Chapter Five

Foreign Arbitral Awards Contrary to Public Policy (Procedural Issues)

The enforcement of a foreign arbitral award in a country other than that in which it was made is one of the stages in the arbitration process in which the court may exercise some control in respect of public policy considerations. At this stage, the court or the competent authority in the country in which the enforcement is sought may examine the award in order to ensure that it complies with particular national regulatory requirements. It is precisely because such conditions vary from country to country that the New York Convention is so important, as it serves to harmonise the enforcement requirements of foreign arbitral awards between the member states.

Since this study is concerned with examining the effect of public policy on the enforcement of foreign arbitral awards, the focal point will be Article V (2)(b) of the New York Convention. As mentioned earlier in this study, Article V (2)(b) of the Convention has created a great amount of complexity.1 This is due to the fact that there are no clearly defined limits to what can be considered contrary to the public policy of countries that are party to the New York Convention. The interpretation of this ground has been left to the national courts emanating from different legal systems and diversity of political, economic, religious and social considerations. Therefore, the concept of public policy has, perhaps inevitably, been applied in different ways, where various categories of public policy issues have emerged since 1958 when the Convention came into being.

1. See Chapter One, at p. 55.

It is the intention here to work towards a clearer and more coherent application of public policy by attempting to search for certain standard of public policy rules applicable to foreign arbitral awards. To this end, the ongoing distinction under question in this thesis, between applying domestic or international public policy as a ground for refusing the enforcement of a foreign arbitral award will be further explored. This is to be achieved through analysing the cases which have considered the same public policy questions, and comparing their approach in order to determine whether, and if so to what extent, the public policy provision has been an effective defence against the enforcement of foreign awards. The evidence supports the argument that the notion of an 'international public policy' is increasingly recognised in the courts as a basis for interpreting Article V (2)(b) of the New York Convention.

To address this argument sufficiently, public policy issues can be categorised into two main areas, procedural public policy rules and issues that relate to the subject matter of the dispute.[2] One should consider that the arbitration procedures may be subject to a measure of control by the court of enforcement in order to ensure that they comply with the requirements of procedural fairness and public policy rules in the state of enforcement.[3] Also, one should recognise that public policy covers a wide range of issues which relate to the subject matter of the dispute including moral, social, political, economic or any other aspect considered a fundamental issue affecting the interests of the state in which the enforcement of the award is taking place. This may be termed 'substantive public policy'. Substantive public policy is distinct from procedural public policy, in that substantive public policy relates to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award as opposed to procedural public policy, which relates to the process by which the dispute was adjudicated.[4]

The scope and the extent of application of public policy according to these two categories must be carefully analysed. Therefore, this chapter will be confined to reviewing a number of situations and judicial decisions that have been considered as constituting a viola-

2. Van den Berg, op. cit., p. 300 and 376; Rubino-Sammartano. M., op, cit., p. 301; see the comments in the 1985 UNCITRAL Commission's Report, UN Doc. A/40/17 paras. 297 and 303; the ILA Report, London Conference (2000), op. cit., p.15, states that: "Public policy includes both substantive and procedural categories"; Klaus Peter Berger, op, cit., p. 676.

3. Rubino-Sammartano. M., op, cit., p. 297; Stephen M. Shwebel and Susan G. Lahne, op cit., p. 207.

4. See, ILA Report, London Conference (2000), op. cit., p. 17.

tion of procedural public policy issues, leaving examination of the substantive public policy issues to the following chapter.

I. Procedural Public Policy Issues

Enforcement of a foreign arbitral award may be refused if the arbitral procedures (on which the award was based) infringe the standards of procedural due process[5], as conceived by the courts in the country where enforcement is taking place. This is due to the fundamental values of justice and fairness, such as respecting the right of defence and equity as upheld by the concept of public policy in the state of enforcement. In this regard, the courts of enforcement may invoke the public policy ground as a safety net to remedy the procedural irregularities that emerged during the arbitration proceedings. For example, courts in the country of enforcement may find that the applicable foreign law to the arbitral procedures, although is proper to govern the arbitration procedures, but it obstructs justice. Accordingly, procedural public policy as a ground concerns the procedural fairness which relates mainly to the question of whether or not the requirements of natural justice have been observed in the arbitration proceedings.[6] This requires the examination, for any issue that would hinder justice between the parties, of a wide range of procedural requirements upon which enforcement of a foreign arbitral award may be refused.

To illustrate the extent to which public policy is applied to procedural issues, several examples considered as requirements of procedural public policy need to be examined. The first issue under examination will be the parties' right to be treated equally. The second issue concerns whether the absence of a strong basis for the award having been made can be a valid ground for refusing to enforce the award. Finally, lack of impartiality will be examined as a public policy issue since lack of impartiality is a lack of justice.

5. The defence of denial of due process is a procedural irregularity which incorporates the infringement of procedural public policy rules. See, Stephen M. Schwebel and Susan G. Lahne, op. cit., p. 208; Klaus Peter Berger, op, cit., p. 677; Hussam Fatahi Nasif, Supervising Foreign Awards by the National Courts, Dar Al Nhdah al Arabiah (1996), p. 41. (in Arabic).

6. Public policy also intervenes to repair the possible unevenness that may originate from the concept of "parties' autonomy", to restore equilibrium between the parties where one party would otherwise be more dominant in an arbitration agreement, as the dominant party in an arbitration agreement may impose additional or difficult conditions on the other party. It may be, for example, the dominant party coerces the other party to accept the appointment of a sole particular arbitrator, under its influence, to decide on the dispute, or that only the dominant party can be heard by the arbitral tribunal. Such conditions are invalid, even if both parties had agreed to it. This was the view of the Egyptian Court of Cassation in case No. 97/ 1977 year 28, p. 511; Klaus Peter Berger, op, cit., p. 677, see particularly his comments on this issue according to the Dutch and Swiss laws.

A. Equity and Fair Opportunity to Present the Case

Generally, equity in arbitration demands that each party should have an equal right to present his case before the arbitral tribunal. According to this principle, each party should be made aware of the issues the other party is attempting to prove and which issues the opposing party will have to meet[7], so that neither party will be taken by surprise by either the evidence or the arguments advanced by the other party.[8] This includes the right of the claimant to present his case and the right of the respondent to discuss the position of the other party.[9] Therefore, in order to achieve this, each party should be fully informed of any issue of fact or law which is raised by the other party, whether or not he may have anticipated it.[10]

The parties' right to have an equal opportunity to present their case raises several issues. Parties, for example, have the right to be notified of the appointment of the arbitral tribunal, the arbitral proceedings, and the allegations which have been raised against them. Parties also have the right to be afforded an opportunity adequately to present their case[11] and to be represented in arbitration if they wish

7. See, Irvani v. Irvani, [2000] 1 Lloyd's Rep. 412; [2000] C.L.C. 477. The facts of this case include that the sole arbitrator, who was appointed to resolve the dispute, had relied upon information which had not been made available to one of the parties. The court held that: "the arbitrator's conduct had arguably given rise to a breach of the rules of natural justice, which could establish that (A) had been 'unable to present his case' for the purposes of S.103 (2)(c)"; also see, Montrose Canned Foods Ltd v. Eric Wells (Marchants) Ltd [1965] 1 Lloyd's Rep 597; Government of Ceylon v. Chandris [1963] 2 Q.B., 327; Van den Berg, op, cit., p 307. He states that: "The principle of due process implies that the arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon."

8. In Government of Ceylon v. Chandris (1963) 2 QB 327, [1963] 2 All ER 1, [1963]2 WLR 1047, Mr Justice Megaw stated that: "It is, I apprehend, a basic principle, in arbitrations as much as in litigation in the courts (other of course, than ex parte proceedings) that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may override that basic principle"; also see, Woolridge Timber Ltd v. Branntorps Travaru (1982) The Times 14 June. Mr Justice Parker held that: "… if an award was, or might have been based on points which were not put to the other side, the interests of justice required that the award be set aside or remitted"; Scrimaglio v Thornett and Fehr (1923) 17 Ll L Rep 34; See, John Parris, Arbitration Principles and Practice, Granada Publishing (1983), p. 122.

9. Berthold Goldman, "Commentary", in 60 Years On, A Look at the Future, op. cit., p. 267. He distinguished between the right of a party to present his case and the right of the other to discuss the position of his opponents: "these two requirements are not identical, since the first implies that every party must have the opportunity to develop fully its claims and arguments in defence, whilst the second ordains that no question shall be decided by the arbitrator until each party has been afforded the opportunity of discussing it"; also see, Moran v. Llovd's (1983) The Times 3 March.

10. D. Mark Cato, op, cit., p. 55. He states that: "An arbitrator must give each party a fair and proper opportunity to meet the other's case. In order for this to occur, each party must be able to find out what the other side's case is, and this will involve the arbitrator in ensuring that all pleadings, reports and other relevant documents, e.g. any written submissions, are copied to all interested parties."; This duty was also emphasized by Megaw J. in Montrose Canned Foods Limited v. Eric Wells (Merchants) Limited [1965] 1 Lloyd's Rep. 597.

11. Van den Berg, op, cit., p. 307; Roger K. Ward, "The Flexibility of Evidentiary Rules in International Trade Dispute Arbitration- Problems Posed to American- Trained Lawyers," 13 J.Int. Arb., September (1996), No. 3., p. 11. He emphasised that: "parties to an arbitration should have an absolute right to have, at a very least, an opportunity to contradict the evidence introduced against them."

by an attorney or other representative.[12] General hearings should be convenient, efficient, and fair for all parties.

Such procedural conditions aim to guarantee equality between the parties, since equity is the most vital element in any kind of dispute resolution, including litigation before a court of law. Therefore, the parties' right of having a fair opportunity to present their case is generally protected by mandatory rules that can be found in most national arbitration laws[13], which impose upon arbitrators the obligation to observe high standards of conduct and to maintain fairness in arbitration.[14] Under the New York Convention, the parties' right to present their case has been expressly mentioned in Article V (1)(b)[15], which provides that recognition and enforcement of the award may be refused if "(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."[16] One could recognise here that the first part of Article V (1)(b) expressly refers to two important procedures: the proper notice of both the appointment of the arbitrator[17] and of the arbitration

12. See, for example, Section 36 of the English Act 1996: "Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him"; this right was considered in Arbitral Case No. 112/1997, Issued under the auspices of The Cairo Regional Center for International Commercial Arbitration (CRCICA), 1 Journal of Arab Arbitration (1999), p. 45. The tribunal examined the requirements of parties representatives under Article 4 of the UNCITRAL Rules, and provided that: "Article 4 does not stipulate that the parties' representatives should be lawyers, neither do they provide for any particular conditions -whether formal or informal - for the methods of representation. The previous wording of this article provided that the parties should be represented by lawyers or agents, but in the current wording this condition was revoked and the parties are allowed to be represented by any persons of their choice without procedural conditions"; also see, Henry Bath & Son Ltd v. Birgby Products (1962) 1 Lloyd's Rep 389; Tatem Steam Navigation v. Anglo-Canadian Shipping Co Ltd (1935) L1. L. R 161; Canon IV of the Code of Ethics 1977 for Arbitrators in Commercial Disputes, prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association AAA and a special committee of the American Bar Association ABA; (1985) X Yearbook Commercial Arbitration, p. 239.

13. The right of the parties to have an equal and fair opportunity in presenting their case has been asserted by several legal systems, for example: Section 33 of the English law of the 1996 Act; Article 18 of The UNCITRAL Model Law which states that: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"; Article 26 of the Egypt law of 1994: "The two parties to arbitration shall be treated with equality, and each shall be given an equal and full opportunity of presenting its case"; also see, Canon III(A)and (C) of Code of Ethics of 1977.

14. Parties must be given the opportunity to address the arbitrator on any finding of facts; see Fox v. P.G. Wellfair Ltd [1981] 2 Lloyd's Rep 514; Gbangbola v Smith & Sherriff LtdGbangbola v. Smith & Sherriff Ltd, (QBD) [1998] 3 All E.R. 730; see Canon I of the Code of Ethics of 1977.

15. The right of a party to be given a notice of the arbitration proceedings in sufficient time to enable him to present his case and to be properly represented is also a condition for enforcement of foreign arbitral awards under Article 2 (b) of the Geneva Convention of 1927.

16. Article V (1)(b) succeeded Article 2 (1)(b) of the Geneva Convention of 1927, which provides that: "(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented." However, Article V (1)(b) of the New York Convention has a wider application as it includes all cases that involving a serious violation of due process.

17. Notice of the appointment of the arbitrator has been held to imply notification of the name of the arbitrator. Without knowledge of the name of the arbitrator, the right of a party to challenge the appointment of the arbitrator would be lost. See Van den Berg, op. cit., p. 305.

proceedings. In the second part of Article V (1)(b), the phrase "or was otherwise unable to present his case" implies that a court may refuse the enforcement whenever it finds other procedural irregularities that would affect justice between the parties. Public policy here takes precedence whenever a violation to the due process.

It could be argued that, as long as the right of both parties to present their case is explicitly maintained in various national laws and international conventions, then there should be no grounds for the issue of public policy to be raised under Article V (2)(b) of the New York Convention. The answer to such an argument lies in the fundamental value of protecting such rights.[18] One should keep in mind here that even if such provisions are not explicit in the law, ensuring that the principle of equality between the parties to present their case should be strictly observed as a fundamental right.[19] To justify the interference of the courts on the public policy ground, one should consider the difference between Article V (1) and Article V (2) of the New York Convention. The grounds which are provided under paragraph (1), should be raised by one of the parties[20], whereas under paragraph (2) they can be raised by the court of enforcement on its own motion. Therefore, if a court finds a procedural irregularity that violates the national procedural public policy, then it may refuse enforcement on its own motion.
Furthermore, one should recognise that Article V (1)(b) does not identify under which law a court can determine whether a party has been given proper notice and whether or not he was able to present his case. The absence of a clear reference to the applicable law might provide the court of enforcement with a legitimate reason to apply its national mandatory rules under Article V (2)(b) of the Convention. Van den Berg provides that several legal systems have applied their national law in examining the validity of foreign arbitral awards under Article V (1)(b).[21] To some writers, the absence of a

18. Van den Berg states that Article V (1)(b) has been inserted in the Convention because of the specific importance attached to the fundamental requirement of a fair hearing. He also emphasised the importance of this ground which could be protected under Article V (2)(b) of the Convention. Van den Berg, op, cit., p. 300.

19. In regard to the link between due process and public policy, Professor Berthold Goldman emphasised that: "… the details of mandatory public policy requirements concerning the arbitral hearing and related procedures . . . are so obvious. They lay down that each party's right to present its case and to discuss the position of the other party must be respected." Berthold Gdldman, 60 Years on, op., cit., p 267; also see, Stephen M. Schwebel and Susan G. Lahne, op cit., p. 216; Rubino-Sammartano. M., op, cit., p. 307; Redfern and Hunter, 2nd ed., op, cit., p. 293.

20. It has been reported that the defence of a violation of due process enjoys a high popularity amongst the defence allowed by the Convention. See, Van den Berg, op, cit., p.297. He also states that parties may prefer to raise this defence under Article V (2)(b) as a respondents may think that the invocation of public policy of the forum is more impressive. Ibid., p. 300.

21. Van den Berg, Ibid., p. 298. He states that: "although that no court has held that Article V (1)(b) constitutes an international rule, many have affirmed that standards of due process are basically to be judged under their own law". See in particular footnote 186, where several court decisions are provided therein.

clear reference as set above, has been considered as constituting a truly international rule detached from any national law.[22] However, to determine the applicable law concerning the question of whether or not a party was afforded a reasonable opportunity to take part in the arbitral proceedings, regard should be made first to the law or rules under which the parties have elected the arbitration to take place, as this reflects the parties intentions.[23] In the absence of a specific choice, the applicable law should be based upon the standards of due process of the originating state. This reflects the importance of the law of the country of origin in assisting the tribunal during the arbitration proceedings.[24]

As an additional control a court in the country where enforcement is sought may refuse to enforce the award under its national mandatory rules in virtue of Article V (2)(b). For example, this could possibly occur if one of the parties was not properly notified of the arbitration proceedings and where such procedural deficit was so serious that it may lead the court of enforcement to apply the mandatory procedural rules of its national law in order to ensure that justice has actually been invoked in arbitration.[25] However, this might lead to an inappropriate result, since several procedural laws and rules could have close link to the arbitration and the resulting award. Therefore, to examine the validity of a foreign award a court should consider such potential conflict between its national mandatory procedural rules and the rules that was applied to the arbitration procedures.

The question here is what if the court finds that the procedure which was followed during the arbitration, although correct according to the applicable law to the arbitration procedures, is not fair and does not guarantee an equal opportunity for the parties to present their case according to the national procedural mandatory rules in the country of enforcement? For example, if parties were notified of the appointment of the arbitral tribunal by regular mail, where the law in the country of enforcement requires specific procedures under the penalty of nullification of such notification. The rational procedure that could be followed by a court in such situation is to scrutinise

22. G. Gaja, New York Convention (Dobbs Ferry 19978-1980) “Introduction” I.C. 4; Van den Berg, op, cit., p. 298.

23. Mustill and Boyd, 2nd ed., op, cit., p. 283.

24. See, Andrew and Keren, op cit., p. 306; Georges R. Delaume, op, cit., p. 16; also see, 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). The court highlighted the importance of the law of the country of origin, it held that: “the New York Convention essentially sanctions the application of the forum State’s standards of due process.”

25. Rubino-Sammartano. M., op, cit., p. 306.

the purpose of its national procedural rule before it decides to refuse the enforcement for considerations of due process. Many scholars assert that in such situation a court must examine whether a serious violation of due process has occurred and whether or not the arbitral award would not have been different in case the irregularity in the procedure had not occurred.[26] Moreover, a court is required to give more attention to its ultimate duty which should be confined to considerations of justice between the parties and not to enforcing formal requirements imposed by its national procedural law.[27] Therefore, a defence that is based on the ground of violation of due process should not be accepted except in very serious cases only. For example, the court must examine whether or not notice was actually received, rather than to whether the technical service requirements of its domestic law were met.[28]

In England, for example, in Minmetals Germany GmbH v. Ferco Steel Ltd [29], the court held that:
"A court deliberating whether to set aside leave to enforce a foreign award had to examine the alleged injustice of the arbitral procedure."

The court reached the conclusion that an arbitral award must be examined according to the actual purpose of the procedure and whether or not notice has actually been received or merely that there has been a breach of technical service requirements. In this case two arbitration awards were made under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC). Ferco applied to set aside the leave granted to Minmetals under Section 101 of the English Arbitration Act 1996, for being denied an opportunity to present its case. The court was asked to decide whether the procedure for arriving at the awards had been in accordance with the parties' agreement, thus complying with the CIETAC rules, and whether Ferco had shown that the means of arriving at the awards

26. Van den Berg, op, cit., p. 301.

27. See for example, Egmatra v Marco Trading Corp [1998] CLC 1552. In this case the arbitral tribunal refused to permit a party's expert witness to give evidence. When the award was challenged on this ground, the court took a non-interventionist approach and held that this had not caused that party a substantial injustice.

28. Stephen M. Schwebel and Susan G. Lahne, op cit., p. 217. The writes state that: "sufficient notice is an element of international public policy,… in the international context courts will look to the substance of whether notice was actually received, rather than to whether the technical service requirements of its domestic law were met"; Van den Berg, op, cit., p. 303. He states that: "the word 'proper' can also be interpreted in the sense that the notice of the appointment of the arbitrator and the arbitral proceedings must be adequate… the notice need not be in a specific (official) form."

29. Minmetals Germany GmbH v. Ferco Steel Ltd, January 20, [1999] 1 All E.R. (Comm) 315; [1999] C.L.C. 647; (1999) XXIV Yearbook 739.

was contrary to English public policy to enforce them. The court dismissed the application, and held that:

"It followed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Art. V, which applied to the awards, that an enforcee had to be given a reasonable opportunity to present its case in relation to the findings of fact resulting from the investigations undertaken by the arbitrators."

Another significant decision worth mentioning in this regard was made by the Mexican courts[30], in which the petitioner had served its notice of arbitration by mail in accordance with the procedures according to the ICC Rules. This method however violated the Mexican law, which requires initial personal service. The Court held that the parties, by agreeing to arbitration, had waived the service formalities of Mexican law, which was not part of Mexican public policy, providing that the award: "did not violate Mexican public policy, especially since actual notice to the other party had been clearly proved."

It is to be recognised from these two decisions that courts favoured the application of international public policy rules over the requirements of national public policy. This approach is based on a modern approach which considers the latest developments in international commerce and the modern means of communication, which offers many advantages over traditional means of communication.[31] It also based its test upon answering the question of whether or not the breach of the national rule has a significant effect upon justice between the parties for example whether or not parties have had an equal opportunity to present their case.

30. The Eighteenth Civil Court of First Instance for the Federal District of Mexico, Yearbook Vol. IV (1979), at 301 (MexicoNo.1); see also, Stephen M. Schwebel and Susan G. Lahne, op cit., p. 218.

31. The future indicates that international commerce and arbitration as a means to resolve commercial disputes will use new systems of communication, such as telefax and electronic mail. Parties of an international commercial arbitration and arbitral tribunals may prefer to hold arbitration in a country that recognises modern means of communication as legally valid. See, List of Matters for Possible Consideration in Organising Arbitral Procedures, United Nations Commission on International Trade Law (UNCITRAL), at its twenty-ninth session (New York, 28 May - 14 June 1996).

B. Considerations of due process and the parties' right to present their case

There are several issues that have to be considered in examining the requirements of due process. The broad wording of Article V (1)(b) of the New York Convention provides an indication to potential procedural irregularities. This could be inferred from the second part of Article V (1)(b) which provides that: "or was otherwise unable to present his case", the phrasing of this article indicates that enforcement of the award could be refused for other serious irregularities that would affect the right of each party to present his case. Since preventing a party from presenting his case, sufficiently, is an infringement of justice, which may drive a court to examine such procedural irregularity under its national rules for consideration of public policy.

There are several examples that can be addressed in this regard. For example, when a statement given by a witness on which it was claimed the arbitrators based their award, conflicted with testimony he had given on previous occasions[32], or if the award was based on a false testimony and thus could be considered as having been obtained by fraud.[33] The latter case could be raised as a sufficient ground to refuse enforcement of a foreign award for considerations of public policy, in addition to the civil and criminal liability.[34] Also, enforcement of a foreign arbitral award could be refused if the arbitrator receive an evidence from one party in the absence of the other or without giving the other party the chance to give a full evidence in rebuttal, or a key witness gave his evidence to the arbitrator in the absence of the other party, which could be considered as a procedural defect that violates the procedural mandatory rules of the country where enforcement is sought. Another example that could raise questions under the requirements of due process, is when an arbitrator refuses to hear offered evidence. The refusal of an arbitral tribunal to give one of the parties the chance to present what that party believes to be a relevant evidence to prove his case, without

32. See Christopher B. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention," 71 Journal of International Arbitration (1990), p. 84.

33. This issue was considered by the English courts in Westacre Investment Inc. v. Jugoimport-SDPR Holding Co. Ltd, [1999] 2 Lloyd's Rep. 65. It was alleged that the award had been obtained by perjured evidence and should be unenforceable on grounds of fraud. The court held that "a party will not normally be permitted to adduce in the English courts additional evidence to make good an allegation of fraud, unless it is established that: (a) the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) the evidence of perjury must be so strong that it would reasonably be expected to be decisive at a hearing"; also see, Owens Bank Ltd v. Bracco, [1994] Q.B. 509; [1994] 2 W.L.R. 759; [1994] 1 All E.R. 336.

providing any legitimate excuse for its refusal, contradicts with the party's right to have a fair opportunity to present his case, which could be considered as a violation of public policy.[35]

Before seeking to examine how could a court decide on these issues, one should consider that arbitrators, unlike the courts of law, are not obliged to comply with all the national mandatory rules that regulate the presentation of evidence.[36] This is mainly due to the practical consideration in international commercial arbitration, as arbitrators are often expected to decide the dispute in a short time where such requirement could be found in most of the modern arbitration laws and institutional rules.
For example, Section 33 of the English 1996 Act requires from the arbitral tribunal to adopt procedures which best resolve the matter fairly without causing unnecessary expense and delay.[37] Therefore, one may presume here that arbitrators are given a wide discretion to determine the evidence that could be presented before the tribunal, and thus arbitrators can decide the evaluation of the presented evidence in terms of their relevance and importance. One should consider here that this may contradict with the parties rights to decide the procedure for their reference under Section 34 (1) of the 1996 Act.[38] However, this potential conflict could arguably be determined if we consider Section 40(1) of the 1996 Act which requires that parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings including, "complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal."[39]

34. For example, in England, see the Perjury Act 1911, Section 1. (2) expressly states that the term "Judicial proceedings" includes proceedings before any tribunal or person having by law power to examine evidence on oath; also see, Marianne Roth, op. cit., pp. 21 and 22.

35. See Roger K. Ward, op. cit., p. 5 at 8.

36. Arbitrators, therefore, are not guilty of misconduct if they accept evidence not in accordance with the strict rules of the court or do not require a document to be proved with the strictness required by the law. In GKN Centrax Gears Ltd. v. Matbro Ltd [1976] 2 Lloyd's Rep 555, Lord Denning said that: "One of the reasons for going to arbitration is to get rid of the technical rules of evidence and so forth"; Carlisle Place Investments Ltd v. Wimpey Construction (UK) Ltd. (1981), 15 B.L.R. 109, Mr Justice Goff stated that: "… no requirement that an arbitrator must allow each party to call all the evidence which he wishes to call"; John Parris, Arbitration Principles and Practice, op, cit., p. 121.

37. Section 33 (1) "The tribunal shall: (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined"; also see, Article 20 (1) of the ICC Rules which provides that: "Arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

38. Section 34 (1): "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."

39. See Andrew and Keren, op cit., p. 122.

One should also consider that the methods and requirements of presenting evidence are different in international commercial arbitration from the same requirements in litigation before national courts. For example, in practice it may happen that an arbitrator may refuse to hear a fresh evidence which was presented to him by one of the parties after conclusion of hearing but before the award. Also, it may happen that an arbitrator might stop the counsel of one of the parties from emphasising a point because the arbitrator thought that he is being long-winded.[40] The question here is, can such decisions, which were made during the arbitration process, affect the enforcement of the award on the ground that the tribunal refused to hear certain evidence which amounted to fundamental unfairness, and therefore could be used as a sufficient ground to refuse the enforcement of the foreign arbitral award under Article V (2)(b) of the New York Convention?

The rational view that could be considered here is that determining on such issues should be established upon a careful examination of whether or not arbitrators have considered fairness in making the award and whether or not parties have had a fair opportunity to present their case.[41]

This pinot of view was considered by the District Court in the United States in Tempo Shain Corp. v. Bertek Inc.[42] This case relates to challenging of an arbitral award because, during the arbitration proceedings, Bertek intended to call a witness to provide what Bertek believed to be crucial testimony concerning issues that related to the negotiations and dealings between the parties. However, although the witness was willing to testify, he became temporarily unable to attend the hearings because of his wife's illness. Bertek urged the panel to keep the case open until the witness could testify either in person or by deposition. Despite Bertek's request, the panel closed the hearing without waiting for the witness's testimony, and rendered an award in favour of Tempo. However, the district court confirmed the award based on its conclusion that "the arbitration panel was required to decide whether Pollock's testimony would add to the panel's knowledge or merely be a cumulative "rehash" of what the

40. D Mark Cato, op, cit., p.261.

41. See, O'Sullivan v. Joseph Woodward & Sons Ltd [1987] I.R. 255; Estcheap Dried Fruit Company v. N.V. Geroeders Catz' Handelsvereeninging [1962] 1 Lloyd's Rep. 283; D Mark Cato, op, cit., p.258 and 259.

42. Tempo Shain Corp. v. Bertek Inc, 120 F3d 16 (2d Cir. 1997). Cited in, Julie A Klein, "Agreeing or refusing to Hear Evidence," 2 The New York Law Journal February (1998).

panel had already heard from other witnesses". The court decided that:

"… except where fundamental fairness is violated, arbitral determinations will not be opened up to evidentiary review, and arbitrators must give each of the parties to the dispute an adequate opportunity to present its evidence and argument."[43]

The above examples demonstrate instances where a foreign arbitral award can be subject to courts' control for considerations of procedural public policy. The problem that concerns this study is that a court in the country of enforcement may examine the enforcement of equality between the parties and the fair opportunity to present their case under the requirements of its national public policy. Such control exercised by the courts may cause confusion to parties and arbitrators, as under the threat of refusing the enforcement of the arbitral award they would have to give absolute priority to national legal procedural considerations rather than to the factors of fairness, convenience, and neutrality, besides that it is difficult for arbitrators to consider the application of the procedural requirements of all countries that have connection to the dispute. For the sake of avoiding such confusion in international commercial arbitration, most of arbitration laws and arbitration rules of international institutions have abandoned the formal procedural requirements which are normally required in litigation before the courts. For example, in presenting of evidence, as arbitrators have the power to evaluate the evidence in terms of its relevance and importance. This evidently can be seen, for example, under Section 33 and 34 of the English Arbitration Act of 1996, Article 20 of the ICC Rules and Article 20.3 of the LCIA Rules.[44]

Examining the validity of foreign arbitral awards according to the national procedural public policy rules of the country of enforcement is problematic since such procedural rules are multiple and varied.[45] This may raise a conflict of public policy rules since what

43. See also, Generica Ltd. v. Pharmaceutical Basics Inc. 125 F3d 1123 (7th Cir. 1997). The court held that "the arbitrator's refusal to permit continued cross examination from a witness that the arbitrator deemed immaterial to the proceedings at issue, did not deny the party Due Process"; Iran Aircraft Industries v. Avco Corp. 980 F2d 141 (2d Cir. 1992), cited in, Julie A Klein, op cit., p. 4.

44. Article 20.3 of the LCIA Rules provides that: "Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or as a sworn affidavit."

45. See David W Shenton, "Supplementary rules governing the presentation and reception of evidence in international commercial arbitration," Contemporary Problems in International Arbitration, Julian Lew ed., (1986), p.187 at 190.

may be considered as contrary to the public policy rules of the country of enforcement may be considered valid according to the procedural law which has been applied to the arbitration proceedings. For example, arbitrators in some legal systems can decide whether or not to examine witnesses and parties under oath or affirmation.[46] This may create problems in the enforcement of foreign arbitral awards if enforcement takes place before courts where their national procedural law requires providing testimony on oath and considers this issue a fundamental requirement.[47] Therefore, such courts may refuse enforcement of the award on the ground that the arbitral award was improperly produced.[48] Also, it is said that such differences in the methods and regulations of presenting evidence can be found between the civil and common law systems.[49] For example, the civil law system does not have "discovery" procedure as understood by the common law system.[50] Also, in the civil law system, the preparation of witnesses for their examination on the trial is considered unethical.[51] This is intended to keep witnesses out of the proceedings except for their own testimony as it serves the truth finding process in proceedings where there is no pre-trial discovery, whereas, according to the common law system, parties and their counsel are permitted to prepare a witness for a witness hearing. In this regard

46. Marianne Roth, op. cit., p. 11. The writer distinguishes between affirmation and oath as: "Affirmation is the alternative form of solemnly declaring to tell the truth before giving evidence or making an affidavit. As distinguished from an oath, an affirmation does not refer to God and is used by persons who object to being sworn on oath"; Peter R. Griffin, "Resent Trends in the Conduct of International Arbitration, Discovery Procedures and Witness Hearings," 17 J.Int.Arb. (2000), p. 19 at 28. He states that: "Some legal systems allow arbitrators to administer oaths, while others do not. A common practice in international arbitration is to have the witness state that they will be truthful and that they are aware that false declarations may lead to criminal penalties. While this is not the same as taking oath, it does serve to highlight the solemnity of the proceedings, and remind the witness of the duty to tell the truth"; see for example, the Oaths Act 1978 (English law), the prescribed words for the affirmation are: "I, A.B., do solemnly, sincerely and truly declare that the evidence I shall give shall be the truth, the whole truth and nothing but the truth"; John Parris, Arbitration Principles and Practice, op, cit., p. 127; See Kirkawa Corporation v. Gatoil Overseas Inc. [1990] 1 Lloyd's Rep. 158.

47. Article 33 (4) of the Egyptian Arbitration Law of 1994 clearly provides that: "The hearing of witnesses and experts shall be taken without oath". This has been considered by some of the Egyptian doctrines that the Egyptian legislator has abandoned a fundamental rule by decisively declaring this rule in Article 33 (4), in order to make it clear for the Egyptian courts that hearing of witnesses and experts under oath is no longer a matter of public policy in Commercial arbitration. Nariman Abd al Khader, op. cit., p. 142.

48. This also applies to cases when the administration of oaths by arbitrators in a country where the law only allows oaths to be administrated by judicial officers. See Redfern and Hunter, 2nd ed., op, cit., p. 294, at footnote 29.

49. Arbitration procedures and the law of evidence differ in the common law and civil law systems. See, Roger K. Ward, op. cit., p. 6; the ILA Report, London Conference (2000), op. cit., p. 10; David W Shenton, op. cit., p. 188; Redfern and Hunter, 2nd ed., op, cit., p. 326.

50. Discovery is a procedure according to which, each party is obliged to disclose to the other party in advance the documentation comprising the written part of the evidence. See, John A Tackaberry, "The conduct of arbitration proceedings under English law," Julian Lew ed., (1986), p.216 at 221; Peter R. Griffin, op. cit., p. 19 at 20; for more information about the principle of discovery, See Redfern and Hunter, 2nd ed., op, cit., p. 330; D. Mark Cato, op, cit., p. 171.

51. Marianne Roth, op. cit., p. 11; Redfern and Hunter, 2nd ed., op. cit., p.443, at footnote 8. The writers provide an example of this kind: "In common law systems, it is usual for lawyers to take statements from witnesses before the hearing … a practice which is frowned upon (and indeed regarded as improper) in many civil law countries."

Peter Griffin emphasises that:[52]

"As a general rule, there is nothing untoward in assisting a witness in general preparation for a hearing. Indeed, many witnesses require some form of preparation as they may never have testified before. Parties must, of course, bear in mind that nothing in the preparation of a witness should compromise his or her ability to testify truthfully."

International commercial arbitral awards are in most cases based on foreign laws that should be respected.[53] Therefore, an award that is correctly produced under a foreign law must not be refused unless the resulting award leads to a serious violation of justice between the parties.[54] Accordingly, not every procedural irregularity constitutes a sufficient reason to refuse enforcement of foreign arbitral awards.[55] A distinction should be made between national and international public policy, where in the latter, courts should be more flexible and should give regard to considerations of justice rather than insisting on the literal application of their national law, for example in presenting evidence and providing the parties with proper notice of the arbitration proceedings.[56] Applying the concept of international public policy in determining whether or not equity has been upheld in arbitration, could resolve problems arising from differences between several legal systems.[57] Referring to the concept of international public policy in such cases leads to narrowing the domain of formal conditions

52. Peter R. Griffin, op. cit., p. 19 at 28.

53. In the conflict of laws theory it has been said that it is necessary to apply foreign laws in cases involving a foreign element because not to do so would constitute a disregard of the sovereignty of another state within its territory and thus show a lack of comity towards it. See, J. G. Collier, op. cit., p. 379.

54. Courts would not intervene unless the breach of rules of evidence is fundamental to the arbitrator's decision or amounts to a breach of the rules of natural justice. The Government of Ceylon v. Chandris [1963] 1 Lloyd's Rep 214; Agroexport v. NV Goorden Iport SA [1956] Lloyd's Rep 319; Kenneth S Rokison, op. cit., p. 96.

55. The ILA Report, London Conference (2000), op. cit., p.14, where the report provides that: "the award must be so fundamental¬ly offensive to that jurisdiction's notion of justice"; In Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyd's Rep. 223, 269, Kerr J. stated that: "Article 20 of the ICC rules merely provides that the arbitrator shall have the power to hear witnesses. It gives him a discretion but imposes no obligation. Indeed, the procedure followed by the arbitrator in this case is in my experience the usual procedure in ICC and other continental arbitrations. There can, therefore, be no question of any infringement of any rule of English public policy."

56. Aktham A. EI-Khoul, op, cit., p. 19. He states that: "The equality between the parties is also a principle of international public policy, but the equality is not supposed to be mathematical."

57. One should consider in this regard the role of the IBA Rules (International Bar Association Rules) concerning the presentation and reception of evidence in international commercial arbitration which mainly aims to bring the gap between the common law and civil law systems, and to resolve problems that often arise in international arbitration. The International Bar Association Rules, adopted in 1983, see (1985) 1 Arbitration International). These rules have been revised and now new IBA Rules on the Taking of Evidence in International Commercial Arbitration were adopted by the IBA Council in June (1999). Published in Arbitration, Vol. 65, No. 4 (1999), p. 297, and in Redfern and Hunter, 3rd ed., (1999), Appendix K; also see, Michael Buhler and Carroll Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standardes?," 17 J.Int. Arb., (2000), p. 3 at 5. He states that: "The advantage of the IBA Rules is that they placed witness testimony within a rigid framework and appeared to reflect a somewhat uneasy compromise between the common law and civil law systems."

that are imposed by national public policy which ultimately leads to searching for the justice and equity between the parties where the latter by itself is the object of procedural public policy rules.

II. Lack of Reasons in the Award

The absence of adequate reasons behind an arbitral award has on occasion led to a refusal to enforce the award in countries which consider the provision of the reasons for which an award was made as a fundamental requirement.[58] Article V (2)(b) of the New York Convention may be invoked in support of such a refusal. The question here is whether a court can refuse to enforce a foreign arbitral award which does not contain reasons, because the national law of that court considers providing reasons in an award as a fundamental requirement? The answer to this requires recognition of the following points:

The requirement to provide an award with reasons differs from country to country. In several legal systems, the requirement of providing an arbitral award with reasons is fundamental.[59] Other legal systems do not consider reasoning an award as vital in order to enforce an award.[60] This difference between legal systems could obstruct the process of enforcement of arbitral awards. Therefore, it was deemed

58. The question of whether providing arbitral awards with reasons is a procedural or a substantive matter was determined by the French Court of Cassation in Compagnie d'Armement Maritime v. Ompagnie Tunisienne de Navigation, Court of Cassation (France), March 18 (1980), Rev. Arb. 1980, at 496. In deciding whether the reasons of an award are compulsory or not, it held that this must be decided under the applicable procedural law and not under the substantive law. Cited in, Rubino-Sammartano. M., op, cit., p. 311.

59. Rubino-Sammartano. M., op, cit., p. 310. He referred to examples from several national laws: "The requirement that the award be reasoned is so strongly rooted in several legal systems that in some of them, the Italian one for example, it is even a requirement specified in the Constitution. The Constitution of the Republic of Italy states that: 'All decisions of courts of law must be reasoned.' This requirement seems also strongly rooted in Spanish, Dutch, German, French, Japanese, Article 41 of the Saudi Arbitration regulations (Saudi Arabia, Yearbook Commercial Arbitration 1984, Vol. IX, at 29)"; M. Chafik, Egypt, Yearbook Commercial Arbitration 1979, vol. IV, at 53; Abid el Wahab Al Bahi, "Thoughts Concerning Providing Awards with Reasons According to some International, Regional and Legislative Framework," 2 Journal of Arab Arbitration (2000), p. 132 at 139. (in Arabic). The writer provides that this is a fundamental requirement according to Article 204 of the Qatar Law, Article 183 of the Kuwaiti law and Article 760 of the Libyan Law, Article 48 of the Yemeni Law of 1992, Article 270 of the Iraqi Procedural law and Article 318 (2) of the Moroccan Law; also see, Rene David. op. cit., p. 323, concerning the Swiss courts attitude in this regard.

60. Van den Berg, op, cit., p. 381. He states that: " in several Common law countries it is customary not to give reasons in the award"; Rubino-Sammartano. M., op, cit., p. 311 who provides that: "Other legal systems do not give so much importance to this and thus relieve arbitrators of the task of giving reasons. This seems to be the case in Austrian, Indian, Australian and English legal systems"; Mustill and Boyd, op. cit., p. 543; Rene David, op. cit., p. 319; Stephen M. Schwebel and Susan G. Lahne, op cit., p. 224. The writers state that: "In the United States, an arbitrator is not required to give reasons in his award"; Howard Holtzmann, National Report United States, Yearbook Vol. IX (1984) IX at 62; Trave Schiffahrts GmhH v. Ninemia corp [1986] 802. Q.B; see also the United States courts decision in re Aimcee Wholessale Corp. & Tomar Prods., 21 N.Y 2d 621, 626-27, 237 N.E, 2d 223, 225 N.Y.S. 2d 968, 971 (1981). The court stated that: "arbitrators are not obliged to give reasons for their rulings or awards. Thus our courts may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law." Cited in Henry P. De Vries, op. cit., p. 73.

important to reach a solution that could make enforcement of foreign arbitral awards more obtainable.

Secondly, it must be noted that most of the international conventions concerning the enforcement of foreign arbitral awards do not provide a clear stand on whether or not providing an award with reasons is a requirement for the enforcement of foreign arbitral awards.[61] Neither the Geneva Protocol of 1923 nor the Geneva Convention of 1927 dealt with this issue. The New York Convention does not provide a specific rule in this regard. It seems that the Convention left this issue to be determined by the national law of the country where enforcement is taking place. An alternative approach may be based upon Article V (1)(d) from which one could infer (as this is not explicit) that the requirement to provide reasons in arbitral awards will depend on the law that was applied to the arbitration procedures. Article V (1)(d) states that: "the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, in accordance with the law of the country where the arbitration takes place". Therefore, in examining whether to refuse enforcement of a foreign arbitral award because of a lack of reasons, a court should base its decision upon the agreement of the parties and in the absence of such, on the law of the country where the arbitration takes place.

Finally, it is important to understand the purpose of providing an award with reasons as this may illustrate the connection between doing this and the notion of public policy. Providing reasons in an award is important to justify the grounds upon which it is based, in order to provide the parties with an explanation of how and why the arbitral tribunal reached its conclusion[62], and to enable the court to consider questions which may arise from the award. Therefore, it is considered fundamental that the parties are informed how justice has been done to their case. This includes that the award must

61. In this regard, one can mention that some international conventions may provide explicit conditions to provide an award with reasons. For example, Article 32 of the Amman Arab Convention (Amman Arab Convention on Commercial Arbitration, signed 14 April 1987), which requires that arbitral tribunals must state the reasons upon which the award is based. However, Article 34 of the Amman Convention does not include non reasoning of an award as one of the grounds to set an award aside. The consequence of this may drive the courts in the countries (which are members of the Amman Convention) to refuse enforcement of arbitral awards (which are subject to this convention) under the public policy ground for violating a mandatory rule in the convention itself. In addition to that, Article 35 of the Amman Convention provides that: "The Supreme Court of each contracting state must give leave to enforce the awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public policy". See, Hamza Haddad, "The Arbitration Decision according to Amman Convention for International Commercial Arbitration of 1987," 1 Journal of Arab Arbitration (1999), p. 24; Article 24 (5) of the Agreement on the Settlement of Disputes Between Arab Investment Receiving States of 1974 provides as a ground to set an award aside that: "The award has failed to state the reasons on which it was based." Abdul Hamid El Ahdab, "General Introduction on Arbitration …," op, cit., p. 13.

62. See Van den Berg, op. cit., p. 381.

be specific, unambiguous and capable of performance by the party against whom it is directed. It may also be important for the enforcing body, when it is imposed by its national legal system, to provide reasons in the award to enable the award to stand on its own sufficient information.[63]

A distinction, thus, has to be made between the parties' request to provide an award with reasons, as part of the parties' right to know how the arbitral tribunal reached its decision, and the requirement of the law to provide reasons, in order to review the merits of the award by the courts so as to supervise how justice has been considered in the case.

It is now common in many modern legal systems to find provisions of law which give the parties a free choice to decide whether or not to provide the award with reasons according to the concept of parties' autonomy in international commercial arbitration.[64] For example, in deciding the form of the award, Section 52 of the English law of 1996 provides that:

> "(1). The parties are free to agree on the form of an award. (2). If or to the extent that there is no such agreement, the following provisions apply. (3). The award shall be in writing signed by all the arbitrators or all those assenting to the award. (4). The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons."[65]

Article 43(2) of the Egyptian law of 1994 provides that:[66]

63. Redfern and Hunter, 2nd ed., op, cit., p. 390; Universal petroleum v. Handels Uncl [1987] 1 Lloyd's Rep. 517; Henry P. De Vries, op. cit., p. 74, stating that: "arbitrators must refer to rules with the authoritative weight of law to aid in reaching a decision and to justify that decision to the parties ... particularly if an award is to be recognised and enforced internationally, it should state reasons with a legal basis, including reference to the process by which that legal basis was selected."

64. Regard here should be made to the arbitral awards which takes the form of settlement awards, where arbitrators are merely expected to record the terms agreed upon by the parties and do not render a decision on the merits. Therefore, settlement awards do not require reasons since arbitrators do not reach their conclusions through any reasoning; Rene David. op. cit., p. 324; See Section 52 English 1996 Act; see Chapter One, at p. 16.

65. See also Section 70 (4) which provides in this regard that: "If on an application or appeal it appears to the court that the award- (a) does not contain the tribunal>s reasons, or (b) does not set out the tribunal>s reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."

66. It has been reported that prior to the law of 1994, the prevailing doctrine used to consider as public policy the explicit requirement stipulated in Article 507 of the Egyptian Code of Procedures concerning the necessity of expressing the reasons of the award. Accordingly, the absence of reasons prevents an award from being enforceable in Egypt, regardless of whether or not the law of the country where the award has been made requires the issuance of a reasoned award. However, now Art. 43(2) of the Egyptian law of 1994 entitles the parties to agree to permit the arbitral tribunal to provide an award without reasons; Aktham A. EI-Khoul, op, cit., p. 20. He considers that: "The lack of reasons of an award issued under a law which does not require reasons may be a violation of internal public policy but not of international public policy."

"The arbitral award shall state the reasons upon which it is based, unless the two parties to arbitration have agreed otherwise or the law applicable to the arbitral proceedings does not require the award to be supported by reasons."

Article 31(2) of the Model Law provides that:

"(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30."

However, giving parties the autonomy to decide whether the provision of reasons should be a requirement is limited to countries that recognise such freedom in their national arbitration rules. On the international level, one can establish the requirement of providing reasons according to the prevailing trend that distinguishes between national and international arbitral awards. For example, the Court of Appeal of Northern Lebanon, made a clear distinction between internal arbitral awards that are subject to internal public policy, (which considers it compulsory to back-up an award with reasons), and international arbitral awards that are subject to international public policy, (which does not require such reasons).[67]

The Italian courts, in S.A. Tradax Export v. S.p.a. Carapelli[68], considered the enforcement of an arbitration award that was rendered without reasons under the rules of the Grain and Feed Trade Association (London). The court noted that English law permits awards without reasons and that the New York Convention does not require reasons, stating that; "what is fundamental in Italian law of procedure cannot be imposed upon foreign legislatures or judicial authorities". The same Court also enforced an arbitration award of the American Arbitration Association despite its lack of reasons.[69] The decision states that: "the fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by foreign legislative and judicial authorities". The distinction between domestic and international public policy has also been considered in Italy by the

67. The Court of Appeal, North Lebanon, May 29 (1974), Clunet 1979, at 414. Cited by, Rubino-Sammartano. M., op, cit., p. 312; See also, Abid el Wahab Al Bahi, op, cit., p. 132 at 136, referring to Article 817 of the Lebanese Law of Civil Procedures of 1983, which does not require the provision of reasons in international arbitral awards, although it is a requirement for national arbitral awards according to Article 790.

68. The Court of Appeals of Florence judgement of 22 October 1976, see Yearbook Vol. III (1978) at 279 (Italy No. I8). Cited by Stephen M. Schwebel and Susan G. Lahne, op cit., p. 224.

69. Judgment of 8 October of 1977, see Yearbook Vol. I V at 289 (Italy No. 29).

Court of Appeal of Genoa, in Efxinos Shipping Co. Ltd. v. Rawi Shipping Lines Ltd, which held that:[70]

"… it appears to be no longer contrary to Italian public policy to recognise a foreign award which does not contain reasons, provided that the parties have agreed in advance that reasons shall not be given".

To the same extent, the Paris Court of Appeal in Compagnie d'Armement Maritime[71], held that: "the lack of reasons does not affect international public policy and that therefore it is a ground for nullity only of domestic awards". Also, the district court of Nancy in France, on November 14, 1955 refused to declare an arbitral award enforceable, since it did not give any reasons. The Nancy Court of Appeal reversed this judgement, considering that the lack of reasons, although contrary to a rule of French procedural law, was not contrary to ordre public international in France.[72] The Court of Cassation rejected the appeal made against this judgement, where it states that "taking into account the wide powers granted to English courts and which allow them to intervene in arbitration procedures ... the lack of motives in the award rendered in the case was not, in itself, contrary to French ordre public."

Finally, mention should be made to the situation when the arbitral tribunal makes serious mistakes in the reasoning of the award. For instance, where the reasoning is in contradiction with the decision. This situation had occurred before the Supreme Court in Sweden in GNMTC v Gotaverken[73], where the Libyan respondent, "GNMTC" opposed an ICC award[74] because the reasoning of the award was contradictory. However, the Swedish Supreme Court refused this objection on the ground that the New York Convention does not allow a review of the merits of the award.

70. Judgement of 2 May 1980 of the Court of Appeal of Genoa, Yearbook Vol. VIII (1983) at 381, 383 (Italy No. 51); also see, Stephen M. Schwebel and Susan G. Lahne, op cit., p. 224, where several examples to this regard are provided therein: "The French decision in Denis Coakley Ltd. v. Ste. Michel Reverdy, judgement of 23 July 1981, Yearbook Vol. IX (1984) at 400 (France :Vol. 6), which came to the same conclusion with regard to an English (GAFTA) award; and of similar import and reasoning were the judgement of a Hamburg Court of 27 July 1978, see Yearbook Vol. IV (1979) at 266-68 (FR Germany No. 18), and the judgement of 29 January 1983, in European Grain & Shipping Ltd. v. Seth Oil Mills Ltd., High Court of Bombay, see Yearbook Vol. IX (1984) at 411, 414 (India No. 9).

71. Compagnie d>Armement Maritime v. Compagnie Tunisienne de Navigation, Court of appeal of Paris, April 28 (1976), Rev. Arb. 1978, at 154. Cited by, Rubino-Sammartano. M., op, cit., p. 311.

72. Cass. Civ., un 14, 1960 Rev. crit. Dr. int. prive 1960, 393, J.C.P. 1961. II. Cited by, Rene David. op. cit., p. 322.

73. GNMTC v. Gotaverken, Supreme Court, Augest 13, 1979 (Sweeden no.1). Cited in Van den Berg, op. cit., p. 271.

74. Award of April 5, 1978, Yearbook Vol. VI (1981), p. 133.

The conclusion that can be drawn in this part is that the prevailing trends are to enforce foreign arbitral awards that do not contain reasons, as long as the parties have agreed not to include reasons in the arbitral award.[75] Therefore, if the parties have clearly agreed to exclude reasons from the arbitral award and the law which governs the arbitration procedures allows this, then the award should be recognised and enforced. This is regardless of whether or not giving reasons is a fundamental requirement under the law of the country of enforcement. However, one should also consider that courts of many jurisdictions may still not have had experience with international commercial arbitration. They may consider that providing an award with reasons is a fundamental requirement for the enforcement of an award to ensure that the award does not conceal a violation of public policy, or that the lack of reasons in the award was intended to cover some neglect of the defendant's rights. Therefore, arbitrators are advised to consider that enforcement of the award might take place in a country that does not provide a clear determination in this regard. Even if enforcement will take place in countries which do not require the provision of reasons in arbitral awards, arbitrators have been urged to provide reasons in the awards, which they issue. This was emphasised in Trave Schiffahrts GmhH v. Ninemia corp[76] where Sir John Donaldson M.R. stated that:

"The giving of reasoned awards is to be encouraged, for, as was said at para. 26 of the Commercial Court Report on Arbitration (1978) (Cmnd. 7284): 'The making of an award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality'."

Also in Bermer Handelsgesellschaft mbH v. Westzucker GmbH, Lord Justice Donaldson provided a useful guidance. He said that:[77]

"No particular form of award is required .... all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why in the light of what happened, they have reached their decision and what that decision is."

75. See Van den Berg, op. cit., p. 380-382 and cases cited therein; Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 301. He considers this tendency as part of the modern trend towards the application of international public policy rules.

76. Trave Schiffahrts GmhH v. Ninemia corp [1986] 802 at 808 Q.B. [Court of Appeal].

77. Bermer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2); (1981) Lloyd's Rep. 130 CA; also see, Geoffrey Beresford Hartwell, "The Reasoned Award in International Arbitration," Internet address: (http://www.hartwell.demon.co.uk/intaward.htm), p. 1.

However, arbitrators are not required to give all the details in the arbitral award. What is required here is to provide the award with persuasive reasons, "concise as possible and limited to what is necessary, according to the nature of the dispute".[78]

III. Lack of Impartiality

Lack of impartiality is a ground according to which a party to arbitration can challenge a nominated or appointed arbitrator. The challenge can be raised in any of the different stages of the arbitration process.[79] A challenge to remove an arbitrator may take place after nominating the arbitral tribunal but prior to the issuance of the final arbitral award[80] or after that, by challenging the resulting award before a competent authority in the country of origin.[81] A party can also challenge the enforcement of a foreign arbitral award for the lack of impartiality of an arbitrator which, according to the central interest of this study, will be examined under Article V (2)(b) of the New York Convention.[82]

78. See Redfern and Hunter, 2nd ed., op, cit., p. 391; John Parris, Arbitration Principles and Practice, op, cit., p. 141; also see, D. Mark Cato, op, cit., pp. 104-110.

79. See for example Article 12 (1) of the Model Law.

80. The competent authority before which such challenge takes place differs according to the applicable procedural rules which the parties have been selected. For example, if they have selected rules of an international constitution, then challenging a prospective arbitrator should be made according to such rules. See for example, Article 11. 1 of the ICC Rules, which provides that challenging the appointed arbitrator, should be made before the ICC Court, by the submission to the secretariat of a written statement specifying the facts and circumstances on which the challenge is based; see also, Article 10.2 of the LCIA Rules; Article 18 of the Egyptian law of 1994; See also Article 13 (2) of the Model Law; Section 24 (1) of the English 1996 Act, which concerns the removal of an arbitrator during the arbitration proceedings; Damond Lock Grabowski v. Laing Investments (Bracknell) Ltd, (1992) 60 BLR 112; Save and Prosper Pensions Ltd v. Homebase Ltd (Ch D) [2001] L. & T.R. 11.

81. For example, lack of impartiality is a ground to challenge the award under Section 68 (2) of the English 1996 Act for "serious irregularity affecting the tribunal, the proceedings or the award". Section 68 (2) subsections (a) to (i) provide an illustration to what can be considered as "serious irregularity", according to which a court may consider the arbitration procedures containing substantial injustice to one of the parties, the most important of which in this regard is subsection (a) which refers to "failure by the tribunal to comply with section 33 (general duty of tribunal)". Section 33, imposes on an arbitrator mandatory duties which he cannot disregard, particularly in paragraph (1)(a) which provides that: "The tribunal shall- a- act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."

82. One should take into consideration that raising this ground before the Court of Enforcement must be based on circumstances that were not previously known to the party who is raising this ground to refuse enforcement of the award. See, AAOT Foreign Assoc. Technostoryexport v. International Dev and Trade Services Inc., No. 97-9075 (2d Cir. Mar. 23, 1998). In challenging the enforcement of an arbitral award on the ground that enforcement of the arbitral award was rendered by a corrupt tribunal and would therefore violate the public policy of the United States. The Second Circuit held that "the law precludes attacks on the qualifications of arbitrators on grounds previously known by a party but not raised until after the award has been rendered. By remaining silent during the arbitral proceedings despite knowledge of possible corruption, a party waived the right to object to the award at the enforcement stage". Cited in International ADR web site address, (http://www.Internationaladr.com/judicial.htm), IADR Ref. No. 129.

The court of enforcement may refuse to enforce a foreign arbitral award if one of the parties proves to the court that the award is based on a lack of impartiality because the appointed arbitrator has a personal interest in the dispute, or was biased towards one of the parties. Under the New York Convention, such a challenge can only be established under Article V (2)(b) on the grounds of public policy, as Article V (1) does not contain a clear basis for such action.[83] This is also due to the doctrine of Natural Justice, which establishes that an adjudicator has a duty to act without bias, fairly, in good faith and judiciously.[84] Therefore, the impartiality and independence of an arbitrator is a basic principle of justice in arbitration, which implies the duty on the person who acts as an arbitrator to undertake serious responsibilities to the parties as well as to the public, notwithstanding that this is also part of the arbitrator's ethical obligations.

Before examining the possibility of refusing to enforce foreign arbitral awards on the grounds of lack of impartiality and independence, one should take into consideration that there are many circumstances that have to be considered in order to determine this issue, which vary from case to case. In this regard a distinction should be drawn between two circumstances. The first relates to the existence of justifiable doubts about the impartiality or independence of the arbitrator himself (for example, by communicating with only one of the parties in the absence of the other or to the exclusion of the other, including the receiving of evidence and/or argument from one side in the absence of the other).[85] The second depends on the existence of circumstances that may create doubts about the impartiality of an arbitrator, for instance, if the chairman or sole arbitrator is of the same

83. Although that Article V (1)(d) is deigned to govern the situation which relates to the composition of the arbitral tribunal, as it provides that enforcement of an award could be refused if "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." However, this does not provide a direct ground to refuse the enforcement for lack of impartiality; see W. Michael Tupman, op. cit., p. 26 at 39; See Van den Berg, op. cit., p. 377; Stephen M. Schwebel and Susan G. Lahne, op. cit., p. 210.

84. See for example, Section 1 of the English 1996 Act. It confirms the importance of providing the parties with an impartial and fair arbitration. It could be inferred from Section 1 that this right is one of the main principles of the 1996 Act. It provides that: "The provisions of this Part are founded on the following principles, and shall be construed accordingly - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"; also see Article 10 of the Universal Declaration of Human Rights, which provides that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

85. See London Export Corporation Limited v. Jubilee Coffee Co. Limited [1958] I Lloyd's Rep. 197; Woodridge Timber Ltd v. Branntorps Travaru (1982) The Times 14 june; also see, Henry P. De Vries, op. cit., p. 69. He states that: "… the failure to obtain such standards of behavior is a breach of a fiduciary duty, a serious procedural defect which may result in the setting aside of the award"; Judith O'Hare, "The Denial of Due Process and the Enforceability of CIETAC Awards under the New York Convention, the Hong Kong Experience," 13 J. Int. Arb., (December 1996), p. 180; Andrew and Keren, op, cit., p. 117.

nationality of one of the parties.[86] Also one may consider that under the procedural law in some countries, there are mandatory requirements that concern the composition of the arbitral tribunal which aims to guarantee the impartiality of the arbitrators, such as the requirement that an arbitral tribunal should be composed of an uneven number of arbitrators, or that all arbitrators should participate in the deliberation when rendering the final award or finally, that arbitrators should be nominated in the arbitration agreement. It could be argued here that such requirements might affect the impartiality of arbitrators without necessarily being based upon a positive attitude from the appointed arbitrators. The following material will deal with the first scenario, followed by an explanation of the second type.

A. Impartiality and independence of arbitrators

Impartiality means that an arbitrator should not have any personal interest either by being biased in favour of one of the parties or in relation to the issues in the case.[87] The concept of independence indicates some past or existing relationship of the arbitrator either with one of the parties or with their lawyers, either business, professional or social, which would influence his decision.[88] Therefore, independence relates to the relationship between the arbitrator and the parties; impartiality relates primarily to the relationship between the arbitrator and the subject-matter of the dispute.[89]

Generally, the responsibility of proving the partiality or lack of independence of an arbitrator is on the party who claims the existence

86. See Article 6.1 of LCIA Rules of 1998, which provides that: “Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise”; also Article 9.5 of the ICC Rules of 1998; Article 6.4 of the Cairo Regional Centre for International Commercial Arbitration (CRCICA); also Article 11 (5) of the Model Law 1994 requires from a court (or other authority) if it has been asked to appoint an arbitrator to consider: “any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties”; Michael A. Calvo, “The Challenge of the lCC Arbitrators. Theory and Practice,” J.Int.Arb., 15(4):63-72, 1998, 69. He states that in one case the court decided to appoint a Hungarian Chairman for arbitration between British and Yugoslav parties. The British claimant opposed this direct appointment, claiming that the nationality of the Chairman provokes a violation of the balance of the contract and of required neutrality.

87. Redfern and Hunter, 2nd ed., op, cit., p. 220; Van den Berg, op. cit., p. 377; Huang Yanming, “The Ethics of Arbitrators in CIETAC Arbitrations,” J.Int.Arb., 12(2):5-17, (1997), p. 10; also see, Catalina (Owners) v. Norma (Owners) (1938) 61 Ll. L. Rep. 360, D.C.

88. W. Michael Tupman, op. cit., p. 29.

89. See, Metropolitan Properties Co. (F.G.C) Ltd. Lannon [1969] 1 Q.B. 577. In which Lord Denning said: “A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a direct pecuniary interest in the subject matter. Second, bias in favour of one side or against the other.”

of one or more of such circumstances. Some legal systems may require a party to prove the 'actual bias' on the part of the arbitrator, by proving that the arbitrator is in fact incapable of carrying out his office in an impartial manner.[90] In other legal systems, such as the English law, it would be sufficient to prove a so-called 'imputed bias'.[91] For example, if in the circumstances of the case that any right-minded person, a "reasonable man", would conclude from the arbitrator's conduct that there was a real likelihood of bias on the part of the arbitrator or that his relationship with one of the parties is close enough to be objectionable.[92]

If an arbitrator thinks that a reasonable man might take this view then he should disclose to the parties any facts or circumstances which might question his impartiality. The arbitrators' obligation to disclose any circumstances that may prejudice their impartiality is important in order to avoid the appearance of bias in their conduct.[93] This includes the duty of disclosing all details that an arbitrator believes that are important to be disclosed to the parties. An arbitrator must also inform the other arbitrators of the same tribunal of these circumstances[94] but unlike the parties, an arbitrator of the same tri-

90. AT&T Corp v Saudi Cable Co (CA) [2000] 2 All E.R. (Comm) 625.

91. See, Dublin & County Broadcasting v. Independent Radio and TV Commission & Others, 12 May 1989, (unreported case). In this case, Murphy J. said at p. 13 that: "Certainly it does seem to me the question of bias must be determined on the basis of what a right-minded person would think of the likelihood, of the real likelihood of the prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill informed and did not seek to direct his mind properly to the facts… If it is shown that there is on the facts circumstances which would lead a right-minded person to conclude that there was a real likelihood of bias, then this would be sufficient to invalidate the proceedings of the tribunal." Cited in, D. Mark Cato, op, cit., p. 58; also see, R v. Cough (1993) A.C. 646; Save and Prosper Pensions Ltd v Homebase Ltd (Ch D) [2001] L. & T.R. 11. The court decided to apply as an objective approach "the standard of the reasonable man", where the court decided to consider the circumstances that constitute a real danger of bias.

92. The English courts have applied this test in several cases, see Hagop Ardahalian v. Unifert International SA (The Elissar), [1984] 2 Lloyd's Rep 84, at 89; Bremer Handelsgesellschaft mbH v. ETS Soules et Cie [1985] 1 Lloyd's Rep 160; Tracomin SA v. Gibbs Nathaniel (Canada) Ltd, [1985] 1 Lloyd's Rep 586; see Clive M Schmitthoff, op. cit., p. 230 at 234; also see the judgement of Griffiths J. in Corrigan v. The Irish Land Commission [1977] I.R. 327. The court provided that: "A person in a judicial or quasi-judicial capacity in a matter which is otherwise within his jurisdiction may be disqualified from hearing that matter by reason of actual or presumed bias on his part. However, before such disqualification can take place, there must be a 'real likelihood' of bias"; also see, Rex (Taverner) v. Justice of County Tyrone [1909] 2 I.R. 763, in regard to the necessary bias Lord O'Brien L.C.J. said (at p. 768) that: "By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias."

93. Disclosing such circumstances could be made by submitting a written statement of independence, for example, Article 7.2 of the ICC Rules provides that: "Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them." The burden of proof of disclosure falls on the arbitrator, however, if a party claims that there has been a fact that may affect impartiality, then the responsibility of proving it will rest on that party. See, Stephen R. Bond, "The Selection of ICC Arbitrators and the Requirement of Independence", 4 Arb. Int., p. 300, 307 (1988).

94. In this regard Canon II (D) of the Code of Ethics of 1977 provides that: "Where more than one arbitrator has been appointed, each should inform the others of the interests and relationships which have been disclosed."

bunal cannot challenge the appointment of other arbitrators, as this right is confined to the parties. The only procedure that an arbitrator can do if he disagrees with the appointment of another arbitrator is to withdraw from the arbitration procedures.[95]

The circumstances which must be disclosed by an arbitrator are those which may put the arbitrator in a state of mind where the arbitrator becomes willing to rule contrary to what he would otherwise have ruled. Therefore, arbitrators are required to disclose to the parties any previous or present relation the arbitrator has with the parties, or any interest in the outcome of the dispute. One should consider here that national laws do not include detailed information of what should be disclosed by the arbitrators.[96] Nevertheless, some of the international arbitration institutions may provide in their rules examples to guide arbitrators as to what they should disclose, for example, Canon (I) of the Code of Ethics provides that:[97] "arbitrators in performing their duties have to uphold the integrity and fairness of the arbitration process". In paragraph (D) the code provides several examples of what type of circumstances arbitrators are required to disclose:[98]

"After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the rela-

95. For example, in arbitration between the United Kingdom and Saudi Arabia, the arbitrator which was nominated by the United Kingdom resigned because of the obvious lack of independence of the Saudi nominee. The latter passed notes to the Saudi agent during the sittings of the tribunal, and had rehearsed certain witnesses prior to the giving of their evidence. See J. Gillis Wetter, The International Arbitral Process [The Buraimi Oasis Arbitration], International Commercial Arbitration, The Foundation Press, INC. (1997), p. 565; Martin Hunter, "Ethics of the International Arbitrator," 53 Arbitration (1987), p. 219 at 221; D. Mark Cato, op, cit., p. 59.

96. National laws some times provide examples of what sort of circumstances that are important to be disclosed by an arbitrator, mainly that which relates to the arbitrators' status. For example, Article l6 of the Egyptian law provides: "1. The arbitrator cannot be a minor, under guardianship, have been deprived of his civil rights by reason of a judgement against him for a felony or misdemeanour contrary to honesty or due to a declaration of his bankruptcy; unless he has been restored to his status." Also, in paragraph (3) it provides that: "The arbitrator's acceptance of his mission shall be in writing. When accepting, he must disclose any circumstances which are likely to cast doubts on his independence or impartiality."

97. The Code of Ethics of 1977.

98. See also the Code of Ethics for Arbitrators of The Chamber of National and International Arbitration of Milan, Web Site address:
http://www.mi.camcom.it/eng/arbitration.chamber/etic.htm.

tionship or interest."[99]

Due to the parties' freedom to agree on the procedure for the appointment of the arbitral tribunal and to choose the members of the arbitral tribunal by themselves, a practical problem may exist in international commercial arbitration. It is common to find in international commercial arbitration a previous relation between an arbitrator and the party who appointed him.[100] This is the case especially where the arbitration is administered by a trade association, as arbitrators are likely to be chosen from a small circle of member merchants who regularly do business with each other. In other situations a party may appoint his counsel to be one of the arbitrators with the view of having his own advocate within the tribunal. In such situations the nominated arbitrators may find himself under the pressure of the party who nominated him. However, this should not affect the arbitrator's impartiality. The arbitrator's relationship with the party nominating him should be based upon an independent professional relationship, since although an arbitrator provides his professional services in return for a fee, his position is very different from that of an employee of the party. An arbitrator owes no general duty to such a party as his relationship with the party nominating him is temporary, terminating once the professional work for which his services have been retained has been completed.[101]

If a previous relationship existed between an arbitrator and one of the parties, then the arbitrator will be obliged to disclose all details about this relationship to the other party, in order to avoid any doubts about his impartiality and independence. For example, when submitting his disclosure an arbitrator should give details about: [102]

99. See Canon II of the 1977 Code of Ethics, op. cit., which also provides that an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. See also the AAA Fact Sheet, Web Site address, http://www.adr.org, in which it provides as guidelines for the exercise of arbitrator discretion in this area that: "the following circumstances were deemed sufficient by the courts to require vacatur of the award on the ground of partiality: Relationship of consanguinity within six degree (e.g. second cousins); Business dealings which are significant, ongoing, or regularly conducted; Close social relations or friendships."

100. Stephen R. Bond, op. cit., p. 308. He reported that: "the most common basis for refusal by the ICC Court to confirm or appoint a prospective arbitrator is a past or present direct professional link between the arbitrator and a party or between a business associate of the arbitrator and a party or an entity connected to a party"; also see the 1977 Code of Ethics. Canon VII clearly endorses the view that a non-neutral arbitrator (party-appointed) "may be predisposed toward the party who appointed him"; In Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), the Supreme Court of the United States set aside an arbitral award for the reason that a close business connection existed between "neutral arbitrator" and a party to arbitration that was not disclosed to the other party. The court held that: "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Cited in, Henry P. De Vries, op. cit., p. 70.

101. D. Mark Cato, op, cit., p. 58.

102. See the AAA Fact Sheet, Web Site address, (http://www.adr.org/).

"The nature of this relationship; whether the relationship is in the past, present, or anticipated in the future; the duration of relationship (from when to when); whether business is being conducted directly or indirectly; whether the disclosed relationship is professional, social or familial; the extent of contact--daily, weekly, monthly, yearly; and, the contact event (e.g., business meetings; occupying space in the same building; consultation; legal professional representation; professional or trade association meeting or committee work; intimate social gathering; large group social gathering; etc.)"

If the arbitrator has disclosed to the parties all circumstances that may cause concerns about his partiality and neither of the parties raised any questions having being informed about these circumstances, then the lack of independence or impartiality cannot be used as a basis for challenging the arbitral award.[103] One should consider here two exceptional situations: the first is when one of the parties becomes aware of new circumstances which affect the arbitrator's impartiality after the appointment has been made.[104] The second situation is when a party waives his right to object; for example, if he accepted that the other party may call the arbitrator alone to produce books of accounts, he cannot then object to the arbitrator on the grounds that there had been a private meeting between the arbitrator and the other party[105] or if he participated in the proceedings following the arbitrator's appointment.[106] However, if parties are allowed, in some situations, to waive their right to object on the arbitrator's acts, as in the above example, then this should not lead to the presumption that a party can, by agreement, give up his right to challenge the impartiality and independence of an arbitrator. Parties are not allowed to exclude by their agreement the fundamental rights which are protected by the principle of due process.[107]

103. If a prior relationship is disclosed before or during the arbitration and a party not object at the time, the right to oppose enforcement on this ground is waived. See W. Michael Tupman, op. cit., p. 26 at 48; see also, Art. 12 (2) of the Model Law; Eckersley v. Mersey Docks [1894] 2 QB. 667.

104. This ground could be raised by a party against the arbitrator appointed by that party or in whose appointment he has participated. See for example, Article 12 (2) of the Model Law; Article 18 (2) of the Egyptian law of 1994; Abdul Hamid El Ahdab, "The New Egyptian Act…," op, cit., p. 78.

105. Hamilton v. Bankin (1850) 64 ER 703; (1850) 3 De G. & Sm. 782; Shield Properties & Investments v. Anglo-Overseas Transport Co , (1985) 273 E.G. 69.

106. Rustal Trading Ltd. v. Gill & Duffus SA, [2000] 1 Lloyd's Rep. 14; [2000] C.L.C. 231. In this case Rustal applied to have the award set aside on grounds of serious irregularity pursuant to the Arbitration Act 1996 Section 68 of the 1996 Act, contending that the arbitrator's impartiality was in doubt due to his involvement in a recent and unusually acrimonious dispute involving much the same personalities as in the present case. The court dismissed the application on the ground that Rustal's submission that it was unaware of the arbitrator's continued involvement in the case until after publication of the award was rejected because it could, with due diligence, have made the discovery earlier.

107. See in this regard W. Michael Tupman, op. cit., p. 26 at 52. In his view, "Parties to an arbitration agreement could not violate public policy by providing for the appointment of an arbitrator who is less than indepen¬dent."

The most important issue that has to be considered when claiming grounds for refusing to enforce a foreign arbitral award is the distinction between national and international arbitration. In this regard, it has been reported that the doctrinal trends give more consideration to disputes that involve elements of international commerce.[108] For example, the duty of an arbitrator to disclose all the circumstances that may raise questions about his impartiality has been considered with more liberal understanding in cases that relate to international commercial arbitration. This is due to the modern approach which calls for more consideration being given to the specific character of international commercial arbitration.

This has been considered in Fertilizer Corp. of India v. I.D.I. Management, Inc.[109] The US district court was reluctant to refuse to enforce an award under the New York Convention. In this case the defendant learned only after the award had been rendered that the arbitrator appointed by the plaintiff had been its counsel in at least two other legal proceedings. Although public policy generally favoured "full disclosure of any possible interest or bias …whenever one is in a position to determine the rights of others", the US district court held that: "… the 'stronger public policy' in favour of international arbitration must prevail to enforce the award in this case, particularly because non-disclosure had not otherwise tainted the proceedings".

Other cases similarly reveal that the existence of a previous relationship between a party and the arbitrator does not necessarily lead to the refusal of enforcement of a foreign arbitral award. This has been applied in a decision made by the French courts in Denis Coakley Ltd. v. Sle. Michel Reverdy.[110] The award was attacked under Article V (2)(b) of the New York Convention for considerations of violation of public policy on the basis that, subsequent to rendering the award, an arbitrator had acted as counsel for one of the parties when the award was on appeal before an appeal board constituted under the Arbitration Rules of the Grain and Feed Association. The French Court[111] upheld the award on the grounds that the arbitration panel on which

108. Stephen M. Schwebel and Susan G. Lahne, op cit., p. 210.

109. Fertilizer Corp. of India v. I.D.I. Management, Inc., 517 F. Supp. 948 (1981); 530 F. Supp. 542 (SD Ohio 1982), Yearbook Vol. VIII (1983) at 419 (USA No. 41). Cited in W. Michael Tupman, op. cit., p. 26 at 49.

110. Denis Coakley Ltd. v. Sle. Michel Reverdy, Court of Appeal of Reims (Civil Chamber), Judgement of 23 July 1981, Yearbook Vol. IX (1984) at 400 (France No. 6). Cited in, Stephen M. Schwebel and Susan G. Lahne, op cit., p. 210; Jacques Werner, "The Independence Of Arbitrators in Totalitarian States," 14 J. Int. Arb., 1, (March 1997), p. 141.

111. See, Ibid, the judgement of 23 July 1981 of the Court of Appeal of Reims.

the arbitrator had served "was definitively no longer competent at the time he acted as counsel for the party, and because such a manner of proceeding is in conformity with English law adopted by the parties". The court considered that Article V (2)(b) of the New York Convention referred to international public policy, thus confirming that: "the public policy governing the enforcement of foreign arbitral awards is not domestic public policy, but the public policy of international law of the state where the decision is invoked". The court asserted that the award rendered by the appeal arbitration board did not violate "the French concept of international public policy or due process."[112]
Another example is the decision of the American Court of Appeals for the Fifth Circuit in Imperial Ethiopian Government v. Baruch Foster Corp.[113] The respondent, Baruch Foster, a United States corporation, had opposed the award because the arbitrator, the French professor Rene David, was disqualified to act as an arbitrator since between 1954 and 1958 he had drafted the Ethiopian Civil Code. The Court of Appeals rejected the contention of Baruch Foster by referring to Prof. David's integrity and reputation, and by adding that Baruch Foster had failed "to come forward with anything tending to show that the claim was asserted in good faith and for any reason other than delay." The US Court of Appeal rejected that grounds as the court recognised that any relationship between the arbitrator and the Ethiopian Governmen had ended 16 years prior to the date of the award.[114]

The above examples demonstrate the modern trends to the challenge of foreign arbitral awards on the ground of lack of impartiality or independence. The test that has been followed shows a considerable awareness of the importance of recognising that in international commercial arbitration arbitrators may belong to a certain economic group or may have a professional relationship with the parties[115], which does not justify any influence on the arbitrator's mind, or create an actual

112. This decision was based on the French legislative distinction between international arbitration and domestic arbitration. See French Code of Civil Procedure, Book IV, Arts. 1442-1507; Stephen M. Schwebel and Susan G. Lahne, op cit., pp.210 - 211; Ven den Berg, op. cit., pp. 377-380.

113. U.S. Court of Appeal (5th Cir.), Imperial Ethiopian Government v. Baruch Foster Corp. (U.S. no. 10); see also, Van den Berg, op. cit., p. 376.

114. The court also stated that: "Professor Rene David… is one of the most respected compara¬tive lawyers in Europe and throughout the world and a "man of honour and absolute integrity", to whom bias therefore would not be easily imputed under any circumstances"; also see, W. Michael Tupman, op. cit., p. 47.

115. See the decision of the Court of Appeal of Basle (Obergericht of Basle, June 3, 1971 (Switz. No. 5)). The court rejected the objection that the arbitral tribunal could not be considered independent because all arbitrators came from the circle of mer¬chants in raw materials, whilst no person represented the leather manufacturing in¬dustry. The Court observed that the Swiss Supreme Court has been very reluctant to accept the composition of an arbitral tribunal in international commercial arbitration as a violation of public order. The fact that an arbitrator belongs to a certain economic group, according to the Court, did not justify con¬sidering him beforehand as not being independent. The Court stated that the cru¬cial question is whether in a specific case an arbitrator has been dependent on one of the parties. The latter had not appeared to be the case for the arbitral tribunal in question", cited in Van den Berg, op. cit., p. 378.

appearance of bias.[116] This shows that foreign arbitral awards are subject to narrower public policy rules than the national standards, where examining the validity of a foreign arbitral award on this ground requires a careful analysis of each case separately, according to the surrounding circumstances and according to the applicable law requiring the disclosure.

B. Other Procedural Requirements in the Arbitral Tribunal

There is another category of circumstances that could affect the validity of arbitral awards whereby mandatory procedural rules are breached without that breach being based upon the arbitrators' attitude. For example, some legal systems may require that an arbitral tribunal should be composed of uneven number of arbitrators, which is a condition that aims to assure the impartiality of the arbitrators. Also, some legal systems require that all arbitrators should participate in the deliberation when rendering the final award. Finally, some legal systems insist on nominating the arbitrators in the arbitration agreement as a formal condition to constitute a validly composed arbitral tribunal.

In some legal systems, these are public policy requirements. However, there have been substantive changes in such legal systems, which have started to distinguish between national and international arbitration, and in practice national courts have recognised the importance of distinguishing between the mandatory procedural requirements under their national laws, and the requirements of international public policy. This will be illustrated in the following topics.

1.Uneven number of arbitrators

Many legal systems require that an arbitral tribunal should be composed of an uneven number of arbitrators and consider this requirement as a mandatory procedural rule.[117] Such requirement can also be found under the rules of international arbitration institutions, for example, in Article 8 (1) of the ICC Rules; and Article 5 of the Cairo

116. William W. Park, "Neutrality, Predictability and Economic Co-Operation," 12 j.Int.Arb., (1995), p. 99 at 106.

117. See for example, Article 15 of the Egyptian law of 1994, which provides that: "The arbitral panel consists, by agreement between the parties, of one or more arbitrators. In the absence of such agreement on the number of arbitrators, the number shall be three"; 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. 8. He states that: "the Egyptian law requires, at risk of nullity, that if more than one arbitrator is to be appointed, their number should be odd"; also see, Redfern and Hunter, 2nd ed., op, cit., p. 162, where the authors refer to examples from several legal systems.

Regional Centre for International Commercial Arbitration (CRCICA), which provide that an arbitral tribunal can be composed of either a single or of three arbitrators.

Accordingly, an arbitration agreement that includes a clause providing for appointing an even number of arbitrators might be considered as null and void, and therefore arbitral awards that have been made by a tribunal composed of an even number of arbitrators can be refused for violating the due process in the country of enforcement.[118] Van den Berg illustrated this attitude form the point of view of these countries:[119]

"In these countries it is considered that if the arbitrators are even in number, they will almost always be appointed by the parties and be inclined to defend the point of view of the party who nominated him. This inclination is less likely if there are three arbitrators, one of which is not appointed by one party alone."

Nevertheless, some legal systems have adopted more flexible rules. For example, Section 15 (2) of the English Arbitration Act of 1996 considers as valid the parties' agreement to appoint two arbitrators or any other even number of arbitrators.[120] If such agreement was made then, unless the parties have otherwise agreed in writing, a court under Section 15 (2) could appoint an additional member to act as presiding arbitrator.[121] This has also been confirmed in Section 16 (4) which provides that: "If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so."
The diversity of procedural rules which concern the number of arbitrators, may create a problematic situation for the enforcement of foreign arbitral awards. A foreign arbitral award that was made

118. This is the case in Egypt, an award that results from a decision of an uneven number of arbitrators is considered null and void for considerations of public policy. See Ahmad Abu al Wafa, op. cit., p. 172; Ashraf Al Rifaie, op. cit., p. 241; Abdul Hamid El Ahdab, "The New Egyptian Act…," op. cit., p. 65 pp 97-98. He states that: "it is a ground to set the award aside for being contrary to an imperative provision of the law such as a choice of an even number of arbitrators"; One should mention here that this is not a requirement under the Shari'a law. Mohamed I.M. Aboul-Enein, "Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes," 2 Journal of Arab Arbitration (2000), p. 1 at 7. He states that: "The study of the arbitrated cases according to Islamic Law proves that there are no restrictions on the number of arbitrators. The two parties to a dispute may appoint one or more arbitrators. The number of arbitrators may be odd or even. The matter was always left to the parties."

119. Van den Berg, op. cit., p. 380.

120. This is also the trend in other common law countries, also in France, Belgium, and Netherlands. See Rene David, op. cit., p. 227; V. V. Veeder, op, cit., p. 29; the same may also exist in practice under the procedural rules of certain trades, such as, the Rules of Refined Sugar Association. See Redfern and Hunter, 2nd ed., op, cit., p. 52 and p. 204; Van den Berg, op. cit., p. 380.

121. Section 15 (2) of the English law of 1996 provides that: "Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal."

under a procedural law which permits the parties to compose the arbitral tribunal of an even number of arbitrators, may encounter such problems if enforcement of the award takes place in another country, and that country considers the composition of the tribunal of an even number of arbitrators as contrary to its national mandatory rules. Therefore, such grounds could arguably be established upon Article V (2)(b) of the New York Convention.

Raising such ground could also be made under Article V (1)(d) of the New York Convention, since Article V (1)(d) provides that an award may be refused if: "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". However, one should recognise here that refusing to enforce a foreign arbitral award under Article V (1)(d) could only be established if one of the parties proves to the court that the composition of the arbitral authority was not in accordance with the arbitration agreement or the law of the country where the arbitration took place. Therefore considering this ground under Article V (2)(b) is important for the court of enforcement, as the court could still refuse the enforcement if such composition violates the mandatory rules of its national law and may refuse the enforcement of the award according to Article V (2)(b) of the Convention.

Due to the importance of international commercial arbitration, an international public policy rule has emerged in the domain of enforcement of foreign arbitral award, which requires the national courts to accept the enforcement of a foreign arbitral award that was made by even number of arbitrators. In this regard, several legal systems distinguish between domestic and international public policy.[122] In accordance with this distinction courts have accepted the need to enforce foreign arbitral awards made by two arbitrators, as long as the arbitral panel composition is valid according to the applicable rules of the particular arbitration procedures. [123]
Moreover, one could say that it is irrational to consider the requirement of composing the arbitral tribunal of an odd number of arbitrators as a necessary requirement to guarantee their impartiality, since

122. See, Rubino-Sammartano. M., op, cit., p. 312. He reported that the Italian courts consider this matter as concerning the Italian domestic public policy and not the Italian international public policy.

123. See, Van den Berg, op. cit., p. 380. He states that: "The even number of arbitrators is not a ground for refusing enforce¬ment of the award on account of public policy if an arbitral tribunal composed of an even number of arbitrators is valid in the country in which, or under the law of which, the award was made."

the lack of impartiality of an arbitrator could only be established upon the existence of certain circumstances which require to be proved, which differ from case to case. Also, one should consider that, in practice, parties may appoint two arbitrators and choose one of them as an umpire, which could be considered as appointing a sole arbitrator. Therefore, an award which results from a decision of even number of arbitrators should be enforced as long as the two arbitrators were impartial and have examined all the evidence after giving each of the parties a fair opportunity to present his case or defences.

2. All arbitrators should participate in the deliberations

It is generally acknowledged that if the arbitral tribunal consists of more than one arbitrator then all arbitrators must participate in the deliberation.[124] Some legal systems consider the failure of all arbitrators to deliberate at the same time and place as a ground to annul the award for considerations of public policy.[125] This is intended to guarantee that the award was made after a true exchange of views among all of the arbitrators, and to ensure that justice has been considered by taking into consideration the opinion of all arbitrators.[126]

The first question that may arise here is whether or not arbitrators are necessarily required to be physically present during the deliberations at the same time and place?
This question was considered in Russell on Arbitration where it is said that:[127]

"All must make award together. Where there are two or more arbitrators, all should execute the award at the same time and place. If they do not, the award may be invalidated, but as the objection is one of a formal character, if no other objection is shown, the court may remit the award to the arbitrators for correction."[128]

124. One should mention here that most of legal systems do not require in an award to be made by the unanimous decision of all arbitrators, as an award could be made by the majority decision, but it requires that an award must be made after a deliberation in which all arbitrators have taken part. In this regard see Rene David, op cit., p. 315. He provides that: "unanimity is required in only a few laws, for example, Brazil, Peru and Venezuela."

125. Aktham El kholy, op cit., p. 326. He reported that this was the case under Article 507 of the Egyptian procedural law of (1968): "The Egyptian procedural law authors tend to consider as public policy the implicit requirement under the same Article 507 related to the need for all arbitrators to participate in the deliberations."

126. See, Kenneth Smith Carlston, "The Process of International Arbitration," (1972). Cited in International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes., (1997) The Foundation Press, INC,International Commercial Arbitration, p. 953.

127. Russell, F. Watson, Anthony., Russell on Arbitration, 19th ed. Stevens and Sons, (1979), p. 247; See also, UN Doc. A/40/17, para. 246.

128. In Lord v. Lord (1855) 5 E. & B. 404, each of two arbitrators signed the award but did so at a different time and place. Coleridge J. said, at p. 406 that: "It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment."

However, nowadays, the practice in international arbitration shows that an arbitrator can draw up a draft and send it to the other or others for their consideration and comments. After a draft is agreed, it then can be sent round and signed by each arbitrator separately.[129] This situation was considered in European Grain v. Johnston.[130] In this case one arbitrator signed a blank form of award which was filled in when the remaining two arbitrators reached a decision. The sellers in this agreement accepted part of the award then sought to set aside that part of the award that contradicts with their interest, holding them in default. In an appeal process, Lord Denning M.R. stated that:[131] "whenever all [arbitrators] have signed, each must be regarded as having assented to it, even though each signed it at a different time or place from the others. That principle applies to an award of arbitrators just as it does to a written agreement or any other document to be executed by two or three people." However, in accordance to the facts of the case the court held that:

"… where persons were appointed to act together as arbitrators they were required to reach a decision jointly; that it was misconduct on the part of the arbitrator to sign the award form in blank without taking part in the decision process and for the other arbitrators to endorse his action, that accordingly the whole award was defective but, since the sellers had taken the benefit of the award, they were not entitled to have it set aside."

The second question that needs to be examined here is, whether or not the absence of the signature in the award could be construed as a procedural defect, which indicates that not all the arbitrators took part in the deliberation, and therefore a sufficient ground to refuse the enforcement of a foreign arbitral award for considerations of violating a national procedural mandatory rule.

Legal systems differ at this point, for example, Article 43 of the Egyptian law of 1994 provides that: "If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of all arbitrators shall suffice, provided that the reasons for which the minority did not sign is stated in the award". One can recognise that Article 43 of the Egyptian law of 1994 requires to state in the arbitral award the reasons for which the award is not signed by the

129. 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.

130. European Grain v. Johnston [1983] Q.B. 520; [1983] 2 W.L.R. 241.

131. European Grain v. Johnston [1983] Q.B. at 525.

dissenting arbitrator.[132] The latter is a mandatory requirement, which aims to prove that all arbitrators have participated in the deliberations. Whereas, under Section 52 of the English Act of 1996, for example, parties have the freedom to agree on the form of the award, they are allowed to agree on this issue. In the absence of the parties' agreement, Section 52 provides that the award can be "signed by all the arbitrators or all those assenting to the award". Accordingly, unless otherwise agreed by the parties[133], an arbitrator who does not assent to the award does not have to sign it.[134] Also under Section 52 of the English 1996 Act it is not a requirement to specify the reasons for which a dissenting arbitrator did not sign the award.[135]

It has been reported that the requirement of providing the dissenting opinion in the arbitral award is a matter that differs between the Civil Law and Common Law systems. Such a requirement contradicts with the practice of the civil law system, as one is not authorised to mention the dissident opinion because this is considered to be a violation of the secrecy of deliberations.[136] In this regard, Laurent Levy explained the view of such legal systems.[137] He provides that: "The goal of secret du delibere [confidentiality of deliberation] is to preserve the collegial nature of the courts, to keep the judges immune from the parties' grudges, and so to bolster their independence."[138] On the other hand, under the common law system, providing the dissenting opinion in the arbitral award is not a violation to the secrecy of deliberation.

Therefore, one should consider here that there are countries which consider mentioning the dissenting opinion in the award as a viola-

132. See also Article 31 of the Model Law, provides: "The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated."

133. If such requirement exists according to the parties' agreement and a dissenting arbitrator refused to sign the award, this will be considered as a breach of the arbitrator's duty under Section 33. See Cargill International SA v. Sociedad Iberica de Molturacion SA [1998] 1 Lloyd's Rep 489.

134. Andrew and Keren, op cit., p. 170.

135. See Rene David, op cit., p. 317. He states that: "…this mention is not required in the Common Law countries nor in various countries of Latin America"; see Bank Mellat v. GAA Development & Constriction Co., 2 Lloyd's Rep. 44, 49-51 (1988).

136. Abdul Hamid El Ahdab, "The New Egyptian Act…," op. cit., p. 78; Ronald Bernstein, "General Principles, in Handbook of Arbitration Practice," (1987), p. 101; W. Laurence Craig, Et A.L. "International Chamber of Commerce Arbitration 332-35 (2d ed. 1990). Cited in the "International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes," (1997) The Foundation Press, INC., Directing Editor, David L. Shapiro.

137. Laurent Levy, "Dissenting Opinions in International Arbitration in Switzerland," 5 Arb. Int., (1989), 35–39.

138. However, according to Laurent Levy's opinion, "Such considerations are largely foreign to arbitration where the parties appoint the judges." Ibid., p 39.

tion to the secrecy of the deliberation, while other countries do allow mentioning the dissent opinion and other countries are required by mandatory rules to state the reasons for which the dissenting arbitrator did not sign the award. The diversity between the procedural laws in this regard may lead to obstruct the enforcement of foreign arbitral awards as the application of such requirement to the enforcement of foreign arbitral awards would be unacceptable.

There is a growing tendency to enforce foreign arbitral awards even if the law of the country where enforcement takes place requires rendering the award according to the deliberations of all arbitrators, particularly if one of the arbitrators had deliberately attempted to frustrate the arbitration by refusing to participate in the deliberations.[139] Also, one should consider Article V (1)(d) of the New York Convention as it provides that enforcement of the award may be refused if the arbitration procedure was not in accordance with the rules chosen by the parties or to the law of the country where arbitration took place. Accordingly, determining the validity of the award should be determined according to the law which governed the arbitration proceedings. For example, if the parties agree to apply the LCIA Rules, then, according to Article 26.1, the award can be signed "by the arbitral tribunal or those of its members assenting to it", and according to Article 26. 2 of the LCIA Rules if one of the arbitrators refused to attend the deliberation or refused to sign the award then, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award.[140]

Due to the need to adopt an approach that corresponds to the latest trends in international commercial arbitration, the Cairo Court of Appeals took a step forward by considering the application of such mandatory rules in a less restrictive manner as required under the notion of international public policy. In a decision on 11 August 1996 the Court decided that non-signature of the arbitral award did

139. Such requirement may encourage an arbitrator, who considers himself as the representative of the one of the parties, to deliberately refuse to participate in the deliberations or to sign the award if he recognises that the majority decision is not in favour of the interest of the party who nominated him. Redfern and Hunter, 2nd ed., op, cit., p. 370 and 401; also see Klaus Peter Berger, op, cit., p. 612. He states that: "The dissenting arbitrator is not allowed to go further than communicating his legal opinion on the merits of the case, e.g. by giving an authentic commentary and interpretation of the award as so to provide "his party" with indications on how to attack the award before the courts of the seat of arbitration."

140. Article 26.2 of the LCIA Rules: "If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award."

not mean that deliberation of the arbitral panel did not take place[141], but it only meant that the concerned arbitrator did not approve the award after the deliberations in the case under review. The Court also indicated that the arbitral award was not obliged to outline the reasons for the refusal by an arbitrator to sign the arbitral award if he did not mention those reasons himself.

3. The requirement of nominating the arbitrators in the arbitration agreement

First, a distinction should be made here between the requirement of disclosing the names of the arbitrators in the arbitration agreement and the requirement of informing the parties of the identity of the selected arbitrators. The latter relates to the proper notice of the appointment of the arbitrators, which is subject to Articles V (1)(d) and V (2)(b) of the New York Convention, as already noted in this chapter. This was considered by the Court of Appeal in Germany on 1 June (1976), in regard to challenging of an arbitral award because the parties were not informed of the identity of the appointed arbitrator.[142] The arbitral award related to a dispute between a Danish buyer and a Federal Republic of German seller and was made under the rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. According to the procedures of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade, "the President of the Committee would select the arbitrators to act on a specific case from a publicly available list, but the parties would not be informed of the identity of the specific arbitrators selected. The resulting award would be signed only by the President." The German Court of Appeal refused to recognise the award under Article V (2)(b) of the New York Convention, finding that recognition would have been against the public policy of the Federal Republic of Germany. The court emphasised the importance of informing the parties with the names of the selected arbitrators since this clarifies any objections against the impartiality of a selected arbitrator and guarantees fair arbitration procedures. Furthermore, the court considered this requirement as a "fundamental principle of both FR Germany and international legal order". The court stated that:

"The institution of challenge can be effective only if the parties have

141. The Cairo Court of Appeal's decision on 11 August 1996 in Commercial Case No. 61 of the 113th judicial year. Cited in, Tarek F. Riad, "Arbitration and legal Business Environment in Egypt," 17 J.Int. Arb., (2000), p. 169.

142. The Cologne Oberlandesgericht, Federal Republic of Germany, see Yearbook Vol. IV (1979) at 258; (FR Germany No. 14). Cited in, Stephen M. Schwebel and Susan G. Lahne, op. cit., p. 212 – 213; Christopher B. Kuner, op. cit., p. 82.

the possibility of knowing the names of the judges or arbitrators who take part in the decision of the dispute in question. Only if this condition is fulfilled, can it be investigated whether the judge or arbitrator who takes part is partial and can his participation be prevented. In international law also, great importance is attached to the disclosure of the names of arbitrators: in the New York Convention (Art. V, para. [1] under b) as well as in the European Convention (Art. IX, para. [1], under b), the lack of notification of the appointment of the arbitrators is mentioned expressly as a ground for refusal of recognition and enforcement."[143]

Nominating the arbitrators in the arbitration agreement on the other hand is a requirement that concerns the validity of the composition of the arbitral tribunal. Some legal systems consider the failure to disclose the name of the arbitrator in the arbitration agreement as a reason to refuse the enforcement of the arbitral award. This was the situation in Egypt prior to the 1994 law [144], where this issue occurred before the Egyptian courts on several occasions with reference to the requirement of Article 502 (3) of the Civil Procedural Law of 1968. Article 502 (3) considers not nominating the arbitrators in the arbitration agreement to be a violation of public policy, and therefore a serious grounds for refusing to enforce a foreign arbitral award.[145] Article 502 (3) of the Civil Procedural Law necessitates the direct involvement of the parties to select the arbitrators by names; it provides that:

"Without prejudice to the provisions contained in special legislative acts, the arbitrators have to be nominated either in the arbitration agreement or in a separate agreement."

In Rolaco Holdings S.A. and Casino Palace Port Said v. The Mohafazat of Port Said and Suez Canal Authority[146], the Port Said Court of First Instance ordered the stay of ICC arbitral proceedings to take place in Egypt on the ground that the contract's provision for arbitration was "at variance with the established judiciary rules in the Arab Republic of Egypt which require the two parties' agreement on the name of the arbitrator."

143. Also see, Van den Berg, op. cit., p. 378 providing that the name of the arbitrator is a prerequisite to be known to the parties. If that is not done, a party is deprived of the possibility to investigate whether the arbitrator lacks impartiality and to challenge him.

144. Under Article 17of the Egyptian arbitration law of 1994 it is no longer a requirement to provide the names of the arbitrators in the arbitration agreement.

145. See, Aktham El kholy, op cit., p. 323; Ashraf Al Rifaie, op. cit., p. 227.

146. Rolaco Holdings S.A. and Casino Palace Port Said v. The Mohafazat of Port Said and Suez Canal Authority, ICC Document 4I0/6618. Cited in Stephen M. Schwebel and Susan G. Lahne, op. cit., p. 215.

This was the case until the Egyptian Court of Cassation made a distinction between the application of this rule to national arbitration and international arbitration.[147] The Egyptian Court of Cassation was confronted with this issue on two occasions: The first was when the Alexandria Court of Appeal refused to enforce an award on the basis that the arbitrators who rendered the award (in England, in one case, and in France, in the other case) had not been nominated by the parties themselves in conformity with Article 502.3 of the Egyptian Code of Civil Procedures. The highest judicial court rejected that argument by stating in its first decision of 26 April 1982 that:[148]

"It is unacceptable to claim the exclusion of the applicable English law under the pretext that it violates Article 502 (3) Procedures, even if we assume that this is true. The possibility of excluding the rules of the foreign applicable law is conditioned according to Article 28 of the Civil Code upon the proof that these rules are contrary to public policy in Egypt, i.e., in conflict with social, political, economic or moral bases which relate to the supreme interests of the community. Thus, it is not sufficient that the foreign rules contradict a mandatory legal text."

The second decision was made on 13 June 1983, which stated that:[149]

"The validity of the arbitration agreement had to be decided under the law of the place of arbitration and that Article 502 (3) of the Code of Civil Procedures . . . does not relate to public policy."

IV. Concluding Remarks

Several legal systems contain lists of what can be considered as fundamental procedural rules, the violation of which would justify refusing the enforcement of a foreign arbitral award. It is difficult to specify and examine all issues that can be considered as requirements of procedural public policy because these requirements vary

147. The English courts have had the chance to express their opinion in this regard as early as 1894 in Hamlyn & Co. v. Talisker Distillery. [1894] A.C. 202, at p, 214. Lord Watson provided that: "The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy."

148. M.V. Lela v. Gulf Contractors, Court of Cassation (Egypt), April 26, 1982, (Case No. 714 - judicial year 47), Mediterranean and Middle East Arbitration Quarterly 1988, No. 2, at 1. See, Aktham El kholy, op cit., p. 325; Rubino-Sammartano. M., op, cit., p. 234.

149. Misr Insurance v. M.V. Dominion Trader, Court of Cassation (Egypt), June 13, 1983, (Case No. 1259 - judicial year 49), Mediterranean and Middle East Arbitration Quarterly 1988, No. 2, at 8. See Aktham El kholy, op cit., p. 325; Rubino-Sammartano. M., op, cit., p. 235.

from state to state[150]; therefore it is possible that a defence of denial of due process, which may find success in one jurisdiction, may be unsuccessful in another.[151] National procedural public policy rules may include formal requirements, the violation of which may not necessarily lead to a vital denial of justice to the parties.

Mandatory procedural conditions that do not rest upon principles of universal acceptance can be found in many legal systems. For example, some legal systems may require the person undertaking the position of arbitrator to be of a particular nationality, religion or gender. Some of the Muslim countries like Saudi Arabia, Indonesia, Kuwait, in particular, do not permit woman to be appointed as arbitrators because women are precluded from adjudicating disputes.[152] The international consensus according to the vast majority of countries, and therefore what could be considered as the international public policy rule, is that the arbitrator's gender does not constitute a sufficient reason to refuse the enforcement of a foreign arbitral award, since such ground could not establish a justifiable claim that a vital interest in justice has been violated.

The procedural public policy issues that have been addressed in this chapter prove that the general trend is to construe the Convention's public policy defence narrowly by confining the application of this ground to the minimum standards of justice as known in the practice of international commercial arbitration.

Requirements of purely national public policy rules should not have any impact on the enforcement of foreign arbitral awards. Refusal to enforce a foreign arbitral award for considerations of procedural

150. See, Andrew and Keren, op cit., p. 289; Rubino-Sammartano. M., op, cit., p. 303, stating that: "Procedural public policy plays a role in arbitral proceedings which differs depending on the applicable procedural law."

151. Paul Friedland and Robert Hornick, "The Relevance of International Standards in the Enforcement of Arbitration Agreements under the New York Convention," 6 The American Review of International Arbitration, (1995), p. 151.

152. Rene David, op. cit., p. 246; Abudl Hamid El-Ahdab, "Saudi Arabia Accedes to the New York Convention," J. Int. Arb., p. 87 at 91; Mhaidib Al-Mhaidib, Arbitration as a Means of Settling Commercial Disputes, Special Reference to the Kingdom of Saudi Arabia, Thesis (Ph.D.) University of Edinburgh (1997). However, El Ahdab indicates that there are exceptions to the conditions which are required in an arbitrator according to Shari'a law, that is when arbitration takes place in a non-Moslem country even between two Muslims. See Abdul Hamid El Ahdab, "General Introduction on Arbitration…," op, cit., p. 12; also, Abdul Hamid El Ahdab, "The New Egyptian Act…," op. cit., p. 77. This has been confirmed by Mohamed Aboul-Enein, by depending on the case of the Caliph "Omar Ibn AI-Khattab" who appointed a female called El-Shafae as a judge in the market to decide cases that may arise between parties in disputes in the market. The simple analogy would be that if the woman is eligible to be a judge, she could also be appointed as an arbitrator if she satisfied the requirements for being a judge. Mohamed I.M. Aboul-Enein, "Liberal Trends in Islamic Law…", op. cit., p. 1 at 8. It is worth mentioning that the Egyptian law of 1994 provides an explicit provision in this regard in Article 16. 2 which does not require an arbitrator to be of any gender or nationality unless otherwise has been agreed upon by the parties: "It is not a requirement for an arbitrator to be of a given gender or of a specific nationality, unless otherwise agreed upon between the parties or has been provided by law."

public policy should only be based on the requirements of justice between the parties, that may lead to denial of substantial justice, and where there are matters which may gravely affect the validity of the award or the right to proceed under it. Accordingly, national courts are required to give more consideration to applying common sense rather than insisting on applying a formal rule, which may not be suitable for the requirements of international commercial arbitration. Courts are also required to take into account in their decision-making, that not all of their national rules form part of international public policy, and that international arbitral awards should not be exposed to procedural traditions and concepts of their national legal systems. This does not mean that all judicial review of international arbitral awards should be abolished, since domestic courts are required to preserve the integrity of the arbitral process. The only question the courts should be concerned with when they are requested to review a foreign arbitral award is whether or not the procedural requirements have been respected and whether there has been a serious violation of due process.[153]

153. Henry P. De Vries, op. cit., p. 52.