Enforcement of Foreign Arbitration Awards in Denmark

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Introduction

The importance of arbitration as an out-of-court dispute resolution method could not be overestimated. In the fast and growing global market the need for an effective and fast technique for resolving legal disputes between merchants from different States is evident. The fast and modern means the arbitration offers in solving disputes for parties with different bargaining power is one of the cornerstones of modern business and enterprise. It is an obvious fact that in order for an arbitration to be successful the procedure of the recognition and enforcement of an arbitral award should not be buried under complexities of different legal regimes.

The speed of the arbitration *ipso facto* loses its lead over litigation if an arbitral award could not be enforced in a simple and easy manner. However, the enforcement of an arbitral award should not be met without reasonable lawful restrictions. It is important to realize that all benefits of the arbitration along with its enforcement convenience shall not pre-empt protection of legal rights of the parties concerned. The parties should be able to set aside an arbitral award that was rendered without observing basic principles of natural justice (*e.g.* fair hearing).

In this paper the grounds for refusal of the recognition and enforcement of foreign arbitral awards in Denmark will be reviewed and analysed in accordance with the relevant legislation, mainly, Danish Arbitration Act, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter - New York Convention), and case law. The reference to other jurisdictions will be made when appropriate in order to illustrate the similarities or distinctions in different legal regimes for better understanding of the relevant Danish regulation.

In the first chapter of this paper the growing importance of the arbitration as such will be discussed briefly along with the status of the New York Convention in Denmark. In the second chapter Section 39 of the Danish Arbitration Act will be analysed in detail and compared with the New York Convention in order to get an overview of available defences to the enforcement or recognition of a foreign arbitral awards in Denmark. The third chapter will summarize the pros and cons of the regulation concerned, and the relevant conclusions will be made.

Chapter I

The Importance of Arbitration

International trade and commerce has significantly increased during the last decades.[1] Coinciding with this expansion was an increase in the number of international commercial disputes.[2] The most popular method in this respect is international commercial arbitration,[3] which in the last fifty years has become the most important mechanism for resolving international commercial disputes.[4] Most merchants (and their lawyers) also consider arbitration to be more efficient, more confidential and relatively less expensive than litigation.[5] By opting for arbitration, the parties must be said to have expressed a desire for streamlining and speedy handling which implies that *justice delayed is justice denied*.[6]

However, given the increase in the complexity of pleadings and issues in disputes,[7] the arbitration could not be as fast and relatively cheap as one might expect. Consider an example of *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* when award on jurisdiction and merits was rendered two and a half years after the hearing on jurisdiction and the merits.[8]

Nevertheless, it could be noted that prevalence and significance of arbitration was reassured by the surveys conducted by the School of International Arbitration at Queen Mary, University of London, which stated that significant majority of corporations prefer international arbitration to resolve their cross border disputes.[9] In 2006, 73% of the participating corporations preferred to use international arbitration instead of national litigation.[10] The support of arbitration was even wider when the same institution conducted the survey in 2008, mainly, 88% of the participating corporations have used arbitration.[11] It was admitted that the enforceability of arbitral awards, the flexibility of the procedure

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[1] Juliane Oelmann, *The Barriers to the Enforcement of Foreign Judgments as Opposed to those of Foreign Arbitral Awards*, (Bond Law Review, Vol.18, Issue 2, 2006), p. 77.
[2] *Ibid.*, p. 94.
[3] *Ibid.*
[4] Mark L. Movsesian, *International Commercial Arbitration and International Courts,* (Duke Journal of Comparative & International Law 18, 2007-2008), p. 423.
[5] Joseph Lookofsky & Ketilbjørn Hertz, *European Union Private International Law in Contract and Tort,* (Copenhagen, DJØF Publishing, 2009), p. 160.
[6] Erik Werlauff, *Civil Procedure in Denmark*, 2nd revised edition (Copenhagen, DJØF Publishing, 2010), p. 139.
[7] Anibal Sabater, *Practicing International Arbitration. A New Landscape,* (Experience, Vol. 20, Issue 2, 2010), p. 37.
[8] *Ibid.*
[9] 2006 International Arbitration Study: Corporate Attitudes and Practices, Retrieved 22 April, 2011, from http://www.arbitrationonline.org/docs/IAstudy_2006.pdf
[10] *Ibid.*
[11] 2008 International Arbitration Study. Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards, Retrieved 22 April, 2011, from http://www.arbitrationonline.org/docs/IAstudy_2008.pdf

and the depth of expertise of arbitrators are still seen as the major advantages of arbitration.[12] In 2010, 68% of corporations have a dispute resolution policy, and whether or not they have a policy, corporations generally take a reasonably flexible approach to negotiating arbitration clauses.[13] All of these surveys were conducted among big corporations, where vast majority of companies has an annual turnover between US$500 million to more than US$5 billion.[14] As one commentator pointed out there is little doubt that number of commercial arbitrations have increased significantly during the last decade.[15]

It should be borne in mind that one of the major issues of international arbitration is the enforcement of the arbitral award in and outside the award-rendering state. That is to say, in order for international arbitration to be effective the parties must be able to enforce the arbitral award concerned.[16]

There is no way one could be satisfied in settling the legal dispute in a favourable way, and then not being able to enforce its outcome. In a highly globalized world economy it is essential for the claimant (*e.g.* the winning party of the dispute concerned) to be able to enforce the arbitral award in a State where the respondent (*e.g.* the losing party of the dispute concerned), or *vice versa,* has the considerable amount of its assets. The finality of an arbitral award is vital and in international trade to provide a certain degree of predictability and certainty.[17] However, the power of the winning party to enforce the arbitral award should not be absolute, *i.e.,* it should be met with appropriate legal measures (*e.g.* restraints) in order to secure the justice. To put it simply, in order to protect legal rights of the parties such as fair and competent dispute resolution, these measures or restraints have to be implemented.

It should be noted that parties generally have no right to appeal the arbitral award. In fact, once made, it becomes binding, and parties are obliged to comply with the arbitral award with generally no right to recourse. Moreover, "a key benefit of international arbitration is the limited opportunity for judicial review of arbitral awards, as compared to the broader review allowed in some national arbitration laws for domestic awards."[18]

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[12] *Ibid.*
[13] 2010 International Arbitration Survey: Choices in International Arbitration, Retrieved 22 April, 2011, from http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf
[14] *Ibid.*
[15] Anibal Sabater, *op cit.* note 7, p. 35.
[16] Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards,* (Ohio State Journal on Dispute Resolution, Vol. 1, Issue 2, 1986), p. 366.
[17] Serhat Eskiyoruk, *Harmonisation on the Performance of International Arbitral Awards*, (Ankara Bar Review, Vol. 3, Issue 2, 2010), p. 62.
[18] Lucy Reed and Phillip Riblett, *Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts [comments],* (Southwestern Journal of Law and Trade in the Americas, Vol. 13, Issue 1, 2006), p. 121.

Denmark's Accession to the New York Convention

When it comes to recognition and enforcement of an award outside the award-rendering State, the New York Convention is likely to come into play.[19] It is often said that the New York Convention is "the single most important pillar on which the edifice of international arbitration rests,"[20] and is a convention which "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[21] It makes arbitral awards simple, unified and internationally enforceable.[22] The most significant function that the Convention serves in international trade and commerce is that it provides for the almost universal enforceability of awards.[23] The basic thrust of the New York Convention is to liberalise and facilitate to the greatest possible extent the procedures to enforce foreign arbitral awards.[24]

At the time of writing there are 145 State Parties to the New York Convention.[25] In fact, it is one of the most widely accepted multinational conventions.[26] As for Denmark, its ratification instrument was deposited with the General Secretary of the United Nations on 22 December 1972.[27] In accordance with Article XII(2) of the New York Convention, it became binding upon Denmark on 21 March 1973.[28]

Even though so many states had ratified the New York Convention, it, nevertheless, should be construed in conjunction with a national legislation that regulates arbitration. It is important to note that under Danish law, treaty obligations are only binding before domestic courts to the extent they are implemented by statute.[29] Such statute was adopted by the 1972 Arbitration Act (No. 181 of 24 May 1972) which came into force on 1 July 1972.[30] It was replaced in on 1 July 2005 by Danish Arbitration Act (hereinafter called DAA), during the Danish legal reform.[31] It is based on the 1985 UNCITRAL

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[19] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 182.
[20] Alex Baykitch, Lorraine Hui, *Celebrating 50 years of the New York Convention [comments],* (*University of New South* Wales Law Journal, Vol. 31, Issue 1, 2008), p. 364.
[21] *Ibid.*
[22] Serhat Eskiyoruk, *op cit.* note 17, p. 65.
[23] Alex Baykitch, Lorraine Hui, *op cit.* note 20, p. 364.
[24] Juliane Oelmann, *op cit.* note 1, p. 97.
[25] UNCITRAL, Status on 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Retrieved 22 April 2011, from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
[26] Juliane Oelmann, *op cit.* note 1, p. 97.
[27] Mads Bryde Andersen (country rapporteur), *Special Supplement 2008: Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards*, *Denmark,* (ICC Publication No. 727, 2008), Retrieved 22 April 2011, from http://www.iccdrl.com/CODE/LevelThree.asp?page=Country%20Answers&Locator=32.2&L1=Country%20Answers&tocxml=ltoc_CountryAnswersAll.xml&contentxsl=arbSingle.xsl&tocxsl=toc.xsl&contentxml=CA_SUPP_0021_16.xml&AUTH=&nb=0
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

Model Law on International Commercial Arbitration (hereinafter - Model Law), though with minor distinctions in wording. By enacting DAA Denmark has become an attractive country in which to conduct arbitration with one of the Europe's most modern and streamlined arbitration acts.[32]

Enforcement of Foreign Arbitral Awards in Denmark under the New York Convention

Under Articles III-VI of the New York Convention, Contracting States are required to recognize and enforce foreign arbitral awards. Chapter 9 of the DAA seeks to fulfil that requirement.[33] It may be noted that chapter 9 of the DAA, however, goes further than Articles III-VI of the New York Convention.[34] In particular, chapter 9 of the DAA applies to foreign and domestic awards alike.[35] It should be mentioned that Denmark has made a declaration under Article I(3) of the New York Convention that the convention shall apply only to the recognition and enforcement of awards rendered in another contracting State,[36] and that Denmark will apply the New York Convention only to commercial legal relationships.[37] However, notwithstanding such reservation, the DAA is more liberal and allows for the recognition and enforcement of all foreign arbitral awards, regardless of their country of origin.[38] Furthermore, Denmark, as a matter of fact, also recognizes and enforces arbitral awards made in non-Contracting States and Arbitral awards made in the context of a non-commercial legal relationship.[39] It could be argued that Denmark clearly adopts a pro-arbitration stance concerning the enforcement of foreign arbitral awards. Thus Denmark places itself among such pro-arbitration countries as United States of America and France.

[32] Erik Werlauff, *Arbitration in Denmark – The Parties Influence on a Danish Arbitration Case,* (European Business Law Review, Vol. 19, Issue 2, 2008), p. 267.
[33] Ketilbjørn Hertz, *Danish Arbitration Act 2005,* 1st edition, (Copenhagen, DJØF Publishing, 2005), p. 33.
[34] *Ibid*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] Mads Bryde Andersen (country rapporteur), *op cit.* note 27.
[39] Ketilbjørn Hertz, *op cit.* note 33, p. 34.

Grounds for Refusal of the Enforcement of Foreign Arbitral Awards under Article (V) of the New York Convention

The New York Convention provides uniform standards to enforce arbitral awards.[40] These standards include seven grounds upon which a court may refuse to enforce an award.[41] In fact, there are two groups of grounds on which the application for enforcement may be declined.[42] The first group is procedural grounds, and is related to the right of the losing party to a fair arbitration (Article V (1)).[43] These are the grounds under which parties have unlimited rights of disposition, *i.e.,* parties are free to derogate from these provisions by way of a private agreement (the same is true concerning DAA). The second group are substantive grounds and is related to the arbitrability and public policy, upon which the competent authority of the Forum State may on its own motion refuse recognition and enforcement.[44]

The defending party can only resist enforcement under Article V (1) by proving:
(a) the arbitration agreement's invalidity; (b) insufficient notice of the arbitral proceedings; (c) an award beyond the arbitral agreement's scope; (d) unauthorized or illegal arbitral procedures, or (e) a non-binding award.[45] Article V (2) provides for two additional ex-officio defences: (a) non-arbitrable subject matter or (b) award [otherwise] contrary to public policy.[46]

There are three key features characterizing these grounds: the grounds are exhaustive; a court may not re-examine the merits of the arbitral award; and the burden of proof lies on the respondent.[47] On the whole, courts have given full endorsement to these features, although there have been some notable exceptions where enforcement has been refused.[48]

Most New York Convention Contracting States share the opinion that the list of defences to enforcement of a foreign arbitral award should be construed narrowly, in that only such a narrow construction would comport with the enforcement-facilitating thrust of the Convention.[49] It is irrelevant to analyse the "seven defences" for refusal recognition or enforcement of foreign arbitral awards of the

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[40] May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United Stated and England,* (Arizona Journal of International and Comparative Law, Vol. 23, Issue 3, 2006), p. 748.
[41] *Ibid.*
[42] Serhat Eskiyoruk, *op cit. n*ote 17, p. 67.
[43] *Ibid.*
[44] Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* (Yale Law Journal, Vol. 70, Issue 7, 1961), p. 1066, citation omitted.
[45] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 188.
[46] *Ibid.*
[47] Albert Jan van den Berg, *New York Convention of 1958: Refusals* (ICC International Court of Arbitration Bulletin – Vol. 18/No. 2 – 2007), p. 2.
[48] *Ibid., at page 2*. See also in this regard cited cases in note 5 and 7 of this article.
[49] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 189.

New York Convention separately, due to its indispensable connection with DAA.

Chapter II

Seven Defences to Oppose Recognition and Enforcement of Foreign Arbitral Award under Section 39 of the Danish Arbitration Act 2005

It is obvious that in Denmark as elsewhere arbitration is an increasingly significant vehicle for international commercial dispute resolution by alternate means.[50] In fact, there are three main reasons for the choices of arbitration in Denmark: 1) An arbitration case is decided by "experts", 2) the parties participate in the choice of arbitrators, and 3) the arbitration process and its final product are exempt from the Administration of Justice Act's rules on openness – in other words, the waiver of guaranteed legal right is considered to be an advantage.[51]

It could be admitted that DAA would cause little or no trouble for the winning party of the legal dispute concerned to enforce an arbitral award rendered in or outside the award-rendered State. Nevertheless, it is vital for the parties of the legal dispute to be familiar with the relevant grounds for refusal of the enforcement and recognition of foreign arbitral award that are available under DAA, its application and interpretation in Denmark, even though these rules resemble those of the New York Convention and Model Law. When comparing the relevant articles and sections of the New York Convention, DAA and Model Law that govern refusal of the recognition or enforcement of foreign arbitral awards, there will be an apparent similarities and commonalities, although there might be some minor (mostly technical) differences in legal terminology that is used. These differences, however, should not affect the uniform application of those rules.

The provision that deals with the recognition and enforcement of foreign arbitral awards in Denmark is Section 39 of the DAA that, in substance, is identical to Article 36 of the Model Law, although there are some technical differences in wording.[52] It should be noted that Section 39 applies to arbitral awards rendered in Denmark as well as arbitral awards rendered abroad.[53] As a matter of fact, it could be concluded that arbitration in Denmark as an out-of-court dispute resolution method is more preferable than litigation if, *e.g.,* one of the parties has considerable assets in Denmark. This conclusion is derived from the fact that judicial decisions (court judgements) as opposed to arbitral awards from countries with whom Denmark has no treaty obligations or countries outside European Union that are

[50] Børge Dahl, Torben Melchior, Ditlev Tamm, *Danish Law in European Perspective,* 2nd edition, (Thomson Publishers, Copenhagen 2002), p. 467.
[51] Erik Werlauff, *op cit.* note 32, p. 269.
[52] Ketilbjørn Hertz, *op cit.* note 33, p. 49, citation omitted.
[53] *Ibid,.* p. 33.

not covered by the Brussels I Regulation,[54] are not enforceable in Denmark.[55] However, it should be kept in mind that judgements from other Scandinavian countries are generally enforceable in Denmark.[56]

As it was mentioned above the grounds for refusing recognition and enforcement of foreign arbitral awards in the DAA are identical to those laid down by the Model Law, which are based on Article V of the New York Convention.[57] In other words, Section 39 of the Danish Arbitration Act implements Article V of the New York Convention into Danish Law, thus ensuring Denmark's compliance with its obligations under that convention.[58] It should be borne in mind, that under Danish constitutional law, a treaty is not applicable as such before domestic courts.[59] Under this dualistic system, treaty obligations which concern the contents of the law applicable before domestic courts must be implemented in domestic law by statute or, in some cases, case-law.[60] This system is also known as a doctrine of self-executing and non-self-executing treaties.[61]

Subsection (1)(1)(a) – invalid arbitration agreement

Subsection (1)(1)(a) states that a party to the arbitration agreement was, under the law of the country in which that party was domiciled at the time of conclusion of the contract, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

This subsection concerns the validity of the arbitration agreement. It is evident that if the arbitration agreement is invalid, the very basis of the jurisdiction of the arbitral tribunal to deal with the dispute at all is lacking.[62] Indeed, there should be no enforcement of an award against a party who never agreed to arbitrate.[63] This provision raises two important issues, mainly, choice of law (*i.e.*, what law should determine whether an arbitration agreement is valid) and substantive (*i.e.*, whether the arbitration

[54] COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is important to note that although the Brussels I Regulation is not directly applicable to Denmark, it has effectively been extended to Denmark by a separate agreement between the EU and Denmark which took effect on 1 July 2007, - (Retrieved 27 June 2011, from http://dispute.practicallaw.com/2-205-5103).
[55] Erik Werlauff, *op cit.* note 6, p. 135, citation omitted.
[56] *Ibid.*
[57] Ketilbjørn Hertz, *op cit.* note 33, p. 180.
[58] *Ibid.*
[59] *Ibid.,* p. 32.
[60] *Ibid.,* p. 33.
[61] *See for example*, The decision of the Supreme Court of the United States No.06-984, Jose Ernesto Medellin, Petitioner v. Texas on Writ of Certiorari to the Court of Criminal Appeal of Texas, March 25, 2008.
[62] Ketilbjørn Hertz, *op cit.* note 33, p. 180.
[63] Leonard V. Quigley, *op.cit.* note 44, p. 1067.

agreement is valid).[64] DAA as well as the New York Convention allows the State to examine the validity of an arbitration agreement, but only under the law which the parties have chosen.[65] If the parties have made no choice of law, then the law of the State where the award was made governs.[66] However, the capacity of the parties to contract is to be judged by "under the law of the country in which that party was domiciled at the time of conclusion of the contract".[67] The second legal problem that is worth noting is the applicable law that will determine the existence of an arbitration agreement.[68] The applicable law may either be chosen by the parties or failing that it will be the law of the country where the award was made.[69] It should be borne in mind, that the arbitration court decides any *questions of its own jurisdiction,* including objections against the existence or validity of the arbitration agreement.[70]

Another issue is to be considered is the definition of a term domicile or habitual residence. Neither the New York Convention nor the DAA defines this legal concept, which is "an important example of a general jurisdictional base."[71] It should be noted that the precise definition of "domicile" differs from jurisdiction to jurisdiction, but the basic concept of "domicile" denotes the connection of a natural person with a particular place: a smaller unit within a particular State.[72] In this context, however, "domicile" means the country or territory in which a person resides with the intent to stay there permanently or, at any are, without intending the stay there to be merely temporary.[73] As far as legal persons and other collective entities are concerned, "domicile" means the country or the territory under the law of which the legal person or other collective entity was established.[74] Absent any definition of "domicile" the parties as well as arbitrators should resort to Danish private international law rules if the arbitration proceedings will be held in Denmark or if the parties chosen *lex arbitri* would be that of Denmark.[75]

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[64] May Lu, *op cit.* note 40, p. 757.
[65] Leonard V. Quigley, *op.cit.* note 44, p. 1067.
[66] *Ibid.*
[67] In this case there is a difference in formulation between the New York Convention and DAA, whereas the New York Convention Article V 1. (a) instead of a phrase "under the law of the country in which that party was domiciled at the time of conclusion of the contract" provides "under the law applicable to them". It could be argued, that domicile provides more predictability for the parties in determining the relevant law.
[68] Ketilbjørn Hertz, *op cit.* note 33, p. 181, citation omitted.
[69] *Ibid.*
[70] Erik Werlauff, *op cit.* note 5, p. 141.
[71] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 29.
[72] *Ibid.*
[73] Ketilbjørn Hertz, *op cit.* note 33, p. 181.
[74] *Ibid.*
[75] *Ibid.*

Subsection (1)(1)(b) – lack of a fair opportunity to be heard

According to Subsection (1)(1)(b) it is possible to nullify an arbitral award if the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case.

The Subsection (1)(1)(b) encompasses, in particular, cases of non-compliance with fundamental principles of natural justice concerning equal treatment and the right of access to all statements, documents or other information supplied to the arbitral tribunal and the right to reply to the allegations of the other party (*auditur et altera pars*).[76] The word "proper"[77] was adopted to take care of the situation where the defendant was "under a legal incapacity."[78] The phrase "or was otherwise unable to present his case" was needed to deal with the circumstances where *force majeure* or other cause operated to prevent a party from presenting his case, or where he was not given adequate opportunity to do so.[79]

If an arbitral award was made without observing such fundamental principles of natural justice, recognition and enforcement of the award may be refused.[80] It should be noted that the context of fair hearing is decided under the national law of the forum state.[81] In addition, this defence encompasses two parts: (1) inability to present one's case and (2) improper notice of an arbitrator's appointment or arbitration proceeding.[82] It is important to note, that the provision only considers whether a party received notice and was able to present its case rather than the entirety of the law of procedural due process.[83] Even if mistakes were made during the arbitral proceedings, such a failure to give a party access to documents or other materials, recognition and enforcement of the arbitral award cannot be refused if the party subsequently, before the award was made, was given a full opportunity of presenting his or her case.[84] Moreover, a party's failure to object that it did not receive proper notice or that it was unable to present its case waives that objection at the proceedings to enforce the award.[85] This principle of natural justice could also be found in Article 34 (2) of Brussels I Regulation.[86] An interesting

[76] Ketilbjørn Hertz, *op cit.* note 33, p. 182.
[77] This provision is incorporated into DAA from the New York Convention without any omissions in wording.
[78] Leonard V. Quigley, *op.cit.* note 44, p. 1067.
[79] *Ibid.*
[80] Ketilbjørn Hertz, *op cit.* note 33, p. 182.
[81] Serhat Eskiyoruk, *op cit.* note 17, p. 68.
[82] May Lu, *op cit.* note 40, p. 762.
[83] *Ibid.,* at page 763.
[84] Ketilbjørn Hertz, *op cit.* note 33, p. 183.
[85] May Lu, *op cit.* note 40, p. 763.
[86] The Brussels I Regulation's Article 34(2) states in particular that: "a judgement shall not be recognized where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant

example concerning this legal issue is a decision of the Danish Supreme Court of 18 December 1997 (reported in *Procesbevillingsnævnets årsberetning* at 38).[87] The Supreme Court refused enforcement of an Italian judgement because the Danish defendants had not validly appointed an Italian lawyer to receive service of process on their behalf.[88]

It has been observed that applications for a refusal to enforce on the grounds of violation of due process have been rarely successful.[89] For example, in the case of *Minmetals Germany v. Ferco Steel,* the English court heard argument on whether asking the respondent for disclosure of his evidence and submission of his arguments was enough to provide a fair hearing.[90] The court held that he had given an opportunity to present his case and failing to use this to his advantage did not constitute lack of fair hearing.[91]

Subsection (1)(1)(c) – beyond the scope of arbitration agreement

Subsection 1(1)(c) applies if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

In that case there has been no basis for the arbitral tribunal to deal with the dispute or matter in question, and recognition and enforcement of the arbitral award can consequently be refused in whole or in part.[92] If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration will not be recognized or enforced.[93] In fact, this defence is merely a reiteration of the invalidity defence.[94] In essence, meaning that an arbitral award should not be enforced against a party who never agreed to arbitrate the subject matter of it.[95] Some parties, *e.g.* in the United States, have argued that an arbitration agreement is invalid because the underlying contract is invalid.[96] However, this argument usually fails due to the separability doctrine.[97] In other words, if a contract is invalid, the arbitration

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failed to commence proceedings to challenge the judgement when it was possible for him to do so."

[87] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 151.

[88] *Ibid.,* at page 151. However, it should be noted that this case has no connection with arbitration, but the principle of natural justice acknowledged therein could be applied with regard to the due process in the arbitration case as well.

[89] Serhat Eskiyoruk, *op cit.* note 17, p. 68.

[90] *Ibid.*

[91] *Ibid.*

[92] Ketilbjørn Hertz, *op cit.* note 33, p. 183.

[93] *Ibid.*

[94] Leonard V. Quigley, *op.cit.* note 44, p. 1068.

[95] *Ibid.*

[96] May Lu, *op cit.* note 40, p. 757.

[97] *Ibid.,* citation omitted.

agreement is not automatically invalid.[98]

The same position is adopted in Denmark. Mainly, the principle of *separability* has now finally reached the statute book in the DAA: an arbitration clause which is part of a contract is deemed in terms of the arbitration court's competence to be a separate agreement independent of the other parts of the contract.[99] It is worth to note that when State Parties of the New York Convention negotiated the corresponding provision (Article V.1.(c)), the Indian delegate had a remarkable argument that was made with regard to non-deletion of the separability provision: If the enforcing court was not authorized to sever that (extraneous) matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the arbitral agreement, the applicant might suffer unjustified hardship.[100]

This subsection should be construed in conjunction with Subsection 2 (the relation between these provisions will be analysed below).

Subsection (1)(1)(d) – improper composition of the arbitral tribunal or improper arbitral procedure

Subsection (1)(1)(d) states that the recognition or enforcement of an arbitral award may be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with the law of the country where the arbitration took place.

As it generally known, there is quite a considerable degree of party autonomy when it comes to the question of the composition of the arbitration court.[101] The parties can specify the number of arbitrators, and the procedure how the arbitrators should be appointed (Section 10(2) and Section 11(1) of the DAA respectively),[102] and also declare which rules the arbitrators will use.[103]

This regulation will apply in a situation when a party knows that any provision of the applicable arbitration law from which the parties may derogate by agreement or any requirement under the arbitration agreement has not been complied with and nevertheless proceeds with the arbitration.[104] An interesting remark is that even when parties choose procedures illegal under the law of the seat of arbitration, the enforcing court will have to enforce the award,[105] and enforcement could be denied only

[98] May Lu, *op cit.* note 40, p. 757.
[99] Erik Werlauff, *op cit.* note 5, p. 142.
[100] Leonard V. Quigley, *op.cit.* note 44, p. 1068.
[101] Erik Werlauff, *op cit.* note 32, p. 272.
[102] *Ibid.,* citation omitted.
[103] May Lu, *op cit.* note 40, p. 758.
[104] Ketilbjørn Hertz, *op cit.* note 33, p. 184.
[105] May Lu, *op cit.* note 40, p. 759.

if the procedures actually used constituted a breach of the agreement to arbitrate.[106] For example, parties can use this defence to claim that an arbitrator is not qualified or is biased.[107] It should be borne in mind, that in the field of international commercial arbitration, an issue that is fundamental to the arbitral process is preserving the independence and impartiality of the arbitrators.[108] This is of particular importance since arbitrators have completely free rein to decide the law as well as the facts and are not subject to appellate review.[109]

For example, in *AT & T Corp v Saudi Cable Co*, England's Court of Appeal established the disqualification test for arbitrators on grounds of bias; - the test to be applied on a complaint of bias against an arbitrator is the same as that applied to a judge.[110] The interesting point is that if a party had not showed a "real danger of bias", an arbitrator will not be removed by the English courts.[111]

In this regard it could be mentioned that parties cannot derogate from Section 18 of the DAA that lays down the fundamental procedural principles of equal treatment of the parties,[112] and also enables parties to have "adequate opportunity for presenting their case."[113] However, recognition or enforcement of the arbitral award cannot be refused if during the arbitral proceedings, the parties were treated unequally (*e.g.* concerning one particular issue), but subsequently, before the award was made, the arbitral tribunal corrected the situation by giving the party concerned the same opportunities as the other party.[114]

Subsection (1)(1)(e) – the arbitral award is not binding or set aside or suspended

Subsection (1)(1)(e) states that the arbitral award may be refused recognition or enforcement where the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

That similar provision of the New York Convention (Article V.1.(c)) was criticized for making arbitration awards subject to local standards,[115] since the grounds to set the award aside may differ from country to country.[116] Moreover the national court may impose local requirements that are not

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[106] Leonard V. Quigley, *op.cit.* note 44, p. 1067-1068, note 84.
[107] May Lu, *op cit.* note 40, p. 758.
[108] Hong-Lin Yu and Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives*, (International and Comparative Law Quarterly, Vol. 52, Part 4, 2003), p. 935.
[109] *Ibid.,* p. 937, note 6.
[110] *Ibid.,* p. 939.
[111] *Ibid*.
[112] Ketilbjørn Hertz, *op cit.* note 33, p. 185, citation omitted.
[113] Erik Werlauff, *op cit.* note 32, p. 273.
[114] Ketilbjørn Hertz, *op cit.* note 33, p. 185, citation omitted.
[115] Serhat Eskiyoruk, *op cit.* note 17, p. 69.
[116] *Ibid*.

acceptable in the country of enforcement.[117] In addition, the court at the place of enforcement has also an option to postpone its decision when award has been set aside or suspended.[118]

In this case both logic and conventional wisdom would seem to lead to the conclusion that such an award having been declared a "nullity," simply ceases to exist.[119] However, this legal assumption has been challenged in recent years, both in American and French courts.[120] The question of whether an arbitral award that has been set aside should nevertheless be capable of enforcement has been widely debated ever since the well-known cases of *Hilmarton*[121] in France and *Chromalloy*[122] in the United States.[123]

When comparing DAA and French statute on international arbitration it could be argued that French statute is more liberal than the DAA (which in fact implements the New York Convention), and "does not recognize the annulment of a foreign arbitration award as a ground for refusing to enforce a foreign award."[124] This, however, might seem to be *"too liberal approach"*, since the award was declared non-enforceable in the *proxy* country (*i.e.* the country where the award was rendered), and there is no rational basis to enforce it in another country where the enforcement is sought.

Subsection (1)(2)(a) – arbitrability of the dispute

Subsection (1)(2)(a) deals with an issue of an arbitrability of the dispute concerned, stating that if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Danish law, an arbitral award may be set aside.

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[117] *Ibid*.
[118] Serhat Eskiyoruk, *op cit.* note 17, p. 70 quoting The New York Convention Article V(1), that is incorporated into Danish Arbitration Act as Subsection (3) of Section 39.
[119] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p.187.
[120] *Ibid*., "Indeed the prevailing French opinion is that French courts are free to enforce arbitral awards, whether or not they have been set aside in the country of origin."
[121] *Société Hilmarton v. OTV,* Cour de cassation, 10 June 1997. In this arbitration case that was conducted in Geneva between an English company and a French company concerning the procurement of a government contract in Algeria, the Swiss courts set aside the award by reviewing the merits. The French Cour de cassation held that the award in question was "an international award which was not integrated into the legal order of Switzerland, so that its existence continued despite its being set aside." (Koji Takahashi, *Enforcement of Awards,* Retrieved 10 June 2011, from www1.doshisha.ac.jp/~tradelaw/EnforcementAwardsSetAside.ppt).
[122] *Chromalloy v Egypt* 939 F. Supp. 907 (D.D.C., 1996). In this arbitration case that was conducted in Cairo between a U.S. Company and Egypt. The award unfavourable to Egypt was set aside by the Egyptian court on the ground of a mistake of the application of Egyptian law. The U.S. District Court allowed enforcement on ground that Article V(1)(e) of the New York Convention allowed discretion. And Article VII, Chapter 1 of the Federal Arbitration Act (9 U.S.C. 10), which set forth grounds for setting aside domestic awards, does not permit review of merits. Moreover, public policy grounds allowed to deny *res judicate* effect to the Egyptian court's decision. (Koji Takahashi, *Enforcement of Awards,* Retrieved 10 June 2011, from www1.doshisha.ac.jp/~tradelaw/EnforcementAwardsSetAside.ppt).
[123] Eric A. Schwartz, *The Enforcement of Foreign Arbitral Award,* (2007), Retrieved 20 May 2011, from http://www.kluwerevents.ru/file/070921/erik_shvarc_v1.pdf
[124] *Ibid*.

Arbitrability, in essence, is a matter of national public policy.[125] As public policy can differ from one country to another, the arbitrability of a particular dispute may vary considerably from jurisdiction to jurisdiction[126] in accordance with their political, social and economic policies.[127] Virtually all nations treat some categories of claims as incapable of resolution by arbitration.[128] The gist of the arbitrability doctrine is that categories of public law claims are too sensitive to give to private arbitrators.[129] Among other things, various nations refuse to permit arbitration of disputes concerning labour or employment grievances;[130] intellectual property;[131] competition (antitrust) claims;[132] real estate;[133] domestic relations[134] and franchise relations.[135] More broadly, some nations forbid arbitration of "all matters in the realm of public policy."[136]

As regards which disputes are capable of settlement by arbitration under Danish law, reference is made to Section 6 of the DAA.[137] Under Section 6 of the DAA, "unless otherwise provided,"[138] disputes concerning any civil or commercial legal relationship in respect of which the parties have an unrestricted right of disposition may be submitted to arbitration.[139] It follows that arbitration will often be excluded in family law matters, *e.g.* disputes concerning paternity, adoption, parental custody or visitation rights.[140] Arbitration is also excluded in disputes governed by rules of public law in the

[125] Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability Approaches to Arbitration in the United States, Switzerland and Germany,* (Arbitration International, Vol.19, No.1, 2003), p. 27.
[126] *Ibid*.
[127] Serhat Eskiyoruk, *op cit.* note 17, p. 70.
[128] Gary B. Born, *International Commercial Arbitration: Commentary and Materials,* 2nd edition, (Hague, Transnational Publishers and Kluwer Law International, 2001), p. 245.
[129] Mark L. Movsesian, *op cit*. note 4, p. 429.
[130] Gary B. Born, *op cit.* note 128, p. 245, note 119, quoting *Compagnia Generale Construzioni v. Persanta,* VI Y.B. Comm. Arb. 229 (Italy Corte di Cassazione 1981) (no arbitration of labor dispute); California Labor Code §229 (no arbitration of "wage" claims). *Compare Compagnie Francaise Techinique d'Etancheite v. Dechavanne,* XX Y.B. Comm. Arb. 656 (Grenoble Ct. App.1993) (labor dispute arising from international labor agreement arbitrable).
[131] *Ibid.*, p. 245, note 120, citing Patengesetz §36(c)(Germany); Japanese Code of Civil Procedure Article 786; French Civil Code Article 2059.
[132] *Ibid*., p. 246, note 121, quoting *Decision of the Bologna Tribunale on July 18, 1987,* XVII Y.B. Comm. Arb. 534 (1992) (Italian Court holds claims under EC competition laws non-arbitrable). *Compare Hi-Fert Pty Limited v. Kinkiang Maritime Carriers,* 12 Mealey's Int'l Arb. Rep. C-1 (N.S.W. Australia 1997) (rejecting argument that claims under Australian Trade Practices Act are non-arbitrable).
[133] *Ibid*., p. 246, note 122, quoting Ohio Rev. Code Ann. §2711.01 (p. 1981).
[134] *Ibid*., note 123, quoting Italian Code of Civil Procedure, Article 806.
[135] *Ibid*., note 124, quoting *NSU Auto Union AG v. SA Adelin Petit & Cie,* V Y.B. Comm. Arb. 257 (Belgium Cour de Cassation 1980) (no arbitration of franchisee's claims against franchisor); 10 C.P.R.A. §278 (Puerto Rico statute rendering dealership disputes non-arbitrable).
[136] *Ibid*., note 125, quoting French Civil Code Article 2060 (it should be noted that French courts have construed this limitation quite narrowly, See. p. 430); Quebec Civil Code Article 1926(2); Law of 24 May 1972 Article 7(4) (Denmark).
[137] Ketilbjørn Hertz, *op cit*. note 33, p. 186.
[138] The reservation that it may be "otherwise provided" is an indication that other statutes may restrict the freedom to arbitrate particular matters. The most important example is section 112 of the Rent Act, which excludes disputes concerning residential tenancies from arbitration.
[139] Ketilbjørn Hertz, *op cit*. note 33, p. 72.
[140] *Ibid*.

general interest.[141] In this regard a decision by the Supreme Court of Denmark reported in *Ugeskrift for Retsvæsen* 1999, page 829, where a dispute involving the application of an order issued in pursuance of the Pharmacist Act on the calculation of retail prices of pharmaceuticals was held not to be arbitrable.[142] The Supreme Court referred to the fact that the binding retail prices laid down by the Order in question constituted a part of the general public law regulatory scheme governing the pharmacist industry in Denmark.[143]

In addition, Section 7 (2) of the DAA states that in case of a consumer contract, an arbitration agreement concluded before the dispute arose is not binding on the consumer.[144] This is because European Union wants to ensure a high level protection of a consumer.[145] In this regard it could be mentioned that, *e.g.,* Article 2 (e) of the European E-commerce directive[146] defines consumer as any natural person who is acting for purposes which are outside his or her trade, business or profession. Thus, it is obvious that a consumer has a much less bargaining power than legal entity, and a consumer concerned might not be able to negotiate the contract terms (which usually are a part of standard agreements (regardless of their legal nature), so-called boilerplate clauses). However, the DAA does not prohibit conducting arbitration after the dispute arose if parties agree to do so.

Subsection (1)(2)(b) – the public policy exception

Subsection (1)(2)(b) concerns the recognition or enforcement of the award would be manifestly contrary to the Danish public policy. This is a narrow provision, and recognition or enforcement of the arbitral award may be refused whether or not the party against whom the arbitral award is sought has invoked public policy.[147] Nevertheless, in order to understand when the public policy exception can be effectively used as a defensive device, it is essential to define its exact meaning.[148] However, there is no uniform or global understanding of public policy, and each jurisdiction must be analysed individually with regard to how it interprets this legal concept.[149] It should be noted

[141] *Ibid*.
[142] Ketilbjørn Hertz, *op cit.* note 33. p. 72.
[143] *Ibid.,* p. 72-73.
[144] *Ibid.,* p. 73.
[145] See for example recital 10 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').
[146] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').
[147] Ketilbjørn Hertz, *op cit.* note 33, p. 186, citation omitted.
[148] Juliane Oelmann, *op cit.* note 1, p. 81.
[149] *Ibid.,* p. 82.

that most developed countries, though use different words in their definitions of public policy, have a striking commonality.[150] That is to say, all jurisdictions seem to require a breach so profoundly in its scope that it would totally undermine basic rights in case of the enforcement of the judgement.[151]

However, it is also important to distinguish between the narrow and broad interpretation of the public policy defence. Courts adopting the narrow interpretation distinguish between the enforcing state's domestic public policy and its international public policy.[152] Consequently, much that violates domestic public policy is permitted in the context of international public policy on the basis that international trade is to be promoted.[153]

In a frequently quoted definition of public policy (*Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier)*[154]the court stated that: "We conclude, therefore, that the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."[155] Although it was ruled in this case that a violation of domestic public policy will usually not establish the defence, under certain circumstances this general rule might be invalid, *e.g.*, when the violated national law is based upon the aforementioned basic notions of morality and justice.[156] Therefore, the public policy exception, as set out in the New York Convention and DAA, is likely to apply.[157]

It is interesting to compare the public policy defence (and its interpretation) provided by the DAA and Brussels I Regulation. Article 34 (1) of the Brussels I Regulation, states that a judgement (from another Member State) shall not be recognized if such recognition is manifestly contrary to public policy in the State where recognition is sought. This provision, in substance, is similar to provisions of the New York Convention and the DAA, and "is a narrow exception applicable only in extreme situations, and certainly not just because the enforcement State's courts would have applied a different law or reached a different result, *e.g.,* because an Italian court set a disclaimer clause aside which a

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[150] *Ibid.,* citation omitted.
[151] *Ibid*.
[152] Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention, With Particular Reference to Construction Disputes,* (Journal of International Arbitration 24(1): 9-24, 2007), p. 12
[153] *Ibid.,* citation omitted.
[154] *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974).
[155] *Ibid*.
[156] Juliane Oelmann, *op cit.* note 1, p. 98-99.
[157] *Ibid.,* p. 99, quoting Joel R. Junker, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards* [comments], (California Western International Law Journal, Vol. 7, Issue 1, 1977), p. 241.

German court would not."[158] It could be concluded that the public policy exception whether within the DAA, the New York Convention or Brussels I Regulation meaning is quite narrow provision and would be applied only in limited amount of cases; which, in fact, comports with the pro-enforcement bias or free movement of judgements of the arbitral awards and court judgements.

Subsection (2) – separability of the arbitration clause

Subsection (2) states that if a ground for refusing recognition or enforcement concerns only part of the arbitral award, only that part may be refused recognition or enforcement.

As it was mentioned before this subsection concerns the concept of the separability of the arbitration clause. The concept means that the arbitration clause in contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract.[159]

The analytical rationale for the separability doctrine is that the parties' agreement to arbitrate consists of promises that are distinct and independent from the underlying contract: "the mutual promises to arbitrate (generally) form the quid pro quo of one another and constitute a separable and enforceable part of the agreement."[160] The leading international arbitral award in this regard states that: "The principle...of the autonomy or the independence of the arbitration clause...has been upheld by several decisions of international case law".[161] Indeed, it would be entirely self-defeating if a breach of contract or a claim that the contract was voidable was sufficient to terminate the arbitration clause as well; this is one of the situations in which the arbitration clause is most needed.[162] Among other things, the separability doctrine is generally understood as implying the continued validity on an arbitration clause (notwithstanding defects in the parties' underlying contract), and as permitting the application of different substantive laws to the parties' arbitration agreement and underlying contract.[163]

This section is relevant, in respect of subsection (1)(1)(c), subsection (1)(1)(e) and subsection (1)(2) of the DAA.[164] Mainly, if an arbitral award contains decisions on matters that are (and are not) submitted to arbitration, recognition or enforcement may be refused only in respect of that part

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[158] Joseph Lookofsky & Ketilbjørn Hertz, *op cit.* note 5, p. 147.
[159] Martin Hunter, Alan Redfern, *Law and Practice of International Commercial Arbitration*, 4th edition, (London, Sweet & Maxwell, 2004), p. 162.
[160] Gary B. Born, *op cit.* note 128, p. 56, note 6, quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, F.2d 402, 409 (2d Cir. 1959).
[161] *Ibid.*, at page 56, note 5, quoting e.g. *Texas Overseas Petroleum Co v. Libyan Arab Republic*, Nov.27, 1975 Preliminary award, reprinted in I J.G. Wetter, *The International Arbitral Process: Public and Private* 444-65 (1979).
[162] Martin Hunter, Alan Redfern, *op cit.* note 159, p. 162.
[163] Gary B. Born, *op cit.* note 128, p. 56.
[164] Ketilbjørn Hertz, *op cit.* note 33, p. 187.

of the award which contains decisions on matters not submitted to arbitration (subsection (1)(1)(c)).[165] If an arbitral award contains decisions both on issues the subject-matter of which is capable (and not capable) of settlement by arbitration, recognition or enforcement may be refused only in respect of that part of the award which contains decisions on issues the subject-matter of which is not capable of settlement by arbitration (subsection (1)(2)(a)).[166] Similarly, only parts of an arbitral award that are manifestly contrary to Danish public policy may be refused recognition or enforcement (subsection (1)(2)(b)).[167]

Subsection (3) – stay on enforcement and appropriate security

Subsection (3) applies if an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(1)(e), the court where recognition or enforcement is sought may adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

This subsection that in the New York Convention had been set out as article VI and was incorporated into the DAA without any significant omissions in wording. This provision eases the situations where the "double exequatur" problem arises.[168] This provision is wholly discretionary and the enforcing State is free to refuse adjournment and to enforce the award.[169] This provision offers a balanced solution between the application for setting aside made for reasons of delay only and the right of a *bona fide* party to contest the validity of the award in the country of origin[170] It should be emphasized that this rule applies only if an application for setting aside or suspension of the award is made in the country of origin.[171] If the award has effectively been set aside or suspended in the country of origin, enforcement of the award can be refused on the basis of subsection (1)(1)(e).[172]

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[165] *Ibid*., p.187, citation omitted.
[166] Ketilbjørn Hertz, *op cit.* note 33, p.187, citation omitted.
[167] *Ibid*., citation omitted.
[168] Leonard V. Quigley, *op.cit.* note 44, p. 1071.
[169] *Ibid*.
[170] Albert Jan van den Berg, *The New York Convention of 1958: An Overview,* p. 20, Retrieved 25 May 2011, from http://www.arbitration-icca.org/articles.html?author=Albert_Jan_van_den_Berg&sort=author
[171] *Ibid*.
[172] *Ibid*.

Chapter III

Conclusions

It should be concluded that Denmark clearly adopts the pro-enforcement bias for the enforcement and recognition of foreign arbitral awards. However, parties of the arbitration dispute concerned are able to resist enforcement of the arbitral award under five procedural and two substantive (ex-officio) grounds that are incorporated under Section 39 of the Danish Arbitration Act.

The grounds to refuse the enforcement and recognition of foreign arbitral awards provided in the Danish Arbitration Act should be construed narrowly. This view is in accordance with the purpose of the New York Convention – to encourage enforcement and recognition of foreign arbitral awards, and to limit the possible judicial review of the arbitral award. Moreover, Danish Arbitration Act will help parties to resolve legal disputes that arise from the increasing number of international commercial contracts in an easier, simplified and more flexible manner, than national litigation. The incredible success of the New York Convention will help to ensure that the arbitral award rendered in Denmark under Danish Arbitration Act will be enforced in another State Parties.

It is clear that Denmark by enacting Danish Arbitration Act in 2005 creates an attractive opportunities for parties of international commercial contracts, and international commercial disputes, respectively, to arbitrate these disputes in Denmark under Danish Arbitration Act.

However, the parties of an arbitration case should be aware of public policy and arbitrability issues, and its regulation in Denmark, since the grounds for refusal of recognition and enforcement of international arbitration awards could be applied by Danish courts on its own motion, and could vary significantly from those where the arbitral award was rendered. These aspects should be borne in mind, even though courts construe these provisions quite narrowly and there is a strong pro-enforcement bias in most developed countries including Denmark.

Danish Arbitration Act is a modern and balanced legal tool for resolving international commercial disputes and reflects recent developments in this field. It protects parties' legal interests and rights of the commercial dispute concerned, and allows them to refuse the enforcement and recognition of international arbitral award that, for example, was rendered without observing basic principles of natural justice.

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