Chapter One

Arbitration and Arbitral Awards

In order to discuss the role of public policy as a ground for refusing to enforce foreign arbitral awards, it is necessary first to consider the process of international commercial arbitration and the nature of the resulting arbitral award. This study will start by examining the nature of the arbitral award and identifying the main characteristics of the so-called 'foreign arbitral awards'. Therefore, it is important to search for a comprehensive definition of arbitration, as this would help to discern the bases on which a resulting award is founded. Then, in examining what constitutes an enforceable foreign arbitral award, various questions will be posed: First, from where does the resulting award acquire its compulsory power? Second, on what basis can we determine whether arbitration is domestic or international in nature, and whether or not we can use the same basis to determine the character of foreign arbitral awards? What are the reasons behind enforcing the award voluntarily and on what grounds may the losing party resist the enforcement of an award in the country of origin? Finally, what are the core grounds and rules that govern the execution and enforcement of foreign arbitral awards. At the heart of this discussion lies the New York Convention as the most important convention governing the enforcement of foreign arbitral awards. In discussing the New York Convention the grounds on which recognition and enforcement of an award can be refused will be highlighted.

I. Definition of arbitration and arbitral awards

Finding a comprehensive definition for arbitration is problematic. In this regard Rene David said that:

"It is impossible to devise a definition for arbitration by taking into account the different national laws, it will be in some ways too broad and in other way too narrow." [1]

Then he defines arbitration thus:

"Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons the arbitrator or arbitrators who derive their powers from a private agreement, not from the authority of a state, and who are to proceed and decide the case on the basis of such an agreement."[2]

Ahmad Abu al Wafa defines arbitration as: "an agreement to refer the dispute to a specific person or persons to decide on it. According to this agreement, a party waives his right of litigating before the national courts, as the arbitrators' decision shall be binding on the parties."[3]

It is outside the scope of this work to provide a comprehensive list of all definitions that have been provided in this regard. However, one can recognise that arbitration has general features; it is an agreement between two parties who accept by their consent to resolve their future or existing disputes by an arbitrator or arbitrators.[4] The agreement to arbitrate will normally establish the constitution of the arbitral tribunal and its jurisdiction[5]; parties must comply with the resulting arbitral award as a final and legally binding decision, or otherwise, an award may be enforced with the assistance of the state authorities.

1. David, Rene, op. cit., p. 5.

2. Ibid., p. 5.

3. Ahmad Abu al Wafa, Compulsory and Voluntary Arbitration, 5th Ed., Monsha'at al Ma'arif, Alexandria (1988), p.15 (in Arabic); also see, Samia Rashed, Arbitration in Private International Relations, First Book (Arbitration Agreement)., Dar al Nahdah al Arabiah (1984), p. 75 (in Arabic); Ibrahim Ahmmad Ibrahim, Private International law, 3 ed. Dar Al Nahdah Al Arabiah, (2000), p. 40. (in Arabic). He defines arbitration as: "a legal system which enables the parties to resolve their dispute without resorting to the courts."

4. It has been said that the consensual nature is the cornerstone of arbitration. See Redfern and Hunter, 2nd ed., op. cit., p. 6.

5. The arbitration agreement may be drafted in a simple way, by referring the dispute to be resolved by an arbitral tribunal or it may be extremely detailed, where parties may include in the arbitration agreement the procedures according to which the arbitrators should administrate and it may include the law or the rules that shall govern the substance of the dispute.

Several legal systems and international conventions provide definitions of the arbitration process, and these generally comprise the same features as stated above. For example, Article 7(1) of the Model Law provides a general description of what may constitute an arbitration agreement:[6]

"[an] agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."

Section 6 (1) of the English 1996 Act provides that:

"In this part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)."[7]

Article 4 (1) of the Egyptian Law No 27 of 1994 provides that:[8]

"For the purpose of this Law, the term 'arbitration' means voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organisation or centre."

The New York Convention refers to the arbitration agreement in the context of recognition and enforcement of such agreements. Article II ([1]) of the Convention provides:

"Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

6. Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, (1985). The UNCITRAL Model Law, is a system of arbitration laws which plays a significant role in establishing rules of arbitration that are acceptable in countries with different legal, social and economic systems in order to develop and harmonises these legal systems. See, Gerold Herrmann, "The UNCITRAL Model Law – its background, salient features and purposes," 1 Arb.Int., (1985), p. 6.

7. V. V. Veeder, "English Arbitration Act of 1996 (ENGLAND)," Int. Handbook on Comm. Arb., Suppl. 26, February (1998), Binder 2, p.1. The writer states that: "English courts have considered arbitration as a contractual method of resolving disputes, by which parties can agree to entrust their dispute to the final decision of an arbitral tribunal. The arbitral tribunal is required to be impartial and parties should bind themselves to accept and implement the resulting decision."

8. See Annex B, p. 293.

One should recognise that Article II (1) of the New York Convention requires that an arbitration agreement be made in writing. This requirement is necessary since arbitration is based upon the will of the parties, and accordingly both parties have an interest in proving the existence of a valid arbitration agreement. Also, having a valid arbitration agreement obliges the court to refer the parties to arbitration.[9] Therefore, a party cannot claim before the court on the same subject matter unless the court finds that the arbitration agreement is null and void, incapable of being performed or contrary to public policy.[10] A written arbitration agreement is also necessary to guarantee the recognition of such agreement as this is required by some legal systems.[11] The difficulty that may arise from this requirement is that national laws differ as to when the written form of the arbitration agreement is met. Several legal systems[12] and the Model Law provide a clear guide of what may constitute a written form. Article 7 (2) of the Model Law includes, "telex or other means of telecommunication which provide a record of the agreement".[13]

The Model Law considers the reference in a contract to a document containing an arbitration clause as constituting a valid arbitration agreement, providing that the contract is in writing and the reference is such as to make that clause part of the contract.[14]

9. See Article II (3) of the New York Convention. This also depends on a request which should be made by a party not later than when submitting his first statement on the substance of the dispute. In this regard, the Egyptian Court of Cassation referred to such request as a plea that must be raised by a party before any discussion of the merits of the dispute. Case. 24.05. 1966, year 17th, page 1224; see also Case. 15.02.1972, year 23, p. 168; Case. 06.01.19976, year 27, p. 138. See, Abdul Hamid El Ahdab, "The New Egyptian Act in Civil and Commercial Matters," 12 J. Int. Arb., June (1995), p. 65 at 75; the same has been provided in Article 13 of the Egyptian law of 1994; also see Article 8 (1) of the Model Law.

10. Mohamed I.M. Aboul-Enein, "The principles on which arbitration is based and practiced in Arab and African Countries adopting the UNCITRAL Model Law of Arbitration," 1 Journal of Arab Arbitration (1999), p. 4.

11. Not including an arbitration agreement in a written form could be a reason to invalidate the arbitration agreement in countries which consider such requirement as fundamental. See, for example, Article 12 of the Egyptian law of 1994: "The arbitration agreement must be in writing, on penalty of nullity. An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams or other means of written communication"; to the same conclusion this was decided by the Netherlands' Courts in North American Soccer League Marketing Inc. (US) v Admiral International Marketing,and Trading BV and Frisol Eurosport BV. Court of First Instance, Dordrecht (Netherlands), August 18, (1982), Yearbook Commercial Arbitration 1985, vol. X, at 490. An arbitral award was invalidated for lack of written form of the arbitration agreement. Cited by Rubino Sammartano, M., International Arbitration Law, Kluwer, 1990, p.151.

12. See for example, Section 5 of the English Act of 1996; Article 12 of the Egyptian Law No. 27 of (1994).

13. The same approach was considered by the English Court of Appeal in Birse Construction Ltd v St David Ltd [2000] B.L.R. 57; 70 Con. L.R. 10.

14. It has been reported that the New York Convention also includes an exchange of letters or telegrams as agreement made in writing, regardless of whether or not it was signed by one of the parties. See Berg, van den A. J., The New York Arbitration Convention of 1958, The Hague Deventer, Netherlands: kluwer (1981), p. 171.

A. Definition of arbitral awards

Having defined the general features of what may constitute an arbitration agreement, one must seek to find a definition of the arbitral award itself. Scholars agree that there is a lack of clear definition as to what may constitute an award.[15] It has been reported that during its deliberation on the Model Law, the Working Group repeatedly emphasised the great significance of defining the term arbitral award, as this was intended to determine which kinds of decisions would be subject to recourse under Article 34 of the Model Law. However, several proposals were rejected, as it was not clear whether the questions of procedure should be treated as arbitral awards, and the Working Group decided not to include a definition in the Model Law.[16]

Nevertheless, there are general features that may constitute what could be considered as an arbitral award.[17] An arbitral award is the final procedure in the arbitration process, by which the arbitral tribunal determines all of the issues that have been submitted by the parties to arbitration[18] in a certain and final order. The arbitral tribunal's decision then terminates the arbitral proceedings and shall be binding on the parties.[19]

One should take into consideration here that the arbitral tribunal may render orders or awards during the arbitration proceedings, such as interim or partial awards.[20] However, examining such awards is outside the scope of this research, since they do not meet with

15. There is no internationally accepted definition of the term "award". Redfern & Hunter provide that none of the international conventions which deal with arbitration provide a definition of the arbitral award, including the Geneva Treaties, the New York Convention or the Model Law. Even though the New York Convention is specifically directed to the recognition and enforcement of awards, the nearest it comes to a definition is: "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted"; Article I (2) of the New York Convention; See, A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, 3ed, London: Sweet & Maxwell (1999), p. 364.

16. See, Berger, Klaus. P. International Economic Arbitration, Denver Boston: Kluwer, (1993), p. 588, referring to the UN Doc. A/CN.9/246, para. 194; A/CN.9/264, Article 34, para. 3.

17. One should keep in mind that these general features vary according to what the applicable rules will state.

18. In Tatem Steam Navigation Co Ltd v. Anglo-Canadian Co Ltd (1935) L1. L. R 161. The court defined the meaning of "All matters within the arbitrator's jurisdiction" as: "… all matters that have in fact been raised before him; that is, upon which either party relied. Points which have not specifically been raised by either party or argued will not invalidate an award."

19. This includes both the arbitral tribunal's decision and the parties' agreement to resolve the dispute in a settlement award. The legal nature of settlement awards will be examined later in this chapter. See ahead, p. 13.

20. There are several types of decisions that can be made by the arbitral tribunal. In the course of the arbitration procedure, the arbitrators may have to render several decisions either procedural or substantive, such as, injunctions, procedural orders, interim awards, interlocutory awards, partial awards, consent awards, final awards etc. For example, Article 2 (iii) of the ICC Rules, defines an award as it includes, inter alia, an interim, partial or final Award; also see, V. V. Veeder, op. cit., p. 47.

the requirements of a final and binding arbitral award that could be enforced in foreign countries. There have been doubts about the enforceability of such pre-award orders under the New York Convention. Many writers consider such orders or awards to be non-enforceable under the New York Convention, due to the lack of finality of the award and the possibility that a reverse decision could still be taken by the arbitrators on the same issue.[21] This does not meet the requirement of Article V (1)(e) of the New York Convention that the award contain a conclusive decision which is not subject to further revisal by the tribunal within the arbitral proceedings.[22] The focus of this study concerns only the final award which puts an end to all of the issues that have been submitted to arbitration, and which is ready to be enforced as a foreign arbitral award, rather than examining such other orders or awards as may be made by the tribunal during the arbitration process.

B. The legal nature of arbitral awards

It is important to understand the obligatory power of arbitration and its resulting award by analysing the legal nature of the arbitral award. Two questions arise here: first, where does arbitration get its obligatory power; and second, whether the decision of an arbitral tribunal is to be regarded as equivalent to a court decision, or is it to be treated as a private agreement? This problem creates a great deal of complexity, especially in the case of foreign arbitral awards.[23] It is, therefore, important to decide whether these awards are to be considered as having the character of a contract, or of a foreign judgement.

Two issues have to be considered in this regard. On the one hand, since arbitral awards derive their binding force not from the sovereignty of the state, but from private contract[24], and

21. Klaus Peter Berger, op. cit., p. 345.

22. See Micheal Pryles, "Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell," 10 Arb. Int., (1994), p. 385. However, other scholars consider that interim or partial awards are also enforceable under the Convention as long as they finally resolve a part of the dispute. See Pierre-Yves Gunter, "Enforcing Arbitral Awards, Injunctions and Orders," Internet Address: http://www.psplaw.ch/Publications/AMBAR-1.html.

23. This is important in order to determine the law that should be applied to the enforcement of the award and the possibility to apply an international convention for the enforcement of foreign arbitral awards, such as, the New York Convention, or otherwise, to apply other Treaties that relate to the enforcement of foreign judgements.

24. See Jan Paulsson, "Arbitration Unbounded : Award Detached From the Law of Its Country of Origin," 30 INT'L & COMP. L. Q., (1981), p. 362. He states that: "An arbitrator derives his/her power from the powers conferred by the parties. His/her authority is entirely a private matter "and it would be a rather artificial interpretation to deem his/her power be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration."

therefore the tribunal's decision should be considered to be no more than supplemental to the arbitral agreement.[25] On the other hand, arbitration could be regarded as part of the judicial system of the state. According to the latter view, it has been argued that the arbitral award may not become legally binding and ready to be enforced unless it has been confirmed or declared enforceable by a competent authority, mainly by a court order.[26] Proponents of this view argue that if such confirmation is required and the award was confirmed or declared enforceable by a court in the country where it was made, then the award should be regarded as having the nature of a judgement.

Moreover, the supporters of this view argue that the competent authority to undertake justice in a state is a function which belongs to the public authorities of the state where this authority derives its jurisdiction from the law. An arbitral tribunal also derives its authority from the same source, as the law permits the parties to oust the jurisdiction of the courts and agree to resolve their dispute by private persons. Thus the law, in permitting such ousting of jurisdiction, is what makes the arbitral award equivalent to a judicial decision made by a state court.[27]

Without exploring the above two opinions in depth, one may say that an arbitral award has a mixed nature.[28] It is based on an arbitration agreement between the disputing parties and it ends by a decision made by the arbitral tribunal. This distinctive nature of the arbitral award makes it different from an agreement, as it could be enforced without requiring the merits of the case to be reviewed by a state court. Also, arbitration is not part of the judicial system provided for by the state, since the decision arrived at by a court is different from an arbitral award. The Court decision is rendered by judges who derive their authority from the state, whereas the power of the arbitrators is derived from a commission given to

25. Carlo Croff, "The Applicable law in an International commercial Arbitration: Is It Still a Conflict of Laws Problem?" Int.Law., (1982), p. 613. This was the trend followed by the Egyptian courts. In a judgement rendered by the Giza Court on 27 January 1987, cases No. 10063/83 and 5795/85, the court held that: "Arbitration belongs to the category of contracts consensual, which come into existence through the exchange of an offer and acceptance without requiring any special form whether in respect of the arbitration clause or the submission agreement"; Ahmed S. El-Kosheri, "EGYPT," Int. Handbook on Comm. Arb., Suppl. 26. February (1998), Binder, 2., p. 8.

26. Merrifield Ziegler & Co. v. Liverpool Cotton Association Ltd.(2) (1911) 105 Law Times 97.

27. Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 8.

28. Rene David, op. cit., p. 78 and 133. He considers arbitration as having a mixed nature. "It is an institution both within the law of contract and within the law of procedure"; also Ibrahim Ahmmad Ibrahim, 3ed., op. cit., p. 28. He considers that arbitration has its own nature.

them by the parties.[29] Also, the rules applying to the enforcement of arbitral awards are generally different from those applying to the enforcement of court decisions[30], especially if we consider the role of the international conventions that govern the enforcement of foreign arbitral awards, such as the New York Convention of 1958.

Legal nature of Awards in agreed terms

One should consider the different nature of settlement awards or what is known as awards in agreed terms. During the arbitration proceedings parties may decide to resolve their dispute by a settlement which ends the dispute and may ask the arbitrator to record the settlement agreement in the arbitral award.[31] The trend in most of the internal and international arbitration rules is to consider settlement awards as arbitral awards that can be enforced like any arbitral decision.[32] Several legal systems and the Model law have followed this trend.[33] For example, Section 51 of the English 1996 Act regard such agreed awards as having the same status and effects as any other award on the merits of the case. Section 51 provides a non-mandatory rule that, unless otherwise agreed by the parties, the tribunal shall terminate the substantive proceedings and if so requested by the parties, and not objected to by the tribunal, shall record the settlement in the form of an agreed award.[34]

One may conclude here that recording in the award that it is an award on agreed terms gives a settlement award the same legal

29. Parties to arbitration enjoy a greater degree of control which may be passed to the arbitrators. Therefore, the consensual basis of an arbitration thus radically different from that of plaintiff and defendant in litigation in the courts. See Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] AC 909. p. 964; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.).

30. One should consider here that there are exceptional cases, as some legal systems provide the same rules for the enforcement of foreign arbitral awards and foreign judgements. This is the case in some countries, for example, the Jordanian law for the Enforcement of Foreign Awards No 8 of 1953 is applicable to both the enforcement of foreign arbitral awards and foreign court decisions.

31. Parties may prefer to see their agreement ratified and confirmed by an arbitral tribunal as an award on agreed terms, or as an award by consent. See Rubino Sammartano . M., op. cit., p. 438.

32. Settlement awards can be enforced under the New York Convention. See Van den Berg, op. cit., p. 49.

33. Article. 30 of the Model Law of (1985) provides that: "An award on agreed terms... shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case"; also see, Article 26 of the ICC Rules of 1998; Article 26 (8) of the LCIA Rules of 1998; Article 41 of the Egyptian law of 1994; also see, Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 38.

34. Section 51 (3) of the English 1996 Act. One should mention in this regard that a signature of the two parties is required. See Section 52 of the English 1996 Act. For the question of what happens when a dispute arises from the settlement agreement itself (would it be settled by the former arbitration clause or does it necessitate a new arbitration clause?) see, Klaus Peter Berger, op. cit., pp. 583- 587.

nature as a decision made by the arbitral tribunal. This also explains the power of the arbitral tribunal over the settlement award, as the tribunal could refuse to confirm the parties' settlement if it violates public policy[35], such refusal may deprive the settlement award from its legal nature as a final arbitral award ready to be enforced.

In the light of the definitions explored above, the study will now turn to the question of how and on which bases the character of foreign arbitral awards can be determined. To address this matter, it will be necessary first to distinguish between domestic and international commercial arbitration, and then to determine whether the criteria that are used in distinguishing between domestic and international arbitration could also be used to determine the character of foreign arbitral awards.

II. International Commercial Arbitration and International Arbitral Awards

Domestic arbitration is known as such because it has a close connection with the place in which arbitration procedures took place. There are several factors that link the nature of the arbitration process and resulting final award with the state in which the arbitration took place. For example, where the transaction which is the subject of arbitration has been constituted and ought to be performed in a given state, and the arbitration procedures and the substance of the dispute are governed by the law of that state, the arbitral award will be made and enforced in the territory of that state. According to this example all elements point to a sole and particular state.[36]

International commercial arbitration on the other hand, indicates that one or more foreign elements are involved in arbitration which, therefore, make it not wholly connected to the state in which arbitration proceedings take place. One should here consider that in international commercial relations, parties may

35. Ibid., p. 584. The writer states that arbitrators can refuse to render the award on agreed terms if "the terms of the settlement are illicit or utterly unfair, or obviously violate mandatory norms or the order public international"; also see, Andrew Tweeddale and Keren Tweeddale, A Practical Approach to Arbitration Law, Blackstone Press Ltd. (1999), p. 169; D Mark Cato, Arbitration Practice and Procedure, Lloyd's of London Press Ltd (1992), p. 88; The drafters of the UNCITRAL expected the tribunal to refuse to record as awards those settlements that they deem unlawful or against public policy at the place of arbitration. See UN Doc. A/CN.9/SER.A/1976, p. 179.

36. Howard M. Holtzmann & Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Deventer: Kluwer Law and Taxation Publishers, (1989), p. 1055.

have different nationalities, or they may be domiciled in different countries, and the transaction may relate to goods to be delivered in a country other than the country where they made their contract. Therefore, determining the context of international commercial arbitration requires consideration of a number of key connecting factors: the nationality of the parties; the seat where the arbitration took place; the law applicable to the dispute; and whether or not the award is intended to be enforced within the jurisdiction of the national courts.

Generally, there are two main criteria that have been used to determine the nature of international commercial arbitration.[37] The first criterion mainly considers the parties to an arbitration, that is, their nationality, their habitual place of residence, or, if the party is a 'corporate entity', the seat of its central control and management. However, this criterion disregards the fact that sometimes parties of the same nationality or parties who are resident in the same country may be engaged in international business transactions.

Therefore, it may not be sufficient to determine the nature of international commercial arbitration by relying on this criterion alone. The second criterion involves analysing the nature of the dispute, so that arbitration will be treated as international if it involves the interests of international trade, regardless of the parties' nationality.[38] The latter approach is followed in the ICC Rules, Article 1(1) of which uses 'the nature of the dispute' as a test in order to determine the jurisdiction of the International Court of Arbitration of the ICC. It provides that:

> "The function of 'the Court' is to provide for the settlement by arbitration of business disputes of an international character..."

Accordingly, the ICC prefers to rely upon the character of the dispute rather than relying on the parties' different nationality. This was confirmed by an ICC publication: [39]

37. Other less popular criteria could be mentioned here: The nationality of the arbitrators; The country where the principal place of the arbitral organisation is situated; and the country whose courts would have had original Jurisdiction to hear the case. However, all of these criteria have been heavily criticised. Mahmoud S. EI-Sharkawi, "The Terms International and Commercial under the New Egyptian Arbitration Law," 1 Journal of Arab Arbitration (1999), p. 11 at 14.

38. Redfern and Hunter, 2nd ed., op. cit., p. 15; Andrew and Keren, op. cit., p. 4.

39. The International Solution to International Business Disputes- ICC Arbitration, (ICC Publication No. 301, 1977) at 19.

"By virtue of its object the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same state for performance in another country, or when it is concluded between a state, and a subsidiary of a foreign company doing business in that state."

In one particular case the ICC tribunal held that the arbitration before it was truly international because the arbitration was based on a contract involving the parties of different nationalities, the movement of equipment and services across national frontiers, and the payment in different currencies.[40]

Through a review of the different international and domestic law rules, one could recognise that there are different ways to identify the international nature of a particular arbitration. In this regard Article 1 (3) of the UNCITRAL Model law provides various tests for determining when arbitration is international. It uses both the different place of business of the parties and the nature of the dispute as tests and provides two additional criteria. Firstly, the situation of the arbitration proceedings outside the place of business of one of the parties.[41] Secondly, if the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country. The latter criterion may create some difficulties, as parties who are nationals of the same state could declare an otherwise domestic arbitration to be international by merely stating that the subject matter of their arbitration agreement relates to more than one country.[42] They may do that in order to benefit from the liberal treatment of international commercial arbitration or to circumvent mandatory rules that are specifically designed to regulate domestic arbitration.[43]

The Egyptian arbitration law of 1994 has set several criteria to determine when arbitration is international, and is broad enough to cover a wide range of cases. Article 3 classifies arbitration as international:

40. ICC Award 5029/1986, Volume II, 1986-1990, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, Collection of ICC Arbitral Awards, p. 69.

41. Article 1 (3)(a) and (b) of the Model law; also see the criteria provided in paragraph (b) of the same Article.

42. See Article 1 (3)(c) of the Model Law.

43. This subject will be examined in more depth in Chapter Three, see p. 101.

> "Whenever its subject matter is a dispute related to international commerce in any of the following cases:
> **First:** if the principal places of business of the two parties to the arbitration are situated in two different states at the time of the conclusion of the arbitration agreement. If either party to arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon. **Second:** If the parties to the arbitration have agreed to resort to a permanent arbitral organisation or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.[44] **Third:** If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country. **Fourth:** If the principal places of business of the two parties to the arbitration are situated in the same state at the time of the conclusion of the arbitration agreement, but one of the following places is located outside said state:
> (a) the place of arbitration as determined in the arbitration agreement pursuant to the methods provided therein for determining it; (b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed; (c) the place with which the subject matter of the dispute is most closely connected."

It should be noted that the Egyptian law has adopted the same approach provided for in the Model Law. The above article adds however, that an arbitration is 'international' if the parties agree to hold the arbitration proceedings in a permanent arbitral institution situated in Egypt[45], in reference to the Cairo Regional Centre for

44. The Egyptian Court of Cassation held on various occasions that arbitration can take place abroad, in spite of the fact that Egyptian courts would have certainly had jurisdiction if the parties had not agreed to arbitrate abroad. Decision of 12 April 1956. Case No. 369 - 22nd; Decision of 26 April 1982 Case No. 714, 47th; Decision of 13 June 1983. Case No. 1259. 49th; Decision of 21 January 1985, Case No. 245. 50th; Decision of 13 January 1986. Case No. 326. 51st; Decision of 5 May 1975. Case No. 450, Collection of Court of Cassation Decisions (26), p. 535. See Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 50; Ashraf al Rifaie, Order Public and Arbitration of Private International Relations., PhD thesis, Ein Chams University, Egypt (1996) (in Arabic), p. 179.

45. Mahmoud S. El-Sharkawi, op. cit., p. 14; Ahmad Sharaf al Deen, Arbitration in Disputes of International Contracts, Abna'a Wahbah Hassan publishers (1993), p. 74 (in Arabic); Ashraf al Rifaie, op. cit., p. 112 (in Arabic); Mohamed I.M. Aboul-Enein, "The Development of International Commercial Arbitration Laws In the Arab World," a paper presented to the conference of "International Commercial Arbitration" Cairo, January 28. 2000, p. 7.

International Commercial Arbitration (CRCICA)[46] or even abroad, such as the (ICC)[47], (AAA)[48], (LCIA).[49]

In England the distinction between domestic and non-domestic arbitration agreements is based on the nationality, habitual residence, place of incorporation or central control and management of the parties. This approach was first introduced in the 1975 English Act and repeated in the 1979[50] and 1988 Acts. Section 85 (2) of the 1996 Act defines domestic arbitration as:

> "An arbitration agreement to which none of the parties is- (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom."

Accordingly, any arbitration, which is not domestic according to this definition, is therefore by implication, international in character. However, Section 85 (2) was not brought into force since it establishes the distinction between national and international arbitration on the parties' nationality, which was considered as violating Article 6 and 25 of the Treaty of Rome[51] for creating direct or indirect discrimination against foreign citizens and legal persons of the European Union.[52]

46. The Cairo Regional Centre for International Commercial Arbitration (CRCICA). Under the Auspices of the Asian African Legal Consultative Committee (AALCC). See Internet address: (http://www.crcica.org.eg).

47. International Chamber of Commerce (ICC) Court of Arbitration. See Internet address: (http://www.iccwbo.org).

48. The American Arbitration Association (AAA) Commercial Arbitration. See Internet address: (http://www.adr.org).

49. The London Court of International Arbitration 1998 (LCIA). See Internet addres: (http://www.lcia-arbitration.com).

50. Article 3 (7) of the Arbitration Act of 1979 defines as domestic arbitrations which take place in the United Kingdom, if the parties to them are UK citizens at the time they enter into the submission agreement. See, Rubino-Sammartano. M., op. cit., p. 15.

51. Treaty Establishing the European Community as Amended by Subsequent Treaties Rome, 25 March, 1957. Article 6 provides that: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 189c may adopt rules designed to prohibit such discrimination."

52. See, V. V. Veeder, op. cit., p. 5; Philip Alexander Securities and futures Ltd v Bamberger (1996) 22 Y.B. Com. Arb., 872; Andrew and Keren, op. cit., p. 273.

The question now is to what extent are the criteria thus far considered applicable in regard to determining the character of arbitral awards? The following section will explore this question and argue that international arbitral awards may be seen as such because they result from international arbitration and therefore they should be distinguished from foreign arbitral awards.

A. Domestic arbitral awards and international arbitral awards

Generally, there are two types of arbitral awards - domestic arbitral awards and international arbitral awards. The first type, are known as such because they result from domestic arbitration as explained above. The second type, international arbitral awards, should also be considered as such because they result from international commercial arbitration, therefore, determination of their nature should be based on the same criteria that are used in deciding the international nature of arbitration.[53] The distinction that can be drawn between these two types may relate to the courts' treatment of international arbitral awards. International arbitral awards that result from international arbitrations should be treated under more liberal standards than purely domestic awards- (for example, by giving greater weight to the parties' autonomy by applying a foreign law to govern the procedures or the substance of the dispute if this was agreed upon by the parties). This may lead to the application of more liberal standards when national courts of the country in which the award was made are asked to set the award aside for considerations of public policy, as will be explored in more detail later.[54]

In light of the above, foreign arbitral awards should be distinguished from international arbitral awards. A foreign arbitral award is known as such because the award will be enforced in a country that considers it foreign regardless of whether it is considered a domestic or international arbitral award in the country in which it was made.

53. See Article 1 (3) of the Model Law; Article 3 of the Egyptian law of 1994; Section 85 (2) of the English 1996 Act.

54. National courts are only expected to exercise a limited degree of control over international arbitral awards. This will be explained in more depth in the following chapters.

B. Foreign arbitral awards

One cannot determine the nature of foreign arbitral awards on the same criteria used above in deciding the nature of international arbitration. As explained above, deciding the international nature of arbitration may rely on the existence of several elements, such as the different nationality or domicile of the parties. Using such elements may not be suitable in deciding the nature of foreign arbitral awards. For example, the nationality of the parties is an irrelevant factor to determine the nature of foreign arbitral awards, since the New York Convention is applicable to the situation where an award is made abroad in an arbitration between parties of the same nationality.[55] This can also be inferred from the title of the New York Convention as it refers to "the Recognition and Enforcement of Foreign Arbitral Awards" and not to enforcement of international arbitral awards.

However, determining the nature of foreign arbitral awards can be achieved through using two different criteria. The first is the geographical criterion, and the second is according to the applicable procedural law.[56]

1. The geographical criterion

Various international conventions and arbitration rules of national laws and international institutions indicate that there is a preference for the nationality of the place where the award was made. For example, Article [1] of the Geneva Convention of 1927[57] deals with awards made in the territory of another contracting state. Article I (1) of the New York Convention deals with recognition of awards made in the territory of a state other than that in which

55. One should mention here that the application of New York Convention to cases which involve parties of the same nationality may cause problems in jurisdictions that require in an international arbitration to be between foreigners. See Van den Berg, op. cit., p. 16. The writer states that: "This was the case under Article 2 of the Italian Code of Civil Procedure, where on the base of this Article, the court of First Instance of Ravenna refused to enforce an award made in London in an arbitration between two Italians. S.P.A. Paulo v. Augusto Miserocchi, Tribunal of Ravenna, April 15, 1970, Italy no. 3. However, the Italian Supreme Court reversed this decision on this point and in subsequent decisions the Italian courts have affirmed the decision of the Italian Supreme Court, where this issue seems to be settled."

56. The New York Convention is established on these two criteria, Article 1(3) provides that; "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

57. Geneva Convention on the Execution of Foreign Awards, September 26, 1927, League of Nations Treaty Series (1929-30) Vol. XCII, p. 302.

recognition is applied for.[58] This means that an award is national if it was made within the territory over which the courts of that state exercise their jurisdiction, otherwise the award will be a foreign arbitral award if it was made out side of the territory of the state.[59]

However, the geographical criterion is not always satisfactory, as parties of the same nationality may agree to arbitrate abroad on a domestic transaction, in order that they can enforce the resulting award in the country of their origin under the provisions of the New York Convention. Moreover, applying the 'geographical criterion' may lead to problems concerning arbitrations which have been held in one country, but have been subscribed by the arbitrators in another country. This type of problem can occur in international commercial arbitration. In the case of Hiscox v. Outhwaite,[60] the House of Lords held that an award which had been signed in Paris is a French award, notwithstanding the fact that the entire arbitration had been conducted in England under English law. Consequently, the award was considered 'foreign' in terms of the New York Convention. According to this decision, the English courts were deemed competent not only to set the award aside but also to determine the enforcement of the award as a foreign arbitral award. This decision was criticised as leading to "the dilution of the territoriality principle".[61]

2. The applicable law criterion

The second criterion is also provided in Article I (1) of the New York Convention, which defines foreign arbitral awards by including both the first and the second criteria. Part two of Article I (1) of the Convention provides that: "it shall also apply to arbitral awards not considered as domestic awards in the State where their

58. This may include awards that have been rendered in countries which are not party to the New York Convention, unless a member state has elected to apply the convention on "reciprocity basis", by declaring that it will apply the Convention only to arbitral awards made in the territory of another Contracting State. See Article I (3) of the New York Convention.

59. This criterion is adopted in many laws and also by the New York Convention, although this convention recognise that some arbitral awards rendered within the territory of the state, may not be regarded as national awards in the state according to Article I (1), as will be explained in the second criterion.

60. Hiscox v. Outhwaite [1992] 1 A.C. p. 562; [1991] 3 W.L.R. p. 297; [1991] 3 All E.R. p. 641; [1991] 2 Lloyd's Rep. P. 435.

61. See Klaus Peter Berger, op. cit., p. 657.

recognition and enforcement are sought".[62] The formula used in Articles I ([1]) was intended, as the Convention considered that some countries may regard arbitral awards, which have been made under foreign arbitration rules, as foreign awards.[63]

According to this criterion the nationality of an arbitral award can be determined according to the applicable law. For example, if an award was made in state A, but governed by the procedural law of state B then, it will be considered as having the nationality of state B. Accordingly, if the arbitration procedures were governed by a foreign law the resulting award will then be regarded as a foreign arbitral award, even if it was made within the territory of the state where arbitration took place.

In conclusion, foreign arbitral awards are different from purely domestic and international arbitral awards. This distinction becomes relevant when enforcement of the award is confronted. As on the one hand, resisting the enforcement of national arbitral awards can be achieved by means of appealing or challenging to set the award aside, which may take place before the competent authority of the country in which or under the law of which the award was made. In contrast, recognition and enforcement of foreign arbitral awards takes place in a country that considers the award foreign, and thus subject to different rules which includes the application of international conventions.[64]

The distinction between national arbitral awards and foreign arbitral awards has been recognised by several national and international arbitration rules which are mainly based on the procedure that should be followed in resisting the enforcement of each type. For example, Article 34 of the UNCITRAL Model Law provides grounds for setting a national arbitral award aside separate from the grounds set forth under Article 36 to refuse the recognition and enforcement of foreign arbitral awards. The same distinction is known to several national arbitration laws, for example: Sections 67, 68 and 69 of the 1996 English Act concern challenging arbitral

62. Also see, Article V (1)(e) of the New York Convention, which provides that enforcement of the award could be refused if the award had been set aside "in the country in which, or under the law of which, that award was made".

63. Van den Berg, op. cit., p. 23, referring to France and Germany as examples; also see, the ECOSOC Draft of 1955, the UN DOC E/ 2704.

64. Such as the rules provided in the New York Convention.

awards which were made in England, whereas Sections 99 to 104 concern the applicable rules to the recognition and enforcement of foreign arbitral awards. Likewise, the Egyptian Arbitration Law of 1994 provides in Article 58 grounds to recourse against a national arbitral award different from those which are provided in Articles 60 to 63 which concern the enforcement of foreign arbitral awards.
Finally, the extent of control practiced over national arbitral awards may be different from the control practiced over foreign arbitral awards. Various national legal systems demonstrate that foreign arbitral awards should be subject to merely formal control by the courts, by ensuring that certain minimum standards have been observed in the making of the award.[65] This, however, will be explained later in the context of applying the public policy ground as a means to resist the enforcement of arbitral awards, which will be demonstrated in the course of this study.

III. Executing Arbitral Awards

A party who succeeds in a commercial arbitration will expect to be able to enforce the award without any further delay.[66] However, if the losing party refuses to carry out the award voluntarily, then the award, if necessary, can be enforced by a court order.[67] This section considers the mechanisms available to ensure that the losing party complies with the terms of the award.

A. Voluntary execution

Voluntary execution may arise in particular cases, such as in business relations which are likely to continue, or when the arbitration has been administered under the auspices of some trade

65. Georges R. Delaume, "Relfections on the Effectiveness of International Arbitral Awards," 12 J.Int.Arb 1, 1995, p. p. 6. He provides an additional distinction based upon the effect of the court's decision on the validity of the arbitral award: "Judicial review at the place of making concerns the validity of the award and is of direct relevance to its finality since an adverse decision may lead to the annulment of the award. At the stage of recognition and enforcement of foreign awards, the scope of judicial review is limited to deciding whether the award should be granted or denied recognition. In other words, a denial of recognition may affect the effectiveness of the award but has no bearing upon its validity."

66. An arbitral award is binding on the parties, not only by the rules applied to the arbitration but also by their agreement. For example, Article 32. (2) of the UNCITRAL Arbitration Rules states that the award shall be final and binding on the parties and that the parties undertake to carry out the award without delay; also see, Article 24 of the ICC Rules of 1998; Article 32 of the LCIA Rules of 1998.

67. Hazel Fox, "States and the Undertaking to Arbitrate," 37 Int'l & Comp. L.Q., 1988, pp. 2-3. She provides that: "the enforcement powers of the state are made available through its courts to back up the effectiveness of the arbitration process."

68. Abu Zaid Redwan, General Sources in International Commercial Arbitration, Dar al Fihkir al Arabi (1981), p. 49, (in Arabic).

association of which the losing party is a member.

Commercial pressure is one of the main reasons to ensure the voluntary submission to the arbitral award.[68] This may particularly occur if parties belong to the same social milieu, where they may fear that their reputation would be jeopardised if they do not perform the award voluntarily. They may also fear loss of some of the advantages attached to membership of the association under the auspices of which the award was made.[69] Non- performance may also be interpreted as evidence that one's business is in a critical financial situation. Execution of the award may also be guaranteed by a security constituted when the contract was made or by the fact that property belonging to the losing party is in the hands of the winner.[70]

The most powerful pressure that may be brought on the reluctant party involves sanctions of a financial nature.[71] If a continuing trade relationship exists between the parties, it may well be in the interests of the losing party to perform the award voluntarily, otherwise he risks the possible future business with the winning party. Other sanctions may take the form of preventing the defaulting party from being authorised in future to resort to arbitration administered by the chamber of commerce or the relevant trade association.[72] This can also be found in the ICSID arbitration[73], and where the losing party was a state, it may risk not being able to obtain further loans from the World Bank.[74]

69. For example, some associations, notably the 'London Corn Trade Association and Grain and Feed Trade Association G.A.F.T.A', can make it easier to obtain an award that is voluntarily executed. See, Pierre Lalive, "Enforcing Awards, in Sixty Years of ICC Arbitration; A Look at the Future", ICC Int'l Court of Arbitration ed., 1984, p. 318, 319.

70. See, Rene David, op. cit., p.357.

71. Redfern and Hunter, 2nd ed., op. cit., p. 418.

72. For example, according to the standard contract for the sale of 'cereals' drafted by the Economic Commission for Europe of UNO facilities for arbitration may be refused by a defendant if it is known that the plaintiff has refused to perform any arbitral award in a previous case.

73. International Centre for the Settlement of Investment Disputes. The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which came into force on October 14, 1966.

74. Moreover, it has been reported that, during recent years, commercial companies and businessmen from 83 countries were able to freeze Saudi assets outside the Kingdom of Saudi Arabia on the basis of international arbitral awards. These awards should have been executed in Saudi Arabia. However, this was not possible and this led businessmen and companies to freeze Saudi Arabia assets abroad. The Kingdom of Saudi Arabia decided to ratify the 1958 New York Convention on the Recognition and Execution of Foreign Arbitral Awards, by issuance of Royal Decree No. M/11 dated 29 December 1993, adopted by the Council of Ministers on 27 December 1993 and published in the Official Gazette (Umm Al Qura) on 21 first January 1994. See, Abdul Hamid El-Ahdab, "Saudi Arabia Accedes to the New York Convention," J. Int. Arb., p. 87.

Pressure may also be exerted by the threat of adverse publicity. This method is mainly used by trade associations who may also exclude the recalcitrant parties from the relevant association or market.[75] Thus, the trade association to which a party belongs will be informed of non-performance so that sanctions may be imposed against him. In such case, publicity may take the form of posting the defaulting party's name on a notice board at the seat of the chamber of commerce, or it may be by a letter circulated to members of the association, or it may adopt any other form, which is regarded as appropriate. Many rules specify that it is within the discretionary power of the governing body of the chamber of an association to act as they think fit in such cases.[76]

The ultimate action for non-performance of an award voluntarily, is execution or enforcement by court proceedings. In addition to that, the arbitral award can also be sufficient to attach the assets of the recalcitrant party. Depriving the losing party of his assets may persuade him to enforce the award without further court procedures.

B. Resisting the enforcement of an arbitral award in the country of origin

If the losing party does not carry out the award voluntarily, then winning the arbitration will only be the first step. Litigation may continue, and become more involved (as the winning party will attempt to enforce the award and the losing party will seek to resist the enforcement). In this scenario, the losing party may challenge any attempt by the winning party to obtain recognition or enforcement of the award, by appealing or challenging the arbitral award in order to set it aside in the country where it was made.

In the following sections, an examination will be made of challenging the award in the country of origin. As they vary widely in their details, a survey of the various national legal systems' procedures for attacking an award would require a deep comparative

75. Henry P. De Vries, 'International Commercial Arbitration: A Contractual Substitute For National Courts', 57 Tul.L.Rev., (1982), p. 44. He states, in footnote 9, that: "In domestic and international commerce, there are sectorial associations or commodities exchanges that inflict sanctions on members who do not observe arbitral awards pronounced according to their regulations. The sanctions very according to the case: they might involve expelling the defaulting member from the association, imposing a penalty, refusing his inscription to stock exchange, blacklisting him, refusal by the association to extend its services to defaulting member, etc."

76. See. Rene David, op. cit., p. 358.

analysis of the various national statutory provisions which is outside the scope of this study. Therefore, the following material will provide a general examination of these procedures. A detailed analysis of using public policy as a ground to challenge the award in the country of origin will be handled in Chapter Four.

1. Appeal from arbitral awards

The final decision made by the arbitral tribunal can be subject to an appeal process, which may take place either before another arbitral tribunal or before a court of law.
The first type of appeal could take place if the parties agree to have the merits of the dispute reconsidered by a superior arbitral tribunal.[77] This kind of appeal procedure is a notable feature of the rules of associations specialising in the trade of specific types of goods.[78] Where the parties agree to an appeal procedure to a higher arbitral hearing, the procedure before both tribunals constitutes a uniform arbitration and an action to have the award set aside may be initiated only against the last final award made by the appeal tribunal.

The second type of appeal takes place before a state court. Allowing appeals from arbitral awards to a court has its advantages and disadvantages. The main advantage is that appealing against arbitral awards to a court may help to ensure a measure of judicial control over the decisions of arbitral tribunals so that, for instance, an award which is in clear violation of the law could be corrected on appeal. On the other hand, there are a number of disadvantages. The first is that the decision of the court might be substituted for the decision of an arbitral tribunal specifically selected by or on behalf of the parties.[79] Second, a party who agreed to arbitration as a private method of resolving disputes may find himself brought unwillingly before courts which hold their hearings in public. Third, and most importantly, the appeal process may be used simply to postpone

77. If the parties agree to appeal to another arbitral tribunal, then the award could be reconsidered on the merits by an appellate arbitral tribunal. See, Redfern and Hunter, 2nd ed., op. cit., p. 419.

78. Rene David, op. cit., p. 359, at footnote, 118. He states that: "the possibility of recourse to an arbitration appeal tribunal is envisaged by the law in Austria Article 594, in Belgium Article 1702, and by various articles in the Dutch law of 1984"; Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 43. He provides that in Egypt parties can agree for an arbitral appeal, however, such possibility is uncommon in the Egyptian business community; also see, Section 30 (2) of the English 1996 Act; Rubino-Sammartano . M., op. cit., p. 511. He proposed to institute an "International Arbitration Court of Appeal" under the auspices of an international convention. However, this proposed solution is difficult to be achieved, not only because it needs international co-operation through international convention but also because of the diversity of legal systems between different states.

79. See, Redfern and Hunter, 2nd ed., op. cit., p. 421.

the enforcement of the award, so that one of the main purposes of international commercial arbitration the speedy resolution of disputes is undermined.

Since parties to international arbitration want to avoid court procedures as much as they can, some arbitration contracts provide for a condition whereby parties can waive the right of appeal to courts. This is achieved by means of an exclusion agreement especially in cases where the arbitration agreement is international.[80] Such exclusion clauses are now found in most of the international institutional rules, which require the parties to carry out the arbitral award without delay and to waive the right to any form of appeal. For example, Article 28 (6) of the ICC Arbitration Rules provides that:

"Every award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made". [81]

The question here is whether the parties are allowed to contract out of any right of appeal. The answer to this question depends on the applicable law.[82] For example, in England, Section 69 (1) of the 1996 Act permits a party to arbitral proceedings (upon notice to the other parties and to the tribunal) to appeal to the court on a question of law arising out of an award made in the proceedings.[83]
However, parties to arbitration held in England are allowed under

80. An exclusion agreement may be contained in, or incorporated by reference into, the parties' arbitration clause. See Rubino-Sammartano. M., op. cit., p. 462.

81. Also see, Article 26 (9) of the LCIA Rules; Article 25 of The Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chamber of Commerce, which explicitly provides that: "Any award made under these Rules should be final and may not be the subject of any form of appeal".

82. In Egypt, appeal from an arbitral award to a court was abolished in 1968 under Article 510 of the Code of Civil Procedures, and this has been confirmed in Article 52 (1) of the 1994 law, which states that: "Arbitral awards rendered in accordance with the provisions of this Law may not be challenged by any of the means of recourse provided for in the Code of Civil and commercial Procedures"; Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 43; Abdul Hamid El Ahdab, "The New Egyptian Act…," op. cit., p. 96. He provides that this rule was adopted from the Italian Code of Procedure.

83. An appeal could be established under Section 69 (2)(b) with the leave of the court. According to Section 69 (7), if leave is granted or the parties agree on the appeal, the court may confirm, vary or set aside the award. See, Taylor Woodrow civil Engineering Ltd v Hutchison IDH Development [1998] CILL 1434; 75 Con. L.R. 1. A party may lose its right to apply to the court under Section 73, and its exercise is subject to the restrictions under Section 70(2) and (3). For example, the 28 day time limit for application to the court. This 28 day time limit may be extended by the court under Section 79. See, V. V. Veeder, op. cit., p. 59.

Section 69 [84] to contract out of any right of appeal to the court.[85] Under section 69 of the 1996 Act a court can unquestionably give effect to such exclusion agreements and to any other written agreement in similar terms, such as Article 26 (9) of the LCIA Rules.[86]

However even if the losing party gives up his right to appeal, he is not precluded from initiating setting-aside proceedings before a domestic court against the award that became final with the party's waiver of appeal. Exceptions can be found; some countries - such as Switzerland - may permit the parties to waive all grounds of challenge, including the public policy ground. According to Article 192 (1) of the Swiss Federal Private International Law Act.[87], if the parties are not domiciled or resident in Switzerland and have no business established in that country, they may exclude all setting-aside proceedings or limit such proceedings to one or several of the grounds listed in Article 190(2). This can be made by means of an express stipulation in the arbitration agreement or a subsequent agreement.[88] This is also the situation under Article 1717(4) of the Belgian Code Judiciaire.[89]

84. Section 69 of the 1996 English Act provides: "(1) … An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section."

85. It has been held that the English 1996 Act has abolished the statutory restrictions on pre-dispute exclusion agreements for domestic arbitration agreements and the special categories under Section 4 (1) of the 1979 Act. See Georges R. Delaume, op. cit., p. 11, emphasising that the treatment reserved to the 'Special Categories' has been the object of controversy. So much the more, since the parties soon found effective ways of getting around the problem by the simple device of stipulating the law of Bermuda 'based on English law' as the proper law of the contract, while retaining London as the seat of arbitration. However, it has been held that the waiver of any right of appeal contained in the ICC Rules constitutes a valid exclusion agreement under the English 1979 Act. This was held in two cases, before the 1996 Act. The first case was the Arab African Energy Corp. v. Olieprodukten Nederland B. V. [1983] 2 Lloyd's Rep. 419. The second was the Pioneer Shipping Limited v. B. T. P. Tixoxide Limited, "The Nema", (1982) A. C. 724 (H.L.); also see, Marine Contractors Inc. v. Shell Petroleum Co of Nigeria Ltd [1984] 2 Lloyd's Rep, p. 77; See, V. V. Veeder, op. cit., p. 62; Redfern and Hunter, 2nd ed., op. cit., p. 422.

86. Article 26(9) of the LCIA Rules: "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made". See, V. V. Veeder, op. cit., p. 59.

87. Article 192 (1) provides: "If neither party is domiciled, habitually resident or has a place of business in Switzerland, they can, by an express declaration in the arbitral agreement or in a subsequent agreement in writing, exclude the right to bring proceedings to set aside the arbitral award; they can also exclude the right to bring setting aside proceedings on the basis of any one or more of the grounds set out in Article 190(2) [of the Act]". Klaus Peter Berger, op. cit., p. 709; Georges R. Delaume, op. cit., p. 13.

88. When parties have exclude all setting aside proceedings, the resulting award will be treated as a foreign award and its enforcement in Switzerland will be governed by the provisions of the New York Convention (Article 192 (2)). Willliam W. Park, National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration, 63 Tul. L. Rev. 647, 694-95 (1989).

89. Article 1717 provides: "Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation. Law of March 27, 1985". The difference between Article 192 (1) of the Swiss Act and Article 1717(4) of the Belgian Code is that Belgium has eliminated any kind of judicial control over arbitral awards rendered in Belgium when non of the parties is connected with that country whereas Article 192 (1) of the Swiss Act requires an express stipulation in the arbitration agreement.

2. Challenging the arbitral award to set it aside

Challenging an arbitral award[90] is a procedural action whereby a party who is disappointed by the solution given in an award, attacks the validity of the final award before the competent authority in the country in which, or under the law of which, the award was made. Generally this procedure takes the form of an application to a court91 asking the court to set the award aside. The court may either: (a) confirm the award by granting it a recognition order; (b) set the award aside by pronouncing it of no effect either in whole or in part; (c) remit the award to the arbitral tribunal[92]; or (d) execute the award by attaching assets of the losing party.

In order to constitute a successful attack, the losing party has to establish his petition upon one or more of the grounds, provided for in the law of the country in which, or under the law of which, the award was made.[93] Such grounds are not the same in every legal system, but rather vary from state to state.[94] However, due to the growing recognition of international commercial arbitration as a means to resolve international commercial disputes, most, if not all national arbitration laws now tend to provide limited grounds for challenging international arbitral awards that takes place in their territories.

Certain factors have emerged as prerequisites which could be considered as common to many modern jurisdictions.[95] The reasons

90. Civil law countries uses the term, recourse against an award, and this term is used in the Model Law which in Article 34 refers to recourse to a court against an arbitral awards; Redfern and Hunter, 2nd ed., op. cit., p. 430. The writers prefer the term challenge; See, Lucas Plc v Welsh Development Agency [1986] Ch. 500, (1986) 15 C.S.W. 374; Moran v Lloyds 1983, Q.B. 542; [1983] 2 W.L.R. 672; [1983] 2 All E.R. 200, C.A.

91. For the problem of determining the competent court. See Rubino-Sammartano . M., op. cit., p. 462-465; in Egypt, Article 9. (1) of the Egyptian law of 1994 provides: "competence to review the arbitral matters referred to by this law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate body in Egypt."

92. In England the jurisdiction to remit an award has been described as "a safety net to prevent injustice". See, King v. Thomas McKenna Ltd. [1991] 2 Q.B. 480; [1991] 2 W.L.R. 1234; [1991] 1 All E.R. 653, C.A.

93. For convenience the competent authority to set the award aside will be referred to herein as 'court of origin' or 'court in the country of origin'.

94. One should mention here that there is no international convention to govern the extent of national courts' control over national arbitral awards. The Geneva Convention (1927) and the New York Convention (1958) do not deal with enforcement in the state of origin, since they both govern the enforcement of foreign arbitral awards which takes place in a state that considers this award as foreign. See Redfern and Hunter, 2nd ed., op. cit., p. 429; Pieter Sanders, "Consolidated Commentary", Yearbook Vol. VI (1981), p. 204.

95. Rene David, op. cit., p. 370; Redfern and Hunter, 2nd ed., op. cit., p. 434; Andrew and Keren, op. cit., p. 290.

for which an arbitral award may be challenged can be grouped into three categories. The first category relates to the validity of the arbitration agreement and arbitrability of the dispute, because the arbitration agreement embodies the basis on which the award is instituted, and the subject matter of the arbitration agreement should be capable of settlement by arbitration. The second category of reasons relates to procedural irregularities. Perhaps the tribunal was not properly constituted, the parties were not given a proper opportunity to present their case, the award was based on evidence which was not admissible, the award was not made within the time limit or not all arbitrators took part in the deliberation. The last group of reasons relates to the award itself, if the award is contrary to public policy.[96]

The purpose of such grounds is to situate the award in the context of a statutory framework that provides the state courts with jurisdiction to exercise some degree of control over arbitral awards made within their territory.[97] The difficult question is, to what degree can a national court exercise control over an arbitral award?[98]

One should recognise, however, that when a national court is asked to set aside an international arbitral award it cannot re-examine the merits of the dispute, since the arbitral tribunal already made its decision on this matter, whose decision should be regarded as final.[99] Presuming otherwise will bring the parties back to the starting point, and may force them to bring their dispute before a national court, which is the thing that they were trying to avoid in the first place by resorting to arbitration.[100]

96. John H. Laugbein, "Comparative Civil Procedure and the Style of Complex Contracts", (1987) 35 AM. J. Comp. L., p. 381 at p.390; Adam Samuel, "Arbitration in Western Europe – A Generation of Reform," (1991) Arb. Int. 319, pp. 352 and 353.

97. It is therefore worthwhile to find out what the law of the seat says on the requirements and procedures for enforcement as one of the most important factors is the role of the country's courts in the arbitral process. See Jan Paulsson, "The Role of Swedish Courts in Transnational Commercial Arbitration", (1981) 21 Virginia Journal of International Law, p. 211, at p.215.

98. This will be examined in more depth in Chapter Four.

99. This was confirmed by the Egyptian Court of Cassation in decision No. 274/ 1982 year 49. Cited by Mahmoud Hashim, General Theory in Arbitration, Dar Al Fiker Al Arabi (1990), p. 267, (in Arabic).

100. Redfern and Hunter, 2nd ed., op. cit., p. 435. The writers emphasised that: "If a court is allowed to review this decision on its merits, then the speed and, above all, the finality of the arbitral process is lost"; Stephen M. Schwebel and Susan G. Lahne, "Public Policy and Arbitral Procedure," Comparative Arbitration Practice and Public Policy in International Arbitration, Kluwer Law and Taxation, Pieter Sanders ed. (1987), p. 223. The writers state that: "Extensive judicial review of arbitration awards would frustrate the basic purposes of arbitration, which is sit to dispose of disputes quickly and avoid the expense and delay of extended court proceedings"; also see, Van den Berg, op. cit., p. 349; Bentil, J.K., "Commercial Arbitrators Authorised not to Apply Strict Rules of law and Judicial Reviews," (1992) Journal of Business Law, p 26, at p. 29.

The ultimate effect of a successful challenge is to render part or all of the original decision, null and void. This will affect the enforcement of the award in the country in which it was made, since the arbitral award will lose its legal effect and will not be considered binding on the parties.[101] This also affects the enforcement of the award in any country which has adopted the New York Convention, since the setting aside of an arbitral award in its country of origin is a ground for refusal of recognition and enforcement under Article V (1)(e).[102]

IV. Executing and Resisting the Enforcement of a Foreign Arbitral Award

In order to enforce an arbitral award in a foreign country, the award must travel from the state in which it was made under one system of law to other states under different systems of law. This operation does not happen randomly. The successful party should first determine the country in which he will carry out the enforcement: generally that in which the unsuccessful party's assets are located. If these assets are situated in different countries, then he will enforce the award in the country in which he can obtain the best possible results. Two issues have to be taken into account to achieve this result. The first is the existence of a legal system, whether by the New York Convention or by some other relevant treaty or convention, which facilitates the enforcement of foreign arbitral awards between the prospective place of enforcement and the place in which the award was made.

The second issue is the attitude of the local courts to requests for recognition and enforcement of foreign awards, that is, whether their outlook is likely to be internationalist or parochial.[103] In addition to that, one should consider the question of what attitude the prospective country of enforcement may adopt on applying more liberal standards of public policy rules to foreign arbitral awards a question which will be examined throughout this research paper.

101. Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards", (1959) 8 AM. J. Comp. L., p. 283 at 290.

102. However, an award which has been set aside in the country of origin may still be enforceable in other countries if the court where enforcement of the foreign arbitral award is invoked accepts to enforce the award. This will be discussed in more detail in Chapter Four, at p. 170.

103. Redfern and Hunter, 2nd ed., op. cit., p. 451.

After determining the country in which the winning party can get the best possible results, then the question will be whether he need first seek the recognition of the award or whether he can enforce the award directly.

A. Recognition and enforcement of arbitral awards

The terms 'recognition' and 'enforcement' of arbitral awards are sometimes linked. That is the case in Article 1 (1) of the New York Convention of 1958:

"This Convention shall apply to the recognition and enforcement of arbitral awards..."

The terms are distinct, however. For example, Article 1 of the Geneva Convention of 1927 speaks of 'recognition or enforcement':

"... an arbitral award made in pursuance of an agreement whether relating to existing or future differences... , shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon …."

The same distinction has been made in Article 35 of the Model Law of 1985:

"An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36".

Recognition must be distinguished from enforcement since the latter is intended to oblige the losing party to carry out the award, while the purpose of recognition is different and more limited.[104] Recognition requires recognising that the award made by the arbitral tribunal is equivalent to that of a judgement issued by a court of law in the state in which recognition is taking place. Recognition may occur if the losing party asks the court to decide on the dispute although it has already been determined by an arbitral award. In this case the party

104. Rubino-Sammartano. M., op. cit., p. 484.

in whose favour the award was made will object on the grounds that the dispute has already been determined, and to prove this he will seek to produce the award to the court and ask the court to recognise it as valid and binding upon the parties. Thus, recognition frustrates the losing party's attempt to obtain a new decision by the courts of the state requested to enforce an award. Enforcement, by contrast, is a positive step compelling the losing party to carry out the award which he is unwilling to carry out voluntarily.[105]

The distinction could also be recognised if we consider that an award may be recognised without being enforced, but if it is enforced, then it has necessarily been recognised by the court that orders its enforcement. In other words, a distinction must be made between 'recognition' and 'recognition and enforcement'.[106] A court when it grants enforcement of an award, recognises at the same time that the award is validly made, that it is binding upon the parties to it and, therefore, that it is suitable for enforcement.

B. The applicable rules to the recognition and enforcement of foreign arbitral awards

Recognition and enforcement of foreign arbitral awards is basically governed by domestic laws. As these different national rules are very often unpredictable, it was deemed necessary to remove recognition and enforcement of foreign arbitral awards from the jurisdiction of domestic laws into a more international environment. This was also necessary given that certain countries do not have separate rules for the recognition and enforcement of foreign arbitral awards in their territories.[107] Rather, these countries apply the same rules to the enforcement of foreign arbitral awards as they do for the enforcement of foreign judgements. This approach has many disadvantages. For instance, it requires that an award must be enforceable in the country where it was made before it can be made enforceable in the country where execution is sought. Moreover, as a matter of 'reciprocity', the party requesting the enforcement must provide the court with the proof that a similar domestic award could be enforced in the country where the award was made, under conditions which are no more

105. One should recognise here that recognition is generally less useful, for this reason the large majority of applications concern enforcement. Van den Berg, op. cit., p. 244.

106. Redfern and Hunter, 2nd ed., op. cit., p. 448.

107. For example: the Jordanian Law for Enforcement of Foreign awards. No. 8 of 1953.

restrictive than those of the domestic law. Therefore, if enforcement in that country is deemed possible but under more strict conditions, then the request for enforcement shall be treated in the same manner in implementation of the reciprocity requirement.[108]

The disadvantages that result from the assimilation of foreign arbitral awards to foreign judgements explains why efforts have been made to improve this situation by means of international conventions or regional conventions providing for the recognition and enforcement of foreign arbitral awards.[109] This provides a much more developed and wide spread network system, better than any national provisions for the recognition and enforcement of arbitration awards. Also, such conventions help in establishing considerable uniformity in national laws governing the recognition and enforcement of international awards after being recognised as part of the state's domestic law, which ultimately leads to secure a considerable degree of uniformity in recognition and enforcement of arbitration awards between different states.[110]

The first of these conventions concerning recognition and enforcement of international arbitration awards was the 'Montevideo Convention' of 1889, a regional convention which provided for the recognition and enforcement of arbitration agreements between Latin American states.[111]

The first international convention in respect of enforcing foreign arbitral awards was the Geneva protocol on Arbitration Clauses, September 24, 1923.[112] It had two main objectives. The first was

108. This was the situation under Articles 296-299 of the Egyptian rules of the Code of Civil and Commercial Procedures, Law No. 13/1968, if the applicability of the New York Convention or any other relevant treaty is not invoked. However, Law No 27 of 1994 has abandoned this requirement. See, Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 49.

109. A. Nussbaum, "Treaties in Commercial Arbitration, A Test of International Private, Law Legislation", 56 Harvard Law Review, (1942), p. 219.

110. Generally, the applicability of international conventions in a given state is regulated by provisions of law of that state, for example, in Egypt Art. 301 of the Code of Civil and Commercial Procedures of 1968 provides that: "The application of the rules stated in the above-mentioned articles dose not prejudice the applicability of the international treaties concluded or which will be concluded between the Republic (of Egypt) and other states in this respect"; also this was upheld by the Egyptian Court of Cassation in case No. 2994/1970 year 57, which concerns recognising an arbitral award under the New York Convention. Cited in, Nariman Abd al Khader, The Arbitration Agreement, Dar Al Nahdah Al Arabiah (1996), p. 147. (in Arabic).

111. Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo, January 11, 1889, published in English translation in, "Register of Texts of Conventions and other Instruments concerning International Trade Law, Volume II" (1973) United Nations, p. 5.

112. Geneva Protocol on Arbitration Clauses, League of Nations Treaties Series (1924) Vol. XXVII p. 158, No. 678.

to ensure that arbitration clauses were enforceable internationally, the second was to ensure the enforcement of arbitral awards in the territory of the state in which they were made.

The Geneva Protocol was followed by the Geneva Convention on the Execution of Foreign Arbitral Awards, September 26, 1927.[113] The purpose of this convention was to widen the scope of the Geneva protocol awards within the territories of the contracting states.

The Geneva Treaties still deserve a place in the history of recognition and enforcement of international arbitration agreements and awards, but their field of application is limited as they only relate to awards made in the territory of a contracting state and those involving parties belonging to contracting states. Also, under the Geneva Convention, a party seeking enforcement had to prove the conditions necessary for enforcement, such as proving that the award is final. This creates the problem of 'double execution' - which will be explained later in this paper.[114]

In addition to those international conventions there are a number of regional and bilateral conventions which may also have a significant bearing on the recognition and enforcement of foreign awards.[115]

The most important international treaty relating to international commercial arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. It therefore deserves close attention in order to understand how enforcement of international commercial arbitral awards can be achieved, as well as to find out what obstacles that may place in the way of the recognition and enforcement of foreign arbitral awards.

113. Geneva Convention on the Execution of Foreign Awards of 1927.

114. In order to show that the award had become final in its country of origin, the successful party was often obliged to seek a declaration in the courts of the country where the arbitration took place to the effect that the award was enforceable in that country, before it could be enforced in the courts of the place of enforcement. See Chapter Four, p. 171.

115. Mention could be made, in regard to the regional treaties between Arab countries, for example, the Inter-Arab Convention on the Enforcement of judgements and Awards, entered into by the states belonging to the Arab League on September 14, 1952; The Convention on Investment of Arab Capital, November 27, 1980; The Convention for Juridical Corporation Between States Belonging to the Arab League, Riyadh, April 4, 1983; The Amman Convention of 1987; for further information see, Jalili, "Amman Convention on Commercial Arbitration" (1990) 7, Journal of International Arbitration, p. 139. Other important conventions are the European Convention of 1961; the Inter-American 'Panama' Convention of 1975; the Moscow Convention of 1972.

1. The New York Convention of 1958

During the last four decades the New York Convention has played a very important role by making it possible for foreign arbitral awards to be easily enforced in most countries around the world. By rendering foreign awards enforceable with minimum court intervention in the countries that have acceded to it, the Convention has helped in establishing a deep confidence in the efficiency of arbitration throughout the international business community. This confidence was an essential element for its widespread use.[116]

The New York Convention made considerable improvements on the Geneva protocol and the Geneva Convention, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign awards, and has been described as the single most important pillar on which the edifice of international arbitration rests.[117] The general level of success of the Convention may be seen as one of the factors responsible for the rapid development of international arbitration over recent decades as a preferred means for resolving international disputes.[118]

To achieve its objects, the text of the New York Convention places obligations on contracting states to recognise, as binding, arbitration agreement and awards.[119] In order to enforce arbitration agreements, the New York Convention adopts the technique found in the Geneva Protocol of 1923. In Article II (3) the New York Convention requires the contracting states to refuse to allow a dispute which is subject to an arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by any party to the arbitration agreement.
The Convention also replaces the requirement for a final award in the country of origin with the requirement of a binding award[120], and

116. Jacques Werner, "The trade explosion and some likely effects on international arbitration", 12 J.Int.Arb., (1995), p. 15. He states that: "The New York Convention should not be seen, as an intangible monument, but as a living mechanism, which can evolve in order to meet new needs of the international trading community."

117. Wetter, "The present status of the International Court of arbitration of the ICC: appraisal", 1 American review of International Arbitration (1990), p. 91.

118. The New York Convention has been ratified, acceded or succeeded to by over 120 countries. See the ILA Report, London Conference (2000), op. cit., p. 2.

119. Article II (1) of the New York Convention.

120. Article V (1)(e). Also see, Chapter Four, p. 171.

agrees to recognise it even if it has been challenged in its country of origin.[121] Moreover, it simplifies the requirements for obtaining recognition of an award and puts the burden of proving the existence of negative grounds on the party opposing the application for its recognition.[122] It confirms the parties' freedom in the choice of the arbitral authority and of the arbitration procedure. It gives the authority before which the award is sought to be relied upon the right to order the party opposing the enforcement to give suitable security.[123] It further grants to the parties the right to apply either the Convention rules or other provisions, if more favourable, except for the 1923 protocol and the Geneva Convention (1927).[124]

The latter point may raise a question about the coexistence of different international conventions which are applicable to the enforcement of the arbitral award. A problem could arise, for example, if the Geneva Convention is applied to two states which have adhered to it, but only one of which is a member to the New York Convention. The relationship between those Conventions is regulated under Article VII (1) and (2) of the New York Convention, which provide that:

1- The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting states nor deprive any interested party of any right he may have to avail himself of an award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2- The Geneva protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards shall cease to produce effects between the contracting states on their becoming bound and to the extent they become bound by this Convention."

However, the Geneva Treaties are still applicable when they are not excluded by the application of the New York Convention.[125] In any event, the Geneva Convention has a more limited scope than the

121. Article VI of the New York Convention.

122. Article V of the New York Convention.

123. Article VI of the New York Convention.

124. Article VII (2) of the New York Convention.

125. Van den Berg, op. cit., p. 117; Rubino-Sammartano. M., op. cit., p. 491.

New York Convention in as much as it concerns awards rendered only in the territory of a contracting state and involving parties belonging to contracting states, while the New York Convention has abandoned the nationality requirements and takes into account the place where the award is made.
The most significant achievement of the New York Convention is that it imposes on its signatories an obligation to limit the grounds upon which the enforcement of an arbitral award can be refused, to those set out in Article V paragraphs (1) and (2). This greatly facilitates enforcement in Convention states.

2. Grounds for refusing recognition and enforcement

In order to be enforced according to the New York Convention, a foreign arbitral award must: (i) have resulted from a valid arbitration agreement[126]; (ii) comply with the applicable procedural law as agreed by the parties or the law in the country of origin[127]; (iii) have become binding in its state of origin[128]; (iv) concern a dispute which is arbitrable according the law of the country where enforcement is required[129]; and (v) its enforcement must not be in conflict with public policy.[130]

a. Article V (1)

Article V ([1]) sets out, in paragraphs (a) to (e), five grounds upon which enforcement of an arbitral award may be refused. Each of these grounds must be asserted and proven by the party seeking to rely upon it in resisting the enforcement of the award.[131]
The first ground concerns the parties' capacity and the validity of the arbitration agreement.[132] Under Article V (1)(a) the Convention

126. Article V (1)(a) of the New York Convention; also see, Article II (3).

127. Article V (1)(b) and (d) of the New York Convention.

128. Article V (1)(e) of the New York Convention.

129. Article V (2)(a) of the New York Convention.

130. Article V (2)(a) of the New York Convention.

131. The burden of proving a ground for refusing enforcement is clearly placed on the party claiming under that ground. If he fails to discharge this burden, the other party will be permitted without further argument, to enforce the award. See Article V (1) of the New York Convention.

132. Article V (1)(a) provides that: "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 were the award was made."

specifies that enforcement of the award may be refused if the parties were under some incapacity, and provides that the capacity of the parties should be determined according to the law applicable to them, without specifying the applicable law.[133] Also, the second part of Article V (1)(a) indicates that the award could not be enforced if the agreement of the parties was not valid. The Convention here emphasises that the validity of the agreement should be determined according to the law "to which the parties have subjected it", which confirms the principle of the "parties' autonomy" where parties are free to designate the law applicable to the arbitration agreement. In the absence of such agreement, Article V (1)(a) provides that the validity of the agreement shall be decided according to the law of the country where the award was made.

The second ground concerns the denial of a fair hearing[134], where a party can prove that he was not properly notified of the appointment of the arbitrators or of the arbitration procedures. In addition, the last part of Article V (1)(b) "or was otherwise unable to present his case" could be interpreted to include several procedural irregularities, and may vary from state to state. For example, this may include issues that concern the denial of a party of an equal opportunity to be heard, inequality of arms, or want of appropriate representation. Issues may also arise from the arbitral tribunal's discretion to grant or refuse orders for production of documents, and from its right to rule on the admissibility of the evidence – whether from witnesses, experts, or documents – upon which the parties seek to rely. Such defects could also be raised under the public policy ground, for example on the ground of lack of procedural fairness, as will be explained later.[135]

The third ground concerns excess of authority or lack of jurisdiction.[136] This may occur if the arbitral tribunal has dealt with a dispute which

133. Van den Berg, op. cit., p. 276. He states that, the capacity of a natural person may depend on his nationality or on his place of usual residence. For corporations, it may depend on the place where the legal entity practises its business. The capacity of the parties, particularly when one of the parties is a state or a public body, requires many details which cannot be discussed in this research.

134. Article V (1)(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".

135. The relationship between Article V (1)(c) and Article V (2)(b) will be explained in more depth in Chapter Five, p. 186.

136. Article V (1)(c): "The award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced."

does not fall within the scope of the arbitral clause, or if the arbitral tribunal has given decisions on matters which are beyond or outside the question submitted by the parties.[137] This ground does not concern the case where the arbitrator had no competence at all because of lack of a valid arbitration agreement as the latter situation should be determined under Article V (1)(a), which concerns the validity of the arbitration agreement. The second part of Article V (1)(c) provides for the possibility of isolating that part of the award which contains the decision that has been made within the arbitrator's authority and enforce that part of the award, while refusing to enforce that part of the decision which falls outside of the arbitrator's authority.[138]

The fourth ground concerns procedural irregularities arising from the composition of the arbitral tribunal or from the arbitral procedures.[139] Article V (1)(d) provides that determining the validity of an arbitral award should be established upon the compliance of the arbitral procedures with the parties' agreement, or, failing such agreement, according to the law of the country in which the arbitration took place. One should recognise here that Article V (1)(d) asserts the role of the parties' autonomy in deciding the rules that will govern the arbitration proceedings. It has been reported that the drafters of the Convention preferred to rely on the parties' agreement in order to decide on the irregularity of the composition of the arbitral tribunal and the arbitral procedure, providing that the law of the country in which the arbitration took place can be relied upon only where the parties had not agreed on these matters.[140]

The fifth ground concerns the binding effect of the arbitral award. Enforcement of the award may be refused if the party against whom the award is invoked proves to the court that the award is not yet binding, or has been set aside or suspended by a competent authority in the country of its origin.[141] The extent of the binding nature of an

137. For Example, if the tribunal has awarded more than, or differently from, what was claimed by the parties. See Van den Berg, op. cit., p. 314.

138. See Van den Berg, op. cit., p. 318.

139. Article V (1)(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."

140. Van den Berg, op. cit., p. 323.

141. Art V (1)(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."

award is still subject to a wide debate[142], although Article V (1)(e) indicates that the time at which an award can be considered as binding should be determined according to the law of the country where the award was made or the law under which the award was made. It will be important for this study to examine whether or not a court can enforce an award despite its having been set aside in the country of origin. The question arises where the court of enforcement finds that the award was set aside in the country of origin for considerations of public policy which relate only to the national law of the country of origin, and that the same issue does not violate public policy in the country of enforcement.[143]

b. Article V (2)

Article V (2) may be raised, on its own motion, by the court requested to enforce the award.[144] The Article refers to the 'competent authority' as having the right to raise the objection, since it includes issues that concern public policy. However, the party against whom the award is invoked may also challenge the enforcement of the award upon this ground. This is due to the character of public policy as a notion which relates to both the interest of the public and the interest of the parties, therefore the right to raise such ground must not be confined to a specific authority. Also, as will be explained in the following chapters, this is due to the inevitable connection between Article V (2)(b) and the rest of the grounds which have been mentioned in Article V (1).

i. The relationship between arbitrability and public policy

Article V (2) comprises two grounds. The first concerns the non-arbitrability of the dispute under the law of the state requested to enforce the award [145], and the second concerns public policy.[146]

142. It is submitted that, the New York Convention regards the binding effect of the arbitral award in a quite different way from the Geneva Convention 1927. Under the latter, to enforce an award in other states, it had to be no longer capable of being challenged in the state of origin. See, Article 1 (2)(b) of the Geneva Convention of 1927 which amounted to the system of the so-called "double exequatur". See, Van den Berg, op. cit., p. 333.; see ahead, Chapter Four, p. 171.

143. See, Chapter Four, at p. 174.

144. Article V (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 …"

145. Article V (2)(a); "The subject matter of the difference is not capable of settlement by arbitration under the law of that country."

146. Article V (2)(b): "The recognition or enforcement of the award would be contrary to the public policy of that country."

It has been argued that the two grounds are actually two sides of the same coin, as some writers consider mentioning arbitrability separately from public policy as merely 'superfluous'.[147] However, other writers do not consider arbitrability as necessarily identical with public policy rules.[148] The latter view could arguably be true, especially if we take into consideration that there are several points that distinguish arbitrability from public policy.

Firstly, arbitrability concerns certain fields of law or kinds of disputes which by their subject matter are reserved for state courts. For example, the legislators in a given country may wish to prohibit arbitration for certain categories of disputes, such as certain anti-trust matters. Therefore, arbitrability is mainly a question of which issues arbitrators are not competent to settle. The same issues which are deemed to be not arbitrable, may often quite properly be litigated before the courts. Accordingly, questions that are not-arbitrable do not necessarily themselves constitute a violation of public policy.

Secondly, one can examine the notion of arbitrability by answering the question of what can be arbitrated.[149] Therefore, arbitrability only relates to the subject matter of the dispute, whereas public policy covers a wide range of issues, relating both to the subject matter of the dispute and to procedural irregularities. Accordingly, public policy is a wide concept which includes the concept of arbitrability.

The importance of arbitrability, as part of public policy, will appear later in this research when dealing with public policy issues relating to the substance of the dispute as a ground to refuse the enforcement of foreign arbitral awards under Article V (2)(b).[150]

ii. Article V (2)(b), public policy

Article V (2)(b) states that recognition and enforcement of an arbitral award may be refused if it would be "contrary to the public policy of that country". It is believed that including this ground in the New York Convention was inevitable, since public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and

147. It has been reported that the distinction has been kept for historical reasons since the distinction was mentioned in the Geneva Convention of 1927 and was kept by the New York Convention without discussion in spite of an objection raised by the French delegate, see UN Doc. E/CONF. 26/ SR.11; see Van den Berg, op. cit., p. 360; P. Sanders, "The New York Convention", International Commercial Arbitration Vol. II, The Hague 1960, 293, 323.

148. Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," International Council for Commercial Arbitration public policy in arbitration (ICCA) New York Arbitration Congress, Pieter Sanders ed., (1986), p. 183.

149. Ibid., p. 181.

150. See Chapter Six, p. 239.

foreign judgements.[151] Also, it has been reported that providing this ground as it is in a simple formulation was intentional by the drafters of the Convention, in order to induce the prospective members to enter into the Convention and adopt its provisions without fear of being deprived of jurisdiction and supremacy over foreign arbitral awards.[152]

One should also recognise the main object of Article V (2)(b) in protecting the vital interests of the states which become member to the Convention. Such interests could be moral, political, social or economic. However, the simple formulation of Article V (2)(b) has led some writers to consider Article V (2)(b) as the greatest single threat to the use of arbitration in international commercial disputes, since the background of Article V (2)(b) does not provide a clear illustration of how it should be applied.[153] In its report to the UN Conference, the United Nations committee that prepared the draft convention indicated its intention to limit the application of public policy "to cases in which the recognition or enforcement of a foreign arbitral award would be contrary to the basic principles of the legal system of the country where enforcement of the award is invoked".[154] Working Party No. 3 proposed to limit this ground by referring to the term "public policy" alone, and this limitation was accepted by the Conference, rejecting by that a proposal by Brazil which referred to "fundamental principles of law".[155] Thus, it is apparent that the drafters of the New York Convention did not seek to harmonise public policy or to establish a common international standard. The drafters of Article V (2)(b) deliberately kept the formula as simple as possible in order to persuade all the states to

151. Van den Berg, op. cit., p. 360.

152. See, Gerald Aksen, "United States Implements United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 3 Southwestern University Law Review (1971), p. 13.

153. Richard A. Cole, op. cit., p. 373. He describes Article V (2)(b) as a loophole, he states that: "Courts and commentators alike have worried that the expansion of this loophole could negate the effectiveness of the Convention. Yet, it appears that while the defense is often raised, it is rarely successful"; P. Sanders, "A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 13 Int.Law., (1979), p. 269-270; see the ILA Report, London Conference (2000), op. cit., p. 35. The report provides that public policy exception would undermine the objectives of the Convention; Hakan Berglin, "The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 4:2 Dickinson Journal of International Law (1986), p. 167 at 168; Parsons and Whittemore Overseas Co. Inc. v Societe Generale du l'Industrie du Papier (RAKTA) (1974) 508 F 2d 969 at p. 975 (U.S. no. 7).

154. The U .N. ESCOR. Report of the Committee on the Enforcement of International Arbitral Awards, U.N. Doc. E/2704 and Corr. l. E/AC.42/4/Rev. 1 (1955); Richard A. Cole, op. cit., p. 373, footnote 46.

155. UN DOC E/CONF.26/SR.17; J. D. Bredin, "The New York Convention of June 10th 1958 for the Recognition and Enforcement of Foreign Arbitral Awards," 87 Journal du Droit International (1960) p. 1003 at p. 1027; Van den Berg, op. cit., p. 36I.

become members to the New York Convention, and this has been considered as providing an "escape clause which was necessary for ratification of the Convention by the member states."[156]

The conclusion which can be drawn from this background is that public policy is a ground to refuse the enforcement of foreign arbitral awards which may be raised by either party or by the court where enforcement is sought. The historical background of Article V (2)(b) shows that there have been several attempts to limit the scope of applying this ground to international public policy, but that these were merely recommendations[157], and that the exact scope of how this ground should be applied was not clearly identified in the New York Convention. The absence of a legislative text, which defines and enumerates those matters that can be considered as public policy issues, leaves the door widely open for domestic courts to determine the extent of those matters which are deemed contrary to public policy according to their notion of the concept.[158] This may undermine the objects of Article V of the New York Convention, as giving the national courts such discretionary power may expose the award to additional conditions other than the limited grounds provided under article V (1).

As will be seen through this study, the extent of public policy is subject to a variety of interpretations by the courts of different nations. The questions that need to be settled will be whether it is possible to achieve a comprehensive definition of this concept, especially in cases concerning the enforcement of foreign arbitral awards, and whether it is conceivable to find acceptance of the notion of international public policy?[159]

There are many issues that still need to be addressed in this regard. The following chapters will examine the general content of public policy. A distinction will also be drawn between the public policy

156. Barry, "Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal," 51 TEMPLE L. Q. 832. 839 (1978); Richard A. Cole, op. cit., p. 374, footnote (50); Van den Berg, op. cit., p. 366.

157. See the Statement of the Chairman of Working Party No. 3, UN DOC E/CONF. 26/SR.17. He provides that: "the provision should not be given a broad scope of interpretation."

158. Gerald Aksen, op. cit., p. 13. He states that: "The applicability of Article V (2)(b) has been left to the good faith of the contracting countries."

159. However, it is impossible to provide a conclusive definition of public policy, but I believe that there must be a concept that may give general indications as to the ideas underling the international arbitration public policy. If a workable definition of international public policy could be found, it would be an effective way to protect foreign arbitral awards in an international arbitration from being set aside for purely domestic considerations.

test in purely national affairs and the public policy test to be applied in international agreements as understanding the concept of international public policy would restrict judicial interference with international arbitral awards to a minimum.