS exercises the following functions[29]: It adopts and amends this Code; it elects from among its members for one or several renewable period(s) of four years the president, two vice-presidents who shall replace the president if necessary, by order of seniority in age; if the office of president becomes vacant, the senior vice-president shall exercise the functions and responsibilities of the president until the election of a new president, the president of the Ordinary

24) http://www.tas-cas.org/en/histoire/frmhist.htm(visited Aug. 3, 2013).
25) Art. S2 Code of Sports-related Arbitration. "S" is Statues of the Bodies Working for the Settlement of Sports-related Disputes.
26) Art. S1 Code of CAS.
27) Art. S1 Code of CAS.
28) Art. S5 Code of CAS.
29) Art. S6 Code of CAS.

Arbitration Division and the president of the Appeals Arbitration Division of the CAS, the deputies of the two division presidents who can replace them in the event they are prevented from carrying out their functions. The election of the president and of the vice-presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The ICAS exercises its functions itself, or through its board, consisting of the president, the two vice-presidents of the ICAS, the president of the Ordinary Arbitration Division and the president of the CAS Appeals Arbitration Division.[30]

(3) The Basis of Arbitration

1) The Olympic Charter Article 59 (Dispute-Arbitration):

All disputes related to Olympic Games are obligated to only be filed to the CAS in accordance with the sports related arbitration rules. The CAS's so-called exclusive jurisdiction is acknowledged.[31]

Also, all Olympic athletes can only ask the CAS for judgment if they have written a pledge acknowledging the jurisdiction of a temporary arbitration court.

2) Olympic anti-doping code Art 3.1: The recipient of the decision made by competent authorities such as the IOC, the IF, the NOC, and other organizations applying the rules can appeal to the CAS.[32]

(4) Main Cases under Jurisdiction

The CAS constitutes panels which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules.[33] For such purposes, the CAS provides the necessary infrastructure, effects the constitution of Panels and oversees the efficient conduct of the proceedings.[34]

30) Art. S7 Code of CAS.
31) Olympic Charter Article 59.
32) Olympic anti-doping code Art 3.1
33) Art. R27 Code of CAS.
34) Art. S12 Code of CAS.

1) Doping

The most frequently brought up issue in sports arbitration is doping. In the case of the Nakano Olympics, the IOC decided on depriving an athlete who inhaled marijuana of a gold medal. The athlete appealed to the CAS; the CAS returned the gold medal to the athlete, acknowledging that marijuana is not a doping substance. The measure of doping substances varies game by game; Marijuana is not considered to be a doping substance restricted from all games. On the other hand, not all the doping substances are on the doping list. In the Atlanta Olympics, there was an arbitration in which the athlete was deprived of a bronze medal for using a substance that has a stimulating effect. This substance was invented in the former Soviet Union for military purposes; although it has a stimulating effect, it is not included on the doping list. The CAS returned the medal to the athlete, adjudicating so because the chemical effect of the substance is quite different and the data for the effect of the substance was insufficient.

2) Qualification as Representative

The qualification as representative is not a typically expected dispute for the CAS. It is because the qualification as representative is not a problem between international sports leagues and athletes; it is rather a dispute between each nation's Olympic Committee or domestic sports leagues and the athlete. In other words, it is categorized to be a domestic sports dispute. The CAS holds the right to judge for the qualification as representative for Olympic Games only in Australia. In the United States, the American Arbitration Association categorizes it as general arbitration.

3) Qualification as Representative Athlete.

In the case of South Korea, nationality does not cause much issue. However, in other nations, changing nationality to become a representative athlete is often discussed. In such cases, the legitimacy of qualification as athlete can cause a dispute.

(5) Current Processing Situation of the CAS's Dispute Settlement

Numbers of deputes brought up to CAS is increasing annually. There were 76 cases in 2000, 42 in 2001, 86 in 2002, 109 in 2003, 271 in 2004, 198 in 2005, 204 in 2006, 252 in 2007, 313 in 2008, 275 in 2009, 298 in 2010, 365 in 2011, 374 in 212. In the case of Ad hoc Division that executes during Olympic season, there were 6 in 1996, 5 in 1998, 15 in 2000, 8 in 2002, 10 in 2004, 12 in 200, 9 in 2008, 5 in 2010, 11 in 2012. Detailed statistics are contained in the following chart:[35)]

[STATISTICS]

TABLE 1

This table lists the cases submitted to the CAS since its creation. The year refers only to the date when the requests were filed, not when the awards or advisory opinions were published.

Année / Year	Demandes d''arbitrage enregistrées / Requests for arbitration filed	Demandes d''avis consultatif enregistrées / Requests for advisory opinions filed	Total	Demandes d''arbitrage ayant abouti à une sentence / Requests for arbitration leading to an award	Demandes d''avis consultatif ayant abouti à un avis / Requests for advisory opinions leading to an opinion	Total
1986	1	1	2	1	1	2
1987	5	3	8	2	1	3
1988	3	9	12	0	1	1
1989	5	4	9	1	0	1
1990	7	6	13	1	0	1
1991	13	5	18	4	1	5
1992	19	6	25	12	0	12
1993	13	14	27	6	1	7
1994	10	7	17	5	1	6
1995	10	3	13	6	2	8
1996	20	1	21	16	0	16
1997	18	2	20	10	0	10

35) http://www.tas-cas.org/en/stat/frmstat.htm(visited Aug. 3, 2013).

1998	42	3	45	33	2	35
1999	32	1	33	21	1	22
2000	75	1	76	60	1	61
2001	42	0	42	28	0	28
2002	83	3	86	70	3	73
2003	107	2	109	82	1	83
2004	271	0	271	178	0	178
2005	194	4	198	133	3	136
2006	204	0	204	128	0	128
2007	252	0	252	183	0	183
2008	311	2	313	220	2	222
2009	270	5	275	188	5	193
2010	298	0	298	209	0	209
2011	365	0	365	246	0	246
2012	374	0	374	90	0	90
Total	3,044	82	3,126	1,933	26	1,959

Comments:

1) the consultation procedure was deleted on January 1, 2011

2) the table includes the cases submitted to the CAS ad hoc divisions.

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TABLE 2

Affaires soumises au Tribunal Arbitral du Sport depuis l''entrée en vigueur du Code de l''arbitrage en matière de sport (22 novembre 1994) jusqu''au 31 décembre 2012

Cases submitted to the Court of Arbitration for Sport from the entry into force of the Code of Sports-related Arbitration (November 22, 1994) until December 31, 2012

	O	A	C	AcHoc	TOTAL	F	D	W	P
1995	2	8	3	0	13	8	4	1	0
1996	4	10	1	6	21	16	2	3	0
1997	7	11	2	0	20	10	4	6	0
1998	4	33	3	5	45	35	4	6	0
1999	8	24	1	0	33	22	3	8	0
2000	5	55	1	15	76	61	4	11	0

2001	10	32	0	0	42	28	3	11	0
2002	9	66	3	8	86	73	6	7	0
2003	61	46	2	0	109	83	18	8	0
2004	9	252	0	10	271	178	58	35	0
2005	9	185	4	0	198	136	25	37	0
2006	17	175	0	12	204	128	44	32	0
2007	22	230	0	0	252	183	33	36	0
2008	26	276	2	9	313	222	20	69	2
2009	25	245	5	0	275	193	4	72	6
2010	49	244	0	5	298	209	13	70	6
2011	71	294	0	0	365	246	23	74	22
2012	62	301	0	11	374	90	17	73	194
TOTAL	400	2,487	27	81	2,995	1,921	285	559	230

Abréviations/Abbreviations:

O : Procédures ordinaires / Ordinary procedures

A : Procédures d''appel / Appeals procedures

C : Procédures consultatives / Consultation procedures

AdHoc : Procédures ad hoc / Ad hoc procedures

F : Procédures ayant abouti à une sentence ou un avis / Procedures leading to an award or an opinion

D : Procédures terminées par une décision du TAS autre qu''une sentence / Procedures terminated by a CAS decision other than an award

W : Affaires retirées / Cases withdrawn

P : Affaires en cours au 31.12.12 / Pending cases on 31.12.12

III. The Necessity and the Role of the Korea Sports Arbitration Agency

1. Guarantee of Basic Sports Rights and Sports Autonomous Rights.

Issues about sports-related rights are hardly ever found in the history of the development of basic rights since sports began to play a role in human life in modern society. In that sense, foreign legislation cases show changes in the basic rights of many nations, as the constitution was legislated or reformed after World War II. Among those changes appeared sports rights as a constitutional right; in the 1970s, sports became a major part of a nation's policies, and was starting to be addressed constitutionally.

Sports rights, although not part of constitutional regulation, hold a position

equivalent to the basic law since they are rights that are essential to the development of human culture and happiness. As a constitutional right, sports rights hold a variety of legal characteristics. The basic rights were expanded as they have been developed from the right of freedom to social rights.

One of the nations that has a constitution containing rules on sports is Greece. Greece introduced rules on sports in the constitution during the 1970s. Greek Constitution Art.16.1 codes the freedom of art and scholarship; in second provision states "Education is a nation's fundamental task with the purpose of educating people of Greece morally, mentally, professionally, and physically," defining sports in an educational perspective. Also, provision 9 of the same article states that "Sports is under the nation's protection and regulation; the country financially supports and regulates all sports leagues that belong to each and every sports organization in accordance to the legislation. The constitution regulates the application of guarantee of each financial support in accordance to the aimed provision of the supported organization."

Similar to Greece's case, constitutions of numerous nations regulate basic sports rights as express provisions in the constitution; such nations include Portugal, Spain, Switzerland, Netherlands, and many states of Germany and South Africa.

The Korean constitution surely allows the relief of rights in sports disputes through trial, guaranteeing the right of access to courts.[36)]

Such regulation of our constitution is coded in the same way in every democratic country. It is proper for the ideology of a constitutional state which guards the dignity and value of people and guarantees a living worthy of human dignity that sports people conform to a sports group, legislate rules, and join and participate in that group. Also, disputes occurring in such autonomic and self-regulating sports activity ought to be resolved by its own resources; it coincides with sportsmanship. It is rather natural considering the special characteristics of sports disputes. Therefore, establishing the Korea Sports Arbitration Association and operating an autonomic ally, within the boundaries of positive law, is advisable and adequate.

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36) Art. 10, 37(1) Korean Constitution.

2. Distinct Characteristics of the Rights of Sports Autonomy and Sports Arbitration Bodies

The field of sports has strong professionalism and specialty in legislation of self-government by the rights of sports autonomy in game rules as well as the rules of the game group. In sports, the right of autonomy is the product of practicing autonomous determination. It is guaranteed to form a sports group, set up rules for the organization, set game rules, and operate via an autonomic ally. Each sport operates independently with internationally unified game rules. The legitimacy and binding power of the rules are acknowledged in local tournaments, international tournaments and even in the Olympics.

Each sports group works for the benefit of the concerned sportspeople and for the development of the sport. However, collision of interest occurs among different sportspeople and organizations as competitions gradually increase; speedy and amicable resolution is required.

In order to have reasonable resolutions of sports disputes, it is ideal for the disputes to be resolved within the self-autonomy of sports and avoid the intervention of nations. Therefore, it is the ideal option for resolving sports disputes to establish an independent arbitration organization and not to file a lawsuit to a court that is a governmental institution. To satisfy this, an international organization, the Court of Arbitration for Sport was established in 1984; sports arbitration organizations are installed and are operated in numerous countries including Japan, United Kingdom, United States, Germany, Netherlands, Canada, Hungary, and New Zealand.

The systems that allow arbitration without judicial dispute are: negotiation, intercession, adjustments, arbitration, and reconciliation. When a dispute arises, first the directly involved parties endeavor to resolve it on their own. When such an endeavor collapses, each person requests and counsels with professionals and hopes for the dispute to be resolved through deputies. If the settlement still fails at this point, then the case is filed in an official organization such as a court for a fair settlement.

When the settlement is handed to the hands of the national organization,

court, the winner and the loser are clearly divided; however, usually the conflict and confrontation of the directly involved parties deepens. That is the reason why various ADR systems are applied in each field to reconcile conflicts and confrontation with the purpose of social unification. Moreover, the importance of scholarly research on the method of arbitration and establishment of the organization which can maximize the proper function of such an institution is increasing.[37)]

3. Special characteristics of sports dispute

Sports disputes have to be resolved fairly in a prompt, friendly, and inexpensive manner. Procedures for general trials are processed in accordance to the strict procedure of legal procedure law; if the trial proceeds to the third trial, it takes too much time. Sports disputes must be resolved quickly and in amity. Adjustment and arbitration systems can contribute to making social unity, relaxing and resolving the conflicts and oppositions because the procedure is closed to the public and comprised of sufficient conversation and consultation with amity. It also results in economic advantage for the sports arbitration utilizing a single-trial system, a concentrated trial, and preliminary discussions; the time and expenses consumed during the procedure are inexpensive.

While general civil suit procedures are achieved by strict legal procedure law, thus comparatively guaranteeing propriety and fairness, the arbitration of the arbitration agency can be found to be less fair because of its special characteristics of being speedy and of being founded on the autonomy of the parties directly involved.

The system of arbitration or adjustment must be able to minimize the aftereffects of the dispute arbitration compared to the trials, especially because such a system allows conflict to be resolved or relaxed through offering opportunities to sufficiently stating the point of the issue and depends on mutual negotiation to draw a conclusion.

The system of arbitration and adjustment holds, as unofficial procedure,

37) Hirota Manabu, *Handbook of Dispute Resolution*, Shinsan Publish Co., 2002, Tokyo, Japan, pp. 3~17.

rapidness and elasticity, excluding the strict regulation application of evidence rule.

Generally, in the procedure of resolving disputes, the system of arbitration and adjustment has great significance in the sense that it actively utilizes a single-trial system, a concentrated trial, and preliminary discussions to minimize the time period until a conclusion is deduced; expenses consumed by the parties directly involved in the dispute can be reduced drastically using this system.

For example, if the dispute is about an athlete's qualification, even if the arbitration agency adjudges to admit the qualification of the athlete, the decision may hold no meaning to the athlete if he misses the game in question. Therefore, sports disputes lean to the tendency of requiring the arbitration agency to speedily draw conclusions.

4. Necessity according to International Tendency.

It is almost impossible not to follow the international tendency of sports. The Korea Sports Arbitration Committee was established upon the emphasis of the need for a sports arbitration agency along with successful hosting of the Seoul Olympic Games in 1988 and World Cup 2002. Also, the direct disadvantages the Korean athletes had to endure during the 2002 Salt Lake City Winter Olympics and the 2004 Athens Olympics, the interest in the CAS and international sports dispute systems increased sharply. The KOC requested the CAS for an arbitration, however, the case was dismissed; this unfortunate incident became an opportunity for renewing the realization of the necessity and the significance of a sports arbitration agency.

When the CAS was established in 1984, the organization was unable to resolve any dispute for the first two years; the number of cases resolved increased to one in 1986, and five in 1987; however, until 1993, for about ten years the organization only settled 76 cases (seven cases per year). After the reformation that acknowledged the priority rights and exclusive jurisdiction in sports arbitration area for the organization, the CAS succeeded to stimulate itself and escaped the danger of revocation. As a result, the CAS is now settling an

average of 200 cases every year since the increase of cases in 1994.

Japan established the Japan Sports Arbitration Agency in 2003 and has been operating the organization since then. Although the number of cases settled in this agency seems inadequate (three in 2003, two in 2004, one in 2005, one in 2006, none in 2007, and three in 2008), in April 2009 the agency rather constituted itself as a general incorporated foundation. In April 2013, the agency was approved as a public utility foundation and constructed a firmer legal foundation for itself.

The United Kingdom, the United States, Canada, New Zealand, Hungary, Netherlands, Germany, and South Africa have also established and reformed basic sports law or similar applicable Acts, supporting the sports arbitration agencies' operations.

5. The Necessity of Sports Advancement

The Korea Sports Arbitration Agency is essential for the sports advancement of Korea as a sports powerhouse. It has become more obvious that Korea is now a sports powerhouse, ranking 7th at the 2008 Beijing Olympics and 5th at the 2012 London Olympics. It is a commonly held opinion among all parts of society that Korea should be a developed sports country. It is necessary to achieve a true sports advancement that can act as a foundation for creating economical profit and national integration. It should be noted that the majority of sports advanced countries have established an active sports arbitration agency.

IV. Challenges of Legislative Policy

1. Fundamental Principles for Reestablishment: Granting Priority Rights and Exclusive Rights to Sports Dispute Arbitration.

Regarding the issue of granting priority rights and exclusive rights of sports dispute arbitration to a newly established Korea Sports Arbitration Agency in

accordance with the special characteristics of sports disputes, a question arises as to whether this might violate the right of access to courts, as guaranteed in Art. 27 of the Korean Constitution.[38]

Considering the need for speedy and fair resolutions of sports disputes, sportsmanship, and sports autonomy, an arbitration system that does not oppose good social customs and public order exhibits justification and legitimacy.

Therefore, to invest preferred and exclusive arbitral rights to the Korea Sports Arbitration Agency cannot be seen as violating the rights of access to courts of people since the agency is an arbitration body founded on sports autonomy that is constitutionally guaranteed through the approval and agreement of relevant parties, including the Korea Sports Council and affiliated bodies, as well as district subdivisions.

2. Legislative Measures for Reestablishment

(1) A Measure Coding Basic Sports Law

The necessity of clearly defining a legal basis to enhance the position of a sports arbitration body and to stimulate sports arbitration through enacting a Basic Sports Law or a National Sports Law is emphasized once again.

The following summarizes the necessity of the enactment of a Basic Sports Law, as mentioned numerous times above: First, there are 50 laws related to sports; however, there is no basic law that embraces and organizes these laws. The National Sports Promotion Act, which serves such a function, is insufficient to fill the role of a basic law.[39]

Second, it is natural to include sports in the major policies of a country. It is a commonly approved fact that sports plays a significant role in enhancing national prestige, national harmony and each individual's life through a number of events, such as the Olympics. However, not to mention the current poor legal

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38) Jung Seungjae, "Sports Autonomy and Sports Dispute", *The Korean Journal of Sports and Law* Vol. 5,The Korean Association of Sports and Entertainment Law(KASEL), 2004, p. 47.

39) Detailed contents can be found in: Yeun Kee-Young, "Structure for the Enactment of Fundamental Law of Sport in Korea", *The Korean Journal of Sports and Law* Vol. 11 No. 4, The Korean Association of Sports and Entertainment Law(KASEL), 2008, pp. 113-143.

support for sports, it is not even included in 50 major government administrational tasks. The sports administration realm is dispersed among many departments; it is difficult to plan and execute policies.

Third, a fundamental law that systematically and synthetically regulates and manages the business in the field of sports is needed because it is urgently required to define general principles of other sports-related laws.

A fundamental law generally directs itself through systemizing and integrating many other principles of laws. It is common that a fundamental law leads to greater effectiveness of other relevant laws.

Such fundamental laws began to be enacted in 1966, starting with the Minor Enterprises Act; as of December 10th, 2009, there are 51 fundamental laws enacted and enforced. After 1987's democratic contention, the national consciousness of rights increased and the numbers of fundamental laws increased correspondingly. After 2000, numerous fundamental laws were enacted following the trend of changing social structure and national consciousness. A Basic Sports Law ought to regulate, ideally, fundamental aspects related to a Basic Law of Sports, the responsibility of the government, basic guidelines for sports industry promotion and sports promotion, and sports and international cooperation.

(2) Policy Regulating the National Sports Promotion Act

Until the Basic Sports Law is enacted, it is worth considering reforming the National Sports Promotion Act to regulate necessary respects. As long as the National Sports Promotion Act is enforced, it would be desirable to define it as a corporation having a special status, such as the Korea Anti-Doping Agency. I would like to suggest the draft proposal for the reformation of this act as follows:

Draft Proposal for Amendment to the National Sports Promotion Act

Article 35. 2 (Establishment of a Korea Sports Arbitration Committee)

① In order to bring a peaceful, satisfactory and reasonable settlement to sports disputes through professional mediation and arbitration, with consideration of its distinct characteristics, and to allow each of the following businesses and

activities to be enacted, hereby the Korea Sports Arbitration Committee (KSAC) is founded with the approval of the Minister of Culture-Sports.

1. Establishment and execution of planning consultation, mediation, and arbitration of sports dispute.
2. Installation and operation of a tribunal of sports arbitration.
3. Education, public relations, collecting information, and study for sports arbitration.
4. International and domestic cooperation for sports arbitration.
5. Other businesses and activities for the sake of sports arbitration.

② The KSAC must be established as a corporate body.

③ The KSAC is composed of 11 committee members, including one chairman and one vice chairman. The method for the election and terms of the members are defined in articles of the association.

④ The KSAC is allowed to operate as a for-profit business as defined by a presidential decree, with the purpose of arranging necessary expenses for businesses and activities in accordance to Provision 1.

⑤ Any matter other than defined in this act about the KSAC should apply with codes about a juridical foundation defined in Civil Law.

⑥ The KSAC may demand public officials of the relevant administration and executives and staffs of the relevant organization and/or group to be dispatched upon necessity.

⑦ Prior to a lawsuit claim, parties involved in sports disputes must preferentially apply mediation or arbitration to the KSAC as defined by presidential decree.

(3) Enactment for Special Law

It is possible to consider a method of enacting a “Sports Med-arbitration Act” with consideration of the distinct characteristics of sports arbitration. This Law may define the KSAC's establishment, activities, its procedure for mediation and arbitration, and its effectiveness. Sports-related arbitration requires immediacy and professionalism more than anything. Because of its short history, the KSAC operates under a limited budget and less stimulated activities.

V. Conclusion

Sports disputes require immediacy and professionalism more than anything else. The Korea Sports Arbitration Committee has a short history; the lack of organization, budget, and stimulated activities seems inevitable. Enacting a more definite legal basis for the new, soon-to-be-established Korea Sports Arbitration Agency is strongly recommended in order to stimulate sports arbitration and to enhance the Korea Sports Arbitration Agency's position. Establishment of a National Sports Law and a Fundamental Law of Sports are urgently called for. Defining aspects related to a Basic Law of Sports, the responsibility of the government, basic guidelines for sports industry promotion and sports promotion, and sports and international cooperation, as well as coding a basis for establishment of sports arbitration organizations, are demanded. Legislating a Sports Arbitration Act as a special law of the Arbitration Act currently in force is also proposed. It is also desirable to first define such aspects through reforming the current National Sports Promotion Act until a Basic Sports Law or a special law is enacted.

When a Korea Sports Arbitration Agency is established with the arranged legal basis, it will be required to enact “Sports Arbitration Rules” or “Sports Mediation Rules.” Methods to apply for dispute settlement without arbitral agreement as well as a “Med-Arbitration” system that allows simultaneous processing of mediation and arbitration should be considered through applying supplements and amendments to the articles of association of the KOC and the affiliated organizations when establishing the rules mentioned above.

Such reformation of the institution can emulate the CAS's reformation of related laws to allow the organization have exclusive jurisdiction in 1990. Olympic Charters Article 59 states, “The Olympic Games or any dispute arising related to it should apply only to the CAS for settlement in accordance to the Sports Arbitration Rules,” approving the exclusive jurisdiction of the CAS. The fact that the majority of international sports federations approve of the CAS’s exclusive jurisdiction must be recognized.

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The Protection Offered by "Umbrella Clauses" in Korean Investment Treaties*

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Korea is, after China, the Asian country with the largest number of concluded investment treaties. One of the protections that Korean investment treaties frequently afford to foreign investors and their investment is the so?called "umbrella clause," which requires the host state of the investment to observe the commitments that it has undertaken toward the foreign investor or its investment. This is a potentially very powerful protection. Umbrella clauses, however, have proven to be amongst the most controversial provisions in investment treaties, giving rise to diverging interpretations by tribunals and commentators that are still not reconciled today.

Key Words : Investment Treaty, Free Trade Agreement, Umbrella Clause, Most Favoured Nation Clause, MFN Clause

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* The views in this article are personal to the authors and do not necessarily represent the views of King & Spalding or its clients.

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I. Introduction

Under investment treaties, states undertake to promote and protect investments made by the investors of the other contracting state(s) in their territory. A distinctive feature of investment treaties—and treaties entered into by the Republic of Korea ("Korea") are no exception—is that they almost systematically give foreign investors the means to enforce these protections by commencing an international arbitration against the host state of their investment.

Investment treaties typically offer a number of protections to foreign investors and their investment, such as fair and equitable treatment of the investment, protection against unlawful expropriation, as well as—and this is the focus of this article—the so-called "umbrella clause," also known as an "observance of undertakings" clause. Korean investment treaties frequently contain an umbrella clause. In a nutshell, an umbrella clause is a provision that requires the host state of the investment to observe the commitments that it has undertaken toward the foreign investor or its investment. This is a potentially very powerful protection, on which foreign investors have relied to bring claims before investment treaty arbitral tribunals for breach by the host state of a contract with the investor (*e.g.*, a concession agreement).[1] Umbrella clauses, however, have proven to be amongst the most controversial provisions in investment treaties,

1) On umbrella clauses, see, *e.g.*, Christoph H. Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", Journal of World Investment & Trade, vol. 5, no. 2, April 2004, pp.231 et seq.; Stanimir A. Alexandrov, "Breaches of Contracts and Breaches of Treaty – The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines," Journal of World Investment & Trade, Vol.5 No.4, August 2004, pp. 555 *et seq.*; Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contractual Claims – The SGS v. Pakistan and SGS v. Philippines precedents," in T. Weiler (ed), *International Investment Law and Arbitration – Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law,* Cameron May, 2005; T.G. Weiler (ed.), "Part I – Umbrella Clause," in *Investment Treaty Arbitration and International Law,* JurisNet, 2008; OECD, "The Interpretation of the Umbrella Clause in Investment Agreements," Working Papers on International Investment, No 2006/3, October 2006; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* Oxford University Press, 2nd ed., 2012, pp. 166 et seq.; and Abby Cohen Smutny and Steven Lee, "Chapter 15 The MFN Clause: What Are Its Limits," in Katia Yannaca-Small, *Arbitration Under International Investment Agreements – A Guide to the Key Issues,* Oxford University Press, 2010.

giving rise to diverging interpretations by tribunals and commentators that are still not reconciled today.

In this article, we will survey Korea's investment treaty programme and umbrella clauses found in Korean investment treaties (II). We will then turn to the interpretation of umbrella clauses and their effect (III). Lastly, we will consider the use of a most-favoured-nation clause to import an umbrella clause in Korean investment treaties which do not contain one, thereby enhancing investment protection (IV).

II. Korean Investment Treaties and Umbrella Clauses

A. Overview of Korea's Investment Treaty Programme

There are today over 2,600 bilateral investment treaties ("BITs"). There is also a growing number of free trade agreements ("FTAs") containing an investment protection chapter, which are similar to BITs in their content. In this article, we refer to BITs and FTAs as "investment treaties."

Korea is, after China, the Asian country with the largest number of investment treaties. It is also one of the top ten countries in terms of number of concluded BITs. At the time of writing, Korea is a party to 90 BITs, 82 of which are in force.[2)]

Korea's first BIT, with Germany, dates back to 1964. In the 1970s and 1980s, Korea entered into few investment treaties, mostly with developed countries in Europe. Most investment treaties concluded by Korea since the mid-1990s are with developing countries, reflecting Korea's growing role as a source of outbound investment.

The latest wave of Korean investment treaties dates from 2006-2007. Since 2007, although it has entered into only one BIT—with Uruguay—Korea has entered into a number of FTAs containing an investment chapter, *e.g.*, a 2009

2) *See* the list of Korean BITs and the text of most of them at 〈http://www.unctadxi.org/templates/DocSearch____779.aspx〉 (last visit on July 29, 2013).

Agreement on Investment with ASEAN member states, a 2009 FTA with the United States, a 2009 FTA with India, and a 2011 FTA with Peru.[3)]

Korea signed a tripartite investment agreement with China and Japan to replace the three existing investment treaties between these countries.[4)] It is also negotiating investment treaties with Australia-New Zealand, Canada, and Mexico.

To date, there has been only one reported investment arbitration case under a Korean investment treaty. It is a case brought against Korea by a U.S. private equity fund, Lone Star Funds, under the Belgium/Luxembourg-Korea BIT in relation to its investment in the financial institution Korea Exchange Bank. The case is ongoing.[5)]

B. Umbrella Clauses in Korean Investment Treaties

Of the Korean investment treaties publically available, a majority contain an umbrella clause, and almost all of the Korean investment treaties concluded between 1995 and 2006 do. Korea seems to have abandoned umbrella clauses in its recent FTAs (for example, its FTA with the United States does not contain one).

While umbrella clauses are a well-known provision in investment treaties, such a frequent inclusion is unusual. As an illustration, taking China, the other Asian country in the top ten countries in terms of the number of concluded BITs, only approximately a third of Chinese investment treaties contain an umbrella clause.

The most common wording of umbrella clauses encountered in Korean investment treaties is as follows:

"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting

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3) *See* the list and text of Korean FTAs at 〈http://www.mofat.go.kr〉 and 〈http://aric.adb.org/FTAbyCountryAll.php〉 (last visit on July 29, 2013).

4) *See* Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (signed on May 13, 2012; ratification pending).

5) *See* "Lone Star Claims Against South Korea Has An Arbitral Tribunal in Place," Investment Arbitration Reporter, May 13, 2013, available at 〈http://www.iareporter.com/articles/20130513〉 (last visit on July 29, 2013).

Party."[6]

The only noticeable evolution in the drafting of umbrella clauses in Korean investment treaties concerns the location of the umbrella clause in the treaty. Until 1992, the umbrella clause was located at the beginning of the treaty, among the provisions extending substantive treatment protections to investments and investors. From 1992 onwards, the umbrella clause usually is found at the end of the treaty, after the treatment provisions and after the dispute resolution provisions, in an article entitled "application of other rules" (or similar title).[7] We will discuss in Section IV below what impact, if any, the location of the umbrella clause in the treaty may have on its interpretation.

Based on publically available BITs, Korea's BITs with the following (nearly 50) countries contain an umbrella clause: Albania, Algeria, Bangladesh, Belarus, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Costa Rica, Croatia, Democratic Republic of Congo, Denmark, El Salvador, Greece, Guatemala, Honduras, Iceland/Lichtenstein/Switzerland, Jamaica, Hong Kong, Jordan, Kazakhstan, Kuwait, Laos, Latvia, Lebanon, Mauritania, Morocco, Nicaragua, Nigeria, Oman, Pakistan, Panama, Paraguay, Portugal, Qatar, Romania, Russia, Saudi Arabia, South Africa, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, Uzbekistan.[8]

III. The Effect of Umbrella Clauses in Korean Investment Treaties

The effect of umbrella clauses is one of the most unsettled issues in investment treaty jurisprudence. A consensus seems to have emerged that umbrella clauses may have the effect of elevating into treaty breaches violations by the host state of the commitments that it has undertaken towards the foreign investor or its investment, be it in a contract or in unilateral undertakings such

6) Article 2(2) of the Korea-United Kingdom BIT.

7) See the text of these BITs at 〈http://www.unctadxi.org/templates/DocSearch____779.aspx〉 (last visit on July 29, 2013).

8) *Id.*

as legislation (A). However, the controversy lies in the details as to when an umbrella clause may have such an effect (B).

A. The "Elevating Effect" of Umbrella Clauses Is Accepted in Principle

According to the now prevailing interpretation, an umbrella clause would have the effect of elevating any breach of a commitment undertaken by the host state with regard to the investment or the investor—whether in a contract or in legislation—into a breach of the treaty, which could be submitted by the investor to an investment treaty tribunal. In the words of the tribunal in the *LESI Dipenta v. Algeria case, "the effect of such clauses is to transform the violations of the State's contractual commitments into violations of the treaty umbrella clause and by this to give rise to jurisdiction of the Tribunal over the matter."*[9] This interpretation is also the one favoured by a majority of commentators.[10]

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9) *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire,* ICSID Case No. ARB/03/08, Award dated January 10, 2005, 25. *See also, e.g., SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated January 29, 2004 (*"SGS v. Philippines"*), 134 *et seq.; Eureko BV v. Republic of Poland,* Partial Award dated August 19, 2005 (*"Eureko v. Poland"*), 257 *et seq.*; *Noble Ventures, Inc v. Romania,* ICSID Case No. ARB/01/11, Award dated October 12, 2005 (*"Noble Ventures v. Romania"*), 51 *et seq.; Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay,* ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated May 29, 2009 *("BIVAC v. Paraguay")*, 141 ("the conclusion has prevailed that [the umbrella clause] of the BIT establishes an international obligation for the parties to the BIT to observe contractual obligation with respect to investors"); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay,* ICSID Case No. ARB/07/29 (*"SGS v. Paraguay"*), Decision on Jurisdiction dated February 12, 2010, 162 et seq., and Award dated February 10, 2012, 89 et seq.

10) *See, e.g.,* Emmanuel Gaillard, *La Jurisprudence du CIRDI,* Pedone, 2004, pp.759 *et seq.* and pp.833-835; Christoph H. Schreuer, "Travelling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road," Journal of World Investment &Trade, Vol.5 No.2, April 2004, pp.231 *et seq.*; Stanimir A. Alexandrov, "Breaches of Contracts and Breaches of Treaty - The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines," Journal of World Investment & Trade, Vol.5 No.4, August 2004, pp.555 *et seq.*; T.G. Weiler (ed.), "Part I - Umbrella Clause," in *Investment Treaty Arbitration and International Law,* JurisNet, 2008; and OECD, "The Interpretation of the Umbrella Clause in Investment Agreements," Working Papers on International Investment, No 2006/3, October 2006.

As an illustration, in the *Eureko v. Poland* case, the tribunal held that Poland's violation of contractual undertakings relating to the privatisation of its leading insurance group gave rise to a breach of the umbrella clause contained in the Netherlands-Poland BIT.[11] More recently, in EDFI v. Argentina, the tribunal held Argentina liable for breach of the umbrella clause of the Argentina-France BIT resulting from Argentina's repudiation of its obligations under an electricity concession agreement entered into with the claimants.[12] As another illustration, in *SGS v. Paraguay,* the tribunal held that Paraguay had breached the umbrella clause of the Swiss-Paraguay BIT by failing to pay for services under a contract to inspect goods that it had concluded with SGS. Paraguay was ordered to pay SGS compensation in an amount over USD 57 million.[13]

To reach such conclusions, tribunals have focused on the broad wording of the umbrella clause before them, which referred to "any obligation" and imposed a mandatory obligation by its terms "shall observe."[14] Such wording is similar to that of umbrella clauses in Korean BITs, which therefore should have the same elevating effect in accordance with the prevailing interpretation.

It should be mentioned that the first tribunal called upon to interpret an umbrella clause in the early 2000s—the *SGS v. Pakistan* tribunal—rejected the elevating effect of umbrella clauses, without however ascribing any alternative meaning to that clause. This decision was widely criticised, both by commentators and subsequent tribunals, as effectively depriving the umbrella clause of any effect.[15] It remains an isolated decision.

As mentioned in Section III above, the main evolution in the umbrella clauses contained in Korean investment treaties over time has been their location, from being included in the treatment provisions to being moved towards the end of the treaties in an "application of other rules," or otherwise similar, provision.

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11) *See Eureko v. Poland,* 244 *et seq.*

12) *See EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Award dated June 11, 2012, 938 et seq.

13) *See SGS v. Paraguay,* Award dated February 10, 2012, 162 *et seq.*

14) *See SGS v. Philippines,* 15.

15) *See, e.g., SGS v. Philippines,* 119 *et seq.; SGS v. Paraguay,* Decision on Jurisdiction dated February 12, 2010, 169; and Emmanuel Gaillard, *La jurisprudence du CIRDI,* Pédone, 2004, p.834.

With very rare exceptions, tribunals have not considered the location of umbrella clauses as determinative of whether they should have an elevating effect.[16] The change of the location of umbrella clauses in Korean investment treaties therefore should have no bearing on their elevating effect.

The above examples related to a state's contractual undertakings. Going further, a number of arbitral tribunals have held that unilateral undertakings given by the host state to foreign investors in legislation (and not only contractual commitments) also could give rise to a breach of an umbrella clause. For example, the LG&E v. Argentina tribunal considered that the Argentine Gas Law and implementing regulations were specific obligations undertaken by Argentina towards foreign investors, including the claimant, and that these *"became obligations … that gave rise to liability under the umbrella clause"* of the Argentina-United States BIT. *The LG&E v. Argentina* tribunal concluded that Argentina's changes to its Gas Law and implementing regulations constituted a breach of the umbrella clause.[17]

As in any matters under investment treaties, however, the text of the particular treaty applicable should be examined, as it may contain restrictive language. For instance, some investment treaties expressly refer to "contractual" commitments in their umbrella clauses.[18] This type of wording in all likelihood would limit umbrella clauses claims to breaches of contractual commitments, to the exclusion of commitments given by the host state in legislation or otherwise. To our knowledge, no Korean investment treaty contains an umbrella clause expressly referring to "contractual" commitments.

This being said, the vast majority of umbrella clauses in Korean investment treaties contain the wording "obligation [the host state] may have entered into with regard to investments of nationals or companies of the other Contracting

16) *See SGS v. Pakistan,* 169-170; and *Joy Mining Machinery Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction dated August 6, 2004, 81.

17) *See LG&E Energy Corp. et al. v. Argentine Republic,* ICSID ARB/02/1, Award dated July 25, 2007, 170 *et seq.; and SGS v. Paraguay,* Decision on Jurisdiction dated February 12, 2010, 167.

18) *See, e.g.,* Article 9 of the China-Jordan BIT ("[e]ach Contracting Party shall observe any contractual obligation it may have entered into towards an investor with regard to investment approved by it in investment treaties territory.").

Party" (emphasis added). Some tribunals have found that the phrase "entered into" limits the scope of the umbrella clause to contractual obligations, to the exclusion of general obligations arising from the law of the host state. In the words of the Noble Ventures v. Romania tribunal:

> *"The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts."* [19]

However, as an illustration of the divide in the jurisprudence on umbrella clauses, at least one other tribunal, in *Liman Caspian Oil v. Kazakhstan,* reached the opposite conclusion and found that an umbrella clause containing the phrase "entered into" could cover legislative promises.[20] In view of the inconsistent decisions on this point, investors under Korean investment treaties at least should be mindful that they may have more difficulty bringing an umbrella clause claim for breach by the host state of a commitment arising out of legislation than for breach of a contract with the host state.

While arbitral tribunals have almost invariably accepted that an umbrella clause in principle could have an elevating effect—notably to elevate a contractual breach into a treaty breach—the circumstances in which it will have such effect have given rise to controversy and divergent decisions on a number of sub-issues. These include the impact of a forum selection clause in the underlying contract, whether sovereign conduct is required to trigger a breach of the umbrella clause, and the identity of the parties to the underlying contract for that contract to fall within the scope of the umbrella clause. We examine these issues below.

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19) *See Noble Ventures v. Romania,* 51. *See also Mohammad Ammar- Al-Bahloul v. Tajikistan,* SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability dated June 18, 2010 (*"Al-Bahloul v. Tajikistan"*), 257, with reference to the umbrella clause at Article 10(1) of the Energy Charter Treaty ("In both cases, however, it is clear that the obligation must have been entered into 'with' an Investor or an Investment of an Investor. Therefore, this provision does not refer to general obligations of the State arising as a matter of law.").

20) *See Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazkhstan,* ICSID Case No. ARB/07/14, Award dated June 22, 2010 (*"Liman Caspian Oil v. Kazakhstan)*, 448.

B. Thorny Issues Relating to the Effect of Umbrella Clauses

(1) What Is the Impact of a Forum Selection Clause in the Underlying Contract on an Umbrella Clause Claim?[21]

In cases where a foreign investor seeks to elevate a breach of contract by the host state into a breach of an investment treaty, the underlying contract may contain its own dispute settlement provision, such as an exclusive forum selection clause designating domestic courts or providing for arbitration under the contract.

Investment treaty tribunals have held most consistently that contractual forum selection clauses do not bar investors from bringing claims in relation to contracts on the basis of investment treaties. In other words, investment treaty tribunals have distinguished between the causes of action—"contractual claims" and "treaty claims"—and have retained jurisdiction over the latter, notwithstanding the existence of a contractual dispute resolution clause.[22]

The question is slightly more delicate regarding umbrella clauses, as their breach is premised upon finding that the host state breached a contractual commitment in the first place (where contractual commitments, and not legislation, by the host state are at stake).

To our knowledge, no tribunal has ever denied jurisdiction over an umbrella clause claim based on the existence of a forum selection clause in the underlying contract. In two cases, arbitral tribunals have held that they had jurisdiction but refused to exercise it: they stayed the proceedings and referred the parties to the contractual dispute resolution mechanism.[23] In all other

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21) This section is solely concerned with umbrella clauses. It does not address the separate situation where an investor has an investment agreement with the host state and the investor-state dispute resolution provision of the applicable investment treaty provides for the investment treaty tribunal's jurisdiction over investment agreements.

22) See, e.g., the landmark case, *Compañiá de Aguas del Aconquija S.A. and Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated July 3, 2002.

23) *See SGS v. Philippines,* 127-128, where the tribunal, while recognising for the first time the elevating effect of an umbrella clause, stayed the arbitration, and referred the parties to the contractual forum selection clause—which designated Philippine courts—for a determination of the scope or extent of the host state's contractual obligations (or alternatively, giving the

umbrella clause cases, *i.e.*, the majority of them, arbitral tribunals have retained and exercised jurisdiction over claims for breach of an umbrella clause, notwithstanding the existence of a forum selection clause in the underlying contract.[24] In doing so, the *SGS v. Paraguay* tribunal stressed that *"[a]t least in the absence of express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims [i.e. an umbrella clause claim] of a tribunal constituted under that Treaty."*[25]

(2) Is Sovereign Conduct Necessary to a Finding of Breach of an Umbrella Clause?

A number of tribunals have introduced a distinction, derived from international law on state immunities, between the host state acting as a sovereign and as an ordinary contractual party. According to this approach, umbrella clauses would cover only contracts entered into by the state as a sovereign (as opposed to a commercial contract),[26] or breached by the host state acting in a sovereign capacity (as opposed to an ordinary contractual party).[27]

Such restriction to the full effect of umbrella clauses, which is not found in

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parties the option to agree among themselves on this point, which they eventually did and the stay was lifted. The case settled shortly after the lift of the stay). For a more recent decision, see *BIVAC v. Paraguay,* 143 *et seq.,* in which the tribunal stayed the proceedings and referred the parties to the exclusive forum selection clause in the underlying contract. *See also the obiter dicta in Bosh International, Inc. et al. v. Ukraine,* ICSID Case No. ARB/08/11, Award dated October 25, 2012 (*"Bosh v. Ukraine"*), 252 *et seq.* For a criticism of the stay of proceedings in the above two cases, *see* Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contractual Claims – The SGS v. Pakistan and SGS v. Philippines precedents," in T. Weiler (ed), *International Investment Law and Arbitration – Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law,* Cameron May, 2005, p.334.

24) *See, e.g., SGS v. Paraguay,* Decision on Jurisdiction dated February 12, 2010, 172 *et seq.*

25) *Id.*, 180.

26) *See El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Decision on Jurisdiction dated April 27, 2006, 79 *et seq.*; and *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,* ICSID Case No. ARB/03/13 and *BP America Production Co. and Others v. Argentine Republic,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections dated July 27, 2006, 108 et seq.

27) *See, e.g., Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, Award dated September 28, 2007 (*"Sempra v. Argentina"*), 310 *et seq.*

the text of the applicable investment treaties, has been criticised harshly by commentators and has been rejected, implicitly or explicitly, by a majority of arbitral tribunals.[28] One recent explicit rejection came from the tribunal in *SGS v. Paraguay,* which held that:

> *"Given the unqualified nature of Article 11 of the Treaty [i.e. the umbrella clause, which had a wording similar to the ones of Korean BITs], and its ordinary meaning, we see no basis to import into Article 11 the non-textual limitations that Respondent proposed in its Reply. Article 11 does not exclude commercial contracts of the State from its scope. Likewise, Article 11 does not state that its constant guarantee of observance of such commitments may be breached only through actions that a commercial counterparty cannot take, through abuse of state power, or through exertions of undue government influence… In effect, we see no basis on the face of the clause to believe that it should mean anything other than what it says – that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party's investors."*[29]

28) *See, e.g.,* Emmanuel Gaillard, "A Black Year for ICSID," New York Law Journal, March 1, 2007. *See also Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award dated August 18, 2008, 320; and *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Jurisdiction dated June 2, 2010, 190, for a rejection of the distinction sovereign/commercial as regards umbrella clauses.

29) *SGS v. Paraguay,* Decision on Jurisdiction dated February 12, 2010, 168, and Award dated February 10, 2012, 91 et seq. (In short, if Paraguay failed to observe its contractual commitments, then it breached Article 11 [*i.e.*, the umbrella clause]. No further examination of whether Paraguay's actions are properly characterized as 'sovereign' or 'commercial' in nature is necessary.").

3. Who Should Be Party to the Underlying Contract for the Contract to Fall Within the Scope of an Umbrella Clause?

Where an umbrella clause claim is based on an alleged breach of a contractual commitment by the host state, the identity of the parties to the underlying contract may be relevant to an arbitral tribunal's analysis of whether the umbrella clause is applicable.[30] It may be that the investor bringing the claim is not a party to the underlying contract, for instance because its locally-incorporated subsidiary is. Or it may be that the host state itself is arguably not a party to the underlying contract, for instance because a state-owned enterprise or another entity which under municipal law has a legal personality distinct from the state is. Arbitral decisions to date do not offer a consistent answer as to which entities should be party to the underlying contract for it to be covered by an umbrella clause.

With regard to the party to the underlying contract on the investor's side, some arbitral tribunals have held that a contract to which the foreign investor itself is not a party—for instance, where a locally-incorporated subsidiary entered into the contract—is not covered by the umbrella clause.[31]

Conversely, other tribunals have accepted that umbrella clauses cover a contract entered into by the foreign investor's subsidiary.[32] As an illustration, in

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30) *See* Nick Gallus, "An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract," Arbitration International, Vol.24 No.1, 2008, pp. 157 *et seq.*

31) *See Azurix v. Argentine Republic,* ICSID Case No. ARB/01/12, Award dated July 14, 2006 (*"Azurix v. Argentina"*), 384; *Siemens A.G. v. Argentina,* ICSID Case No. ARB/02/08, Award dated February 6, 2007, 204; *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment dated September 25,2007, 95; *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Liability dated December 14, 2012, 212 *et seq.*; and *Liman Caspian Oil v. Kazakhstan,* 443.

32) *See CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award dated May 12, 2005, 296 et seq.; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award dated May 22, 2007, 269 *et seq.; Sempra v. Argentina,* 308 et seq.; and *Limited Liability Company Amto v. Ukraine,* SCC Case No. 080/2005, Final Award dated March 26, 2008 ("*AMTO v. Ukraine*"), 110.

Continental Casualty v. Argentina, the tribunal held in its discussion of the umbrella clause claim that, *"provided that these obligations have been entered into 'with regard' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary… is not in principle excluded."*[33]

In light of this divided jurisprudence, what can be said at this stage is that the specific wording of the umbrella clause in the applicable treaty may be a relevant consideration. Some tribunals have made a distinction depending on whether the umbrella clause referred to commitments "entered into with regard to *investments*"— which would cover a contract between the investor's locally-incorporated subsidiary and the host state—or to "commitments entered into with the investors"—which would only cover contracts between the investor itself and the host state.[34] Umbrella clauses in Korean investment treaties contain the wording "with regard [or "with respect"] to investments," and accordingly would appear to allow for the former interpretation.

With regard to the party to the underlying contract on the host state's side, and contracts entered into by sub-state entities (*e.g.,* a province of the host state, state agency or a state-owned company), arbitral decisions are equally divided. Some arbitral tribunals have applied the international law rules on attribution, and have upheld jurisdiction over umbrella clause claims where the party to the contract was a sub-state entity, the conduct of which was attributable to the host state under international law.[35] Other tribunals instead

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33) *Continental Casualty Company v. The Republic of Argentina,* ICSID Case No. ARB/03/9, Award dated September 5, 2008, 297.

34) *See, e.g., AMTO v. Ukraine,* under the Energy Charter Treaty, 110 ("The so-called umbrella clause of the ECT is of a wider character in that it imposes a duty on the Contracting Parties 'to observe any obligations it has entered into with an Investor or an Investment of the other Contracting Party.' This means that the ECT imposes a duty not only in respect of the investor which is otherwise customary in an investment treaty context, but also vis-à-vis a subsidiary company, established in the host state. This means that an undertaking by Ukraine of a contractual nature vis-à-vis [the investor's local subsidiary] could very well bring into effect the umbrella clause."). However, investors should caution their expectations as to this interpretation prevailing in all instances: for instance, in the *Azurix v. Argentina case, supra,* the tribunal decided against contracts entered into by the claimant's subsidiary being covered by the umbrella clause in the Argentina-United States BIT, despite the use of the wording "with regard to investments" in the umbrella clause.

35) *See Noble Ventures v. Romania,* 68, 79-80; *Eureko v. Poland,* 115-134; *Al-Bahloul v.*

have applied municipal law to determine whether the entity party to the underlying contract had a personality distinct from the host state, in which case the contract was deemed not to fall within the scope of the umbrella clause.[36]

IV. Use of A Most-Favoured-Nation Clause to Enhance Umbrella Clause Protection

A foreign investor may use a most-favoured-nation ("MFN") clause to enhance the protections that the applicable treaty extends, namely by importing protections (such as an umbrella clause) that may otherwise be lacking from another investment treaty concluded by the host state.

To our knowledge, all Korean investment treaties contain an MFN clause. A typical MFN clause reads as follows:

> *"(l) Neither Party shall in its territory subject investments effected by, and income accruing to, investors of the other Party to treatment less favourable than that which it accords to investments effected by, and income accruing to, investors of any third State.*

Tajikistan, 269 ("the joint venture agreements are not obligations undertaken by a State organ, but rather by State-owned enterprises, and there is no basis for concluding that the State-owned enterprises signed these agreements acting in a governmental capacity…"); *Bosh v. Ukraine,* 241 *et seq.* ("As the Tribunal has concluded above that the conduct of the University is not attributable to Ukraine, it follows that it cannot be said that Ukraine, as a 'Party', has entered into any obligations… with regard to investment. Rather, if the umbrella clause is going to have the effect argued for by the Claimants, it could only do so in respect of obligations that have been assumed by the host State or by an entity whose conduct is attributable to the host State"); and *BIVAC v. Paraguay,* 141.

36) *See Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction dated April 22, 2005, 223. *See also Azurix v. Argentina,* 384, in which tribunal held that a contract entered into by the local subsidiary of the claimant with the province of Buenos Aires was not covered by the umbrella clause; *AMTO v. Ukraine,* 109 *et seq.; EDF v. Romania,* 317 and 319 ("There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked… Attribution does not change the extent and content of the obligations arising under the [contract], that remain contractual, nor does it make Romania party to such contracts"); and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, Award dated June 18, 2010, 343 et seq.

> *(2) Neither Party shall in its territory subject investors of the other Party, as regards their management, use, enjoyment or disposal of their investment, as well as to any activity connected with these investments, to treatment less favourable than that which it accords to investors of any third State."*[37]

Foreign investors have used MFN clauses in the "basic treaty" with a host state that protects them and their investment to import into that basic treaty more favourable treatment offered to investors in a "third state treaty" between the same host state and third states.

The use of MFN clauses to import substantive protections from one investment treaty to another has been uncontroversial in the jurisprudence. There are several examples of states being held liable for breach of treatment provisions that did not exist in the basic treaty and were imported from a third state treaty via an MFN clause. As a recent illustration, in *White Industries v. India,* an Australian investor brought a case against India under the Australia-India BIT. The Australia-India BIT contained an MFN clause similar to the one reproduced above. White Industries successfully relied on the MFN clause to import an "effective means" provision from the India-Kuwait BIT, which provided that "Each Contracting State shall, in accordance with its applicable laws and regulations, provide effective means of asserting claims and enforcing rights with respect to investments." The tribunal found that India's conduct breached "effective means" provision imported into the Australia-India BIT and thereby breached the MFN clause in that treaty.[38]

Turning to umbrella clauses more particularly, while a large number of Korean investment treaties contain an umbrella clause, some do not, such as the Korea-United States FTA. An investor bringing a claim under a Korean investment treaty that does not contain an umbrella clause could rely on the MFN clause in that treaty to import an umbrella clause from another investment treaty concluded by the host state. For instance, a Korean investor under the Korea-

37) *See* Article 4 of the Korea-Indonesia BIT.

38) *White Industries Australia Limited v. The Republic of India,* UNCITRAL, Award dated November 30, 2011.

United States FTA could import the umbrella clause from the Argentina-United States BIT. Such use of an MFN clause is precisely what happened in the recent EDFI v. Argentina case. In that case, the tribunal allowed the French investor EDFI to use the MFN clause of the applicable France-Argentina BIT to import an umbrella clause from another Argentine BIT. The tribunal ultimately held that Argentina had breached the imported umbrella clause.

These cases show what a powerful tool an MFN clause can be for foreign investors to enhance their investment treaty protections.

V. Conclusion

There remain a number of uncertainties—which are unlikely to be lifted in the near future—as to the protection that umbrella clauses effectively offer. Still, foreign investors have been able to bring successful claims for breach of umbrella clauses in a number of cases to date, with respect to undertakings given by the host state both in contracts and in legislation.

The two noted changes in Korea's drafting policy with respect to umbrella clauses may indicate a willingness on the part of the Korean Government to minimise or exclude the impact of umbrella clauses: first, the location of umbrella clauses, where present, has been moved from the treatment provision towards the end of the treaties and, second, in recent treaties, Korea has abandoned altogether including umbrella clauses. However, these two changes are unlikely to affect the availability of umbrella clause protection under Korean investment treaties: (i) as regards Korea moving the location of umbrella clauses toward the end of the treaties, with rare exceptions, arbitral tribunals have not considered the location of the umbrella clause to be relevant to its interpretation and effect; and (ii) as regards Korea refraining from including umbrella clauses in its latest investment treaties, the jurisprudence show that if a treaty contains an MFN clause (which Korean investment treaties do), the investor will be able to import an umbrella clause from another investment treaty and thereby will still benefit from umbrella clause protection.

In view of the number of Korean investment treaties that contain an umbrella

clause or an MFN clause, investors covered by these treaties thus should be aware of the additional protection that umbrella clauses may offer.

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Overview of Alternate Dispute Resolution with Special Reference to Arbitration Laws in Pakistan

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Arbitration is one of the prominent and widely practiced forms of Alternate Dispute Resolution. Different countries are strengthening their alternate dispute resolution mechanism, and focusing on arbitrations is a very important edge. Pakistan is in the phase of developing effective laws and policies to strengthen the process of arbitration. The Pakistan Arbitration Act of 1940 is very important to discuss and along with domestic laws the applicability of the international conventions must be discussed. This paper analyzed the situation of arbitration laws in Pakistan with respect to both the domestic laws and international laws applicable in the country.

Key Words : Arbitration Laws in Pakistan, Applicable Laws, Arbitration Act 1940, ADR in Pakistan

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I. Introduction

Disputes are unavoidable but can be managed and resolved through different techniques. The most well- practiced form of dispute resolution around the world is litigation which is not only a publicly financed and administered form of settlement of disputes but is also carried out in a public forum and bound by mandatory rules of process, evidence, and testimony.[1)]

Initially attempts have been made to speed up the litigation process and to reduce its cost but litigation remains an expensive and time-consuming way to resolve disputes. After which, arbitration has been introduced to overcome some of the problems encountered in litigation but this also proved itself very similar to litigation in both cost and time. Gradually the judicial systems of the world started recognizing Alternate Dispute Resolution (ADR) as one of the options to deal with this situation.[2)]

In the abovementioned circumstances, ADR can be defined as: "Any alternative to the two established and traditional methods of dispute resolution, namely litigation and arbitration, is encompassed by the term ADR, even including some processes which involve an imposed decision."[3)]

In an advanced world, ADR will attain an important place. In some jurisdictions like the United States, it is observed that nearly 90 percent of disputes are resolved through this means.

Various forms of ADR mechanisms are commonly used, including arbitration, mediation, fact-finding, mini trial, small claims court, and rent-a-judge.[4)]

The use of ADR mechanisms is wide due to its lower time-consumption and costs. In commercial disputes, arbitration, a form of ADR, provides a platform for the parties to save their reputation and business relationship and to resolve their disputes confidentially.[5)]

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1) Navin Merchant (2006), Commercial Dispute Resolution, International Judicial Conference 2006, Supreme Court of Pakistan, 11-14 August, 2006

2) Ibid.

3) Ibid.

4) Stone Katherine V.W. (2004), Alternative Dispute Resolution, Encyclopedia of Legal History, Stan Katz, ed., Oxford University Press.

The roots of the existing judicial system in Pakistan can be traced back to the medieval period and even before. The judicial system that we practice today has passed through several epochs covering the Hindu era, the Muslim period including the Mughal dynasty, the British colonial period, and the post-independence period.[6)]

In Pakistan people generally resort to the courts for the resolution of their conflicts or disputes, which glaringly indicates that litigation is the most utilized form of dispute resolution here as well.[7)] However, it is a wrong perception that the current increasing trend of adopting ADR in Pakistan is an imported project at the behest of West. The settlement of controversies through alternative dispute resolution mechanisms like "Punchayats" and "Jirgas" has had strong roots in our culture since centuries.[8)]

This paper will analyze the situation of laws on arbitration in Pakistan, the characteristics of ADR in Pakistan, along with a case law situation on ADR. The paper would explore the domestic laws on the subjects along with the applicability of the international conventions Pakistan is signatory to.

Ⅱ. Overview on Arbitration Laws in Pakistan

Among the different ADR practices, arbitration is one of the most renowned and commonly exercised forms. Arbitration is the process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision.

Ali and Shah (2009) argue that ADRs in the 21st century mean finding domestically and internationally a quicker, inexpensive, and more effective alternative system to litigation which is currently time-consuming and expensiv e.[9)]

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5) Isfandyar Ali Khan (2011), Critique of Section 89-A, Civil Procedure Code, 1908 and Case for Amendment

6) Dr. Faqeer Hussain (2011), The Judicial System of Pakistan, Supreme Court of Pakistan

7) Ibid

8) Zafar Iqbal Kalanauri (2012), Tracing the future of ADR in Pakistan, also available at www.zklawassociates.com/wp-content/uploads/2012/03/Tracing-the-Future-of-ADR-in-Pakistan1.pdf

Different developments were made to strengthen the laws of arbitration throughout the world and States have made efforts to get the maximum benefit from the process of arbitration. In Pakistan, the Arbitration Act of 1940 is only an enactment on this subject.

1. Historical Perspective

Before and even after the advent of British Rule, the punchayat[10] system was practiced in British India as a means to settle the disputes out of court. In 1927 the Bombay High Court observed in Chanbasappa Gurushantappa Hiremath v. Baslingayya Gokurnaya Hiremath that "to refer matters to a panch is one of the natural ways of deciding many disputes in India."[11]

In Pakistan, the Arbitration Act of 1940 is currently applicable and if we look into the background of arbitration in Pakistan, it can be traced back to the period before the independence of Pakistan in 1947 when Pakistan was a colony of British India, also known as a sub-continent.

Arbitration as a dispute resolution mechanism was recognized in the sub-continent prominently with the Indian Arbitration Act of 1899. This Act had a limited scope and initially it was applicable only to the presidency-towns of Madras, Bombay, Calcutta, and few others. Later in 1908, a new Code of Civil Procedure applicable to the whole British India was enacted and in the second schedule a provision was included regarding arbitration in respect of pending suits. This was an effort to make arbitration a part of laws. The civil justice committee of India gave proposals and suggestions in 1925 to present a new and comprehensive Arbitration Act although it was not shaped until 1940 after being passed by the Indian Legislative Assembly. This Arbitration Act of 1940 remains in force in Pakistan till today but it expired in India in 1996.[12]

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9) Ali S.I. and Shah M. (2009), Alternate Dispute Resolution and its Scope in Pakistan. QLCian. Pakistan

10) A group of respectable of the locality to decide upon the disputes between the locals of that area.

11) Chanbasappa Gurushantappa Hiremath v Baslingayya Gokurnay Hiremath AIR 1927 Bombay 565, 568-9

12) Mr. Justice Mian Saqib Nisar (2006), International Arbitration In The Context Of Globalization:

The abovementioned was a matter regarding domestic laws, but British India was not much recognized as a distinct entity under the international law for certain purposes. In that capacity it was a signatory to the Geneva Protocol on the Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927. In 1937, an Act known as the Arbitration (Protocol and Convention) Act, 1937, was passed by the Indian legislature to give effect to international arbitration agreements. It showed that three years before having the domestic legislation regarding arbitration, British India had the statute that broadly dealt with international commercial arbitrations. The Act of 1937 continued to be in force in Pakistan after 1947 although Pakistan became a signatory to the New York Arbitration Convention on December 30, 1958. In July 2005 the convention was made a part of the Pakistani laws by the promulgation of an ordinance.

Pakistan developed laws in respect of international arbitrations and foreign awards almost exclusively with reference to the Act of 1937 and to a certain extent the Act of 1940. It is only very recently that the courts have begun to deal with issues arising under the New York Convention.

2. Laws of Arbitration in Pakistan

In the domestic field, Pakistan followed the Arbitration Act of 1940 for the resolution of disputes, the one adopted before the independence of Pakistan.

The sole purpose of the 1940 Arbitration Act was to curtail litigation in Courts and promote the settlement of disputes amicably through persons in whom both the parties repose their confidence. A brief analysis of the Act is included in this document.

The Statute

On March 11, 1940, by the enactment of Act No. X of 1940, an Act was passed by the Governor-General of the Indian Council, which was later on

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A Pakistani Perspective, International Judicial Conference 2006

adopted by the newly independent state of Pakistan in its letter and spirit to consolidate and amend the law relating to arbitration. The Act was called as The Arbitration Act, 1940, which came into force on the first day of July 1940.

The Act provides for three classes of arbitration which are (a) arbitration without court intervention (mentioned in Chapter II, Sections 3-19) (b) arbitration where no suit is pending but through court (mentioned in Chapter III, Section 20) and (c) arbitration in suits through court (mentioned Chapter IV, Sections 21-25).

The Act also contains further provisions common to all the three types of arbitration (mentioned in Chapter V, Sections 26-38).

Arbitration Agreement

Section 2(a) of the definition clause provides for an arbitration agreement according to which in all kinds of arbitrations there must be an arbitration agreement. The Arbitration Act of 1940 defines it as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Arbitrators

There can be one, two, three, or more number of arbitrators. The first schedule of the enactment provides for implied conditions of the arbitration agreements according to which in case the number of arbitrators is even, an umpire is to be appointed according to the procedure prescribed in the Act. In case the agreement of arbitration is silent about a specific number, the arbitration shall be done by a sole arbitrator. Sometimes the name of the arbitrator has already been mentioned in the arbitration agreement but at times it is left to be appointed by a designated authority.

Section 8 to 10 of the Act provides for a mode of appointment of Arbitrators. Where the arbitration agreement is silent about the mode of appointment of arbitrators and the parties also remain in disagreement about the choice of the arbitrator, the court is empowered to make the appointment per the procedure prescribed in the enactment.

Section 11 of the Act provides for the removal of the arbitrator by the court

after due inquiry in case he deliberately remains negligent in conducting the proceeding or is guilty of misconduct.

According to Section 6 of the enactment if the cause of action remains in field, even the death of a party cannot terminate the arbitration proceedings.

Section 13 of the act empowers the arbitrator to administer oaths to witnesses to state a special case for the opinion of the court, to correct any clerical mistake, etc.

Court Intervention

Per Section 20 of the Act, in case one party to an arbitration agreement declines to go to arbitration, the other party can seek intervention from the court in order to compel a reference to arbitration.

Per Section 30 of the Act the arbitrator or umpire is bound to observe the essentials of natural justice, failing which, the arbitrator's award can be set aside for misconduct or on other grounds mentioned in the same section.

The Award

Section 28 along with the first schedule of the enactment deals with the award according to which the award must be pronounced within the time limits laid down in the arbitration agreement or (failing such agreement), within 4 months of the commencement of hearing. However, the time limit can be extended by the court in certain circumstances. The award has to be in writing and signed by the arbitrator. In case there is more than one arbitrator, the opinion of the majority would prevail.

Court Control Over the Award

To enforce an award, the judgment of the court has to be obtained per Section 17 of the Act. The Arbitration Act of 1940, provides the following powers to a court: either to pass a judgment in terms of the award per Section 17, to modify or correct the award per Section 15, to remit the award (on any matter referred to arbitration), for re-consideration by the arbitrator or umpire

per Section 16, or to set it aside per Section 30.

In short, the court has to adopt one of the three courses. It may totally accept the award, totally reject it, or adopt the intermediate course of modifying it or remitting it.

Modification of Award by Court

Section 15 of the Act provides that the Court may, by order, modify or correct an award in the situations mentioned below:

(a) Where it appears to the court that a part of the award is upon a matter not referred to arbitration and can be separated from the other and does not affect the decision on the matter referred.

(b) Where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision.

(c) Where an award contains a clerical mistake or an error arising from an accidental slip or omission.

Remitting the Award

The court may remit the award or any matter referred to arbitration to the arbitrators or umpires for reconsideration per Section 16 of the Act in the following situations.

Where the award has left undetermined certain matters, where it determines matters which are not referred to arbitration and which cannot be separated from the rest, where the award is so indefinite as to be incapable of execution, where an objection to the legality of the award is apparent on the face of it (Section 16).

Setting Aside the Award

Section 30 of the Act provides the court power to set aside the award on the grounds mentioned below.

(a) That the arbitrator or umpire has misconducted himself or the proceedings
(b) That the award has been made after issue, by the court, of an order

superseding the arbitration (c) That an award has been improperly procured or is otherwise invalid.

3. International Approach

1) International Conventions Applicable in Pakistan

Almost 137 countries ratified The New York Convention including Pakistan and India. Pakistan and India signed the Convention in 1958 but Pakistan didn't pass any related domestic legislation, which India did in 1961. All the countries which were signatory to the Geneva Protocol and Convention enforced through the Act of 1937 were also party to the New York Convention. Due to several reasons, the Convention could not be incorporated into Pakistan's municipal law for a long time, and this absence was felt increasingly. Finally, in 2005, an ordinance was promulgated to give effect to the Convention.

Under Pakistan's Constitution, an ordinance has the same effect as an Act of the Parliament, but lapses after four months. An Act is yet to be passed by the Parliament to give a permanent legal effect to the Convention. So far, it appears to have been kept alive as part of the municipal law by means of successive Ordinances issued from time to time.[13)]

The ordinance enforcing the New York Convention repeals the Act of 1937 to make any challenge to the enforcement of an international award even more difficult as compared to the Act of 1937. Second, an ordinance directly confers exclusive jurisdiction with regard to its subject matter on the High Court. It is likely to speed up the process of international arbitration and enforcement of foreign awards to a greater extent.[14)]

The ordinance, like the Act of 1937 mainly deals with legal proceedings brought in Pakistan regardless of the existence of an international arbitration agreement and the enforcement of foreign awards in Pakistan.

13) Ibid.
14) Ibid.

2) Pakistan Enacts a Statute to Implement the ICSID Convention

Pakistan while defending investment claims and in order to restore investor's confidence, in 2011, the Pakistani President introduced a law to secure foreign investments.

In reality the Act is a response to the highlighting of the Supreme Court of Pakistan's 2002 decision[15] that the International Convention on the Settlement of Investment Disputes (ICSID) convention, although ratified by Pakistan, having not been incorporated into the laws of Pakistan by implementing legislation, the domestic courts had no power to enforce the provisions of the Convention while ignoring the existing national enactments relating to arbitration.

In the same case the Supreme Court upheld the lower courts' decision not to keep the arbitration proceedings under the Pakistani Arbitration Act following the commencement of the ICSID arbitration.

The rationale of the Act is to apply the International Convention on the Settlement of Investment Disputes between States and Nationals of other States, with an intent to bring transparency in the settlement of investment disputes. The Act attaches the ICSID Convention as a schedule.[16]

In addition to this Act, Pakistan is also preparing the enactment of two statutes relating to international arbitration. First, a law to enforce the New York Convention has been passed by the National Assembly and is currently awaiting consideration before the Senate. Second, a new Arbitration Act, based on the UNCITRAL Model Law, is pending before the National Assembly.

4. Proposed Legislation in Pakistan

In recognition of the New York Convention, The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act of 2011 was passed by the National Assembly.

The Arbitration Bill of 2009 (the Bill) was introduced into the Pakistan National Assembly on April 24, 2009. This bill was introduced with an intent to

15) in cases such as SGS v Pakistan

16) Laurence Burger (2011), Pakistan Enacts A Statute To Implement The ICSID Convention,

remove the deficiencies in the Arbitration Act of 1940 earlier. The preceding Arbitration Act of 1940 that governs domestic arbitration in Pakistan has several deficiencies. The Preamble shows the intention to implement the UNCITRAL Model Law on International Commercial Arbitration in Pakistan.

The Bill is intended to supersede and build on the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance of 2007 (REAO) which implemented the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NY Convention) into Pakistani law. The Bill also proposes to establish an arbitration and conciliation center in Pakistan.

Ⅲ. Characteristics of Alternate Dispute Resolution in Pakistan

ADR is not a new phenomenon but can be traced back in the primitive societies of the past in the form of the Punchayats, Punchs, Jirgas, and Qazi's. Despite having no legal backing, their decisions were respected and obeyed. Now once again in this new era of law and order this mechanism is gaining importance due to the prolonged, costly, and nerve-racking process of litigation.

ADR includes numerous methods for the expeditious disposal of disputes such as negotiations, mediation, conciliation, and arbitration along with other modes.

1. Historical Perspective

Since its inception in 1947, Pakistan adopted various laws from the British India i-e Sub Continent where litigation was considered as the best form of dispute resolution therefore all the procedural laws leaned towards either lengthy procedures of evidence and testimony or summary trials without the concept of ADR being found in procedural laws adopted from there.

2. Constitution of Pakistan

Although no explicit mention of ADR can be viewed in the Constitution of Pakistan, there is a reference to commercial and financial activities which may lead implicitly to a view that Pakistan practices certain methods of ADR. A quick review of the Constitution reveals that Articles 153-154 deal with the Council of Common Interest, Article 156 deals with the National Economic Council, Article 160 deals with the National Finance Commission, and Article 184 of the Constitution gives rise to the original jurisdiction to the Supreme Court of Pakistan in "any dispute between two or more Governments."[17)]

3. United Nation's Conventions

Pakistan is a signatory of the New York Convention which is also known as the New York Convention of 1958 and the Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

4. Domestic Laws of ADR in Pakistan

As regards the ADR in Pakistan, some of the relevant laws are as follows: Arbitration Act, 1940; Conciliation Courts Ordinance, 1961; Muslim Family Laws Ordinance, 1961/Family Courts Act, 1964; Section 89-A of the Civil Procedure Code, 1908 read with Order X Rule 1-A; The Small Claims and Minor Offences Courts Ordinance, 2002; Punjab Local Government Act, 2012; Khyber Pakhtunkhwa Local Government Act, 2012.

1) Small Claims and Minor Offences Courts Ordinance, 2002

The Small Claims and Minor Offences Court Ordinance is a law promulgated with the intention to establish a court of Small Claims and Minor Offences, where the value of the small claims suit is Rs.100,000 ($1600) or less in case of

17) Salman Ravala (2010), Alternative Dispute Resolution in Pakistan, available at www.nyulawglobal.org/globalex/Pakistan_ADR1.htm

civil suits and offences punishable up to three years, or fine or both can be adjudicated upon.

The ordinance also provides for a simple, specific, and expeditious procedure for process serving in order to finalize the case for trial. The court is also awarded with the power to persuade the parties to adopt any of the processes of ADR to reach an out-of-court settlement for the expeditious disposal of their cases but in the event of failure in the ADR proceedings the court would proceed to determine the suit through a prescribed summary procedure.[18] The purpose of the law is to provide an "inexpensive and expeditious disposal" of minor claims and offences.[19]

2) The Code of Civil Procedure (Amendment) Ordinance No. XXXIV of 2002

In order to provide an opportunity to courts for the adoption of the methods of ADR including mediation and conciliation,[20] in order to bring an end to the controversy and expeditious disposal of a case, Section 89-A and Order X Rule 1-A have been inserted in the Code of Civil Procedure of 1908.[21]

3) The Punjab Consumers Protection Act, 2005

The Punjab Consumers Protection Act, 2005 provides for a mandatory provision for the use of the ADR mechanism for the resolution of consumer disputes presented before it. The Act empowers the Consumer Tribunal to adopt any mode of ADR in order to bring an end to the controversy before it.[22]

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18) Zafar Iqbal Kalanauri (2012), op. cit.

19) M. Mahmood, Jawad Mahmood (2012), The Civil Major Acts, Al- Qanoon Publishers, 10th Edition, 2012

20) M. Mehmood (2012), The Code of Civil Procedure, 1908 : amendments & case law up to date, al-Qanoon Publishers 11th Edition, 2012

21) 2011 CLC 758

22) Zafar Iqbal Kalanauri(2012), op. cit.

4) The Local Government Ordinance, 2001

The Punjab Local Government Ordinance, 2001 under Sections 102 and 103 provides for the constitution of the "Mosalehat Anjuman" and "Insaf Committees" for resolving local disputes. Section 104 empowers the Courts to refer cases to Mosalehat Anjuman. These Mosalehat Anjumans are empowered to resolve and settle the disputes related to Civil, Criminal, Family, and Revenue matters brought before it either through courts or by parties.[23)]

5) The Arbitration Act, 1940

The Arbitration Act of 1940 was enacted before the independence of Pakistan in 1940 for all of British India but adopted by it in its letter and spirit and still applicable in Pakistan today. The purpose of this enactment is to provide a domestic tribunal for the settlement of disputes between the parties and a provision of expeditious relief.[24)]

6) Some other Enactments

In 1961, in order to enable people to settle certain disputes through conciliation, the Conciliation Courts Ordinance, 1961 was promulgated. Conciliation Courts are mandated to adjudicate upon specified civil disputes and minor offences.

Provisions were also made in the Family Laws making it incumbent for the Family Court to strive for, bringing about reconciliation for settling family disputes. For the resolution of labor disputes, "shop stewards" acted as a link between the workers and the employer to help workers in the solution of problems connected with their work.

The appointment of "conciliators" was visualized by the Industrial Relations Ordinance of 1969 (now of 2002) to negotiate and to bring about an amicable settlement of the disputes.

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23) The Punjab local government ordinance (2001)
24) PLD 2010 S.C (AJ & K) 1

For settling fiscal disputes, relevant Laws have been amended. The addition of Rule 231-C has been made in the Income Tax Rules, encouraging the resolution of disputes through the Alternate Dispute Resolution Committee.

Ⅳ. Alternate Dispute Resolution Cases in Pakistan

1. Traditional Case

ADR stands for alternative dispute resolution and refers to alternatives to the established and traditional method of dispute resolution in the form of litigation. Two types of ADR are practiced in Pakistan: traditional ADR and formal ADR. Traditional ADR comprises the centuries old systems including Panchayat in Punjab and Jirga in Khyber Pakhtunkhwa as well as Balochistan. The latter refers to the ADR attached to public bodies; for example, Arbitration Councils, Union Councils, Conciliation Courts, and Musalihat Anjuman.

Pakistan has some experience with alternative means of dispute resolution in the form of so-called "panchayats." Panchayat literally means the assembly of five wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settle disputes between individuals and villages. However, these judgments are legally nonbinding and are typically applied to personal or family disputes. In short, there are no effective alternatives to lengthy and costly judicial procedures for Pakistani enterprises to settle any commercial disputes.

2. Current Situation

The need for an alternative to litigation is becoming increasingly popular, primarily because of time and cost considerations but also because it helps to avoid the adversarial process, which leaves wounds and destroys relationships.

A courageous initiative of the judiciary in Pakistan to institute an alternative

dispute resolution system through "National Judicial Policy, 2009" which remained a matter of consideration even in the National Judicial Conference, 2013, showing a strong commitment of the Superior Judiciary in Pakistan to reduce the burden of millions of cases pending with the courts through the adoption of ADR mechanisms.

Several laws have already been amended and some more are on their way to facilitate mediation, conciliation, arbitration, and other alternative dispute resolution mechanisms, as the result of the efforts was tremendously encouraging.

Under a pilot project, it is intended that ADR should be initiated in the selected districts and in a class of cases, under the supervision and control of the High Courts, which can eventually be extended to all the districts. This mechanism would save an average court time of seven to ten years.[25)]

The Islamabad Declaration adopted at the conclusion of the three-day International Judicial Conference, 2013 approved some recommendations on ADR which includes that the training programs for the Bench, the Bar, and other stakeholders on ADR should be devised by the Bar Councils in collaboration with the Law and Justice Commission, and that the Pakistan Bar Council should introduce a course on ADR in the LL.B degree program. Similarly, an official institute of arbitrators is to be established so that persons from fields relevant to the matter in dispute are readily available.[26)]

3. Business and ADR Center, Pakistan

The trade bodies, whose members are the target end-users, are now showing greater eagerness to have recourse to this alternate mechanism to release their assets caught up in litigation. They have also started thinking in terms of having a clause for mediation inserted into their future contracts and asking the Center to arrange in-house mediation training for the member firms.

There are only two ADR Centers established in the country. One is the Karachi Center for Dispute Resolution and the other is the Lahore High Court

25) Zafar Iqbal Kalanauri (2012), op. cit.
26) Islamabad Declaration of international judicial conference(2013), 19-21 April 2013

Annexed ADR Center.

As Pakistan is still at the inception of the adoption of the ADR mechanism at a professional and official level, no case law and precedents are officially published; however, the Karachi Center for Dispute Resolution (KCDR) has shared some success stories at their official website.[27)]

The Lahore High Court Annexed ADR Center has not started working and no case has been taken up yet. However, some cases at an international level, where the Pakistan party is, can be found.[28)]

Ⅴ. Conclusion

Along with ADR, arbitration has a bright future in Pakistan. With strong arbitration instruments in Pakistan, foreign and domestic investments in the country can increase as investors are discouraged by lengthy and costly litigation processes.

The judiciary can play an important role in practically executing the arbitration process and in encouraging the litigants to adopt the process of arbitration in a speedy and cost-effective manner. The legal profession has to accept business and market needs, equip themselves with the knowledge and skills of mediation, and develop professional capacity in the field of ADR as this is a major requirement for modern-day clients.

The National Judicial Conferences are giving an important place to ADR mechanism to discuss its benefits, problems, and future development including its recommendations.

The Constitution of the Islamic Republic of Pakistan under Article 37 is mandated to ensure inexpensive and expeditious justice. The use of ADR is defiantly one of the best possible options to resolve disputes expeditiously and restore the confidence of the people in the judicial system.

ADR provides an alternative to litigants to settle their disputes by avoiding

27) http://www.kcdr.org/index.php

28) Jacob Grierson and Dr. Mireille Taok (2009), Comment on Dallah v. Pakistan : Refusal of Enforcement of an ICC Arbitration Award against a Non-Signatory, Journal of International Arbitration vol.26(6), pp.903-907

lengthy, multiple, and cost-oriented proceedings. ADR has proven to be the best method for resolving disputes so efforts should be made by the Bench and the Bar for referring the matter to ADR as provided in the above laws.

An alternative facility in Pakistan is yet to take a meaningful uplift but the current efforts of establishing ADR Centers, among others, in order to assist the ADR system in Pakistan's justice delivery process is highly appreciable and will open a new horizon in our legal firmament. A meaningful expansion of ADR in Pakistan is the first step to bringing change. A second important milestone to achieve in the practice of this system is its implementation at the grass roots level.

Another important thing to be kept in mind while exploiting our resources in the expansion of this system of ADR as discussed above is that by strengthening our local, existing, and highly respected and accepted system of ADR, Punchayats and Jirgas need not be discarded but strengthened so that maximum benefits can be achieved.

National and international arbitrations conducted are small in number but a positive approach can be assumed for Pakistan to attain a better position in the field of arbitration law in the coming few years. Lawyers will need to support mediation in the larger interest of their clients as prolonged litigation does not favor litigants and a quick resolution through the mediation process can provide clients with a win-win solution.

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Arbitration in Egypt in the Realm of the Arab Spring

Ismail Selim*

Egypt has gone through a major metamorphosis following the Egyptian Revolution that began on 25 January 2011. The aim of this article is to analyze the influence of the aforementioned metamorphoses on the Egyptian Arbitration Law and Practice and to shed light on the recent developments of the latter. Whilst positive legislative amendments have been recently achieved with regards to enforcement of arbitral awards, it is crystal clear that the January 2011 Revolution has negatively impacted the jurisprudence of the Administrative Court of the Conseil d'Etat which has annulled several arbitration clauses enshrined in contracts related to privatization. However, save for disputes arising from administrative contracts, Egypt has been and shall remain a friendly seat of Arbitration as it possesses an arbitration?friendly legislation, its Ordinary Judicial Courts are familiarized with international arbitration practice and it has a prominent and famous arbitration Centre.

Key Words : Egyptian Arbitration Law and Practice, January 2011 Revolution, Arab Spring, June 2013 Corrective Revolution, Egyptian Spring, CRCICA, Enforcement of Arbitral Awards, Cairo Court of Appeal, Counsel of State, Supreme Constitutional Court

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I. Introduction

Arbitration in Egypt was traditionally regulated by provisions of the Code of Civil and Commercial Procedure ("CCCP") which was influenced by the old French Arbitration Law. However, throughout the last five decades, Egypt has undergone a significant modernization of its Arbitration Law and practice. On 7 June 1959, Egypt ratified the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards without any reservations or declarations. The establishment of the Cairo Regional Center for International Commercial Arbitration ("CRCICA") in 1979 was another positive step. In the years since then, the number of domestic and international arbitration proceedings administered under its auspices continuously grew.

A major momentous reform was the enactment of the new Egyptian Arbitration Law No. 27 for the year 1994. The said Egyptian Arbitration Law was greatly inspired by the UNCITRAL Model Law on International Commercial Arbitration (1985), subject to some amendments.[1] As mentioned by the former Senator Edward Al-Dahabi prior to the enactment of the said law, *"I believe that if such draft law is adopted, Cairo and Alexandria will become seats of international commercial arbitration like Paris, London, Geneva and New York* [···]".[2] With the exception of very few rulings, the jurisprudence of both, Cairo Court of Appeal and the Court of Cassation affirms the continued pro-arbitration stance of the Egyptian Courts.[3]

Egypt has gone through a major metamorphosis following the January 2011 Revolution that put an end to the 30 year long Mubarak Regime, despite steady economic growth achieved by the government lead by former Prime Minister Ahmed Nazif. Welfare and social justice, together with political freedom, have

1) Mohamed Aboulenein, "Reflections on the New Egyptian Law on Arbitration", Arbitration International, 1995, Vol 11, No 1, p. 75.

2) *Parliamentary Debates concerning the Draft Arbitration Law*, Ministry of Justice, 1995, p. 83 (in Arabic).

3) Bourhan Atallah, " The 1994 Egyptian Arbitration Law Ten Years On", ICC Bulletin, Vol. 14/ 2. 2003.17 ; Philippe Le Boulanger and Hadi Slim « Chronique de Jurisprudence étrangère, Egypte », Revue de l'arbitrage, 2004, p. 941; Dalia Hussein, Ismail Selim and Sally El Sawah, "Chronique de Jurisprudence étrangère, Egypte », Revue de l'arbitrage, 2013, p. 191.

been, logically and justifiably, the main mottos and rationale behind the Egyptian Revolution as poverty and poor life conditions were among the chief causes of the popular uprising which eventually lead to the fall of the Mubarak regime.

That said, the Post-Revolution context was characterized and highlighted by the denigration of the image of Egyptian and foreign successful businessmen and investors on the assumption that their success was, most probably, associated with corruption and/or strong ties with Mubarak's Regime.[4] Moreover, the unprecedented rise in the number and magnitude of strikes as well as legal actions pursued by employees and even retired employees undoubtedly created an anomaly and added further difficulties to the business and investment environment.[5]

Unfortunately, Egypt has gone through another major, but negative, metamorphosis which was the arrival of the Muslim Brotherhood to power. The Muslim Brotherhood regime adhered to the pre-revolution liberal economic set up. However, the encroachments of the new regime against the independence of Justice and its fueling of political unrest largely outweighed its liberal view of the economy. On 30 June 2013, millions of Egyptians flooded into the streets of all the cities on the first anniversary of President Mohamed Mursi's to demand that he resigns as well as to command the abolishment of the Islamist Constitution adopted under his rule.[6] Upon Mursi's expected refusal to step down, he was ousted by the Egyptian army. As per the demonstrators' will, Adli Mansour, the Chief justice of the Supreme Constitutional Court, stepped in as an interim president until new elections are held. Whilst this Corrective second Revolution is indeed a heavenly bliss for Egypt's future, where the Egyptians are redeeming their Country and putting Egypt on the right track, it is too early to assert that it will have a positive influence on Arbitration in Egypt.

Generally, the aim of this Article is to analyze the influence of the

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4) Firas El Samad, « Draft amendments to the Egyptian Competition Law, populism or sound policy », International Bar Association Legal Practice Division, Arab Regional Forum News, October 2011, p. 23.

5) Firas El Samad, "Chapter 15 – Egypt", The Merger Control Review, Law and Business Research Ltd, 3rd edition, p. 158.

6) According to CNN, the number of demonstrators reached 33 million. The BBC stated that it was the largest number of protesters in a political event in the history of mankind.

aforementioned metamorphoses on the Egyptian Arbitration Law and Practice and to shed light on the recent developments of the latter. In light of the above, this Article shall be divided into five parts including this Introduction as Part I. Part II shall set out issues relating to the enforcement of arbitral awards. Part III shall provide an overview of the Counsel of State recent decisions pertaining to privatization matters. Part IV shall outline a resent pro-arbitration ruling of the Supreme Constitutional Court. Part V shall shed light on the continuous rise of CRCICA. Finally, Part VI shall be dedicated for the concluding remarks.

Ⅱ. Enforcement of arbitral awards: the jurisprudence of Cairo Court of Appeal facing the Decree of the Minister of Justice No 8310/2008 and its subsequent amendments

Throughout the years preceding the Egyptian Revolution, Egypt suffered from a phenomenon of fraudulent arbitral proceedings whose aim was to evade from public policy rules pertaining to the publicity of lawsuits relating to real estates and to the acquisition of such real estates by foreigners. Such maneuvers have even paved the way to undue acquisitions of lands and buildings, by Egyptians as well as by foreigners. In order to protect private property through combating fraudulent arbitral proceedings and the subsequent refusal to enforce the awards resulting from such proceedings, the Minister of Justice issued the Decree No. 8390 for the year 2008 regarding *"The Organization of Arbitral Awards deposit procedure by virtue of Article 47[7] of the Law on Arbitration in Civil and Commercial Matters No 27 for the year 1994".*[8]

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7) Article 47 of the Egyptian Arbitration Law reads as follows: "*The party in whose favour the arbitral award has been rendered must deposit the original award or copy thereof in the language in which it was issued, or an Arabic translation thereof authenticated by the competent authority if it was issued in a foreign language, with the clerk of the court referred to in Article (9) hereof.*
The court clerk shall evidence such deposit in minutes and each party of the parties to arbitration may obtain a copy of the said minute".

8) Official Gazette, Vol. 230, 7 oct. 2008, p. 3.

Despite the innocent intention of the Minister of Justice, the Decree was viewed by the scholars as being unconstitutional and detrimental to Arbitration for several reasons, the most important two reasons are: Article (2) of the Ministerial Decree which provided that the deposit request of the arbitral award with the clerk of the competent Court must be routed to the Technical Office of Arbitration at the Ministry of Justice for review and issuance of its approval. From this perspective, the Ministerial Decree has added to the post-arbitral judicial control, provided for in the Arbitration Law, another Administrative control without being authorized to do so by the law, thereby encroaching against the Independence of Justice. On the other hand, Article (4) of the Ministerial Decree authorized the Technical Office of Arbitration to reject the deposit request for several grounds, one of which is that the awards pertains to a real right on a real estate, its possession, its hand over, the establishment of its ownership or its division or "*relates to a real estate by any mean whatsoever*". Hence, the plain wording of the Ministerial Decree drastically reduced the scope of Arbitrability as it did not merely limit the non-arbitrability to the real estate lawsuits which are subject to publicity public policy rules. Astonishingly, it went much further.

Indeed, the Ministerial Decree barred the enforcement of any award settling a dispute pertaining, even indirectly, to a real estate, thereby excluding de facto such disputes from the scope of arbitrability. Accordingly, disputes pertaining to hotel management agreements, construction contracts, BOT agreements and public service concessions could no longer be settled by enforceable arbitral awards, even where such disputes are unrelated to an immovable property. Yet, the said disputes are explicitly arbitrable by virtue of Article (2) of the Egyptian Arbitration Law which enumerates examples of economic arbitrable disputes as follows: "*[…] construction…exploration and extraction of natural wealth, […] the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, […] and the establishment of nuclear reactors*". Therefore, such Ministerial Decree failed to coincide with the Egyptian Arbitration law.

In order to neutralize the adverse effects of the Ministerial Decree, it has been amended twice. The first amendment occurred through the Decree No. 6570 for

the year 2009, thereby restricting the non-arbitrability to matters pertaining to real rights on real estates as well as matters which are not amenable to compromise. However, such amendment did not satisfy the Cairo Court of Appeal which has rendered several rulings in post-arbitral proceedings denying any legal effect to the said Ministerial Decree being an encroachment to the independence of the judiciary. In one of its rulings dated 6 September 2010,[9] the Cairo Court of Appeal stated:

> *"[…] the aforesaid ministerial decree, amended by the decree no 6570 of the year 2009 is unconstitutional as it violates article 166 of the Constitution which provides that Judges shall be independent, subject to no other authority but the law. No authority may intervene in cases or in justice affairs. Whereas the Arbitration Law grants the judges exclusively the jurisdiction over the exequatur of arbitral awards, accordingly, no other authority may intervene in procedures pertaining to such exequatur […]".*

The second amendment to the said Ministerial Decree was the fruit of the Egyptian Revolution of 2011. Indeed, the Minister of Justice of the post-revolution transitionary government seemed to have taken heed of the negative critiques laid down by the Court of Appeal as well as by the Egyptian scholars. Hence, by virtue of a Decree No. 9739 for the year 2011, dated 5 October 2011, the competence of the Technical Office of the Ministry of Justice with regards to the exequatur of arbitral awards became restricted to rendering an advisory opinion and with a scope limited to reviewing whether the enforcement of the awards contravenes with Egyptian public policy and whether the award is settling a matter which is not amenable to compromise. Here, the breeze of the Arab Spring blew in favor of Arbitration in Egypt. However, that is not the whole picture.

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9) Cairo Court of Appeal, 7th Commercial Circuit, 6 September 2010, n° 10/127, "Arab Arbitration Journal", Vol. 15, p. 198, commentary Mohamed Abdelraouf.

Ⅲ. The Counsel of State recent rulings in Privatization Lawsuits

Right after the occurrence of the Revolution of 25 January 2011, several lawsuits have been initiated before the Administrative Courts of the Counsel of State by former employees of privatized Egyptian Public Sector Companies. The relief sought was usually the same: the annulment of the Ministerial Decree approving the sale of the relevant Public Sector Company to the foreign investor and all its effects, including the early retirement of the employees. The said relief sought was usually based on the allegations that the price paid for selling the Company was low due to corruption allegations and that the employees were forced to accept the early retirement plans due to the threats of the State Security Police. Analyzing such allegations falls out of the scope of this article. However, it is useful to pinpoint the influence of the "social" goals of January 2011 Revolution on the decisions of the Administrative Court, which is a first instance Court.

It all started with the famous Omar Effendi Case. Omar Effendi is a very famous Egyptian chain of department stores which was nationalized in 1957. After five decades it was then privatized and sold by the owning Public Sector Company (the "National Company for Construction and Development") to a Saudi group called Anwal by virtue of an agreement dated 2 November 2006 which was entered into following a Ministerial Decree dated 25 September 2006. A dispute arose between the two parties and the Saudi investor initiated arbitral proceedings in Cairo under the auspices of the CRCICA.

On the other hand, the Egyptian party initiated a Counterclaim by which it requested the rescission of the Sale Agreement. The arbitral tribunal rendered an award in favor of the investor and rejected the Egyptian Party's Counterclaim. However, a famous political activist called Hamdi El Fakharani[10] filed a lawsuit before the Administrative Court on 21 December 2010. Several Egyptian citizens joined Hamdi El Fakharani as plaintiffs. The lawsuit was filed against the

10) Hamdy El-Fakharany is also a former member of the now-dissolved Parliament, representing the coalition called "The Revolution Continues".

Egyptian government, the National Company for Construction and Development, the Anwal Company and the Saudi Investor in person.

It is an established principle of Egyptian law by virtue of Article 3 of the CCCP, that "*Pas d'intérêts, pas d'action*" (there is no claim where there is no interest). Such interest of the plaintiff must be legal, personal, direct, existing and imminent[11] "*i.e being in a legal status vis-à-vis the [challenged administrative] decision thereby having a direct effect on him [the plaintiff]*".[12] Failing to satisfy these conditions collectively, a claim shall be unacceptable for lack of sufficient and valid interest.[13]

That said, it is very striking how the first instance Administrative Court, in its Post-Revolution jurisprudence, derogated from the narrow interpretation given by the High Administrative Court to the concept of *"direct and personal interest"*. Indeed, in the Omar Effendi case where the plaintiffs were mainly Egyptian political activists, the first instance Administrative Court decided that:

> *"[…] Article 6 of the Constitutional Declaration currently in force […] provides that: "Public ownership shall have its sanctity, and its protection and reinforcement are the duty of every citizen in accordance with the law". Accordingly, the Constitutional Legislator has entrusted every citizen with the obligation to protect public property from any encroachment…thereby entitling each citizen vested capacity and interest to resort to courts claiming the protection of public property […]".*[14]

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11) Fathi Waly, *Civil Procedures in Egypt*, Great Britain, 2011, Kluwer, p. 45 paragraph 86.

12) High Administrative Court, 25 January 1992, n° 2125/36.

13) Article 3 of the CCCP reads as follows : "*No claim, request or pleading shall be accepted by virtue of the provisions of this Law or any other law, if the applicant has no personal, direct and existing interest approved by law.*
However, a potential interest may suffice in case the purpose of the request is precautionary against an imminent danger or to emphasize a right which evidence may be lost during litigation thereon.
The Tribunal shall, upon its own volition, rule the inadmissibility of the claim, no matter the state of the proceedings, if the conditions referred in the preceding two paragraphs are not satisfied.
The Tribunal may, when declaring the case inadmissible for lack of the interest requirement, to fine the claimant with a procedural fine not exceeding five hundred Egyptian Pounds if it is clear to it that claimant has abused its right to claim."

14) Administrative Court, 7th Circuit, 7 May 2011, No 11492/65.

Furthermore, the first instance Administrative Court found that the sale agreement of Omar Effendi stores to the Saoudi investor is an administrative contract, i.e a *jure imperii* Contract. Since the criticism of such debatable finding falls out of the subject matter of this article, we will solely focus on the Administrative Court anti-arbitration interpretation of Article 1(2) of the Egyptian Arbitration Law which reads as follows:

> *"With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect"*

Indeed, there are two possible interpretations for the aforementioned Article 1(2), one of which is a pro-arbitration one and in line with the principle of good faith while the other is not. The former would consider that the absence of the approval of the competent minister would not lead to the annulment of the arbitration agreement but solely to the disciplinary liability of the official who consented to the arbitration agreement without obtaining the ministerial approval. The Administrative Court found that the arbitration agreement has not been signed by the Minister of Investment and adopted another interpretation according to which the default of the ministerial approval causes the annulment of the arbitration agreement:

> *"[…] the approval of the competent minister representing the State in his ministry is an approval pertaining to public order without which the arbitration clause in administrative contracts disputes is not valid and in the event of its absence the clause shall be null and void and non existing without any effect on the jurisdiction or competence and any proceedings undertaken in absence of such approval".*

In a nutshell, the Administrative Court ignored the principle of Kompetenz-Kompetenz enshrined in Article (22) of the Egyptian Arbitration Law as well as

the arbitral award rendered in favor of the Saudi investor. In doing so, the Administrative Court appears to be driven by certain ideological considerations as it has criticized the Mubarak's policies as follows:

> *"[…] the privatization operations, including Omar Effendi's privatization, took place under the supervision and were financed by foreign entities and according to its instructions and guidelines, and such donations contributed in a strong desire to rapidly accomplish such privatization with the aim of exhausting all the amounts subject of the donation and to avoid the so called "failure" which would lead to the recovery of what would have been disbursed from this donation. Accordingly, the Parliament who represents the Nation shouldn't have accepted such donation which encroaches to the State sovereignty and interferes in its internal matters. Similarly, the President should have neither approved it from the outset on 28 December 1993, with the ratification reservation, nor ratified it on 12 March 1994."*[15]

The same aforementioned legal principles have been reiterated by rulings of the same Administrative Court in similar post-revolution privatization lawsuits, like the Boilers case[16] and El Sukari Gold Mine case.[17] If such rulings are not reversed by the High Administrative Court, which is the second instance Court of the Counsel of State, the Egyptian State would risk ICSID proceedings and more public funds may be lost in paying damages and compensations.

However, avoiding a pessimistic approach and urging for a positive fundamental change, there may be some light at the end of the tunnel.

15) Administrative Court, 7th Circuit, 7 May 2011, No 11492/65.
16) Administrative Court, 7th Circuit, 21 Septembre 2011, No 40510/65.
17) Administrative Court, 8th Circuit, 30 October 2012, No 57579/65.

Ⅳ. Review of arbitral awards; the distribution of jurisdiction between the judicial and administrative Courts

Article 25 (paragraphs 2 and 3 thereof) of the Law No. 48 for the year 1978 entrusts the Supreme Constitutional Court the function of determining the competent tribunal in case of conflict of jurisdiction. Accordingly, the Supreme Court has recently rendered a ruling in favor of arbitration by selecting the Ordinary Judicial Courts which are known for their pro-arbitration decisions.

The post-arbitral proceedings pertinent to the *Malicorp* case were submitted to both the High Administrative Court and the Cairo Court of Appeal. Due to the hostile position of the Egyptian Counsel of State vis-à-vis the arbitrability of *Jure imperii* contracts, *Malicorp* sought the Supreme Constitutional Court to resolve such conflict of jurisdiction.

By virtue of its decision dated 15 January 2012, the Supreme Constitutional Court explicitly stated that:

> *"[…] although as a general rule the Administrative courts have jurisdiction over disputes related to public works concessions contracts and any other administrative contract pursuant to Article 10 (11) of the Counsel of State law No. 47 for the year 1972, the legislator has provided for an exception to the said general rule which is the action for setting aside of arbitral awards rendered on the basis of an arbitration agreement, even though inserted in an administrative contract, where it has an international commercial character pursuant to the relevant definition provided by Articles 2 and 3 of the Arbitration Law No. 27 for the year 1994. Consequently, the Cairo Court of Appeal has jurisdiction over such action by virtue of the explicit provisions of Articles 9(2), 53(1)(a) and 54(2) […]".*

It is irrefragable that this very important decision of the Supreme Constitutional

Court has settled the issue of conflict of jurisdiction in case of administrative contracts' disputes; favoring the ordinary judicial Courts whose commercial circuits are known for their pro-arbitration approaches, and has reinstated Egypt as an attractive seat of Arbitration. On the contrary, we have seen that the administrative courts of the Counsel of State are traditionally hostile to the arbitrability of the *jure imperii* Contracts.

Ⅴ. The Continuous rise of CRCICA

When discussing arbitration in Egypt, it is of manifest importance to highlight the primordial role of the Cairo Regional Center for International Commercial Arbitration ("CRCICA"). CRCICA is an independent non-profit international organization established in 1979 under the auspices of the Asian African Legal Consultative Organization.[18)]

Since its establishment, CRCICA adopted, with minor modifications emanating mainly from the CRCICA's role as an arbitral institution and an appointing authority, the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL") including the new UNCITRAL Arbitration Rules as revised in 2010.

Dr. Mohamed Aboul-Enein was the first Director of CRCICA until 14 November 2008 where he passed away in a dramatic car crash. Due to his dedication and hard work, he raised CRCICA to become one of the most famous arbitration institutions worldwide.[19)] CRCICA continued to assume such role under the Direction of Dr. Nabil El Arabi in 2009 and 2010. As a consequence of the Arab Spring, the latter was nominated as Minister of Foreign Affairs and then as Secretary General of the Arab League. The Direction of CRCICA since the January 2011 Revolution was then entrusted to a very respectful and competent arbitration practitioner from a younger generation: Dr. Mohamed Abdel Raouf.

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18) CRCICA website available at 〈http://www.crcica.org.eg/factsheet.html 〉 (last visit on July 31, 2013).

19) CRCICA Annual Report of 2008-2009, available at 〈http://www.crcica.org.eg/publication/annual/pdf/English/09/CRCICA_ANNUAL_REPORT_09.pdf〉 (last visit on July 31, 2013).

Despite the turbulences and unprecedented political unrest that took place during the last two and a half years as a result of the Arab spring, CRCICA however maintained a very solid performance against this challenging environment. The number of domestic and international cases and amounts in dispute remained on the rise[20] and the nationalities and backgrounds of the parties and arbitrators involved in CRCICA cases remained very diverse.[21]

Furthermore, on 4 July 2012 in Lausanne, CRCICA entered into an agreement with the International Court of Arbitration for Sport (ICAS) nominating it as the African host of an Alternative Hearing Centre (AHC) for the Court of Arbitration for Sport (CAS) based in Switzerland. This is part of a delocalization scheme of the International Council of Arbitration for Sport (ICAS) to create "CAS alternative hearing centres" on different continents which would be used to host CAS hearings and meetings related to arbitration or mediation procedures involving parties based in certain regions in the world. By hosting an official CAS regional spot, CRCICA steps into sports arbitration in a region having booming sports practices but a relatively limited physical access to arbitration.[22]

On different note, it is worth mentioning that by virtue of a ruling dated 6 June 2012,[23] Cairo Court of Appeal has declared that it has no jurisdiction over lawsuits filed against CRCICA or to which the latter is joined, owing to the fact that CRCICA is an international organization established by virtue of an agreement concluded between the Asian-African Legal Consultative Organization (AALCO) and the Egyptian Government. According to the Cairo Court of Appeal, such status grants CRCICA certain privileges and immunities, especially the immunity from jurisdiction of national courts, thereby protecting CRCICA from lawsuits brought against it whilst administering arbitral proceedings and exercising its functions as an arbitral institution. For the Cairo Court of Appeal,

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20) CRCICA Newsletter 4/2012, available at 〈http://crcica.org.eg/newsletters/nl042012/nl042012a001.html〉 (last visit on July 31, 2013).

21) CRCICA Newsletter 2/2013, available at 〈http://crcica.org.eg/newsletters/nl022013/nl022013a001.html〉 (last visit on July 31, 2013).

22) CRCICA Newsletter 2/2012, available at 〈http://crcica.org.eg/newsletters/nl022012/nl022012a001.html〉 (last visit on July 31, 2013).

23) Cairo Court of Appeal, Section 7 Commercial, Challenge No. 32 of the judicial year 128, Session of 6 June 2012.

CRCICA should not be subject to any judicial entity in Egypt being the country hosting its headquarters, and cannot, therefore, be sued before any courts of law in Egypt, including the court having jurisdiction to decide on setting-aside proceedings initiated against arbitral awards rendered under the auspices of CRCICA.[24)]

This solution shall protect CRCICA from lawsuits often initiated by losing parties as a mere dilatory tactic in order to bar the enforcement of arbitral awards.

Ⅵ. Conclusion

With the exception of disputes arising from administrative contracts, Egypt has been and shall remain a friendly seat of Arbitration as it possesses a modern pro-arbitration legislation, awards being reviewed by Ordinary Judicial Courts based on limited grounds, and a prominent and famous arbitration Centre. Nevertheless, minor and necessary legislative reforms remain necessary in order to ensure the full and unconditional arbitrability of *jure imperii* contracts. Egyptians suffered from the major economic downturn that followed the January 2011 Revolution and reached its peak under the rule of the Muslim Brotherhood. The public opinion which was strongly influenced by the social slogans of January 2011 Revolution is more mature today to realize the difference between mere vacuous slogans raised for ulterior motives; campaigning and political maneuvers and the importance of adopting and applying a real practical and material solution to bring life to such slogans that were raised during the revolution: attracting foreign investments as a tool for achieving the indispensable economic growth. The corrective Revolution of 30 June 2013 will hopefully guide Egypt in such right direction of development and prosperity. There is no reason that arbitration would deviate from such right track of this special and purely Egyptian spring that started on 30 June 2013.

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24) CRCICA Newsletter 2/2012, op. cit.

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Legal Culture and Commercial Arbitration in the United States and Japan

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In this paper, a conceptual model of legal culture based on Ehrlich's "living law" theory and Cole's social-cultural explanation can explain the low utilization rates of arbitration of Japan and the high utilization rates of arbitration in the United States, simultaneously. This model highlights the clash between social norms and legal provisions in Japan. Japan has developed a two-tiered system of dispute resolution. At the official level, Japanese people accept the legal system imposed by the outside world. But, at a deeper level, they utilize diverse forms of informal dispute resolution mechanisms, such as reconcilement and conciliation, reflecting their own social norms. In contrast, there is no conflict between social norms and legal provisions in United States. This study may show that there are distinctions between American-style arbitration and Japanese-style arbitration, reflecting their own respective social norms. The question of reconciliation between the American style of arbitration and the Japanese style of arbitration can be resolved by an international arbitrator.

Key Words : Legal Culture, Arbitration, Eugen Ehrlich, United States, Japan

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I. Introduction

Japan is characterized by low arbitration rates as well as low litigation rates. In contrast, the United States is characterized by high arbitration rates as well as the highest litigation rates in the modern world. Many scholars in the West and East have studied this contrast. Kawashima(1963) addresses this issue from the cultural perspective in his seminal paper.[1] Since then, a series of literature including Kim and Lawson(1979) and Tanaka(1985) has explained the low litigation rates of Japan by appealing to unique elements of Japanese culture. On the other hand, Haley(1978, 1982, 2002)[2] and Ramseyer(1985, 1988)[3]have discussed this topic from the institutional perspective. Haley(1982) argues that one of the primary reasons for Japan's low litigation rates is the paucity of judges and lawyers in Japan compared with other industrialized countries like the United States and Germany.[4] Ginsburg and Hoetker(2006) show that the increase of the litigation rate in Japan during the post-war period can be regarded as the product of post-war procedural reform and bar innovation.[5]

Both the Culturalist and Institutionalist camps have limitations in explaining both the low utilization rates of arbitration and litigation of Japan. Culturalists can explain the low level of Japanese litigiousness by appealing to the Japanese

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1) Kawashima, Takeyoshi, "Dispute Resolution in Contemporary Japan" in A. von Mehren (ed), *The Legal System and the Law's Processes*, Harvard University Press, Cambridge, 1963. pp.41-72.

2) Haley, John, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies*, Vol.4, 1978, pp.359-380. Haley, John, "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions," *Journal of Japanese Studies*, Vol. 8, 1982, pp.265-281. Haley, John, "Litigation in Japan: A New Look at Old Problems," *Willamette Journal of International Law and Dispute Resolution*, Vol.10, 2002, pp.121-142.

3) Rameyer, Mark, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *Yale Law Journal*, Vol.94, 1985, pp.604-645. Rameyer, Mark, "Reluctant Litigant Revisited: Rationality and Dispute Resolution in Japan," *Journal of Japanese Studies*, Vol.14, 1988, pp.111-123.

4) With less than two-thirds of Japan's population, Germany has nearly six times as many judges as Japan (approximately 15,500 to 2,700). There are also nearly three times as many private attorneys in Germany today as in Japan (approximately 28,800 to 10,000). Haley, John(1982), p.274.

5) Ginsburg Tom and Glenn Hoetker, "The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation," *Journal of Legal Studies*, Vol.35, 2006, pp.31-57.

cultural characteristics of favoring harmony over competition. But this theory has difficulty explaining the low level of arbitration in Japan, in the sense that if the Japanese do not employ litigation, they are expected to choose arbitration within the framework of litigation and arbitration. Institutionalists can explain Japanese low litigiousness by appealing to the scarcity of Japanese lawyers and judges. But Cole(2007) points out that this explanation is limited in the sense that the shortcomings of Japanese arbitration law is not sufficient to fully explain low Japanese arbitration rates. The weak predictability of arbitral awards is not solely a problem with regard to Japan, even though Haley points out the weak predictability of arbitration as a reason for the low level of arbitration.[6] Moreover, both camps only focus on dispute resolution in Japan. A "more general" theory is needed to explain the current status of commercial arbitration in the United States, as well as in Japanese society.

Eugen Ehrlich's "living law" theory(1922, 2009) highlights the dynamic interaction between law and society. This idea has pragmatic value for the explanation of law and arbitration in Japan and the United States[7], since both countries share a common element that their laws were imported from the outside world relatively early in their history. In this case, the clash between foreign-based law and the established social order is inevitable. However, differing attitudes of Japanese and American people toward the law might result in different consequences. The purpose of this paper is to provide an alternative explanation for the low utilization rates of litigation and arbitration of Japan, compared with the high utilization rates of litigation and arbitration of the United States from the perspective of legal culture. First, this paper constructs a conceptual model of legal culture based on Ehrlich's "living law" theory[8] and Cole's social-cultural explanation.[9] Second, the contrasting phenomena of

6) Cole, Tony, "Commercial Arbitration in Japan: Contributions To the Debate on "Japanese Non-Litigiousness," *New York University Journal of International Law and Policy*, Vol.40, Fall 2007, pp.29-114.

7) Ehrlich, Eugen, "The Sociology of Law," *Harvard Law Review*, Vol.36, 1922, pp. 130-145. Ehrlich, Eugen, *Fundamental Principles of the Sociology of Law,* Transaction Publishers, 2009.

8) Cole(2007), pp.29-114.

9) Professor Tamanaha criticizes the vagueness of the concept of "living law", even though he supports the dynamic interaction between law and society in Ehrlich's works. Tamanaha, Z.

litigation and arbitration of the United States and Japan are explained by appealing to the interaction between the social norms and legal provisions of each society, following the line of Cole's social-cultural explanation.[10] Third, the differences and common features of commercial arbitration between the United States and Japan in the contemporary setting are discussed.

Ⅱ. Legal Culture and Dispute Resolution

1. A Conceptual Model of Legal Culture

To explain the phenomenon of the low litigation and arbitration rates of Japan and the high litigation and arbitration rates of the United States, a conceptual model of dispute resolution can be developed based on the "living law" theory of Ehrlich(1922).[11] Kawashima(1963) shares common ground with Ehrlich's "living law" theory.[12] In recent times, there has been a series of works that highlight Ehrlich's contributions in the area of the dynamic relationship between law and society. Likhovski(2003) and Tamanaha(2011) claim that Ehrlich's "living law" theory is suitable for a pluralistic setting in which there is a clash between official law and the norms of social life that are actually followed.[13] Cole[14] explains the low litigation rate of Japan using the framework of Ehrlich's "living law" theory(1922). Following Cole(2007) and Ehrlich(1922, 2009), a conceptual model to explain the contrasting phenomenon surrounding the utilization rates of litigation and arbitration in the United States and Japan is constructed. In order

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Brian, "A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"," *Law & Social Inquiry*, Vol.36, No.1, Winter 2011, pp.297-318.

10) Cole(2007), pp.29-114.

11) Ehrlich(1922), pp. 130-145.

12) Kawashima(1963). pp.41-72.

13) Ehrlich was born to a Jewish family in Czernowiz, the capital city of Bukovina, one of the eastern provinces of the Austro-Hungarian Empire. Bukovina was situated between Russia, Romania, Hungary, and Galicia. Early twentieth century, Bukovina was a place inhabited by a strange mixture of races. In 1910, there were approximately 800,000 people living in the province, which was populated by Armenians, Gypsies, Hungarians, Poles, Russians, and Slovaks. Likhovski, Assaf, "Czernowiz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence," *Theoretical Inquires in Law*, Vol.4, July 2003, p.639.

14) Cole(2007), pp.29-114.

to do this, Cole's explanation of living law theory to a model incorporating the interactions of legal provisions and social norms is extended.

For the understanding Ehrlich's "living law" theory and Cole's social-cultural explanation, the distinction between what Ehrlich terms a "law" and a "legal provision" must be clarified. The former are those social norms that actually control ordinary social interactions, while the latter are instructions framed in words addressed to courts as to how to decide legal cases. In Ehrlich's view, the term "law" is properly applied not just to the pronouncements of legislators and judges, but also to the social norms that control ordinary interactions. In Ehrlich's view, "law" arises immediately from society itself in the form of a spontaneous ordering of social relations, marriage, family associations, possessions, contracts, and inheritance.[15] Legal provisions, Ehrlich notes, are often isolated from the realities of everyday social interactions, although they are derivative forms of law.[16] Ehrlich provides several reasons why legal provisions cannot possibly cover the entire "law." First, judicial decisions, the origin of "legal provisions," flow only from those cases which are brought before a court. But only a very few matters come before a court because most affairs work themselves out without any dispute. But even if a dispute arises, it is often settled in a friendly manner.[17] Moreover, only the decisions of the highest courts operate to create legal provisions and many kinds of disputes, in which only negligible sums are involved, never reach courts. In these cases, there are no legal provisions. Finally legal provisions are naturally lacking for new legal situations, because it necessarily takes some time until a sufficient number of legal disputes reach the point of judicial decisions.[18]

The brilliance of Ehrlich's theory is rooted in his explanation of the dynamic interaction between law and society.[19] According to Ehrlich, the social order is

15) Ehrlich(1922), p.136. Ehrlich put it differently in the same vein. "The great mass of law originates with social institutions come into being and develops in the living present as the natural offspring of society itself." Ehrlich(1922), p.144.

16) Ehrlich(1922), p.144.

17) The parties have reached a compromise or they have renounced claims because they dreaded the costs in time and money. Ehrlich(1922), p.141.

18) Ehrlich(1922), p.141.

19) Tamanaha(2011) support this view in that the uniqueness of Ehrlich is his explanation of dynamic interaction between law and society, although the concept of living law is already

not fixed and unchangeable. It is in a constant flux. Old institutions disappear, new ones come into existence, and those which remain change their content constantly.[20] New aspects of the social order also imply new conflicts of interest and new types of disputes, which call for new decisions and new "legal provisions."[21] In Ehrlich's account, legal provisions themselves are ultimately derivative of the social norms embodied in living law. Judicial decisions, of course, only emerge from concrete cases, and hence are inherently dependent on social interactions, which are governed by social norms.

<Table 1> A Conceptual Model of Legal Culture

	United States	Japan
Legal Provisions	• The common law of Great Britain • The Federal Arbitration Act • The Uniform Arbitration Act	• German law • Japanese Civil Law • Japanese arbitration law
Social Norms	• Christian values • The Rule of God • The Rule of Law • Universalism	• Confucian values • Shinto • Contextual logic • Particularism

In this section, a conceptual model of legal culture based on Eugen Ehrlich's "living law" theory is developed. "Legal provisions" and "social norms" are

found in his contemporaries such as Gierke and Tonnies. Professor Tamanaha traces the origin of "living law" to Gierke and Tonnies. Ferdinand Tonnies, a pioneering sociologist, sets out the contrast between Gemeinschaft(community) and Gesellschaft(civil society). Community is a natural organic unity grounded in the family and village, whereas, Society is an artificial, mechanical unity of rational individuals. According to Tonnies, anything which is in agreement with the inner character of a community relationship constitutes it's law and will be respected as the true essential will of all those bound together in it. Similarly, Gierke used the label "social law" to refer to the organically generated inner ordering of associations. Ehrlich(2009) also writes "The inner character of the associations is determined by legal norms." Tamanaha, Z. Brian, "A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"," *Law & Social Inquiry*, Vol.36, No.1, Winter, 2011, p.312.

20) "The family of today is not the family in which we spent our youth. Commerce and life have changed." Ehrlich(2009), p.392.

21) This work is being done by means of the Legal Provisions of judicial and juristic law. Ehrlich(1922), p.140.

adopted by this paper as the two pillars of this model of legal culture, following Ehrlich. In the category of major sources of the legal provisions of the United States, the Federal Arbitration Act(FAA), as well as Anglo-American common law, is included, since the identification of the sources of the differences of arbitration and litigation rates of the United States and Japan are focused on. In the category of major sources of the legal provisions of Japan, Japanese arbitration law[22] as well as Japanese Civil Law is included. In addition, German law is included, since Japanese Civil Law was derived from German Law during the Meiji Restoration.

The social norms of this paper's model emphasize the cultural aspects of the social norms of each society to illustrate the differences of the social norms of the United States and Japan. In this model, the core social norms of the United States are Christianity and the Rule of Law, whereas those of Japan are Confucianism and contextual logic. In the case of the United States, Christianity can be chosen as a social norm of the United States, since the first immigrants to North America were Christian refugees from England and the primary ethnic group of the United States is immigrants from the European continent, among whom the major religion is Christianity. The Rule of God is the essential concept of Christian values and Universalism means that only the unifying principle or "truth" of Christian values dominates all nations[23]. The Rule of Law is a well known characteristic of the United States.

In contrast, Confucian values are a law of motion in Japanese society. A major reason to choose Confucian values as a social norm in Japan is that they are still influential in modern Japan,[24] although they have foreign origins. Confucian

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22) Japan had not the independent Code of arbitration. Japanese arbitration law was the part of Civil Law of Japan which was same as German Civil Law.

23) "And you shall know the truth, and the truth shall make you free." John, 8:32, *The Holy Bible, Korean and English,* Korean Bible Society 1987.

24) Dollinger, Mark, J., "Confucian Ethics and Japanese Management Practices," *Journal of Business Ethics*, 1988, pp.575-584. Tanaka, Hideo, "The Role of Law in Japanese Society: Comparisons with the West," *University of British Columbia Law Review*, Vol.19, No.2, 1985, p.383. "The family plays the central role in the traditional Japanese group consciousness. Social relationships are modelled on family relationships, even in emotional content. A business firm is still often felt to be analogous to a family, and family ideals therefore colour the field of labour relations." see Kim and Lawson (1979), p.499.

values became modified and embedded in Japanese society through a naturalization process during Tokugawa period. Many Tokugawa Confucians sought to make an equation between the Confucian way of the sages and what they called the way of the kami, or Shinto.[25] In addition, Shinto, the ancient religious heritage of Japan, is included to compare with the Rule of God in Christianity. Shinto is Japan's indigenous pantheistic faith, a faith which is intuitively linked with nature and the regular natural cycle of birth, growth, change, and death.[26] The contextual logic of Japanese is chosen to compare with the Rule of Law, which is a core concept of the United States. Particularism is emphasized as a Japanese peculiarity by Kawashima(1963)[27] and is derivative of contextual logic, which is chosen to compare with the Universalism of the United States.[28] Now, what is the result of interaction between the legal provisions and social norms of the United States and Japan, respectively, can be examined.

2. Social Norms of the United States and Japan

(1) Harmony and Particularism in Japan

One of the dominant sources of the values of Japanese society is Confucianism. In Confucianism, there is no concern for matters after death: it only focuses on this world. Confucianism is not concerned with God or divine intervention in

25) For example, Hayashi Razan (1583-1657) links Confucian ideas and Shinto at various levels. He identifies kami, the central spiritual entity of Shinto, with the central metaphysical concepts of Sung Confucianism, principle(li) and mind(hsin). Patrons of Tokugawa Confucians remained intensely aware of their identity as Japanese and of the foreign origin of the creed to which they adhered. For this reason, they were animated by a strong impulse to detach Confucianism from its Chinese context. Nakai, W. Kate, "The Naturalization of Confucianism in Tokugawa Japan: The Problem of Sinocentrism," *Harvard Journal of Asiatic Studies*, Vol.40, No.1, 1980, p.160. p.162.

26) Kim, Chin and Craig, M. Lawson, "The Law of the Subtle Mind: The Traditional Japanese Conception of Law," *International and Comparative Law Quarterly*, Vol.28, No.3, 1979, p.493. Shinto is the only religion that is not be introduced from outside world. In contrast, Buddhism and Confucianism were introduced from outside world.

27) Kawashima(1963). pp.41-72.

28) Parker, Richard, "Law and Language in Japan and in the United States," *Osaka University Law Review*, Vol.34, 1987, p.52.

human affairs. Confucianism only focuses on humans and the maintenance of human relationships across a spectrum of status in this world.[29] For the maintenance of peaceful relationships with others, Confucianism teaches 'harmony' instead of 'competition.'[30]It also teaches 'endurance' instead of 'challenge' to sustain long term relationships with other members of society. Confucianism suggests behavioral rules for members of society to follow. However, the social category of relationships within Confucianism is confined only to the relationships of a person with their espouse, children, friends, elders, and king. It implies that there are no concrete behavioral rules outside of those five categories of relationships. Therefore it is possible that behavioral rules can be determined by contextual logic outside of those of five categories. Since Japanese people tend to act not as isolated individuals but as part of a context, a network of roles and group memberships,[31] contextual logic or particularism determines Japanese behavior in concrete cases, as shown by Kawashima(1963).[32] For this reason, Parker(1987) argues that, in everyday life situations, Japanese people feel compelled to act in socially appropriate ways with socially appropriate feelings, rather than follow principles articulated in abstract terms.[33]

(2) The Rule of Law and Universalism in the United States

The dominant value of Universalism in the United States is derived from Christianity. Western society, including the United States, has a long tradition of believing that human beings should accept the Rule of God as the behavioral rule of society. According to this idea, there is an unchangeable Rule of God that people should observe. From the Christian point of view, the world can

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29) One of Confucius's students asked Confucius of the other world. Confucius replied that I am not concerned with the other world and he said that I focus only on this world.

30) Many scholars point out the harmony as a core value of Japanese mind. see Kawashima(1963), Kim and Lawson(1979), and Tanaka(1985).

31) A relational actor is established when relationship with other actors are objectified emphasizing the co-existentiality between the relationships and people. Hamaguchi, Esyun, "A Contextual Model of the Japanese: Toward a Methodological Innovation in Japanese Studies," *Journal of Japanese Studies*, Vol.11, 1985, p.300.

32) Kawashima(1963), pp.41-72.

33) Parker(1987), p.52.

only be truly comprehended from God's point of view. Prophets, scientists, and philosophers are valued to the degree in which they espouse what is "objectively true," that is, to describe the world from God's point of view.[34] The Gospel of Christianity is the one and only one truth that is to be accepted by all nations. In contrast to the monotheism of the United States, a large number of gods are worshipped in the Shinto of Japan.

Law holds a particularly privileged place in Western society and thinking. When there was a paradigm shift due to the scientific revolution in the seventeenth century, the world view based on religion was shaken by scientific discoveries. Law was particularly well situated at the time to fill this void and provided a means of social organization. Having rejected other forms of rule, including authoritarianism, monarchy, and arbitrary despotism, the notion of rule by impartial law was a pleasing ideal.[35] As a part of Western society, the United States shares this view of law. In addition, law plays an important role in the coordination of the entire society, which consists of diverse ethnic groups in the United States. Under the Rule of Law, every citizen is treated equally by courts and administration, irrespective of background.

3. Interaction between Social Norms and Legal Provisions

(1) The Non-Litigiousness of Japan

Based on this paper's model of legal culture, it is found that there have been no intimate interactions between social norms and official "legal provisions" in Japan. In other words, there has been a series of disjunctions between law and social norms in Japanese history since "legal provisions" were imposed by the outside world. In Edo-era village life, Shogunate law was not only drawn from

34) Parker(1987), p.69.

35) "When the Roman Catholic Church lost its power over increasingly significant parts of the population. Western society, stripped of it's guiding religion by the scientific discoveries flowing from the Enlightenment and the Protestant Reformation, looked to other forms of social organization and authority." Sheehy, Benedict, "Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes," *Northwestern Journal of International Law and Business*, Vol.26, Winter 2006, p.248.

the realities of social life but did not even attempt to alter them. In the Meiji era, alterations to the legal system arose from a wholesale adoption of foreign law selected by legal officials. In turn, the legal restructuring that occurred after the World War II was again the imposition of foreign law on the basis of power.[36]

The social order of Tokugawa Japan was characterized by unconditional loyalty to one's superiors and the notion that one should be content with one's place in society and these concepts were supported by Confucianism.[37] Bringing law suits was therefore discouraged within the society. Moreover, Japanese emotional dislike for law is common place. Resort to law carries the shameful implication that the plaintiff believes his opponent is an unworthy or an abnormal person with whom mutual understanding cannot be reached through ordinary discussion.[38]

On the other hand, societal views of individual network members also explain the Japanese logical dislike for law. If the individual is seen as an isolated entity, a consistent model of punishment is to isolate rather than reintegrate or restore a relationship. But if an individual is seen as operating within networks and contexts, it is appropriate to restore their network and attempt reintegratio n.[39] In the comparison of Japanese and Americans, Hamilton et. al(1988)'s empirical results are consistent with the view that Japanese seem to assume that there are bonds to be restored between offender and victim, as if the individuals exists in a network of interlocking others.[40]

Faced with disjunction between legal provisions and social norms, Japanese law, in a Kawashima's terminology, resembles a denka no hoto sword, a treasured symbol of force, morally revered, but not to be used.[41] Law has symbolic power, but it is incapable of resolving the disputes to which it is

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36) Cole(2007), p.76.

37) Tanaka(1985), p.383.

38) Japan has been called a "shame culture", Kim and Lawson(1979), p.503.

39) Hamilton, Lee, J. Sanders, Y. Hosoi, Z. Ishimura, N. Matsubara, H. Nishimura, N. Tomita, and K. Tokoro, "Punishment and the Individual in the United States and Japan," *Law & Society Review*, Vol.22, 1988, p.304.

40) Hamilton, et. al(1988), p.305.

41) Kim and Lawson(1979), p.509.

supposedly addressed, since it does not reflect social norms.[42] The social norms of dispute resolution are conciliation, mediation, and compromise, which are congenial to the Confucian spirit.[43] This paper's model of legal culture predicts Japanese non-litigiousness, since appeal to law as a means of resolving disputes would be disfavored as the imposed legal provisions would simply not reflect the social norms underlying the disputes.

(2) The Litigiousness of the United States

In the case of the United States, there is no conflict between social norms and legal provisions, since the Rule of Law is one of the primary social norms of dispute resolution in the United States, although much of the content of American law was borrowed from Great Britain. Law plays the essential role of coordinating the whole society which consists of diverse ethnic groups. Each ethnic group has its own cultural background and here is no unifying culture among the various ethnic groups of Europeans, Africans, and Asians who make up American society. In this situation, the Rule of Law itself is a social norm, since it guarantees the equal treatment of disputants before courts irrespective of race. Furthermore, the Rule of Law is congenial to Christianity, another social norm since Christianity's view of the world as a theater of struggle between light and darkness is reminiscent of the adversarial nature of court proceedings.[44] There is no logical inconsistency between the Rule of God and the Rule of Law in this respect.

The basis of the legal provisions of the Unites States is Anglo-American common law. Anglo-American common law developed in the United States, even though its legal provisions were imported from Great Britain. Since the initial settlement of what would become the United States was predominantly English, there was no conflict between legal provisions and settlers in the early period of settlement. Nowadays, the case law of the United States has replaced the case

42) Cole(2007), p.76.

43) Kim and Lawson(1979), p.507. Kawashima(1963). pp.41-72.

44) The contrast of light and darkness, is a central theme of modern culture of United States. For example, remind a series of Star Wars, famous fantasy movies in 20th century.

law of England in deciding the verdict in the court. As time has gone by, the case law of the United States has incorporated cases related to disputes occurring in the United States. Accordingly, there is no clash between legal provision and social reality in the United States. This paper's model of legal culture predicts the litigiousness of the United States, since appeal to law as a means of resolving disputes is favored as legal provisions reflect the social norms underlying the disputes.

Ⅲ. Commercial Arbitration of the United States and Japan

1. Commercial Arbitration in Japan

(1) A Dichotomized Dispute Resolution System

Japanese history suggests that there have been several major invasions from the outside world into Japanese territory. One of the famous examples of this is the invasion of a Mongolian army into the Japanese islands in the 13th century. At that time, the troops of the Mongolian empire of China invaded Japan, although they did not conquer Japan.[45] In the nineteenth century, the coming of an American fleet to Japan resulted in the dissolution of the Tokugawa government. In these situations, Japanese people tended to show dualistic attitudes in order to protect their territories. On the one hand, the Japanese tried to maintain peaceful relationships with outsiders during these periods of tumultuous historical change. On the other hand, however, they did submit to outsiders in any real sense.

45) First invasion was conducted by allied troops of Mongol and Korea dynasties in 1274 AD and Second invasion was conducted by allied troops of Mongol and Korea dynasties in 1281 AD. The storm destroyed allied fleet of Mongol and Korea dynasties. Subsequently, Mongol and Korea pulled the troops out of Japanese islands. Kubilai Kahn, emperor of Mongolian empire in Beijing ordered Korea government to build ships and Mongolian troops departs a port of Korean peninsula to Japanese islands.

These dualistic attitudes toward the outside world have their roots in a longstanding aspect of Japanese culture: the dichotomy between *tatemae* and *honne*.[46] *Tatemae* can be understood as the expression of one's commitment or compliance to the demands of social norms, while *honne* may be understood as the expression of one's sense of frustration, unwillingness, or the feeling that the demands of the group are unreasonable or impractical.[47] In other words, *tatemae* is an outward expression while *honne* is an internal feeling. Faced with shock from the outside world, Japanese people tend to adjust themselves to a new environment through declaring *tatemae* to weaken hostility from the outside world.[48] Nevertheless, their *honne* is such that they do not surrender to the outside world in any real sense.

Analogous to the dichotomy of *honne* and *tatemae*, historically Japanese village dwellers adopted a dichotomized dispute resolution system. That is, at the official level, there was a well-defined Shogunate law system imposed by the Tokugawa government. But, at an underlying level, village dwellers utilized an informal dispute resolution system developed in the Edo period. For example, village dwellers utilized the *naisai* system in which a third party intervened and settled disputes among village dwellers or inter-village disputes. In this informal system, the appointed third party could be a village chief, Buddhist monk, or official innkeeper.[49] Since the third party was a man of high moral repute,

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46) Japanese describe a person's stated reasons or opinions as tatemae, and his real intention, motive or feeling as honne. Tatemae is that which one can show or tell others, while honne is that which one should not or had better not tell others. Wagatsuma, Hiroshi and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States," *Law & Society Review*, Vol.20, 1986, p.465

47) Wagatsuma and Rosett(1986), p.466.

48) In connection of this, Wagatsuma and Rosett(1986) have drawn attention to the role of apology in the United States and Japan. They note that the sincerity of an apology is likely to have different connotations in two countries. Americans are more likely to stress the wholeheartedness of the apology, while Japanese emphasize the offender's submission to the normative order for the restoration of the relationship between offender and victim. Americans attach greater significance and legal consequence to the perceptions of autonomy, thus making apology important as an expression of self. The act of apology must accordingly spring from internal motivations, not from the request of external authority. In contrast, the Japanese concept of apology attaches primary significance to the act as an acknowledgement of group hierarchy and harmony.

49) An, Sung-Hoon and Okazaka, Mayumi, "A Study on the NAISAI System: Traditional

disputes among village dwellers were resolved by effectively by a third party.

In modern Japan, there remain diverse alternative dispute resolution systems: reconcilement, conciliation, court-annexed mediation(shotei), consultation with a police officer,[50] and arbitration. Tanase(1990), in his study of automobile accidents, shows that the primary dispute resolution mechanism is consultation even in modern Japan[51]. Out of the 958,188 traffic accidents he examined, 836,391 accidents were resolved by consultation by insurance companies, police officers, and the Traffic Accident Consultation Center[52]. Japanese firms are heavily influenced by administrative guidance.[53] Even in international commercial arbitration, Japanese firms follow domestic practices of arbitration, although they do include arbitration clauses in their contracts.[54]

(2) A Hybrid Form of Arbitration and Naturalization

As for Japanese dispute resolution, there are two stylized facts of the unpopularity of arbitration and conciliatory-type arbitration. First, the low utilization rates of arbitration and litigation in Japan should be noted. Instead, Japanese people prefer conciliation-type resolution. Several pieces of empirical research show the unpopularity of commercial arbitration among Japanese corporations. In a survey conducted by the JCAA, 51 percent of a total of 669 companies replied that the most desirable way to settle a commercial dispute is

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Alternative Dispute Resolution(ADR) Methods in the Edo Period," *Korean Journal of Victimology*, Vol.20, No.1, 2012, p.247.

50) There is a long tradition of police intervention in disputes between citizens. Police officers act as mediators on the basis of their authority. With their authority and psychological dominance, particulary under the authoritarian regime of old Constitution, police mediators were by and large effective and efficient. Kawahsima(1963), p.55.

51) Tanase, Takao, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law & Society Review*, Vol.24, 1990, pp.651-686.

52) 449,297 accidents are resolved though the consultation by insurance companies. 229,441 accidents are resolved through the consultation by police offices. 157,653 accidents are resolved with the help of Traffic Accident Consultation Center. Tanase(1990), p.662.

53) Young, Michael, K., "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," *Columbia Law Review*, Vol.84, May 1984, pp.923-983.

54) Ragan, Charles, R., "Arbitration in Japan: Caveat Foreign Drafter and Other Lessons," *Arbitration International*, Vol.7, No.2, pp.93-119.

by *wakai*[55] achieved by *hanashi-ai*(consultation).[56] Forty eight percent stated that they would choose from among *wakai,* litigation, *chotei,* and arbitration, depending upon the nature and amount of the claim.[57]

Second, the most distinctive feature of Japanese commercial arbitration compared with Western-style arbitration is that it connotes an element of conciliation within the framework of commercial arbitration as several experts, both foreign and Japanese, have pointed out.[58] Ragan(1991), a foreign attorney, remarks that when Japanese authorities speak about arbitration, they talk glowingly about "amicable texture."[59] The arbitral procedure with which he has specific experience in Japan is settlement or reconciliation.[60] Sato(2005), a professor at Nagoya University, recognizes that with respect to the existing practice of international arbitration in Japan, the arbitrator virtually dictates the conciliation method.[61] Tashiro(1995), an arbitration practitioner, argues in defense of Japanese style arbitration that what the parties try to do is to reserve an opportunity to negotiate even after they are involved in arbitration.[62]

Faced with the low utilization rate of arbitration, two kinds of explanations have been suggested. The Culturalist view is that the Japanese try to avoid any adversarial method to settle a dispute because they hate conflicts and love harmony. On the other hand, Haley represents the Institutionalist views that arbitration is unpopular as an alternative to litigation in Japan because while the court system may be slow and expensive, it is no more so than arbitration.[63] Moreover, courts have the benefit of being both highly predictable and highly

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55) wakai means that compromise and settlement or amicable solution, Nomura, Yoshiaki, "Some Aspects of the Use of Commercial Arbitration by Japanese Corporations," *Osaka University Law Review*, 1987, p.56.

56) The core notion of hanashi-ai is to sit down and talk things in a friendly manner.

57) Nomura(1987), p.58.

58) Tashiro, Kenji, "Conciliation or Mediation during the Arbitration Process, A Japanese View," *Journal of International Arbitration*, Vol.12, 1995, pp.119-133.

59) Ragan(1991), p.108.

60) Ragan(1991), p.109.

61) Sato, Yasunobu, "The New Arbitration Law in Japan: Will It Cause Changes in Japanese Conciliatory Arbitration Practices?," *Journal of International Arbitration,* Vol.22, No. 2, 2005, p.141.

62) Tashiro(1995), p.121.

63) Haley(2002), p.127.

respected.[64] Cole criticizes Haley in that he significantly underestimates the ability parties have to secure predictability in arbitration. Since even in situations in which prior awards are not available for examination, conclusions can be drawn regarding how a proposed arbitrator will approach the central issue of a dispute through significant background research of arbitrators.[65]

An alternative explanation based on this paper's model of legal culture is as follows. For many years Japanese arbitration was regulated by the Japanese Code of Civil Procedure(CCP), enacted in 1890, and Japan had no independent arbitration law, much like Germany.[66] As a matter of fact, the Japanese CCP was modeled after the German Code of Civil Procedure. Accordingly, so-called "Japanese arbitration law" did not reflect the social norms of Japanese society. The social norms of Japan include the informal settlement of disputes. The social norms of dispute resolution favor a more harmonious reconciliation of the interests of all parties-what the Japanese call a 'full and round solution'[67] which is deeply embedded in Confucian and Buddhist thought.[68] Faced with imposed arbitration law, the first reaction was that Japanese people simply did not use arbitration. This explains the low utilization rate of arbitration in Japan.

Moreover, Japanese people try to naturalize arbitration by changing the adversarial content of commercial arbitration into a more amicable form which reflects the social norms of Japanese society. As a result, Japanese arbitration includes an element of conciliation, while the form of arbitration remains. In 2003, Japan enacted a new arbitration law in order to reflect international arbitration trends. Nevertheless, Article 38(4) still provides for attempts by arbitrators to make the parties settle their dispute. In practical terms, this attempt is equivalent to mediation or conciliation.[69] According to Tashiro(1995), a Japanese certified public accountant who works in an international accounting

64) Public opinion polls show that trust in the judiciary was three times as great as trust in religious institutions or the self-defense forces, Haley(2002), pp.139-140.

65) Cole(2007), p.99.

66) Sato(2005), p.142.

67) Kim and Lawson(1979), p.501.

68) The famous statue of Buddha in Sokkuram Cave of Korea, shows the full and round image of Buddha. It surpasses the logic of right and wrong.

69) "an arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subjects to the arbitral proceedings, if consented to by the parties."

company with colleagues from other countries, "It does not matter where they are from to work with, but it really matters what personality he has."[70] All these findings seem to show that social norms are still effective, through the naturalization process of foreign-based legal provisions in Japan.

2. Commercial Arbitration in the United States

With the help of the pro-arbitration policies of the Supreme Court of the United States, arbitration in the United States has extended its territory to diverse areas such as antitrust, labor disputes, bankruptcy, consumer claims, family law disputes, and intellectual property.[71] This widespread of arbitration has emerged from the soil of United States, endogenously. One of the main characteristics of American commercial arbitration is the initiating role of businessmen in the legislation of legal provisions. First, the enactment of the Federal Arbitration Act(FAA), 1925, was initiated by entrepreneurs to meet the demand for a neutral arbitral forum within society in the age of railroads. Historically, United States courts had refused to enforce arbitration agreements, guarding their dispute resolution monopoly.[72] However, as economic growth accelerated in the age of railroads, the business activities expanded beyond the territory of a single state and merchants began to engage in more inter-state commerce. When parties began to enter into contracts with people whom they did not know and who resided in distant jurisdictions whose courts might reasonably be feared as xenophobic, well-advised parties could sometimes make deals if both were assured of a neutral arbitral forum.[73]

The second major group that was important in determining the need for arbitration was international businessmen who participated in foreign trade. Apart from the enhanced possibility of delay inherent in transnational law suits,

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70) Tashiro(1995), p.132.

71) Mclaughlin, Joseph, "Arbitrability: Current Trends in the United States," *Albany Law Review*, Vol.59, 1996, pp.915-940.

72) Mclaughlin(1996), p.906.

73) Carrington, D. Paul and Paul Haagen, "Contract and Jurisdiction," *Supreme Court Review*, 1996, p.340.

resort to a formal legal system poses uncertainty and relative unpredictability of results for at least one of the parties involved. Faced with such uncertainty of litigation, any affected trade group is apt to develop its own set of substantive rules of standards, which finally take the form of commercial arbitration.[74] The Ehrlich's "living law" theory explains the proliferation of arbitration in the United States. Ehrlich says, "wherever modern large-scale industry has been introduced, it has given rise to countless new kinds of contracts, real rights, rights of neighbors, forms of succession, and has influenced even the family law."[75] Accelerating economic growth and international trade connote the advent of commercial arbitration as an alternative to a formal legal system.

Furthermore, the common law system of the United States has an element in common with international commercial arbitration in the area of fact-finding. A common law system is a law system in which the parties are jointly responsible for the taking of evidence through discovery.[76] On the other hand, a civil law system is a law system in which parties only bear the burden of proof of their own case and do not have the responsibility to find evidence. Nowadays, international commercial arbitration usually adopts a limited discovery process to find evidence. Accordingly, this legal norm of the common law tradition of the United States is congenial to international commercial arbitration. Since there is no conflict between the social need for arbitration and the legal provisions of the Federal Arbitration Act in the area of arbitration, this paper's conceptual model of legal culture predicts that commercial arbitration would be widely utilized in the United States.

Ⅳ. Discussion

One of the interesting phenomena of the 21st century is the change of the composition of social norms in the United States and Japan. Hamamura(2012) finds that these two countries experience cultures that become more

74) Mentschikoff, Sola, "Commercial Arbitration," *Columbia Law Review*, Vol.61, May 1961, p.850.
75) Ehrlich(2009), p.391.
76) Vercauteren, Laurent, "The Taking of Documentary Evidence in International Arbitration," *American Review of International Arbitration*, Vol.23, 2012, p.344.

individualistic over time as their economies grow.[77] But he also finds that trust of others shows a diverging pattern between the two countries: Although the level of trust declined among Americans, the same pattern did not emerge in Japan.[78] Individualism can be classified into two sub-groups in order to differentiate the effect of individualism on the two countries. Let us call the American individualism "strong" individualism and the Japanese individualism "weak" individualism, reflecting the divergence of the individualism of the two countries. In Japan, individualism is not a longstanding element of Japanese tradition, but rather a mixture of individualism and collectivism generated by the economic growth of modern Japan.[79] In contrast, American individualism can be regarded as being present from the birth of that nation.

In the case of the United States, it is expected that the advent of "strong" individualism has intensified the existing Rule of Law in this paper's conceptual model of legal culture, since the individual who pursues success[80] shows a more competitive attitude towards others. Nowadays, Americans tend to rely more on the Rule of Law than before, as Christian values have weakened in the face of the secularization of religion and the immigration of ethnically diverse peoples with heterogeneous cultures over the course of the past several decades.[81]

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77) In both countries, the average household has become smaller and urban population has increased, In the United States, obedience is less important in child socialization today. Similarly, in Japan,, following tradition has become less important over time. Hamamura, Takeshi, "Are Cultures Becoming Individualistic? A Cross-Temporal Comparison of Individualism and Collectivism in the United States and Japan," *Personality and Social Psychology Review*, Vol.16, No.1, 2012, p.14.

78) Hamamura(2012), p.16.

79) East Asian countries with rapid economic growth have witnessed the similar phenomena of mixture of individualism and collectivism. For example, the social norm of Singapore is also regarded as the mixture of individualism and collectivism. Chang, Weining, Wing K. Wong and Jessie, B. Koh, "Chinese Values in Singapore: Traditional and Modern," *Asian Journal of Social Psychology*, Vol.6, 2003, p.26.

80) with the constant advances in technology, the competency of a modern workforce demands constant updating of skills and knowledge base. In other words, the success of a modern workforce necessitates hard work and an achievement-oriented mind-set in employees. Hamamura(2012), p.15.

81) The divergence of individualism between the United States and Japan is due to the relative cultural homogeneity. Although in the United States, the proportion of foreign-born citizens increased in the past several decades, In Japan, such a proportion has remained small and

〈Table 2〉 Revised Model of Legal Culture

	United States	Japan
Legal Provisions	• Revised Uniform Arbitration Act(2000) • Revised Code of Ethics for Arbitrators of AAA-ABA(2004)	• New Japanese Arbitration Law(2003) • New Rules of JCAA(2004)
Social Norms	• "Strong" Individualism • Rule of Law	• "weak" Individualism • Confucian values

On the other hand, the advent of "weak" individualism is expected to weaken Confucian values of harmony in Japan, since the competitive nature of individualism is in conflict with the harmonious nature of Confucianism. At the same time, Shinto, one of pillars of social norms of Japan, is expected to play a minor role in Japanese culture, since Hamamura(2012) finds that following tradition has become less important over time as individualism has accelerated. Nevertheless, he also finds that unlike Americans, Japanese people still maintain a level of trust of others. This implies that Confucian values have an influential impact on the Japanese relationships with others, even after individualism became one of the social norms.

Our Revised Model of Legal Culture based on Ehrlich and Cole's insights, predicts that if the social norms change, then the legal provisions will subsequently change. Now it can be examined whether there have been corresponding changes of legal provisions in the United States and Japan following change in their social norms.[82] In the United States, the economic growth has weakened Christian values and intensified individualism. American people are increasingly dependent on the Rule of Law as more immigrants with diverse cultural backgrounds arrive in America. Similarly, economic growth has weakened Confucian values and other traditional values such as Shinto in Japan.

New legal provisions of the two countries can be compared in order to search

largely unchanged over time. Hamamura(2012), p. 16.

82) We use the concept of "composition of social norm", since we do not preclude the possibility that the social norm consists of multiple objects.

for evidence of the predictions of this paper's model. In the 21st century, there have been changes in the legal provisions of arbitration in the two countries. Among them[83], the 2004 Revised Code of Ethics for arbitrators and the New Japanese Arbitration Law are noticeably related to the topic at hand. According to Meyerson and Townsend(2004), the Revised Code of Ethics of the American Arbitration Association(AAA) calls for the application of a presumption of neutrality to all arbitrators, including party-appointed arbitrators. By contrast, the 1977 Ethics Code presumed that party-appointed arbitrators would not be neutral.[84] The 2004 Revised Code of Ethics intensifies the impartiality of all arbitrators and the objectivity of arbitral awards. It ultimately reflects an axiom of the Rule of Law, the so-called "equal treatment of parties." Faced with the increasing cultural heterogeneity of American society, the Rule of Law is an effective coordinating mechanism of American society.

On the other hand, as remarked upon earlier, the New Japanese Arbitration Act, promulgated in 2003, retains a provision allowing for attempts at settlement that allows for the arbitrator to use their initiative to attempt to settle disputes using conciliation during arbitration proceedings, even though this enactment was based on the 1985 UNCITRAL Model Law.[85] However, attitudes of this sort on the part of Japanese legislators are not a new phenomenon. Faced with the dissolution of the social structure upon which the political regime had been based since the Meiji Restoration, what the Japanese government did was reinstitute chotei in the early part of the 20th century. According to Kawashima(1963), the reinstitution of chotei was mean to replace the informal mediators of the past who were mostly village elders with mediation committees, consisting of laymen and a judge and to have parties reach agreement under the psychological pressure derived from the "halo" of a state court.[86] Furthermore,

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83) RUAA is designed to recognize the significant changes in arbitral practices and process, Pravetti, Francis, J., "Why the States Should Enact the Revised Uniform Arbitration Act," *Pepperdine Dispute Resolution Law Journal*, Vol.3, 2003, p.447.

84) Meyerson, Bruce and John, M. Townsend, "Revised Code of Ethics for Commercial Arbitrators Explained: Both the AAA and the ABA House of Delegates Have Approved the Revised Code," *Dispute Resolution Journal,* Vol.59, 2004, pp.10-16.

85) Nagata, Mari, "Some Practical Issues Concerning International Arbitration in Japan," *Osaka University Law Review*, No.60, 2013, p.2.

86) During World War Ⅰ, the industrialization and urbanization of Japan developed rapidly

administrative guidance as a consensual and informal dispute resolution mechanism has been established as a routine in the modern Japanese business environment. Administrative guidance occurs when administrators take action with no coercive legal effect that encourages regulated parties to act in a specific way in order to realize administrative aims.[87] From all these phenomena, it can be presumed that the social norm of harmony is deeply rooted in Japanese culture and underlies legislation even in modern Japan.

This discussion shows that the evolution of the legal provisions of the two countries reflect the core values of the social norms of the two countries. In other words, the core values of the social norms of each country have a persistent impact on legal provisions, even if there are changes in the legal provisions, reflecting change in social norms. In this respect, this paper arrives at a different viewpoint from that derived from this paper's version of Ehrlich's living law theory. Ehrlich's theory predicts that if the social norms change, then new legal provisions emerge, reflecting the change in social norms.

On the other hand, the findings of this paper suggest that the core values of social norms, i.e. the substantive element of a society, are maintained within new legal provisions, after changes in social norms. However, new legal provisions reflect the changes in social norms. The inner part of a new legal provision connotes the core values of the social norms of a society. The history of Japanese legislation shows that Japanese culture tries to protect the core values of social norms when faced with exogenous shocks from the outside world. The reinstitution of shotei in the early part of the 20th century reflects this attitude of transplanting the core values of village-type mediation into the soil of industrialized society. From the analysis of dynamic relationships between the legal provisions and social norms of the two countries, it can be identified that the core values of the social norms of Japan are Confucian values, whereas the core value of the social norms of the United States is the Rule of Law.

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and upset the traditional social structure. In such a time of social unrest, the trust in those traditionally in positions of authority was weakened. Kawashima(1963), pp.53-54.

87) Young(1984), p.923.

Ⅴ. Conclusion

In the United States, commercial arbitration has become the main dispute resolution mechanism owing to the pro-arbitration policy of the Supreme Court of the United States. In contrast, Japan does not show a comparable popularity of commercial arbitration. This paper constructs a model of legal culture which emphasized the interaction between social norms and legal provisions. It can be shown that this conceptual model of legal culture based on Erlich's "living law" theory and Cole's social-cultural explanation, can explain the low utilization rates of arbitration and litigation in Japan. Similarly, this conceptual model of legal culture also explains the high utilization rates of arbitration and litigation in the United States, simultaneously. This paper has shown that the Japanese have developed a two tiered system of dispute resolution. At the official level, Japanese people respect the legal system imposed by outside world. But, at the unofficial level, they have utilized diverse informal dispute resolution mechanisms, such as shotei, reconcilement, and conciliation, where the origin of these forms of informal dispute resolution goes back to the Tokugawa Edo period.[88)]

Furthermore, this study seems to show that there are two kinds of arbitration: American style arbitration and Japanese style arbitration. American style arbitration emphasizes party autonomy, whereas, Japanese style arbitration, persistently and implicitly, does not relinquish the initiative role of the arbitrator in arbitration proceedings. The remaining question is whether the difference between Japanese style arbitration and American style arbitration will persist or vanish in the future. The answer depends on the role of international arbitrators. In recent times, the international rules of arbitration confer on the arbitrator a more active role in managing and conducting the proceedings.[89)] Unlike domestic arbitration, international commercial arbitration presupposes an

88) An, Sung-Hoon and Okazaka, Mayumi, "A Study on the NAISAI System: Traditional Alternative Dispute Resolution(ADR) Methods in the Edo Period," *Korean Journal of Victimology*, Vol. 20, No.1, 2012, pp.237-260.

89) Bernardini, Piero, "The Role of the International Arbitrator," *Arbitration International*, Vol. 20, No. 2, 2004, p.118.

encounter between distinct cultures. Accordingly, the question of reconciliation among American and Japanese style arbitration systems will be resolved by the role of international arbitrators through discretionary measures in the area of arbitration proceedings.

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4. For a thesis presentation, 60,000 won is to be paid as the examination fee (an additional fee may be required for re-examination), and the publication fee for theses qualified for publication is 200,000 won (printing fees included). As for a thesis with research funds, 100,000 won shall be paid as the additional publication fee.
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8. The theme (Korean · English) of the thesis, name of the writer (Korean · English), table of contents, Korean keywords, main text, reference, English abstract, and English keywords (in this order) shall be specified in the thesis.Additionally, the writer's position, title, and email address must be stated on the first page of the thesis.
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Han-Shin Lee and Sung-Yong Kim, "Cross-border Internet Dispute Resolution", *Electronic Commerce Research and Applications,* Vol.2 No.1, 2010, pp.35-36.
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