A THEORETICAL OVERVIEW OF THE FOUNDATIONS OF INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

In this paper, the author tries to explain differences in interpretating the nature of arbitration among various national courts by comparing different theories on arbitration. Four theories are introduced in this article: jurisdictional theory, contractual theory, hybrid theory and autonomous theory. Both the arguments and evaluation of each of the four theories will be discussed by, firstly, looking into the nature of international commercial arbitration to see how each theory defines the mechanism of international commercial arbitration and the kind of relationship that should exist between arbitration and national courts. Secondly, the nature and scope of the arbitrator's power will be discussed from the viewpoint of the relationship between the arbitrators and the parties. Thirdly, the status of arbitral awards under the different theories will be studied in order to examine the conflicts arising at the enforcement stage. Finally, the issue of the choice of the proper law will be discussed.

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I. WHY STUDY THEORIES

International commercial arbitration has been perceived as the most popular method of alternative dispute resolution. It is also noted that different interpretations have been given by national courts on various aspects of arbitration. One explanation of this is the fact that different national courts adopt different theories in relation to international commercial arbitration. Taking the issue of delocalisation as an example, both French and US courts have placed more emphasis on the contractual element and enforced some arbitral awards which have been set aside at the place of arbitration whereas the English courts are still embracing the jurisdictional nature by following Lord Mustill's statement that at all events it cannot be the law of England, for otherwise this House would have dismissed at the very outset the attempt in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* to procure an interim injunction during the currency of an ICC Arbitration. Generally speaking, the various commentaries about the nature of arbitration have been collected into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory.

Among them, the jurisdictional theory is based on the complete supervisory powers of states to regulate any international commercial arbitrations within their jurisdiction, whereas the contractual theory argues that international commercial arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be conducted according to the parties' wishes. The hybrid theory stands as a compromise between the jurisdictional and contractual theories. It maintains that international commercial arbitration has both a contractual and a jurisdictional character. The autonomous theory, which has been developed more recently, dismisses the traditional approach and places emphasis on the purpose of international commercial arbitration. Instead of fitting arbitration into the existing legal framework, the autonomous theory defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. As a result, parties should have unlimited autonomy to decide how the arbitration shall be conducted.

Since the theory a national court applies in respect of international commercial arbitration also affects its attitude towards the operation of arbitration, in this article a detailed discussion of the four theories will be presented by studying their effect on several different aspects of international commercial arbitration. Where appropriately, both the arguments and evaluation of each of the four theories will be discussed by, first, looking into the nature of international commercial arbitration to see how each theory defines the mechanism of international commercial

arbitration and the kind of relationship that should exist between arbitration and national courts. Secondly, the nature and scope of the arbitrator's power will be discussed from the viewpoint of the relationship between the arbitrators and the parties. Thirdly, the status of arbitral awards under the different theories will be studied in order to examine the conflicts arising at the enforcement stage. Finally, the issue of the choice of the proper law will be discussed.

II. THE JURISDICTIONAL THEORY

A. Definition

The jurisdictional theory invokes the significance of the supervisory powers of states, especially those of the place of arbitration. Although the jurisdictional theory does not dispute the idea that an arbitration has its origin in the parties' arbitration agreement, it maintains that the validity of arbitration agreements and arbitration procedures needs to be regulated by national laws and the validity of an arbitral award is decided by the laws of the seat and the country where the recognition or enforcement is sought. Proponents of the jurisdictional theory maintain that all arbitration procedures have to be regulated by the rules of law chosen by the parties if there are any and those rules of law in force in the place of arbitration. They also believe that arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states by means of the rules of law. As with judges, arbitrators are required to apply the rules of law of a specific state to settle the disputes submitted to them. Moreover, the awards made by the arbitrators are regarded as having the same status and effect as a judgment handed down by judges sitting in a national court. As a result, they maintain that the awards will be enforced by the court where the recognition or enforcement is sought in the same way as judgments made by the courts. Proponents of the jurisdictional theory stress, in particular, the significance of the seat of arbitration. For instance, Dr. Mann[1] emphasized the significance of the laws of relevant states to an arbitration, especially the law of the place where the arbitration takes place, that is, the *lex fori*. The premise of Dr. Mann's argument is that every sovereign state is entitled to approve or disapprove the activities carried out within its territory.[2] Following this premise, consequently, every arbitration

[1] *See generally* Francis A. Mann, *Lex Facit Arbitrum*, 2(3) ARB. INT'L 245 (1983); *see also* M Mustill, *Transnational Arbitration in English Law*, 37 CURRENT L. PROBS. 133, 142 (1984).
[2] *See generally* Mann, *id.*

is subject to the law where it takes place. Moreover, an arbitrator is required to carry out the arbitration proceedings in accordance with the will of the parties' to the extent that the *lex fori* allows. Any acts of arbitrators that contradict the mandatory rules and public policy of the place of arbitration are regarded as judicially unjustified.[3] In other words, the various issues arising from international commercial arbitration, such as the validity of the arbitration agreement, the arbitral procedures, the arbitrator's power, the scope of submission and the enforceability of arbitral awards, have to be decided within the mandatory rules and public policy of the *lex fori*. Failing to do so, the awards may be set aside by the court of the place of arbitration; furthermore, recognition or enforcement of the awards may be refused by the courts of the enforcing states.

Regarding the relationship between arbitration and the national courts where the arbitration takes place or the courts where recognition or enforcement of the arbitral awards is sought, the jurisdictional theory provides a strong basis for the national courts exercising supervisory powers over the arbitration.[4] Such supervisory powers are also confirmed in the New York Convention 1958. For instance, in accordance with Article V, in the absence of the express choice of law, the validity of arbitration agreements,[5] arbitral awards,[6] the composition of the arbitral authority and the arbitral procedures[7] have to be decided in accordance with the law of the country where the arbitration takes place. Also, the supervisory powers over the validity of arbitral awards can be exercised by the courts where recognition or enforcement is sought, if the subject matter of the difference is not arbitrable under the law,[8] or the enforcement of such an award would be against its public policy.[9]

In relation to the supervisory powers of the national courts where the arbitration takes place, the jurisdiction over the arbitration, which might have no connection with this country, is based on three theoretical arguments, namely, the arbitrator's right to make binding adjudications is derived from a delegation by the state of its exclusive powers in this field, that every act is subject to the law in force where it occurred, and the application of the *lex fori* and the use of its courts are sometimes more

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[3] Francis A. Mann, *State Contracts and International Arbitration*, 42 BRIT. Y.B. INT'L L. 1, 10, 14, 16 (1967).
[4] With the exception of Belgium.
[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, ¶ 1(a), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter the New York Convention].
[6] The New York Convention, art. V, ¶ 1(e).
[7] The New York Convention, art. V, ¶ 1(d).
[8] The New York Convention, art. V, ¶ 2(a).
[9] The New York Convention, art. V, ¶ 2(b).

efficient than any other system.[10] In practice, such supervisory powers can be conferred by law;[11] for instance, in Scotland, subject to the exceptions of consumer matters, exclusive jurisdictions and prorogation, the jurisdiction of Scottish courts over the parties to an arbitration held in Scotland is granted in Rule 2(13) in Schedule 8 to the 1982 Act, which states that a person may be sued: "In proceedings concerning an arbitration which is conducted in Scotland or in which the procedure is governed by Scots law, in the Court of Session."[12]

Arbitrability is a good example to illustrate the issue of jurisdiction over the arbitration proceedings and arbitral awards. In relation to supervisory powers over the arbitration proceedings, arbitrators can only deal with a dispute to the extent that the law to which the parties have subjected to it allows;[13] however, such a choice cannot overrule the mandatory rules of the *lex fori*. In the absence of the parties' express choice of law, the issue of arbitrability will be governed by the law of the place where the arbitration takes place. An arbitral award may be challenged before the courts if the arbitrator deals with disputes that are outside the scope of arbitrability under the applicable laws, for example, the *lex arbitri* or the *lex loci contractus*, chosen by the parties, and possibly under the *lex fori* if the arbitration is running under the concurrent procedural rules of law in the place of arbitration.

In addition, under the jurisdictional theory, the courts in the country where recognition or enforcement is sought also have a supervisory power over the issue of arbitrability at the stage of recognition or enforcement. Accordingly, under Article V(2) the courts have the discretion to refuse to recognise or enforce an arbitral award if it finds that "The subject matter of the difference is not capable of settlement by arbitration under the law of that country"[14] or "recognition or enforcement of the award would be contrary to the public policy of that country."[15] The same approach has also been adopted by the United States Supreme Court, which confirmed the federal policy favouring arbitration in the *Mitsubishi* case.[16] The *Mitsubishi* case involved an anti-trust dispute which was prohibited from being resolved by means of arbitration in a domestic case. The United States

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[10] ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, US AND WEST GERMAN LAW 63 (1989).

[11] Model law countries provide a basis for such supervisory powers for non-citizens.

[12] It is also discussed in ALEXANDER ELDER ANTON & P. R. BEAUMONT, PRIVATE INTERANTIONAL LAW – A TREATISE FROM THE STANDPOINT OF SCOTS LAW 356-59 (2d ed., 1990).

[13] *See generally* The New York Convention, *supra* note 5.

[14] The New York Convention, art. V, ¶ 2(a).

[15] The New York Convention, art. V, ¶ 2(b).

[16] *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).

Supreme Court enforced the parties' arbitration agreement involving an anti-trust dispute, even assuming that a contrary result would be forthcoming in a domestic context;[17] as Justice Blackmun pointed out – "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed."[18] It is because that "[t]he convention reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country."[19] Based on this argument, one may be able to say that the relationship between the courts and arbitration is of a supervisory nature in accordance with the jurisdictional theory.

B. The Status of Arbitrators

In relation to the status of arbitrators, the jurisdictional theory mainly follows the approach of the delegation theory. According to the delegation theory, in order to settle disputes between parties, an arbitrator must possess a delegated authority given by a state in which he sits to conduct an arbitration. An award made by an arbitrator lacking this authority will be void and can be challenged. Due to this delegated power, the proponents of the jurisdictional theory deny that the arbitrator's power is originated from the parties' arbitration agreement. They maintain that the arbitrator's power is drawn from the state by means of the local law on the ground that it is in the public interest to permit private individuals to decide disputes when the parties have agreed. This is the argument supported by Mr. Moutulsky, who said that "[a]rbitrators are individuals whom the legal system permits to perform a function that is in principle reserved to the state";[20] furthermore, arbitration is regarded as an exception granted by the state to its monopoly over the administration of justice in its jurisdiction.[21]

Because of the special status granted by the states, arbitrators are regarded as resembling judges of national courts. The only difference between them, as illustrated by Niboyet, is that a judge "derives his nomination and authority directly from the sovereign", whilst an arbitrator "derives his authority from the sovereign but his nomination is a matter for

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[17] *Id.* at 629.
[18] *Id*. at 638.
[19] *Id.*
[20] MOUTULSKY, ECRITS 14 (1974); *see* SAMUEl, *supra* note 10, at 55.
[21] *See* SAMUEl, *id*.

the parties."[22] Following this argument, an arbitrator, similar to a judge, is also required to follow the law and observe the mandatory rules and public policy of the *lex fori* to settle the dispute between the parties.

C. Nature of Arbitral Awards

The nature of arbitral awards is also examined under the jurisdictional theory. In accordance with this theory, an arbitral award should be granted the same status and effect as a judgment made by a national court judge since arbitrators are regarded as resembling judges. Because of a similar status to judgments, in the absence of the voluntary performance of the award by the losing party, the awards will have to be enforced (in the same way as a judgment) by the court where the recognition or enforcement is sought.

This idea corresponds with the viewpoint of Lainé, who invokes the idea that the arbitral awards have a similar effect to judgments.[23] Lainé agreed that no arbitration can legally exist or be performed without the parties' agreement; however he denied that the parties' arbitration agreement constitutes the jurisdiction of the arbitration. Lainé's view is also agreed to by Pillet, who went a step further and argued that the arbitration agreement was irrelevant once the arbitrator has been appointed. He stated:

> The arbitration agreement is necessary to give the arbitrators their authority, but once that authority has been conferred on them, provided they keep within the limits of the task given to them, their freedom is absolute and the arbitration agreement has no influence on their award which is based on quite different matters.[24]

The same opinion can also be found in Klein's work:

> [T]he State alone has the right to administer justice, so that if the law allows the parties to submit to arbitration, this institution could be exercising a public function, from which logically it must be concluded that the award is a judgement in

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[22] *See* J. P. NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS 137 (1950); JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 53 (1978).

[23] *See* Lainé, *De l'éxécution en France des Sentences Arbitrales Étrangeres*, 26 J.D.I. 641, 650 (1899); SAMUEL, *supra* note 10, at 36.

[24] *See* ANTOINE-LOUIS PILLET, 2 TRAITE PRATIQUE DE DROIT INTERNATIONAL PRIVE 537 (1923); *see also* SAMUEL, *supra* note 10, at 52.

the same sense as the decisions rendered by the judges of the State.[25]

D. Choice of the Proper Law

Regarding the choice of the proper law, in most jurisdictions judges of national courts, while dealing with international commercial disputes submitted to them, are only allowed to apply the law of their own country or the national laws of other states if the parties so choose. Alternatively, in the absence of the parties' express choice of the proper law, they have to choose the substantive law in accordance with the choice of law rules of the place where they sit. In other words, for the judges of national courts, in respect of the choice of law issue, they are not allowed to go beyond the scope of national laws to decide the merits of the disputes.

Based on the same territoriality principle which leads to a close relationship between the place of arbitration and the procedural rules to be applied to international commercial arbitration, under the jurisdictional theory arbitrators are only allowed to choose the proper law of the contract in accordance with the procedural law chosen by the parties if there is any, and the *lex fori*. As a scholar stated: "The effect of this theory is to allow arbitrators no greater freedom in the application of substantive law than judges have."[26]

In addition, adopting the territoriality principle, arbitrators are required to decide the issues arising from international commercial arbitration according to municipal laws, which also include the choice of law rules of the place where the arbitration is held. Some scholars who have a more liberal attitude maintain that, under the jurisdictional theory, the power to choose a-national principles or decide *ex aequo et bono* or according to the rules of professional bodies, may be given by the parties to the arbitrators "only if the law of the place of seat of the arbitral tribunal so authorises them."[27]

However, this liberal idea was not shared by Dr. Mann. He not only highlighted the importance of the *lex fori*, but also went a step further to deny the existence of "international" commercial arbitration. First of all, he

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[25] *See* FREDERIC-EDOUARD KLEIN, CONSIDERATIONS SUR L'ARBITRAGE EN DROIT INTERNATIONAL PRIVE, PRECEDEES D'UNE ETUDE DE LEGISLATION, DE DOCTRINE ET DE JURISPRUDENCE COMPARE EN LA MATIERE 181-82 (1955); *see* LEW, *supra* note 22, at 52-53.

[26] LEW, *supra* note 22, at 53.

[27] Riccardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, *in* 1977 IV RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 52 (1981).

said that no definition of international commercial arbitration has been provided despite that "Numerous attempts have been made in recent years to define an 'international commercial arbitration'. They have failed to produce any clear formula, nor is it certain whether an effective formula, if it were to be found, would constitute a useful contribution rather than a sterile exercise."[28]

Dr. Mann asserted that, in accordance with a strict interpretation, every arbitration is a national one and it should be governed by the municipal laws of the country where it is held. The so-called "international" arbitration is, in fact, a fallacy,[29] since no arbitration can exist in a legal vacuum. Dr. Mann strongly criticised the delocalisation theory and the autonomous theory [30] which maintained that international commercial arbitration should be free from the restraints of the *lex fori*. He argued: "In the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law."[31]

As well as the procedural matters, in Dr. Mann's opinion the substantive issues of the dispute are also governed by the municipal laws. He stated:

> No one has ever or anywhere been able to point to any provision or legal principle which permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derives from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact to speak of the *lex arbitri* or in French *la loi de l'arbitrage*.[32]

In Dr. Mann's opinion, any arbitration procedures, the composition of arbitral tribunals and the structure of arbitration procedures have to be

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[28] Mann, *supra* note 1, at 245.
[29] *Id.*
[30] It will be discussed in a later section of this article.
[31] Mann, *supra* note 1, at 245.
[32] *Id.*

subject to a national law of a specific country. Within the framework of international commercial arbitration, only the *lex fori* can provide such a complete and effective control over the arbitration procedures to decide the relevant issues arising from an arbitration. Finally, he concluded that "it would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of freedom granted by himself."[33]

III. THE CONTRACTUAL THEORY

A. Definition

Rejecting the significance of the *lex fori*, proponents of the contractual theory[34] argue that arbitration is based on the agreement between the parties. They deny that any strong links exist between the arbitration proceedings and the law of the place in which the arbitration takes place. They maintain that parties have the freedom to decide the relevant issues concerning the arbitration procedures and this freedom should generally not be interfered with by the powers of any states.

The contractual theory, different from the jurisdictional theory, explores the nature of arbitration from a contractual viewpoint. Although the contractualists admit the fact that arbitration proceedings and arbitration agreements can be influenced by the relevant national laws, they argue that arbitration has a contractual character that originates in the parties' arbitration agreement. Accordingly, an arbitration agreement between the parties is regarded as a contract which expressly states the parties' wish to have their disputes resolved by means of international commercial arbitration. This kind of contract is voluntarily made between the parties, and allows them to determine the time and place of arbitration, select the arbitrators to hear their case and choose the laws governing both procedural and substantive matters.

The proponents of the contractual theory believe that the settlement of the dispute in arbitration should not be influenced by the power of any

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[33] *Id*. at 246.

[34] Such as Merlin, Foelix, Balladore-Pallieri, Bernard and Klein in France and Kellor, Domke and Kitagawa outside France. *See generally* Stone, *A Paradox in the Theory of Commercial Arbitration*, 21 ARB. J. 156, 182 (1966); MARTIN DOMKE, COMMERCIAL ARBITRATION 31 (1965), who stated that "the express intent of both parties to enter into the arbitration agreement is essential existence." Kitagawa, *Contractual Autonomy, in* INTERNATIONAL COMMERCIAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 133, 138 (Pieter Sanders ed., 1967), who believes that "the binding force of the arbitration agreement comes from '*pacta sunt servand*a' as well as other ordinary contracts without any state authorization."

states and that the concept of *pacta sunt servanda*[35] should prevail, binding the parties to perform the arbitration agreement made between them without state's pressure. As illustrated by Kellor:

> [A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.[36]
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> Accordingly, with the exceptions of arbitrability and public policy which are reserved for the lex fori, the lex fori has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that "national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration."[37]

In most jurisdictions, the mechanism of international commercial arbitration is undeniably designed on the basis of contractual theory. Recognising the business people's desires to have a more flexible and informal method of dispute settlement, most courts tend to follow the contractual theory and interpret the relationship between the parties and the arbitrators as a contract. Taking the relationship between parties and arbitrators as an example, the contractual theory prevails in most jurisdictions. For instance, in England, in the case of *Cereals S.A. v. Tradax Export S.A.*,[38] where the court, first of all, held that a contractual relationship existed between the parties and the arbitrators. Secondly, the court stated that the arbitrators became parties to the arbitration agreement as soon as they accepted the appointment. The court observed: "It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are, as a matter of

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[35] "*Pacta sunt servand*" represents the idea that agreements should be observed.

[36] *See generally* FRANCES KELLOR, ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL AND INDUSTRIAL ARBITRATIONS (1941), quoted by Stone, *supra* note 34, at 182; LEW, *supra* note 22, at 55.

[37] KLEIN, *supra* note 25, at 182; *see* LEW, *supra* note 22, at 56.

[38] Cie Europeene de Cereals SA v. Tradax Export SA, [1986] 2 Lloyd's Rep. 301 (U.K.).

contract (subject always to the various statutory provisions), bound by the terms of the arbitration contract."[39]

A similar idea was also upheld in a recent case[40] in relation to the issue of remuneration. The court decided that the arbitrators were entitled to reasonable remuneration. This entitlement was based on a trilateral contract between the two parties and the arbitrators.[41] The implied terms of this kind of trilateral contract require arbitrators to "conduct the arbitration with due diligence and at a reasonable fee"[42], by using all reasonable means in entering on and proceeding with the reference.[43]

Apart from cases of arbitrability and compulsory arbitration, the present writer's view is that, to a certain extent, it is correct to portray the relationship between parties and arbitrators as a contract. Moreover, the contractual relationship discussed here is, in fact, comprised of two contracts: one is the contract between the parties, that is, the arbitration agreement, while the other is the appointment agreement between the parties and the arbitrators. As far as the contract between the parties is concerned, subject to the statutory exceptions, to start an arbitration there must be a valid arbitration agreement existing between the parties. On the other hand, in relation to the contract between the parties and the arbitrators, consent from both the parties and the arbitrators is essential to form a valid appointment of the arbitrators, since the appointment of arbitrators cannot be carried out by one party's unilateral decision. In accordance with these contracts, the disputes between the parties are submitted to the arbitrators, the arbitrators carry out the arbitration and have the parties' disputes settled, and the parties then pay the arbitrators a reasonable remuneration in return for their service, that is, providing the arbitral award.

B. The Status of Arbitrators

In respect of the status of arbitrators, the contractualists reject the delegation theory which holds that arbitrators resemble judges of national courts. Among them different opinions have been expressed about whether

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[39] An injunction was granted in this case where a breach of the arbitration agreement had been committed by the arbitrators who were regarded as one of the parties to the arbitration agreement.
[40] K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd., [1991] 3 All ER 211 (CA) (U.K.).
[41] *Id.* at 537. The court said: "So far as the parties are concerned, their obligations under the trilateral contract include the liability to pay remuneration for the service of the arbitrators . . . The contractual obligation on Hyundai and Norjarl to pay such remuneration could not be altered without the consent of both." *See also id.* at 531 ("Once the arbitrator has accepted an appointment, no term can be implied that entitled him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties.")
[42] *Id.* at 532.
[43] *See* The Arbitration Act 1950, § 13(3).

arbitrators are the agents of the parties; however, they have failed to reach any agreement on this issue. The agent theory was invoked by Merlin,[44] who believed that arbitrators were, in fact, the agents of the parties. He dismissed the idea that arbitrators closely resemble judges of national courts and their powers and authority were drawn from the local law. He was of the opinion that, due to the fact that arbitrators did not perform any public function, arbitrators obtained their powers and authority from the parties' agreement when they were appointed. In short, arbitrators were appointed as the agents of the parties to resolve the disputes on the parties' behalf.[45] Being the agents of the parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, any decisions, that is, arbitral awards, made by the agents have a binding effect on the parties.[46]

Believing that the decision-making process was wholly dependent on the arbitration agreement between the parties,[47] Foelix agreed with Merlin's argument that arbitral awards were made by the arbitrators who were regarded as the agents of the parties.[48] He claimed that the relationship between the parties and the arbitrators had a private, rather than a public, nature, that is, a relationship of principal and agent. As a result, in this relationship no court intervention can be exercised because the sole basis of the power of the arbitrator is the arbitration agreement.

Although upholding the contractual nature of arbitration, a number of contractualists disagreed with Merlin and Foelix and claimed that arbitrators were not the agents of the parties.[49] Bernard is representative of this group. He believed that the power of the arbitrators was drawn from the parties' arbitration agreement which allowed the arbitrators to judge. However, he denied that the arbitrators were the agents of the parties. In fact, he maintained that the agreement between the arbitrators and the

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[44] PHILIPPE ANTOINE MERLIN, 9 RECUEIL ALPHABETIQUE DE QUESTION DE DROIT 144 (4th ed., 1829); *see* SAMUEL, *supra* note 10, at 34.

[45] *Id.; see* LEW, *supra* note 22, at 54.

[46] Accordingly, in some commodities arbitration, in the case of price disputes oversmen appointed by the parties to put a reasonable price forward are regarded as the agents of the parties.

[47] Both Merlin and Foelix regarded compulsory arbitration as outside their definition. *See* MERLIN, *supra* note 44, at 144; SAMUEL, *supra* note 10, at 34.

[48] JEAN JACQUES GASPARD FOELIX & CHARLES DEMANGEAT, TRAITE DU DROIT INTERNATIONAL PRIVE: OU, DU CONFLIT DES LOIS DE DIFFERENTES NATIONS EN MATIERE DE DROIT PRIVE 461 (2d ed., 1847); *see* SAMUEl, *supra* note 10, at 35.

[49] Giorgio Balladore Pallieri, *L'Arbitrage Privé dans les Rapports Internationaux*, 51(1) RECUEIL DES COUR 287, 311 (1935); ALFRED BERNARD, L'ARBITRAGE VOLONTAIRE EN DROIT PRIVÉ: L'ARBITRAGE EN DROIT INTERNE BELGE ET FRANÇAIS, ÉTUDE CRITIQUE COMPARÉE, L'ARBITRAGE EN DROIT INTERNATIONAL PRIVÉ, DROIT COMPARÉ 28 (1937); Frédéric-Edouard Klein, *Autonomie de la Volonté et Arbitrage*, 47 REV. CRIT. 255, 260 (1958); *see generally* SAMUEL, *supra* note 10.

parties did not fit into any of the established categories of contracts;[50] furthermore, "it is a contract sui generis, governed by rules appropriate to it and which must be dealt with by taking into account both the principles governing contracts in general and the particular nature of the function exercised by the arbitrator."[51] Bernard's argument was supported by Klein, who stated that "[t]he arbitral agreement is the work of the parties alone. The award is the work of the arbitrators. The appointment of the arbitrators is the work of the parties and the arbitrators together."[52]

Not only do the contractualists fail to reach an agreement on the agent theory, Merlin's agent theory is strongly criticised by Lainé.[53] As Lainé points out, the functions of arbitrators are contradictory to the agent theory. With respect to the relationship between principal and agent, the agent works on the principal's behalf in their best interest. However, according to Lainé, this does not apply to the relationship between arbitrators and the parties within the present arbitration framework. Three reasons have been given by him. First, unlike agents, arbitrators are appointed to resolve the dispute between the parties independently and impartially, rather than being appointed to fight for the best interests of the party who appointed them. In fact, arbitrators are obliged to determine the rights of the parties in an impartial manner since they owe an equal obligation of fairness to both sides.[54] Following this logic, it is impossible for arbitrators, acting as agents, to fight for the best interests of the parties who appointed them since it is against the underlying fundamental duties of the arbitrators.

Secondly, arbitrators are required to be financially independent from the parties who appoint them.[55] Under these circumstances, the same questions are raised. How can arbitrators work for the parties' best interests when they are supposed to act impartially and independently? And how can arbitrators work for the parties' best interests when both parties' interests are in conflict?

Thirdly, the agent theory is also criticised over the different scope of the agent's and the arbitrator's powers. In accordance with the agent theory, agents represent the principals within the scope of the authorisation. Agents can only decide on the matters authorised by the principals. The decision made by the agent is regarded as a contract which has a binding effect on the principal. However, this description does not fit into the relationship

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[50] BERNARD, *id*. at 152 ; *see* SAMUEL, *supra* note 10, at 41.
[51] *See* SAMUEL, *id.*
[52] Klein, *supra* note 49, at 260; *see* SAMUEL, *supra* note 10, at 43-44.
[53] *See generally* Lainé, *supra* note 23; also discussed in LEW, *supra* note 22, at 52-61.
[54] STEWART C. BOYD & MICHAEL J. MUSTILL, COMMERCIAL ARBITRATION 43 (2d ed., 1989).
[55] Some commentators criticise the contractual theory on the basis that it fails to explain the nature of the duty of the arbitrator to give the parties an impartial and fair hearing – commentators such as Weiss, Balladore Pallieri, Bernard and Klein.

between the parties and the arbitrators. In fact, the agent theory contradicts reality since arbitrators can perform functions which can never be performed by the parties, such as the power to summon witnesses in certain countries or order security of costs against one of the parties

The contractual theory also fails to provide a satisfactory answer about the arbitrator's immunity. Arbitrator's immunity is designed to avoid proceedings being brought against arbitrators by a dissatisfied party during or after the arbitration procedures. Though different scopes of immunity are granted by different jurisdictions, generally speaking arbitrators enjoy a quasi-judicial immunity from suit for any errors or omissions. For instance, in France, though no legal texts governing the issue of arbitrator's immunity exist in the French law, generally it is recognised that the party in question should file an appeal against the award for annulment before raising a claim of liability against the arbitrators. In England, an absolute immunity is granted to arbitrators as the House of Lords indicated in the cases of *Sutcliffe v. Thackrah*[56] and *Arenson v. Arenson*[57:]

> It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognises that, on balance of convenience, public policy demands that they shall all have such an immunity. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation.[58]

And, "since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred."[59]

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[56] Sutcliffe v. Thackrah, [1974] A.C. 727, 737-38 (H.L.) (U.K.). In this case, Lord Reid stated: "There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties. They do not submit evidence as contentions to him. He makes his own investigations and comes to a decision."

[57] Arenson v. Arenson, [1977] A.C. 405 (U.K.). Similar to the case of *Sutcliffe v. Thackrah*, the House of Lords also refused to grant accountants immunity for the errors they made while valuing the shares in a private company.

[58] Sutcliffe v. Thackrah, *supra* note 56, at 757.

[59] *Id.* at 758.

The courts in the United States have gone further than the English courts on the issue of immunity. The United States courts not only offer immunity to arbitrators but also to arbitration institutions.[60] The common law doctrine of judicial immunity was first recognised in the case of *Bradley v. Fisher*[61] on the ground that: "If civil actions could be maintained in such cases against the judges, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away."[62] The same immunity is also extended to arbitrators whose jobs have traditionally been construed to be quasi-judicial in nature, [63] since the United States courts have been convinced that arbitrators usually do not have any interest in the outcome of the awards. Arbitrators are simply appointed to perform a functionally judicial job; therefore, they are protected from civil suit under the doctrine of arbitral immunity.[64]

In accordance with these judgments delivered by the courts, it can be concluded that arbitrators' immunity has been granted by means of case law or, indeed, by legislation. Because of the involvement of the state's powers on this matter, the judicial immunity is granted to arbitrators regardless of the parties' agreement. Furthermore, due to the considerations of general public interest and the welfare of the arbitrators as quasi-judicial officers, a negative answer can be provided to the questions whether the arbitrator's immunity can be contracted out of the arbitration agreement (under the contractual theory) and whether an arbitration agreement which expressly excludes the arbitrator's immunity is valid. In addition to the criticisms of the agent theory discussed above, this is another example of the deficiencies of the contractual theory.

C. The Nature of Arbitral Awards

The arguments surrounding the agent theory also extend to the issue of the nature of arbitral awards. Based on the agent theory, Merlin and Foelix maintain that an arbitral award is a contract. Under the agent theory,

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[60] Corey v. New York Stock Exchange, 691 F.2d. 1205, 1211 (1982). The court said: "Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association."

[61] *See generally* Bradley v. Fisher, 20 L.Ed. 646 (1871).

[62] *Id.* at 649-650.

[63] Cahn v. International Union Ladies' Garment Workers Union, 311 F.2d. 113, 114-15 (3d Cir. 1962).

[64] *See* Hoosack Tunnel, Dock and Elevator Co. v. O'Brien, 137 Mass. 424, 426 (1884).

arbitral awards are regarded as contracts made by the arbitrators who act as agents of the parties. As a result of this principal and agent relationship, the contract made by the agents, that is, the arbitral award, has a binding effect on the principals, that is, the parties. The parties have to accept the arbitrators' award as "having binding contractual force and to voluntarily give effect to it."[65] Because of its contractual nature, an arbitral award should be enforced anywhere in the world. As Merlin maintains:

> An arbitral decision rendered in a foreign country, is it anything other than a contract? Is it not the consequence of the agreement to arbitrate, as a result of which the arbitrators have rendered it? Is it not tied essentially to this arbitration agreement? Does it not form with this arbitration agreement a single entity? What would it be without this arbitration agreement? It would only be a useless piece of paper, it would be nothing. It is the arbitration agreement that gives it its existence; it is from the arbitration agreement that it derives all its substance; it has, then, like the arbitration agreement, the character of a contract; and the precise truth is that it is only the performance of the mandate that the parties have entrusted to the arbitrators; it is even, to put it precisely, only an agreement to which the parties have bound themselves by the hands of the latter (the arbitrators).[66]

Merlin also contends that no question of territoriality will arise and the awards shall be recognised and enforced as contracts in any national court because no state power and authority is involved in the decision-making procedures. His argument has had certain influence on the development of the French and English arbitration laws. For instance, in 1937, the French Cour de Cassation ruled that the enforcement procedures for the arbitral awards could be less cumbersome than those for a foreign judgment, because "arbitral awards, which have, as their basis, an arbitration agreement, form one entity with it and share its contractual character."[67] In a passage in *Vynior's* case, the Chief Justice (Coke) stated that the arbitrator's power and authority may be revoked like a number of engagements, such as making a letter of attorney to make livery or assign auditors to take an account, or submitting to an arbitration, and so on.[68]

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[65] LEW, *supra* note 22, at 54.
[66] MERLIN, *supra* note 44, at 144; *see* SAMUEL, *supra* note 10, at 34.
[67] The Roses case, [1938] I Dalloz 25. The court held that the awards can be enforced by the President of the Tribunal Civil; *see* SAMUEL, *supra* note 10, at 36.
[68] The Vymor's Case, 8 Co. Rep. 81b, 82a (1609). *See* SAMUEL, *supra* note 10, at 36.

However, Balladore Pallieri, Bernard and Klein have tried to challenge Merlin's argument that an award is a contract made by the parties, acting through their agents (the arbitrators). To Balladore Pallieri, fitting arbitral awards into any particular juridical category is not entirely necessary.[69] However, Bernard and Klein believe that an arbitral award is a direct consequence of the contractual relationship between the parties and arbitrators and "the award is the work of the arbitrators".[70] Based on this agreement, the parties promise that the arbitral award will have a binding effect on them, and the national courts simply enforce the award as an obligation agreed by the parties.

Though, there has been disagreement on the issue of the agent theory, the contractual nature of arbitration and arbitral awards has never been disputed among the proponents of the contractual theory. As observed by Niboyet:

> Arbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or the judicial authorities, but from the parties' agreement (arbitration agreement, submission to arbitration). The arbitrator decides just as the parties could have done by agreement; [the parties] give the arbitrators a real mandate to decide in their place. The award is thus impregnated with a contractual character, and [according] to the law, it appears to be the work of the parties, it must have, as with all agreements, lawful effect, and [it must] possess the authority of a final judgement.[71]

D. Choice of the Proper Law

With respect to the choice of the proper law, under the contractual theory the parties are offered an unlimited autonomy in choosing both the procedural law governing the arbitration and the proper law governing the main contract. The arbitrators are required to apply the law specified by the parties. As far as the issue of the choice of the procedural law is concerned, in order to fill the gap, the *lex fori* relating to arbitration proceedings is only applied in the absence of any express choice of law made by the parties. When a choice of the proper law issue arises, the arbitrators will have to look to the contract or the arbitration agreement to find the applicable

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[69] Pallieri, *supra* note 49, at 311, discussed in SAMUEL, *supra* note 10, at 40.
[70] Klein, *supra* note 49, at 260, discussed in SAMUEL, *supra* note 10, at 43-44 .
[71] NIBOYET, *supra* note 22, at 136. It is translated in LEW, *supra* note 22, at 54.

substantive law according to the parties' expressed or implied wishes. Failing to find an express choice of law, they may have to follow the conflict of laws rules of the *lex fori* to determine the proper law. However, because of the contractual nature of arbitration, and distinct from the jurisdictional theory, the parties are thought to have freedom to choose any laws, including a-national principles, as the substantive law.

IV. THE HYBRID THEORY

A. Definition

The jurisdictional theory and the contractual theory both have considerable support at opposite ends of the arbitration spectrum. However, to some jurists,[72] neither the jurisdictional theory nor the contractual theory provides a satisfactory and logical explanation of the modern framework of international commercial arbitration. Under these circumstances, as Dr. Lew pointed out, it is not surprising that a compromise theory with a mixed or hybrid character has developed.[73] The group of jurists which has developed the hybrid theory is convinced that the perfect operation of international commercial arbitration relies on both jurisdictional and contractual elements. The hybrid theory, in fact, is a compromise theory which is mixed between the contractual theory and jurisdictional theory.

The hybrid theory was created by Professor Surville,[74] and developed by Professor Sauser-Hall. Suggesting that international commercial arbitration is a mechanism with a dual character, Professor Sauser-Hall maintained, on the one hand that a contractual element in arbitration is reflected in the argument that arbitration has its origins in a private contract, where the parties have the power to choose the arbitrators and the rules to govern the arbitration procedures and substantive matters. On the other hand, he agreed with the jurisdictional theory that an arbitration has to be conducted within national legal regimes in order to determine powers of the parties, the validity of the arbitration agreement and the enforceability of the awards.

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[72] For example, Surville, F. and Sauser-Hall. For Surville, *see* FERNAND SURVILLE & FRANÇOIS ARTHUYS, COURS ELÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ 634-35 (7th ed., 1925), discussed in SAMUEL *supra* note 10, at 60.

[73] LEW, *supra* note 22, at 57.

[74] This theory was developed by Professor Sauser-Hall in 1952, in Sauser-Hall, *L'arbitrage en Droit International Privé*, 44(I) ANN. INST. DR. INTERN. 469 (1952) & 47(II) ANN. INST. DR. INTERN. 394 (1957); *see* LEW, *supra* note 22, at 57.

Accordingly, arbitration has been defined as "a mixed juridical institution, *sui generis*, which has its origin in the [parties'] agreement and draws its jurisdictional effects from the civil law."[75] In short, arbitration has a jurisdictional nature involving the application of the rules of procedure while it derives its effectiveness from the arbitration agreement between the parties. [76] Professor Sauser-Hall's argument is accepted by some practitioners, such as Messrs Redfern and Hunter, who expressly state:

> International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.[77]

In accordance with the hybrid theory, on the one hand the parties' freedom to contract an arbitration agreement, select arbitrators and choose the governing laws is based on the contractual nature of arbitration. On the other hand, the jurisdictional character of arbitration requires the issues relating to arbitral proceedings and the validity of arbitration agreements to be subject to the mandatory rules and public policy of the *lex fori*. Also, in relation to the recognition or enforcement of arbitral awards, the validity of arbitral awards will be scrutinised according to the mandatory rules and public policy of the country in which the recognition or enforcement is sought.

Robert Hunter also suggests that it is inappropriate to deny the dual character of arbitration:

> [T]he arbiter is required to decide the whole matters submitted to him or her by means of a "decree arbitral" or "award", and in so doing must not merely adhere to some rule, principle, criterion or standard; he or she must not contravene the law. Though the power of the arbiters over the submitters is based on

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[75] Sauser-Hall, *id.* at 398-99; LEW, *supra* note 22, at 57.
[76] Sauser-Hall, *supra* note 74, at 471 (1952), discussed in Pieter Sanders, *Trends in the Field of International Commercial Arbitration*, 145(2) RECUEIL DES COURS 205, 233-34 (1975).
[77] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 8 (2d ed., 1991).

> contract, there is thus a jurisdictional as well as a contractual element in arbitration.[78]

The fundamental dual character of arbitration is also stressed by Ancel, who believes that the dual nature of arbitration is a concept "at the same time both contractual, because of its origin (the agreement binding the parties) and jurisdictional, because of the way in which it is expressed (arbitral award, decision on jurisdictional issues and decision by private judicial authority)."[79]

Professor Sanders also believes that the hybrid theory appears to be more complete than the contractual or jurisdictional theories to explain the issues arising from arbitration. He maintains that it would be inadequate if the emphasis was only based on one element of arbitration, either contractual or jurisdictional, because:

> On the one hand arbitration must be based on an agreement of the parties to arbitrate; no arbitration can take place when there is not valid agreement of the parties to submit their difference to arbitration. If emphasis is laid upon this starting point and the line is drawn further, covering as well arbitral procedure and the award, it leads to the contractual theory on the nature of arbitration. On the other hand emphasis may be put upon the quasi-judicial character of arbitration. Arbitration is a judicial process. The arbitrators, once appointed, act as judges. Their function is to give a final decision on the differences submitted to them. Their decision has, in principle, the same effects as a judgement of a court. The dualistic character of arbitration has lead to the intermediary view taken by those who adhere to what may be called the mixed arbitration theory: the character of arbitrator is influenced both by its contractual origin and by the judicial process it involves.[80]

Supporting the dual character of arbitration, Jean Robert points out a close link between the arbitration procedures and the forum of arbitration. He explains that the constitution of arbitration and the powers of the arbitrator are based on the parties' agreement while the validity of the agreement and enforcement of awards have to be decided in conformity

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[78] ROBERT L. C. HUNTER, THE LAW OF ARBITRATION IN SCOTLAND 3 (1987).
[79] J. P. Ancel, *French Judicial Attitudes towards International Arbitration*, 9(2) ARB. INT'L 121, 121 (1993).
[80] Sanders, *supra* note 76, at 233-34.

with public policy or mandatory rules of the relevant laws, for example, the lex fori and the law of the country where the enforcement is sought.[81]

B. The Status of Arbitrators

Under the hybrid theory, the relationship between the arbitrators and the parties is regarded as contractual in nature. This contractual nature reflects the arbitration agreement made between the parties. Under the arbitration agreement, the parties submit their disputes to arbitration and select the arbitrators who are regarded as suitable to resolve the disputes between them. As a result, arbitrators obtain their powers from the parties' authorisation and they are allowed to act on behalf of the parties within the scope of authorisation. Nevertheless, unlike the contractual theory, the extent of the arbitrator's power is subject to the scrutiny of the mandatory rules of the lex fori and the public policy rules of the enforcing states. As far as the nature of the arbitral awards is concerned, distinct from both the jurisdictional and contractual theories, the hybrid theory defines the nature of arbitral awards as half way between a judgment and a contract.[82]

C. Choice of the Proper Law

Similar to the jurisdictional theory, the hybrid theory recognises the significance of the supervisory powers of the national courts of the place of arbitration and the enforcing states. It maintains that, in the absence of any express agreement between the parties, the law of the seat will be applied to govern the arbitration. Arbitrators are required to decide the proper law of the contract in accordance with the conflict of laws rules of the *lex fori*. In other words, arbitrators have to apply the law expressly chosen by the parties to the dispute; however, in the case where no expressed choice of law can be found, they have to resort to the conflict of laws rules of the place of arbitration in order to decide the law governing the substantive issues.[83] The jurisdictional nature has a stronger influence on the choice of the proper law. Since the conflict of laws rules of the lex fori are important in deciding the proper law of the contract under the hybrid theory, therefore, the validity of a choice of a-national principles and the application of a national principles as the proper law of the contract will have to be decided

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[81] J. Robert, *De la Place de la Loi dans L'Arbitrage*, discussed in Sanders, *supra* note 34, at 227-29, and SAMUEL *supra* note 10, at 62.

[82] Fernand Surville, *Jurisprudence Française en Matière de Droit International*, 29 REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE 129, 148 (1990); *see also* SURVILLE & ARTHUYS, *supra* note 72, at 634-35.

[83] LEW, *supra* note 22, at 58.

by the mandatory rules of the lex fori and those of the countries where the recognition or enforcement is sought.

V. THE AUTONOMOUS THEORY

A. Definition

Instead of trying to define arbitration within the scale of the spectrum between the jurisdictional and contractual theories, Rubellin-Devichi looked into the practical aspects of arbitration and developed an autonomous theory. Believing that the merit of international commercial arbitration was the speedy and flexible character of the proceedings, she argued that an appropriate theory should be established by examining the use and purpose of arbitration. With an intention to create a friendly atmosphere for arbitration in the international commercial community, Rubellin-Devichi argued that the autonomous character of international commercial arbitration should be recognised.[84] She rejected the traditional jurisdictional and contractual theories on the grounds that both theories failed to correspond with reality and contradicted each other. She also rejected the hybrid theory because of its indefinite scope of application.

Instead of following the traditional debates over the jurisdictional and contractual characters of arbitration, Rubellin-Devichi maintained that the real character of arbitration had to be decided on the basis of its use and purpose by placing arbitration on a "supra-national" level and recognising its autonomous nature. Having studied the social and economic demands for international commercial arbitration, she suggests that "[i]n order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous."[85]

Rubellin-Devichi did not argue about the dual nature of arbitration, but she disagreed with the efforts involved in trying to distinguish the jurisdictional and contractual characters of arbitration. In her opinion, it is difficult or even impossible to draw a line between the jurisdictional and contractual features of arbitration. An undesirable distortion of the development of international commercial arbitration may be caused by insisting on this kind of segregation. She did not classify arbitration as purely contractual or jurisdictional because both characters have been "so

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[84] *See* LEW, *supra* note 22, at 59-61.

[85] *See generally* J Rubellin-Devichi, *L'arbitrag: Nature Juridique: Droit Interne et Droit International Privé*, *in* LIBRAIRIE GENERALE DE DROIT ET DE JURISPRUDENCE 365 (1965); *see* SAMUEL, *supra* note 10, at 67.

inextricably intertwined that they have become impossible to separate."[86] As she stated: "It is out of the question to apply the law of contract to the arbitral agreement and that relating to judgements to the award. The award is not a judgement and the arbitral agreement is not a contract like any other."[87] Moreover,

> The question is to know whether the arbitration does not extend beyond its two components to establish an autonomous institution, the nature of which should not be defined by reference to the contract or to jurisdiction, but whose legal authority is to be justified both by its purpose and by the guarantee necessary for those parties who do not bring their disputes before the official courts.[88]

She also believed that the existence and continuing development of international commercial arbitration corresponded with the demands from the international trade community. Business people have realised that arbitration meets their demands for a more flexible and easily-controlled method to settle the disputes between them. In order to satisfy the development and expansion of the arbitration industry, she argued that complete party autonomy should be offered to the parties. In accordance with this idea, parties enjoy the full autonomy in deciding the arbitration procedures, such as the law governing the procedural matters and the time and place of arbitration as well as the ability to choose the law to govern the substantive matters.

B. The Status of Arbitral Awards

Furthermore, Rubellin-Devichi maintained that, based on the autonomous theory, arbitration agreements and arbitral awards were enforceable in any country. She also saw the necessity of having an international dispute settlement institution established in order to provide perfectly functional arbitrations for the international business community. Therefore, she concluded that "only an original system, free from both the contractual and jurisdictional notions, would permit the necessary speed and guarantees which the parties legally claim to be brought together."[89]

While acknowledging full party autonomy in determining every detail of arbitration, the proponents of the autonomous theory deny the

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[86] *See* Rubellin-Devichi, *id.* at 363; *see* LEW, *supra* note 22, at 60.
[87] LEW, *id.* at 17; *see* SAMUEL, *supra* note 10, at 68.
[88] *See* SAMUEL, *id.* at 59.
[89] *Id.* at 60.

controlling or supervisory powers of the *lex fori* over arbitration. They invoke the idea of delocalisation theory and the idea of a supra-national arbitration and this can be observed in the discussion of the validity of arbitration agreements and arbitral awards and in choice of the proper law. With respect to the issue of the validity of arbitration agreements and arbitral awards, in accordance with the delocalisation theory, the proponents of the autonomous theory maintain that an arbitration should be free from restraints imposed by the laws of the relevant states. They also argue that the national laws of the place of arbitration or the place where the recognition or enforcement is sought should not have a supervisory role to play in an arbitration. Furthermore, because of the parties' wishes to arbitrate and the supra-national nature of arbitration, arbitration agreements and arbitral awards should be enforceable in any country.

C. Choice of the Proper Law

As far as the choice of the proper law is concerned, instead of confining arbitration within the national or international legal framework, the autonomous theory invokes the creation of a real "supra-national" law for international commercial arbitration. Under this truly supra-national arbitration, parties are entitled to choose any rules of law, a national system of law, international law, the new *lex mercatoria*, the general principles of law or even amiable composition to govern their relationship. Furthermore, they believe that the international commercial community should create its own law to be applied to international commercial disputes.

The idea of having total freedom in the choice of the proper law has been supported by Goldman,[90] Lando[91] and Lew.[92] The most revolutionary idea invoked by the autonomists is to create a supra-national character for international commercial arbitration. To achieve this goal, they maintain that business people should not confine themselves within a framework of national systems of law. The international business community is quite capable, they argue, of developing its own set of rules to resolve international commercial disputes. Based on this idea, it is argued that in international commercial arbitration the arbitrator's power to choose the

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[90] Berthold Goldman, *La Nouvelle Réglementation Française de L'arbitrage International, in* THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION: LIBER AMICORUM PIETER SANDERS 153, 164 (Jan C. Schultsz & Albert Jan van den Berg eds.,1982); *see generally* Berman et al., *The New Law Merchant and the Old Sources, Content, and Legitimacy, in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 31 (Thomas E. Carbonneau ed., 1990).

[91] Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34(4) INT'L & COMP. L.Q. 747, 747 (1985).

[92] LEW, *supra* note 22, at 112-18.

proper law should not be restricted within the scope of national laws. They should be free to decide the dispute on the basis of either a municipal system of law or the general principles of international law, custom, usages of trade, good sense, fairness or justice.

Goldman supports the idea that the *lex mercatoria* is a legal system which is designed to govern certain types of international commercial dispute, while municipal law appears to be insufficient in certain aspects.[93] Lew expresses his belief in the party autonomy doctrine and the existence of an autonomous legal order that does not belong to any particular national legal system.[94] Goldman's idea is also accepted by Lando. He is convinced that the lex mercatoria, instead of being made and promulgated by state authorities, is recognised as an autonomous system by the business community and by state authorities.[95] As Lando states:

> By choosing the *lex mercatoria* the parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contracts. Thus they escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws which are unknown in other countries such as the common law rules on consideration and privity of contract. Furthermore, those involved in the proceedings – parties, counsel and arbitrators – plead and argue on an equal footing, nobody has the advantage of having the case pleaded and decided by his own law and nobody has the handicap of seeing it governed by a foreign law.[96]

The application of a-national principles is also upheld by Mr. Tallon, who states that:

> The autonomy of the parties, so it is said, may produce a contract without law, a contract subject to un droit anational, so that arbitrators are not called upon to apply any fixed rules of a specific system of law, but may have resort to a law of their own creation.[97]

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[93] *See generally* Goldman, *supra* note 90; discussed in Berman et al., *supra* note 90.
[94] LEW, *supra* note 22, at 112-18.
[95] *See generally* Lando, *supra* note 91.
[96] *Id.* at 748.
[97] CLIVE MACMILLAN SCHMITTHOFF, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE: WITH SPECIAL REFERENCE TO EAST-WEST TRADE 157 (1962). It is also supported by Professor Goldman and Professor Fragistas.

The autonomists are convinced that it is necessary for international commercial arbitration to be free from the controls of the lex fori. In addition, they believe that developing a set of laws to apply to international commercial relations is the only way to achieve the ideal of self-regulation for international commercial arbitration. Once these ideas are widely accepted, a truly international commercial arbitration will be created. A passage written by Luzzatto can serve as a concluding remark for the autonomy theory:

> The detachment of the arbitral procedure from any municipal legal system and its organisation according to the free will of the parties to the dispute require therefore, that the operation of the said autonomy is recognised by means of an international convention, which also makes this aspect of international commercial arbitration relevant with regard to national laws. When the parties' autonomy becomes able to regulate the whole of the arbitration procedure without any connection with municipal laws, and when international regulations provide the parties with the machinery and facilities which may enable arbitration proceedings to fulfil their purposes without any resort to municipal courts, then it can be said that international commercial arbitration is recognised as such, in its truly international character, by the legal systems of the States which are parties to the convention.[98]

VI. CONCLUSION

To understand how international commercial arbitration operates in different jurisdictions, it is important to understand the basis of the theories which are invoked among different jurisdictions. While both jurisdictional and contractual theories take two opposite positions on the same spectrum, the hybrid theory took a more compromised stand which seems to be more acceptable. The autonomous theory tries to provide a basis for an ideal arbitration framework, but it was strongly criticised by Dr. Mann. He questioned whether such autonomous arbitration, which is not bound to any national legal system, is what every user of arbitration wants. Dr. Mann refused to accept the autonomous theory and stated that an arbitration has to be rooted in a national legal system. Furthermore, he suggested that most

[98] Riccardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 (4) RECUEIL DES COUR 9, 52 (1977).

international traders would prefer to have their disputes resolved in accordance with municipal laws as opposed to transnational law.[99] This is because in reality, the success of arbitration lies in the successful enforcement of an arbitral award. Compared to the jurisdictional, contractual and hybrid theories, the autonomous theory has gone beyond the reality of modern international commercial arbitration. Within the present arbitration framework, the criteria determining whether the award can be enforced are controlled by the relevant national laws, consequently, it is essential to understand different theoretical approaches adapted by various jurisdictions.

[99] Mann, *supra* note 1, at 245-46.

REFERENCES

Books

ANTON, ALEXANDER ELDER & P. R. BEAUMONT (1990), PRIVATE INTERANTIONAL LAW – A TREATISE FROM THE STANDPOINT OF SCOTS LAW, 2nd ed.

BERNARD, ALFRED (1937), L'ARBITRAGE VOLONTAIRE EN DROIT PRIVÉ: L'ARBITRAGE EN DROIT INTERNE BELGE ET FRANÇAIS, ÉTUDE CRITIQUE COMPARÉE, L'ARBITRAGE EN DROIT INTERNATIONAL PRIVÉ, DROIT COMPARÉ.

BOYD, STEWART C. & MICHAEL J. MUSTILL (1989), COMMERCIAL ARBITRATION, 2nd ed.

CARBONNEAU, THOMAS E. (ed.) (1990), LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT.

DOMKE, MARTIN (1965), COMMERCIAL ARBITRATION.

FOELIX, JEAN JACQUES GASPARD & CHARLES DEMANGEAT (1847), TRAITÉ DU DROIT INTERNATIONAL PRIVÉ: OU, DU CONFLIT DES LOIS DE DIFFÉRENTES NATIONS EN MATIÈRE DE DROIT PRIVÉ, 2nd ed.

HUNTER, ROBERT L. C. (1987), THE LAW OF ARBITRATION IN SCOTLAND.

KELLOR, FRANCES (1941), ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL AND INDUSTRIAL ARBITRATIONS.

KLEIN, FRÉDÉRIC-EDOUARD (1955), CONSIDERATIONS SUR L'ARBITRAGE EN DROIT INTERNATIONAL PRIVE, PRÉCÉDÉES D'UNE ÉTUDE DE LÉGISLATION, DE DOCTRINE ET DE JURISPRUDENCE COMPARÉ EN LA MATIÈRE.

LEW, JULIAN D. M. ET AL. (1978), THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION.

1977 IV RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1981)

MERLIN, PHILIPPE ANTOINE (1829), 9 RECUEIL ALPHABETIQUE DE QUESTIONS DE DROIT , 4th ed.

MOUTULSKY (1974), ECRITS.

NIBOYET, J. P. (1950), TRAITE DE DROIT INTERNATIONAL PRIVE FRANÇAIS.

PILLET, ANTOINE-LOUIS (1923), 2 TRAITE PRATIQUE DE DROIT INTERNATIONAL PRIVE.

REDFERN, ALAN ET AL. (1991), LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 2nd ed.

LIBRAIRIE GENERALE DE DROIT ET DE JURISPRUDENCE (1965).

SAMUEL, ADAM (1989), JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, US AND WEST GERMAN LAW.

SANDERS, PIETER (1967), INTERNATIONAL COMMERCIAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE, 2nd ed.

SCHMITTHOFF, CLIVE MACMILLAN (1962), THE SOURCES OF THE LAW OF INTERNATIONAL TRADE: WITH SPECIAL REFERENCE TO EAST-WEST TRADE.

SCHULTSZ, JAN C. & ALBERT JAN VAN DEN BERG (eds.) (1982), THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION: LIBER AMICORUM PIETER SANDERS.

SURVILLE, FERNAND & FRANÇOIS ARTHUYS (1925), COURS ELÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ, 7th ed.

Articles

Ancel, J. P. (1993), *French Judicial Attitudes towards International Arbitration*, 9(2) ARBITRATION INTEREST 121.

Klein, Frédéric-Edouard (1958), *Autonomie de la Volonté et Arbitrage*, 47 REVIEW CRITIC 255.

Lainé (1899), *De L'éxécution en France des Sentences Arbitrales Étrangeres*, 26 J.D.I. 641.

Lando, Ole (1985), *The Lex Mercatoria in International Commercial Arbitration*, 34(4) THE INTERNATIONAL & COMPARATIVE LAW QUARTERLY 747.

Luzzatto, Riccardo (1977), *International Commercial Arbitration and the Municipal Law of States*, 157(4) RECUEIL DES COUR 9.

Mann, Francis A. (1967), *State Contracts and International Arbitration*, 42 BRITISH YEARBOOK INTERNATIONAL LAW 1.

Mann, Francis A. (1983), *Lex Facit Arbitrum*, 2(3) ARBITRATION INTEREST 245.

Mustill, M. (1984), *Transnational Arbitration in English Law*, 37 CURRENT LEGAL PROBLEMS 133.

Pallieri, Giorgio Balladore (1935), *L'Arbitrage Privé dans les Rapports Internationaux*, 51(1) RECUEIL DES COUR 287.

Sanders, Pieter (1975) *Trends in the Field of International Commercial Arbitration*, 145(2) RECUEIL DES COURS 205.

Sauser-Hall (1952), *L'arbitrage en Droit International Privé*, 44(I) ANN. INST. DR. INTERN. 469.

Sauser-Hall (1957), *L'arbitrage en Droit International Privé*, 47(II) ANN. INST. DR. INTERN. 394.

Stone (1966), *A Paradox in the Theory of Commercial Arbitration*, 21 ARBITRATION JOURNAL 156.

Surville, Fernand (1990), *Jurisprudence Française en Matière de Droit International*, 29 REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE 129.

Cases

Arenson v. Arenson, [1977] A.C. 405 (U.K.).
Bradley v. Fisher, 20 L.Ed. 646 (1871).
Cahn v. International Union Ladies' Garment Workers Union, 311 F.2d. 113 (3rd Cir. 1962).
Cie Europeene de Cereals SA v. Tradax Export SA, [1986] 2 Lloyd's Rep. 301 (U.K.).
Corey v. New York Stock Exchange, 691 F.2d. 1205 (1982).
Hoosack Tunnel, Dock and Elevator Co. v. O'Brien, 137 Mass. 424 (1984).
K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd., [1991] 3 All ER 211 (CA) (U.K.).
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).
Sutcliffe v. Thackrah, [1974] A.C. 727 (H.L.) (U.K.).
The Roses case, [1938] I Dalloz 25.
The Vymor's Case, 8 Co. Rep. 81b, 82a (1609).

International Covention

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

Others

The Arbitration Act 1950.