1. Recognition and Enforcement of a Foreign Arbitral Award– An Analysis of Pakistani Jurisprudence

Dr. Khurshid Iqbal[1]

Abstract

The recent award by the International Centre for Investment Disputes (ICSID) in the Reko diq case against Pakistan has spurred interest in international commercial arbitration. This paper discusses measures that may increase the likelihood of recognition and enforcement of a foreign arbitral award in case the parties refuse to comply voluntarily. It studies key relevant cases, including Hubco and Societe Generate de Surveillance from Pakistan. It concludes that much depends on the intention of the parties in an arbitration agreement. It also concludes that the courts tend to ensure performance of international commercial contracts in public interest as compared to severability.

1. Introduction

In 2019, the International Centre for Investment Disputes (ICSID) issued an award against Pakistan in the famous *Reko diq* case[2]. The award is of huge amount: $ 4.08 billion penalty and $1.87 billion in interest (total $5.96 billion). The claim was instituted by Tethyan Copper Company (TCC), the firm to whom the contract of mining in the Reko diq (a place in Baluchistan) was awarded by the Government. While the matter is now a subject of hectic public discourse, one key aspect of it is the 2013 decision of the Supreme Court of Pakistan which declared the contract as void for being contrary to the relevant laws and rules

[1] PhD (UK, Ulster University, 2007); LLM (UK, Hull, 2002). Judge, Peshawar High Court. The views expressed here are the those of the author and don't reflect the official position of the Government of Pakistan and/or the Judiciary, and prompted by academic interest only.

[2] ICSID, 2019. [online] Available at: <itlaw.com>: [Accessed 12 July 2019].

of the country[3]. This aspect of the matter renewed academic interest in the role of the courts in international commercial contracts vis-à-vis international arbitration.

In a world of ever growing economic interdependence, the role of arbitration, as a useful method of alternative dispute resolution, needs no emphasis. International commercial arbitration is the accepted way of resolving international business disputes. In the contemporary world, the dispute resolution mechanism will invariably be arbitration. Almost all international commercial contracts contain arbitration clauses.

International commercial arbitration is a broad designation that could include the activities of a multitude of trade associations in adjudicating disputes between parties from different countries[4]. As compared to normal court litigation, it is based on what the parties have agreed upon. It is speedy in process, cheap in costs, simple in procedure and across-the-board in resolution (award). It has a binding effect on parties by way of their mutual consent. The parties are free from the clutches of usual statutory limitations. The arbitrators they chose belong to their commercial communities, who are usually well versed in resolving disputes on facts with practical implications, in an informal, inexpensive and expeditious manner[5].

As an alternative means of settling a business dispute, it gears up its motion with the choice of the parties. Indeed, the parties enjoy a considerable freedom of choice to enter into an arbitration agreement, to appoint arbitrators, to opt for the procedure for the conduct of the arbitration process, and to choose a place for arbitration. Yet when it becomes a matter of practice, the choice appears to be difficult and even risky. The reason is that there has

[3] PLD 2013 SC 641

[4] Drahozal, Christopher R. "Commercial norms, commercial codes, and international commercial arbitration." Vand. J. Transnat'l L. 33s (2000): 79.

[5] Clements, Philip J., Daniel E. Furst, Weng-Kee Wong, Maureen Mayes, Barbara White, Fredrick Wigley, Michael H. Weisman et al. "High-dose versus low-dose D-penicillamine in early diffuse systemic sclerosis: analysis of a two-year, double-blind, randomized, controlled clinical trial." Arthritis & Rheumatism: Official Journal of the American College of Rheumatology 42, no. 6 (1999): 1194-1203.

to be a multifaceted interaction of different laws. Usually, "as many as four different national systems or rules of law" [6] come into play in an international commercial arbitration. Firstly, the law governs the arbitration agreement. Secondly, the law under which the arbitration proceedings are conducted. Thirdly, the law applied to substantive facts in issue. Fourthly, the law which regulates the recognition and enforcement of arbitral awards[7]. The last mentioned, i.e., the law, which regulates the recognition and enforcement of award, is of much more significance in the entire process of arbitration. The reason is obvious. The award being of binding force has to be executed by the losing party. An effective enforcement mechanism is, therefore, a must. What the wining party can do is to take recourse to the court for enforcement of the award if the losing party does not voluntarily execute it. Such enforcement can be either at the seat of arbitration or in another state.

The main question in this paper is: what measures could be adopted to increase the likelihood of recognition and enforcement of an arbitral award in case the parties refuse to comply voluntarily. Seeking to answer this question, the paper discusses the grounds of refusal for recognition and enforcement arbitral award as provided in the relevant international instruments and jurisprudence developed on it. The paper studies key cases from Pakistan concerning recognition and enforcement of foreign arbitral awards. It also specifically focuses on those cases—*Hubco vs. WADPA*[8] and *SGS Societe Generate de Surveillance S.A. V Islamic Republic of Pakistan*—in which Pakistani courts refused to recognize and enforce. The paper concludes that the parties must pronounce their intention clearly in an arbitration agreement. It further concludes that the refusal by court appears to be prompted more by ensuring that the mandatory requirements of international commercial contracts

6 Alan Redfern, Alan and Hunter, Martin (1999), Law and Practice of International Commercial Arbitration, London: Sweet and Maxwell (3rd Ed.).
7 Ibid
8 Barrington, Louis (2000) Arbitral Judicial Decision: Hubco v. WAPDA: Pakistan Top Court Rejects Modern Arbitration", 11 The American Review of International Arbitration 11(2000) 385

are fully fulfilled in public interest, as compared to consideration of the doctrine of severability.

2. International Commercial Arbitration: An Overview

International commercial arbitration is of two kinds, viz. *ad hoc* and institutional. In the *ad hoc* arbitration those rules of proceedings are followed which the parties have agreed to[9]. But the question is which rules these should be? These rules can be adopted by the parties or by the arbitral tribunal or some international organisation, e. g. United Nations Commission on International Trade Law (UNCITRAL)[10]. Whereas institutional arbitration is run by specialist arbitral institutions under its own rules framed for the purpose of arbitration, to name, but a few of those institutions, they are the London Court of Arbitration, the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC).

The first step in an international commercial arbitration is that there must be an agreement. It means the parties must have agreed to each other that in case a dispute arises between them that will be referred to arbitration. The agreement must be valid, and in written form. Both the New York Convention (article II (2)) and the Model Law (art. 7(2)) require that the agreement must be in writing.

The arbitration agreements are of two categories, namely, the arbitration clause and the submission agreement. A clause pertaining to recourse to arbitration in case a dispute arises in future, added into the main agreement by the parties, is called arbitration clause. When the parties enter into agreement to submit an existing dispute to arbitration, it is known as submission agreement.[11] Irene Welser and Susanne Molitoris argue that arbitration clause is a "midnight clause", the need of its consideration may arise 'sometimes late at night or in the early

[9] Ibid 6
[10] Ibid
[11] Ibid 6

hours of the morning....'[12] A look at the UNCITRAL arbitration rules (21(2)) will show that an arbitration clause is independent of the remaining conditions of the contract of which it is a part and its validity is not rendered illegal if the contract is adjudged as null and void.

Validity of arbitration agreement is also an important issue. It is judged both in form and substance. While, as stated above, it must be in written form, formal requirements of arbitration agreement may vary from state to state. What is indispensable to be seen is the validity of substance. In this respect first of all the existence of arbitration agreement is to be determined by finding out the intention of the parties[13]. The intention of the parties can be determined by examining the arbitration clause. The second essential is the legal capacity of the parties. That is to say, the parties must be natural or juristic persons. The general principle is that every person having capacity to enter into a contract can make an arbitration agreement. Every person is competent to contract who is of the age of majority according to the law to which s/he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which s/he is subject[14]. Almost the same conditions of capacity apply under the English law of contract [15]. According to the New York Convention[16], capacity is seen under the applicable law. The third essential is what is known as arbitrability, i.e. whether a dispute is capable of settlement by arbitration. Both the New York Convention [17] and the Model Laws[18] clearly speak about arbitrability. The reason is that some proceedings are of public consequences, for example, a dispute over matrimonial property [19] which does not deserve to be settled by private proceedings of arbitration. The question of arbitrability needs to consult

[12] Irene Welser, Susanne Molitoris, "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract", 2012,
[13] Ibid 6
[14] Pakistan, The Contract Act, 1872: section 11
[15] UK, Contract (Applicable law) Act, 1990: article 11
[16] New York Convention, Article V (a)
[17] New York Convention, Article II (1)
[18] The Model Law, Articles 34 (2.b.i)

domestic laws of states because the states determine which matters may or may not be resolved by arbitration. A dispute not capable of settlement by arbitration means that it does fall within the contemplation of the arbitration clause; it has invited debate in legal circles in the US.

Arbitrability is deeply linked with public policy. Under the New York Convention (art.V (2.b)) as well as the Model law (art. 36 (b.ii)) recognition of award may be refused if the award is contrary to the public policy of the state where enforcement is sought. A recent example is *Hubco v. WAPDA* decided by the Supreme Court of Pakistan. It was held by majority of the court that the "dispute is not arbitrable [and] as such should be decided by a Court of law as a matter of public policy" [20] However, public policy is not one and the same in each and every country. The various subjects that may be considered covered by the doctrine of public policy, are bankruptcy, insolvency, antitrust laws, securities laws, criminal matter, grant and validity of patents and trademarks, bribery, corruption, fraud[21]. The contentious issue in the *Hubco v. WAPDA* case was 'whether the nature of the dispute and the question of *mala fide*, fraud, illegalities and the legal incompetence raised preclude resolution of the matter through arbitration as a matter of public policy and as such the dispute between the parties is not arbitral and cannot legitimately be subject matter of ICC arbitration...?'[22].

The substance of the agreement must be expressed in a language that should carry out the intention of the parties. Thus, it is advisable that due care should be exercised at the time of drafting the agreement. A clause not drafted with due diligence and care may land the parties in trouble. Look at this clause, for example:

> *Any dispute arising from this agreement shall be settled finally under the rules of conciliation and arbitration of*

[20] Barrington, Louis (2000) Arbitral Judicial Decision: Hubco v. WAPDA: Pakistan Top Court Rejects Modern Arbitration", 11 The American Review of International Arbitration 11(2000) 385.
[21] Blackaby et al., Redfern and Hunter on International Arbitration para. 2.04 (5th ed. 2009)
[22] Ibid 19

the 'Chamber de commerce' by an arbitrator appointed in compliance with such rules; the place of arbitration shall be Paris; French law shall be applicable law [23].

A dispute as to what did *Chambers de Commerce* mean arose, one of the parties argued that it meant the Paris Chamber of Commerce and Industry, known as such, adding that the dispute cannot be referred to international arbitration because the Paris Chamber of Commerce has no arbitration rules. Resultantly, the arbitration agreement was held to be null and void. Courts have observed that not enough attention has been directed to the true nature and function of an arbitration clause in a contract[24] .The flaws are owing to inadequate and insufficient drafting of the arbitration clause or to the *lacuna* in the arbitration arrangements, which later on come to light.[25] Redfern and Hunter [26] argue that defective clauses suffer from inconsistency, inoperability and uncertainty. Discussing the defects pertaining to scope of the arbitration clause and to appointment of arbitrator,[27] argues that the words, *'all matters in difference between the parties'* not only refer to claims arising from particular transaction but points to such issues which may impinge on the civil rights of the parties. Whereas defect as to appointment of arbitrator is/can be curable 'if the parties have adopted' what he calls 'statutory or regulatory framework.' The basic elements of arbitration clause are: valid arbitration agreement, the number of arbitrators (at the most three), establishment of arbitral tribunal, choice as to *ad hoc* or institutional arbitration, filling vacancies in the tribunal, place of

[23] Rubino-Sammartano, Mauro. International arbitration law and practice. Juris Publishing, Inc., 2014.
[24] Collier, John and Lowe, Vaughan (1999), *The Settlement of Disputes in International Law Institutions and Procedures,* Oxford: Oxford University Press
[25] Clive M. Schmithoff, Clive M., Defective Arbitration Clauses, 1975, The Journal of Business Law 9-22.
[26] Ibid 6
[27] Ibid 24

arbitration, governing law, inclusion of default provisions, use of contract language, entry of judgement and rule of court clauses[28].

As stated above international commercial arbitration involves a complex interplay of different laws. Although it is argued that the parties have the option to choose their own law subject to such conditions as public policy [29], the question arises which law shall apply to arbitration proceedings? The answer is that the law on which the parties have agreed (*Compagnie Tunisienne de Navigation SA v. Compagnie d' Armement Maritime)*[30]. International commercial arbitration proceedings are conducted in a neutral state[31]. Procedural law governing arbitration proceedings is usually different from the law governing substantive facts in issue. The procedural law is called *lex arbitri*. In (*UK: Bank Mellat v. Helliniki SA* (1983)[32] Kerr L.J. held that 'the procedural (curial) law governing arbitration is that of the forum of the arbitration, whether this be England...or some foreign country [...].' Some authors argue that *lex arbitri* is not merely a procedural law but much more than that, e. g. dispute over patent being a matter of public policy, is substantive in nature[33].

International commercial arbitration is governed also by municipal procedural law, most frequently by the law of the jurisdiction in which the arbitral tribunal sits. This law, known as the *lex loci arbitri*, may be crucial in resolving procedural issues that arise. Thus, arbitral tribunals often meet in a jurisdiction with an arbitration law that is both developed and supportive of arbitration as a dispute resolution mechanism[34]. The parties may opt for the procedural law of one state in another state but it may complicate the matter for them in case of a situation where they

[28] Irene Welser, Pitfalls of Competence, in Austrian Arbitration Yearbook 2007, 3 (Klausegger et al. eds., 2007)
[29] McNair, Douglas M. "Reinforcement of verbal behavior." Journal of experimental Psychology 53.1 (1957): 40.
[30] Compagnie Tunisienne de Navigation SA v. Compagnie d' Armement Maritime [1971] A. C. 572.
[31] Ibid 6
[32] (UK: Bank Mellat v. Helliniki SA (1983)
[33] Ibid 6
[34] Larson, Clifford (1997), "International Commercial Arbitration", www.asil.org/insight6.htm

take recourse to a court of law because the court of one state may obviously refrain from giving verdict on the procedural law of another country[35]. The arbitral tribunal may hold its meetings in different countries, say, to record evidence or to inspect the spot of the project. This will not affect the seat of the arbitration[36]. If a time period stipulated in the arbitration is not honoured and the proceedings are not instituted within that period, the arbitration agreement may lose its legal value[37]. In an Italian case (Italy: *Romano v. Rinaldi (Italy)*)[38], it was "held that not only the arbitration agreement is no longer effective, but also the parties' rights to refer the dispute to the courts could no longer be exercised."

The arbitration proceedings conclude with an award. A question may arise as to where an award is made. Article 25 (3) of the ICC Rules says that "the award shall be deemed to be at the place of the arbitration and on the date stated therein." Per article 2 of the New York Convention 'the term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.' Article 28 of the ICC Rules requires that the award shall state the reasons upon which it is based, and that it shall be binding on the parties. According to both the letter and spirit of the aforementioned rules, the very submission of dispute to the arbitration means that the parties undertake to enforce any award without delay. Award may be interim or final. An interim award disposes of such issues as jurisdiction or procedural matters[39]. It follows that an award, which does not cover the dispute in its entirety, is called interim award. Final award, on the other hand, is a decision on all facts in issue[40], carrying binding effect on the parties. During the proceeding, parties may arrive at a mutually acceptable resolution of the dispute by way of

[35] Ibid 6
[36] Ibid
[37] Rubino-Sammartano (1990), International Arbitration Law, Kluwer Law and Taxation Publisher.
[38] Italy: Romano v. Rinaldi, Court of Cassation (Italy), January 8 No. 111 (1980), Foro It. 1980, I, 1.
[39] Ibid 6
[40] Ibid

compromise on the basis of which an arbitral tribunal can pass an award. Such an award is called consent award. Where a party either fails or refuses to participate in the arbitration proceedings, the tribunal shall do its best to afford it the opportunity to put forward its submissions. An award passed against such a defaulting party is known as default award[41]. Once the arbitral tribunal makes an award, it has got no concern with its enforcement. However, it is the duty of the arbitral tribunal to make an enforceable award e.g., art. 26, ICC Rules[42].

3. Grounds for refusal of enforcement

3.1. Enforcement (recognition): meaning

Enforcement is a remedial right[43]. In other words, it is execution of an arbitral award by means of legally coercive methods. It is available as a sword to the wining party[44], who requests the court for enforcement of the arbitral award. In the law of international commercial arbitration, the term enforcement is often used along with the word recognition (the New York Convention, Article I. 1[45]; the Model Law, Articles 35 and 36[46]; Geneva Convention, Article 1, para. 1 *&* 2[47]). This fact itself requires seeing whether the two are different from each other or the same. As a defensive ground recognition can be raised "in respect of dispute that has been the subject of previous arbitral proceedings"[48]. Recognition prevents rising of those issues anew which the arbitration tribunal has already disposed of. The English Arbitration Act, 1996 [49] acknowledges recognition as a defence. An award may be recognised yet it may not be enforced. But its enforcement will mean that it is already recognised. In this respect, the case *Dallal*

[41] Ibid
[42] Article 26, ICC Rules
[43] Black Law Dictionary (1999), Seventh Edition, West group (1999).
[44] Irene Welser, Pitfalls of Competence, in Austrian Arbitration Yearbook 2007, 3 (Klausegger et al. eds., 2007)
[45] The New York Convention, 1958, Article I. 1
[46] the Model Law, Articles 35 and 36
[47] Geneva Convention, Article 1, para. 1 *&* 2
[48] Ibid 6
[49] English Arbitration Act, 1996 (s. 101(1))

v. Bank Mellat [50]may be cited. In this case Hobhouse J. held that recognition of the award passed by the Iran-US Claim Tribunal was conclusive between the parties, although the award was not enforceable under the New York Convention. Redfern and Hunter have explained this difference in a hypothetical case. They say that suppose a dispute as to non-payment arises between a defendant company and a foreign supplier, which is submitted to arbitrator who dismisses the claim of the foreign supplier. In case of a claim by the foreign supplier, the ground of defence available to the company is to solicit to the court for recognition of the award. If the court agrees with the defence, the claim of the opposite party will stand dismissed. This will mean the recognition of the foreign award but not the enforcement of the award itself. On the authority of Van Den Berg, Rubino-Sammartano [51] says that recognition aims at neutralising a losing party's attempt to open new questions in the court of the state requested to enforce the award.

3.2. General Principles

The wining party has to apply for enforcement of award in that state where the losing party has its property. An award is executed against assets, comprising bank accounts, or other valuable property, such as, a ship, a cargo of oil, and other goods, aircraft, etc. Different countries provide different methods of enforcement. For example, the Swiss law requires deposition of the award with a court and issuance of certificate of enforceability [With the Swiss court where the tribunal sits; certification by the tribunal shall be equivalent to such a filing][52]. The English law provides that an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect. Where leave is so given, judgement may be entered in terms of the award. In France, recognition is a step

[50] Mark Dallal v. Islamic Republic of Iran, Bank Mellat (formerly International Bank of Iran), IUSCT Case No. 149, [1983]
[51] Ibid 34
[52] Poncet, Charles and Gaillard, Emmanuel, Private International Arbitration Introductory Note, at http://www.praetor.ch/francais/whoswho/poncet/divers/arbitration-fr.htm

that precedes the enforcement[53]. In Australia, where the foreign arbitral award has a binding force on the parties, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that state or territory in accordance with the law of that state or territory[54]. Almost the same is the position under the Canadian law, that is to say, the arbitral award is binding and enforceable through a court of competent jurisdiction on application in writing on supply of duly authenticated and certified copy of the award[55]. Arbitral award can also be sued upon as evidence of a debt making arbitration agreement liable to contractual obligation[56].

So far enforcement of arbitral award in the seat (the state where the arbitration proceedings are held) is concerned it is as simple and easy as if the award is under the municipal law[57]. The enforcement of an award in other state involves intricate procedure[58]. The wining party is required to ask for enforcement in that state where the losing party has its resources. It is also important for the wining party to see whether the state, in which it seeks enforcement, is a party to the New York Convention or other international agreement[59]. There is also a limitation period for the recognition and enforcement, which is usually provided by the municipal laws.

4. Grounds for refusal in international conventions

4.1. Earlier conventions

Keeping in view its global importance, there have been efforts on the international level to regulate recognition and enforcement of award through international conventions. The Geneva Protocol of 1923[60] was the first such convention in the twentieth

[53] Article 1498, of the Code of Civil Procedure, 1981
[54] International Arbitration Act, 1974: s. 8 (1&2).
[55] Commercial Arbitration Act R.S., 1985, c. 17 (2nd Supp.) Section 35 (1&2).
[56] Ibid 6
[57] Ibid 6
[58] Ibid 6
[59] Ibid
[60] The Geneva Protocol of 1923 (see art. 3)

century. It provided recognition of arbitration agreement and enforcement of award by contracting states. Very soon, the Geneva Convention of 1927, which provided for enforcement of award in the territory of any contracting state, followed the Geneva Protocol. Commentators argue that the Protocol suffered in scope and impact[61]. The Convention yielded to what is known as *double exequatur*, i. e. getting *exequatur* from the court of the state where it was made, to the effect that it was final, as well as from the court of the state where its enforcement was sought[62].

4.2. The New York Convention, 1958

The most important and effective one presently, is the New York Convention, 1958, on the recognition and enforcement of foreign arbitral awards. This Convention has greatly increased and relieved the process of recognition and enforcement. The grounds of refusal are provided in its article V. First, the parties had no legal capacity or the agreement was not valid. Second, the non-issuance of proper notice of the appointment to the party against whom an award is made. Third, the award deals with issues not contemplated by or not falling within the terms of the agreement. Fourth, the composition of arbitral tribunal or procedure is not in accordance with arbitration agreement or the relevant law. Fifth, the award is either not binding, or suspended or set aside. The two additional grounds of refusal are firstly, when the dispute is not capable of settlement by arbitration; or secondly, the recognition or enforcement of award would be contrary to the public policy of the country where its recognition and enforcement are sought.

4.3. The Model Law, 1985

With a view to achieve uniformity of arbitration laws of different countries, the Model Law was adopted by a resolution of UNCITRAL in 1985. Its article 36 enunciates the same grounds of refusal couched in the New York convention summarised above. Covering the entire gamut of the arbitration proceedings, from

[61] Kosheri, International Handbook of Commercial Arbitration, Suppl. January 11, 1990, pp1-52; El-Ahdab, J. Int. Arb., vol. 14, No. 4, pp59-88.
[62] Ibid 6

the start to the final, the Model law has recorded success worth appreciation[63]. While both the laws provide exhaustive grounds for refusal, they do not allow scrutiny of the merits of the award.

4.4. The Washington Convention

Another important international convention is the International Centre for the Settlement of Investment Dispute (ICSID), commonly known as the Washington Convention. It came into being in 1965. The ICSID articles 50 to 52 provide a mechanism to deal with revision, interpretation and annulment of the award. Articles 53 to 55 pertain to recognition and enforcement of award. It requires that each contracting state must recognise and enforce an ICSID award unless revised or annulled under its own internal procedure. As many as 166 countries have signed it till yet.

4.5. Regional Conventions

The European Convention of 1961 provides that an award in one contracting state may be set aside in another contracting state only if it has been set aside on the grounds enshrined in the Convention. It provides four grounds for refusal of foreign arbitral award. The three grounds which article IX sub paragraphs (a), (b) and (c) provide are similar to those mentioned in article V, paragraph 1 of the New York Convention. While its sub paragraph (d) differs from paragraph (d) of the above provision of the New York Convention, which relates to the composition of tribunal or procedure not in accordance with arbitration agreement or the relevant law. Interestingly, the ground of policy is not mentioned. This has been explained in the following words: "…. an award made in State A, between nationals of States B and C, which was to be enforced in either State B or C, could not be enforced because it had been set aside in State A violating public policy, notwithstanding the fact the award was not contrary to the public policy of either State B or C"[64].

[63] Ibid 6

[64] Benjamin, P.I., The European Convention on International Commercial Arbitration, XXXVII British Yearbook of International Law (1961), 478.

The Moscow Convention, 1972 provides that award 'shall be final and binding', and in case of failure to enforce award, it may be enforced as judgement of court. The Panama Convention, 1975 which provides the same grounds of refusal as the New York Convention provides for the reciprocal enforcement of awards, using the word execution instead of enforcement. The Amman Convention, 1987 is recent one. Its model is based on the Washington Convention.

4.6. Specific grounds of refusal: an analysis

The application of these grounds for refusal as laid down in these conventions has been creating legally important and academically interesting examples in international commercial arbitration. Where it was proved that the two ICC awards were "non-existent" having been made "without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of the State", the defence of incapacity was successful, and the enforcement was refused (France: *Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic*)[65]. In an Italian case, the defence of invalidity of agreement was unsuccessful on the ground that the arbitration agreement was printed on the reverse side of the purchase order (Italy: *Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s. a. s. (Italy) (1979*)[66].

The second ground of refusal pertaining to non-issuance of notice can be shortly called 'due process.' This means opportunity of fair hearing to the parties. The court will see whether the opportunity of fair hearing was afforded to the parties or not. As arbitration agreement is based on the consent of the parties, therefore, it needs not to be considered a fair hearing requirement as complied with by courts.

[65] France: Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic, XV Yearbook Commercial Arbitration (1990), 515.
Italy: Romano v. Rinaldi, Court of Cassation (Italy), January 8 No. 111 (1980), Foro It. 1980, I, 1.
[66] Italy: Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s. a. s. (Italy) (1979), IV Yearbook Commercial Arbitration, 289.

The third ground of refusal pertains to what may be called jurisdictional issues. It may contain many layers, for instance, existence of valid arbitration agreement, whether the tribunal is properly constituted, what matters have been submitted to the arbitration in accordance with the arbitration agreement, and arbitrability[67]. Jurisdiction may be challenged either at the start of the proceedings, regarding which the tribunal can pass an interim award or after the final award is made, in which case it can be raised as an attack on the award being devoid of jurisdiction. However, according to s. 31 of the English Arbitration Act, 1996 objection as to substantive jurisdiction must be raised at the outset of the proceedings. If the objection is not raised forthwith or within such time as may be allowed by the arbitral tribunal, the party wants to raise it, will be precluded from raising it subsequently. The due process defence has attracted debate because of its standards recognised in different jurisdictions. For example, in an American case a party contended before the court that one of the arbitrator's suggestions to submission of summaries was so misleading that it was denied the opportunity to present its case in a meaningful manner[68]. Due process can be seen from such angles as opportunity to appear in the arbitration proceeding, opportunity to produce evidence and opportunity to raise objection to the procedural rulings of the arbitral tribunal. The issue of jurisdiction may also be taken that there is no valid agreement of arbitration. In this respect the *Pyramids* arbitration can be cited as a good example. There was an agreement between the claimant, the owner of a holiday resort or hotel and the Egyptian Government. The claimant proposed to construct a holiday village and other facilities near Pyramids, which attracted wide spread opposition both in and outside Egypt. The government cancelled the project due to this opposition. The claimant instituted a claim for breach of contract by way of arbitration. The Egyptian government took the plea that it was not a party to the arbitration agreement, which was accepted and

[67] Ibid 6

[68] Inoue, Osamu, The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard, 11 American Review of International Arbitration (2000), 24.7.

the award set aside by a Paris court of appeal[69]. It follows that the final authority rests with the court to adjudge whether a valid agreement exists between the parties or not. To elaborate further one can say that judicial component (the other is contractual) of arbitration is subject to the supervisory jurisdiction of the courts to see the principles of impartiality of arbitrators and natural justice are fulfilled[70].

The fourth ground of refusal is that either the composition of arbitral tribunal is not in accordance with the arbitration agreement or such agreement is not in accordance with the law of the country where the arbitration took place. This provision is an improvement over article 1(c) of the Geneva Convention of 1927. In the New York Convention this constraint is dropped. It is the agreement that has got precedence; if there were no agreement, the laws of the seat of arbitration would be give consideration[71]. In a Hong Kong case, this ground of the composition of arbitral tribunal not in accordance with the agreement, was raised because the arbitrators appointed were on the Shenzhen list but not on the Beijing list (China: *China Nanhai Oil Joint Service Cpn v. Gee Tai holdings Co. Ltd.*)[72]. The court concluded that "technically the arbitrators did not have jurisdiction to decide the dispute...in all circumstances ...the ground specified in the section is made out"[73]. But the court allowed the enforcement invoking the doctrine of estoppel because the party objected to enforcement, took part in the arbitration proceedings despite knowing the fact that arbitral tribunal was not on the relevant list.

The fifth ground of refusal is that the award is not binding, suspended or set aside. This ground is subject of much debate[74]

[69] Redfern, Alan (1986) International Commercial Arbitration Jurisdiction Denied: The Pyramids Collapses, 1986 Journal of International Business Law 15-22.
[70] Schmithoff, Clive M., 'Arbitration: The Supervisory Jurisdiction of the Courts', Journal of Business Law (1967), pp318-328
[71] Ibid 34
[72] China: China Nanhai Oil Joint Service Cpn v. Gee Tai holdings Co. Ltd. Reported in XX Yearbook Commercial Arbitration 671.
[73] Ibid 6
[74] Ibid 34

for various reasons. For example, with reference to Van den Berg, Redfern and Hunter say that it is the practice of some national courts to examine whether the award is in fact binding under the law[75]. According to article 1 (d) of the Geneva Convention the word "final" has been used, which had led to the view of its first declared as final by the court at the seat of arbitration (the doctrine of *double exequatur*). In the New York Convention the word "binding" is used for award, which is seen as not subject to appraisal on merits[76]. Another view is that 'it can be enforced even if it has not yet been declared enforceable'.

Two other grounds of refusal are arbitrability and public policy. Where a party to the contract in one country terminated the distributorship of another party in another country, the court held that the cause of action was exclusively triable by court in the other country, as such not capable of settlement by arbitration (*Audi-NSU Auto-Union AG (Germany) v. Aseline Petit & Cie (Belgium)* reported in (1980))[77]. As referred above, the Supreme Court of Pakistan has invoked the principles of public policy and arbitrability in the *Hubco* arbitration case. In India, too, for example, the public policy ground is recognised in many cases, *Renusager Power Co. Ltd Vs General Electric Company (1994) Suppl CLAI/AIR 1994 SC 86; National Thermal Power Corfin.V Singer Co. (1992) 8 CIA116 (c))*[78]. In England the courts, may refuse to enforce unlawful contract[79]. In a case relating to contract of smuggling carpets, the court held that the arbitral award is not enforceable if it is contrary to English public policy[80]. In another case it was held that 'a contract was to be performed abroad, it would be enforced by the English court unless it was also contrary to the domestic public policy of the country of performance (*Westacre Investments In. v. Jugoimorpt-SDPR*

[75] Ibid 34
[76] Ibid 34
[77] Audi-NSU Auto-Union AG (Germany) v. Aseline Petit & Cie (Belgium) Reported in Redfern and Hunter, 1999.
[78] Renusager Power Co. Ltd Vs General Electric Company (1994) Suppl CLAI/AIR 1994 SC 86; National Thermal Power Corfin.V Singer Co. (1992) 8 CIA116 (c)
[79] Halsbury's Laws of England, 4th Ed. 1998
[80] UK: Soleimany v. Soleimany, The All E R, 3 (1999), p847

Holding Co Ltd. and others)[81]. Discussing enforcement of foreign arbitral award in the US, McClendon argues that "corruption, fraud, or undue means" and "evident partiality" will be against public policy as such a defence under article V (2) (b) of the Convention[82].

5. Enforcement of arbitral award in Pakistan

5.1. The existing regime

Pakistan's arbitration laws date back to the colonial time. The British colonial government of undivided India introduced the Arbitration (Protocol & Convention), Act, 1937, followed by the Arbitration Act, 1940. The former, pertained to foreign arbitration and enforcement of foreign arbitral award, was introduced in pursuance of the Hague Convention. The law, under section 3, excluded the application of Pakistan's Arbitration Act, 1940 and the Civil Procedure Code, 1908. It further provided that the foreign arbitral award shall be treated as binding for all purposes on the parties between whom it was made.

After independence, Pakistan signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") on 30 December 1958. However, no domestic legislation was passed to ratify the convention. It was, however, in 2005 that the Recognition and Enforcement (Arbitration Agreements and Foreign, was passed. Till 2011, the ordinance was repeatedly promulgated when finally, the legislation was enacted as the Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act, 2011. The Act repealed the Arbitration (Protocol & Convention) Act, 1937. Commentators argue that the Arbitration Act, 1940 is now almost obsolete in its present form as it is not well equipped to handle modern and more complex commercial arbitration disputes. There is an immense need of a new legislation so that it could provide uniformity and certainty

[81] UK: Westacre Investments In. v. Jugoimorpt-SDPR Holding Co Ltd. and others, The All E R, 3 (1999), p864.
[82] McClendon, J. Stewart Enforcement of Foreign Arbitral Awards in the United States 4 Journal of International Law and Business (1982), pp58-74.

to both the categories of arbitration, domestic as well as international commercial arbitration[83].

In this perspective, a new legislation has been proposed which is pending before the Parliament since 2009. The proposed law seeks to implement the UNCITRAL Model Law on International Commercial Arbitration. There is legislation in other fields which encourage dispute settlement through arbitration. They are family matters, industrial disputes, cooperative societies, electricity, and income tax.

5.2. An analysis of case law

Till 2011 when a new legislation was introduced, the cases of foreign arbitration were dealt with under the Arbitration (Protocol and Convention) Act, 1937. In a 1993 case, the Supreme Court articulated what it called its dynamic approach towards enforcement of a foreign arbitral award, in the following words:

"...[W]hile dealing with...foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport system in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations [...][84].

[83] Saad Mir, Saad, 'Court Intervention in Arbitration: Pakistan's Perspective', Pakistan Law Journal, 2016.
[84] PLD SC 1993, 42, 52 (Eckhardt & Co. GmbH vs. Muhammad Hanif).

A similar view was expressed by the High Court of Sindh in a 1999 case. The court argued that Pakistan's international respect lies in the proactive role of its judiciary to facilitate quick performance of international commercial agreements[85]. In another case, the same court rather lamented the institution of cases in Pakistan by those against whom awards are made abroad. The court believed that such cases "tantamount to abuse of the process of the Court tantamount to abuse of the process of the Court.... [and] may lead Pakistan into becoming pariah in the commercial world".[86]

In a number of cases, the courts have preferred to refrain from interference for several reasons. For example, in one case, the High Court ruled that 'the arbitrator is a judge of all matters arising out of a dispute whether of fact or law and the Court is not to act as a Court of appeal sitting in Judgment'[87]. In another case, the Supreme Court held that a court should not intervene 'unless it could be shown by sufficient and reliable material on the record that the arbitrator was guilty of misconduct or that the award was beyond the scope of reference or that it was violative of a statute or was in contradiction to the well settled norms and principles of law'[88]. Taking a similar view in another case, the court held the award could be challenged only on the grounds mentioned in section 30 of the Arbitration Act, 1940—the arbitrator's and the proceedings not based on merits. The court maintained that while hearing objections against the award it could not sit as a court of appeal[89].

In the case of *Hitachi Limited vs. Rupali Polyester's and Others*, where an award was made by an ICC tribunal in London in a contract which was to be governed by Pakistani law, the Supreme Court dismissed the plea of the Pakistani party to remove the

[85] (1999) CLC 437 (A. Meredith Janes Co. Ltd v. Crescent Board Ltd.)
[86] (1999) CLC 1018 (Conticotton S.A. v. Farooq Corporation and others)
[87] 2001 MLD 99 (Federation of Pakistan vs. Al Farooq Builders).
[88] 2004 SCMR 590 (President of Islamic Republic of Pakistan vs. Syed Tasneem Hussain Naqvi).
[89] 2002) CLD 153 (Meredith Jones & Co through Attorney vs Usman Textile Mills).

English arbitrators[90]. In this case, the court did not follow an Indian Supreme Court view in a case titled as *Indian Supreme Court in National Thermal Power vs. Singer Co. & other.* In this latter case, the contract was to be governed by Indian law. A dispute arose between the parties. The dispute was referred to arbitration under the ICC Rules. The parties had not agreed to a seat for the arbitral tribunal. The ICC Court decided that the arbitration would have its seat in London. The tribunal made an award in London. One party sought to set aside the award within the meaning of section 14, 30 and 33 of the Indian Arbitration Act 1940, a law applicable to domestic awards. The court accepted the appeal, holding the Indian courts have jurisdiction set aside the award.

Flame Maritime Ltd. v. Hassan Ali Rice Export [91] is another example in which the court refused to interfere with foreign arbitral award. In this case, when the enforcement of the award was sought through the court, two objections were raised: first, the arbitrator was alleged to have committed misconduct by passing the award *ex parte* as he considered the claim of one party only. Second, the interest awarded by the arbitrator was alleged to be not recoverable as interest is against the injunctions of Islam. The court rejected both the objections, arguing that the objector did not prefer with his own free will to participate in the proceedings. As for the second objection, the court ruled that since the award has become final in the UK, therefore, at the stage of enforcement in Pakistan, it cannot be nullified on the ground of interest. One commentator argued that the decision regarding the finality of the award vis-a-vis the issue of interest

'[i]s a credible decision which excludes any iota of element of biasness against the foreign parties as grant of interest being in violation of injunctions of Islam could be accepted by the Court as a public policy ground, as plead by the objecting party[92].

[90] 1998 SCMR 1618 (Hitachi Limited vs. Rupali Polyester's and Others) [1992] 2 Comp. L.J..256.
[91] 2006CLD Karachi 697 (Flame Maritime Ltd. v. Hassan Ali Rice Export).
[92] Ibid 66

Metropolitan Steel Corporation Ltd (plaintiff) filed a civil suit against *Macsteel International UK Ltd. (defendant)* for recovery of money[93]. The defendant was under an obligation to supply to the plaintiff 1600 MT rods. It supplied 500 MT rods only. As the defendant failed to perform the remaining part of the sale contract being unable to supply the remaining quantity, the plaintiff brought a civil suit. The defendant sought stay of the civil suit and issuance of direction to the plaintiff to go for arbitration proceedings. The plaintiff denied arbitration agreement. After examining the record of the case, the court found the correspondence between the parties proved that there was an agreement for arbitration. The plea of the defendant prevailed; the court stayed the suit and directed the parties to go for arbitration first.

5.3. REJECTION BY COURTS

While the above discussed cases indicate judicial support for enforcement of foreign awards, in two cases—*Hubco vs WAPDA* (*Hubco*) and *SGS vs. Pakistan* (*SGS*)—the courts rejected international arbitration. The rejection attracted comments from within Pakistan and at broad. One Pakistani commentator argued that these cases "rather undermined international arbitration." Both are high profile cases and need detailed discussion.

5.3.1. HUBCO

In 1992, *Hubco*, a Karachi-based power generation company, signed with WAPDA (Pakistan's water and power development authority, the main organization responsible for power generation and supply in the country) a power purchase agreement (PPA). According to Schedule VI to the PPA, WAPDA had to make payments to *Hubco* per a certain financial model for tariff calculations. The payment was to be made for thirty years, which was the life of the project. The agreement had an arbitration clause providing for ICC arbitration at London. WAPDA contended that the revisions to Schedule VI to the PPA, pertaining to inflated tariffs payment due from it, were prompted

[93] PLD 2006 Karachi 664

by collusion and illegality without lawful agreement by WAPDA. In October 1998, WADPA took three actions against *Hubco*: first, it repudiated through a letter three amending contractual documents on grounds of illegality, fraud, collusion and *mala fide* aimed at causing wrongful loss; second, instituted criminal proceedings against *Hubco* and its own officials; and third, filed a suit in Lahore for recovery of overpaid tariff amounting to Rs. 16.0 billion. Hubco, on the other hand, filed a suit in Karachi, challenging WAPDA's letter of repudiation, sought its suspension and issuance of an injunction restraining WAPDA from seeking any judicial remedy contrary to the ICC arbitration clause in the PPA. *Hubco* launched a second attack against WAPDA by initiating ICC arbitration proceedings alleging contractual breach.

As the matter reached the Supreme Court of Pakistan, a five-member bench heard it. By a majority opinion by three judges, the court held that the allegations of corruption constitute circumstances which provide *prima facie* basis for further probe into the matter judicially. The court ruled that if such allegation were proved, the contract will become void. This, the court ruled, was required by public policy, a ground for refusal to refer the matter to international arbitration. In its minority opinion, the court invoked the doctrine of severability. The two judges relied on two English cases titled *Harbour Assurance vs. Kansa*[94] and *Westacre Investment vs. Jugoimport*[95]. In the latter case, the court severed the allegation of bribery (public policy), directing the enforcement of the agreement.

5.3.2. SGS

In 1994, the Government of Pakistan entered into a contract with the SGS, for pre-shipment inspection services of all consignments to be imported into Pakistan on the basis of which the custom duty and other Government dues as prescribed under the relevant Statutes were to be charged and recovered from the importers. The Government of Pakistan terminated the contract on 12

[94] [1993] Llyod's Rep. 455 (UK: Harbour Assurance vs. Kansa).
[95] [1998] 4 All ER 570 (UK: Westacre Investment vs. Jugoimport).

December 1996 which the SGS accepted on 23 December 1997, but with the reservation of its legal right. SGS initiated litigation before Swiss Courts which it lost till the highest forum. Pakistan filed an application before a local court for referring the dispute to arbitration as per the contract. During the pendency of that application, SGS initiated ICSID arbitration proceedings. Later, SGS requested the Pakistani court for stay of proceedings keeping in view the ICSID tribunal proceedings. The trial court as well as the High Court rejected the request. Both the parties appealed to the Supreme Court. In 2002, the Supreme Court stayed the ICSID tribunal proceedings by an interim order and restrained both the parties from pursuing the matter further till the disposal of their appeals. While the proceedings before the tribunal were still pending, the Supreme Court accepted the appeal of Pakistan and rejected that of SGS. The court ruled that because the Washington Convention was not incorporated by Pakistan in its municipal laws, it could not be relied upon and that the parties were bound to go for arbitration in Islamabad according to their express agreement. Later, the tribunal passed an order directing Pakistan not to pursue its contempt application before the Supreme Court of Pakistan. The tribunal decided that while it has jurisdiction to hear claims arising out of Pakistan-Switzerland BIT, it lacked jurisdiction to hear claim arising from the contract. After this decision, the parties settled the matter.

Both the decisions attracted wide spread academic discussion. Commenting on Hubco, one commentator argued that the criticism focused on four aspects. First, the doctrine of separability (or severability) was not properly appreciated. Second, the allegations of corruption and illegality pertained to a separate agreement which was not relevant to the arbitration agreement. Third, the allegations of corruption and illegality were mere assertions and that the tribunal was competent to investigate them. Fourth, the court's intervention could have been only after the award was made[96]. Some comments were very harsh. For example, one argued that in Pakistan 'international arbitration is considered more risky than advantageous due to

[96] Ibid 66

interventionist approach of the local courts'...[s]uch behavior shows that there is an inherent distrust amongst the Courts of Pakistan [...][97]. Another commentator, in the opening lines of his paper, while appreciating the global festivities on the occasion of the fortieth anniversary of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1998, argued that 'in our enthusiasm we must not forget that there remains a great deal to be done. Nowhere is this more evident than in a decision of the Pakistan Supreme Court released in June of last year [2000]'[98].

In a paper, Justice Saqib Nisar referred to international criticism on both cases[99]. His first reference pertains to a paper presented in a 2001 conference in New Zealand. The paper argued that the Pakistani judiciary has set its face against the international arbitration. Justice Nisar's second reference was to a 2003 Asian Foundation paper for the Asian Development Bank, which argued that the Supreme Court essentially restricted the freedom of investors to choose how to resolve disputes. Justice Nisar offered what may be called a reply to those comments, arguing that the criticism is unduly harsh as the post-*Hubco* jurisprudence shows no deviation from the case decided earlier. He maintained that the *Hubco* had its own peculiar facts on the basis the majority formed its opinion. Justice Nisar, however, did not discuss the doctrine of severability, a key aspect of the case, on which the minority judgement was based and which is supported by case law from other countries as well (for example, the English case of *Harbour Assurance v. Kansa* ([1993] 1 Lloyd's Rep. 455, and *Westacre Investment v. Jugoimport* ([1998] 4 All ER 570)[100]. Justice Nisar specifically commented on SGS, arguing that its stance was obviously self-contradictory as it wanted arbitration

[97] Ahmad, Naima (2016) 'Pakistan's Case with Arbitrability', available at http://courtingthelaw.com/2016/02/08/commentary/pakistans-case-with-arbitrability-2/ accessed 28 Aug. 19.
[98] Ibid 7
[99] Nisar, Saqib Justice (2019) 'International Arbitration in the context of Globalization: A Pakistani Perspective', available at <www.supremeCourt.gov.pk/ijc/Articles/8/2.pdf> accessed 30 August 2021
[100] Ibid 68

on its own terms instead of the agreement that required arbitration in Islamabad.

A comment has also come from Justice Umar Ata Bandial (now honourable Chief Justice of Pakistan), who was counsel of WAPDA in the *Hubco*. Justice Bandial argues that the *Hubco* verdict 'dilutes its effect on the extremely important question of the arbitrability of criminal matters'[101]. He cited a contemporary English case in which the effect of doctrine of palpable illegality of a contract on the prospects of arbitrability was considered. The case was *Soleimany v. Soleimany* ([1999] 3 All ER 849. The court argued that where a contract could not be lawfully enforceable that would suffer with what it called palpable illegality. The examples of such a contract would be trading with the enemy, or where robbers would refer their dispute to arbitration. Commenting on the issue of public policy as a ground for refusal, Justice Bandial argued that the courts apply the mandatory procedural safeguards of a contract as a matter of public policy. He further argued that the validity of a contract should not be left for its determination by an arbitrator.

CONCLUSION

The answer to the question posed at the start of this paper now is that the parties should, while entering an agreement for arbitration, consciously attend to the grounds on which recognition and enforcement of an award may be refused. Arbitration starts with the agreement of the parties, which is based on their intention and ends not merely with the making of award but with the successful recognition and enforcement of the award by a court of competent jurisdiction. The clearer the intention of the parties is, the easier the dispute resolution will be. This is possible if the arbitration clause clearly spells out the intention of the parties. But "the drafting of arbitration clause perfection is a relative concept"[102]. The enforcement, however, is

[101] Bandial, Justice Umar Ata (2019) 'Limitations on Arbitrability of Commercial Disputes under Pakistani Law', available at <http://www.supremecourt.gov.pk/ijc/Articles/8/1.pdf> accessed 26 June 2022

[102] Ibid 24

the prerogative of a court, which begins its judicial review with the existence of a valid agreement. If an award is set aside by a competent authority (court), in a state where it was made, its recognition and enforcement is liable to be refused under the New York Convention and the Model Law. What then the courts can do? They need to give their utmost consideration to the intention of the parties. But in the realm of international commercial arbitration, other considerations, in addition to the above, are required, for example, the state legislation on the subject must be in consonance with international norms and rules accentuated in the international Conventions. And the parties themselves must exercise due diligence in drafting the arbitration agreement. The fact that majority of states are parties to the New York Convention itself indicates that a general consensus does prevail as to the institution of arbitration not only as an effective method of alternative dispute resolution but also a means to smooth running of international trade and commerce. However, the need of common methods of implementation along with common interpretation, is also recognised academically in order to promote the objectives of co-operation perceived by the New York Convention[103].

The jurisprudence, particularly, of Pakistan has proved that Pakistani courts have a clear tendency in favour of recognition and enforcement of foreign arbitral award where the parties refuse to execute an award. However, two cases have emerged as exceptions. An analysis of the academic discussion on the jurisprudence generally and on those specific case particularly has proved that the courts lay greater emphasis on the fulfilment of mandatory requirements of a contract as a serious issue of the public policy. It has also proved that the courts think that the question of validity of a contract is not to be left for determination by an arbitrator. It follows that in courts' view it is their inherent duty to check the executive's power of contract within the bounds

[103] Laura M. Murray, "Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" 41 Virginia Journal of International Association (summer 2001), pp 859-921 at 861

of the law. Of great significance, however, is the doctrine of severability that, arguably, appears to have been marginalized. Perhaps, giving the doctrine of severability its due role may not impinge on the public policy issue. The doctrine may greatly help separate an arbitration agreement more efficiently and thereby help encourage recognition and enforcement of an award more effectively.