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Doctoral Thesis

THE IMPACT OF THE ADOPTION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN LAOS BY FOCUSING ON ITS INTERPRETATION

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Abstract

This dissertation argues for the need to narrow the gap between *the Law on the Resolution of Economic Disputes* (hereinafter referred to as the *"LRED*") and *the UNCITRAL Model Law on International Commercial Arbitration* with its amendments as adopted in 2006 (hereinafter called the "*Model Law*"). The suggested reforms of the *LRED* demand a radical change in judicial interpretation from the current Lao rules on international commercial arbitration.

This research explores the impacts of the adoption of the *Model Law* and the best interpretation for Laotian contexts. The dissertation focused on two provisions of the *Model Law*, the conditions for the setting aside of arbitral award (Article 34) and the competence of arbitral tribunals to rule on their own jurisdictions (Article 16). These two provisions are vital for international arbitration and some experts believe that they embody fundamental principles of the full adoption of this uniform law. The countries that adopted the *Model Law* have interpreted it in various ways, which is against the desirability of the UNCITRAL to provide a uniform arbitration procedure and specific needs for international commercial arbitration practices.

Based on a close examination of the *Model Law*, this dissertation establishes that the adoption of the *Model Law* would change the content and implementation of the *LRED* in two ways such as the impact to its content and the interpretation change. The latter is the focus of this research. The empirical and theoretical analysis of international scholars and practitioners suggest that there exist two competing approaches to the interpretation of the *Model Law*, a national and an international approach. The international approach illustrates a preference toward the UNCITRAL Secretary-General's resolution that the *Model Law* should be interpreted with regard to the terms in the context of the law and the object and purpose of the *Model Law*, that is, to pay attention to the international origin and the need to promote uniformity in its application. Before the inclusion of Article 2A, the *Model Law* was silent about the methods of interpretation, and it seemed to have left the matters for judicial discretion. The incorporation of Article 2A, however, gave rise to the international interpretation.

After an extensive analysis of the *LRED* and the *Model Law*, international scholarly writings and practices, the worldwide consensus, the international conventions, treaties, and the *travaux préparatoires*, this dissertation presents a conclusion and recommendation for the *LRED* and the Lao courts. In summary, the research extends favorable views toward the international approach in line with the desirability for the uniform application of the *Model Law.* The international approach would persuade Lao judges to interpret and apply the *Model Law* expansively and broadly by taking into consideration Article 2A, international interpretation practices, and the principle of comity. This interpretation is close to the blended approach of the common law modern rule of interpretation, and the teleological approach found in civil law.

List of Abbreviations

AAA	American Arbitration Association
AALCC	Asian African Legal Consultative Committee
AEC	ASEAN Economic Community
ASEAN	Association of South East Asian Nations
BCICAC	The British Columbia International Arbitration Center, Canada
CEDR	Center for Economic Dispute Resolution, Ministry of Justice, Laos
CIETAC	The China International Economic and Trade Administration Commission
CIS	Commonwealth of Independence States (includes Russia and many former states of the Soviet Union)
CMEA	Council for Mutual Economic Assistance (Organization for international cooperation of the Eastern European countries that belonged to the Soviet Union bloc)
CISG	*The United Nations Convention on Contracts for the International Sale of Goods*
CLOUT	The Case Law on UNCITRAL Texts
CMAC	Chinese Maritime Arbitration Commission
CPP	*The French Code of Civil Procedure*
DPRK	Democratic People's Republic of Korea
FAA	*The Federal Arbitration Act of the United States*
GAFTA	The Grain and Feed Trade Association

GCD	*General Conditions for Deliveries of Goods*
GENCON	*A standard voyage charter party*
IAA	*The [Singaporean] International Arbitration Act*
ICA	International Cotton Association
ICAA	*The [Canadian] International Commercial Arbitration Act*
ICC	International Chamber of Commerce
ILA	International Law Association
ICSID	*The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States*
Lao PDR	Lao People's Democratic Republic
LCIA	The London Court of International Arbitration
LDCs	Least Developed Countries
LRED	*Law on the Resolution of Economic Disputes, Laos*
OEDR	Office of Economic Dispute Resolution, Ministry of Justice, Laos
SCC	the Arbitration Institute of the Stockholm Chamber of Commerce, Sweden
SIAC	Singapore International Arbitration Center
UNCITRAL	The United Nations Commission on International Trade Law
VCLT	*Vienna Convention on Law of Treaties*

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Chapter I: Introduction

Lao law derived from French civil law, socialist legislation, and Lao traditions and customs.[1] Laos is a People's Democratic State where the Lao People's Revolutionary Party is a leading party. The national economy is a market economy regulated by the state in the direction of socialism, including a multi-sectoral economy and various types of ownership.[2] Laos is a party to the worldwide conventions related to international arbitration, such as *the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958* (*the New York Convention.*) Although most ASEAN countries have already integrated the *UNCITRAL Model Law on International Commercial Arbitration* (the *"Model Law"*) in their laws, Laos has not. The question may arise on why Laos should adopt the *Model Law*, what would be the impact of the adoption, and how Lao judges should deal with such changes. The United Nations Commission on International Trade Law (hereinafter called to as "UNCITRAL") is a United Nations legal organization whose core objectives are to unify and harmonize international trade law worldwide. The *Model Law* is its legal instrument was designed to harmonize the arbitration law of many countries. All member states of the United Nations should consider adopting the *Model Law*.

In fact, there are a few cases in which parties from Laos filed disputes to the major international arbitration centers. However, most of the clients were represented by foreign lawyers and therefore Laos may need to increase the confidence of domestic and international disputants toward the alternative dispute resolution in Laos. Adopting the *Model Law* may improve and modernize *the Law on Resolution of Economic Dispute (*the *LRED)* especially in regards to international standards. Such an adoption can ensure the foreign investors and international parties toward accepting Laotian dispute resolution. Finally, the adoption of the *Model Law* may create a scenario in which foreign parties choose Laos as their seat of arbitration in the future. For instance, the parties may select international arbitrators, choose Lao law as the substantive law of the contract, the *LRED* as a

[1] L- Martin Desuatels and D. Greenlee William Jr., "Lao People's Democratic Republic," in *Asia Arbitration Handbook* (The United States: Oxford University Press, 2011), 560.
[2] "The Constitution of the Lao PDR of 2015," 63/NA § (2015), Art.3 and 13.

procedural law, the Center for Economic Dispute Resolution (CEDR) as an appointing authority, and the CEDR's rules on arbitration for the form of an arbitration agreement.

1. Domestic law and international arbitration in Laos

Laos established the economic Arbitration Organization in 1989 and promulgated *the Decree on the Resolution Economic Disputes* in 1994.[3] The Lao National Assembly enacted the first arbitration law, the *Law on the Resolution of Economic Disputes (LRED),* in 2005,[4] and whose latest amendment was added in 2018.[5] The *LRED* has contributed to the improvement of the economic dispute resolution of the CEDR.[6] The case statistics of the CEDR from 2010-2018 showed a stable number of caseloads filed to the Center.[7] In 2010, 24 cases were filed to the center, while in 2018 the number was 27. In 2014, only 20 cases were filed, but the cases increased in 2015 showing 36 cases. The *LRED* provides alternative dispute resolutions for domestic and foreign parties. This dispute resolution mechanism offers parties an option to resolve economic disputes out of court systems.[8]

Laos became a party to *the New York Convention* in 1998,[9] the World Trade Organization (WTO) in 2013,[10] the ASEAN Economic Community (AEC) in 2015[11] and *the Convention on Contracts for International Sale of Goods of 1980* (CISG) in 2019.[12] Nevertheless, Laos is not a member of *the Washington Convention on the Settlement of Investment Disputes between States and*

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3 "The Decree on Resolution of Economic Dispute (1994)," 106/PM § (1994).
4 "Lao Law on Resolution of Economic Dispute (2010)," 06/NA § (2010), https://laoofficialgazette.gov.la.
5 "Lao Law on Resolution of Economic Dispute (2018)," 51/NA § (2018), https://laoofficialgazette.gov.la.
6 Civil and Economic Law Group, the Project on Human Resource Development in Justice Sector of the Lao PDR, *Manual on Economic Dispute Resolution* (Vientiane Thepphanya Publisher, 2017), 5.
7 Case Statistic of the CEDR: 2010:24; 2011:35; 2012:28; 2013:15; 2014:20; 2015:36; 2016:34; 2017:29; 2018:27.
8 *Ibid.,* 1.
9 *The Notice of the Prime Minister Office of Lao PDR Concerning the Accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 1998.
10 "General Council Accepts Laos' Membership, Only Ratification Left," *World Trade Organization* (blog), accessed October 27, 2012, http://www.wto.org/english/news_e/news12_e/acc_lao_26oct12_e.htm.
11 "AEC 2015 Remains On Track and Top Priority," *Asean Secretariat News* (blog), September 12, 2012, http://www.asean.org/news/asean-secretariat-news/item/aec-2015-remains-on-track-and-top-priority.
12 "Laos Becomes Party to Two More UN Treaties," *Vientiane Times*, October 1, 2019.

Nationals of Other States (ICSID) of 1965.[13] The World Bank provided the Ease of Doing Business data every year. This comprehensive quantitative data compares the business regulation environment across 190 economies worldwide, the survey encourages economies to compete toward more efficient regulation, and has provided data for academics, journalists, and private sector researchers in the business climate of each economy.[14] In 2019, the business performance of Laos is ranked 154th,[15] whereas Thailand and Vietnam are ranked 21[16]and 70[17] respectively. The lower a number is, the better the regulation and business climate of each country is. This figure means the regulation and business climate in Vietnam is better than Laos, but not as good as Thailand.

Although there are substantial improvements in the latest amendments of the *LRED* in 2018, this economic dispute resolution law needs further reform. The problem of the current *LRED* is, firstly, the law was drafted for internal dispute resolution with the aims to determine principles and regulations and ensure that such domestic disputes are resolved peacefully, fairly, and promptly.[18] Still, it cannot provide a recourse for international commercial arbitration according to international standards. The second weakness is that some internationally accepted rules and principles do not exist in the current *LRED*, such as the doctrine of competence-competence, the principle of separability of arbitration agreements, and the doctrine of *stare decisis*. In addition, having international arbitration standards would increase the confidence of both domestic and foreign parties in selecting Lao procedural rules. The foreign party would be more satisfied if the arbitration law contains familiar and internationally accepted principles when the arbitration proceedings are conducted in a foreign country. The Lao party would also benefit from the use of its national arbitration law by which it can save the costs and time for the proceedings initiated in Laos, rather than to resolve the dispute abroad.

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13 "ICSID Convention," accessed June 5, 2019, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.

14 "Doing Business Website," accessed March 10, 2020, https://www.doingbusiness.org/en/about-us.

15 "Doing Business 2020 of Lao PDR," accessed July 10, 2019, https://www.doingbusiness.org/content/dam/doingBusiness/country/l/lao-pdr/LAO.pdf.

16 "Doing Business 2020 of Thailand," accessed October 25, 2019, https://www.doingbusiness.org/content/dam/doingBusiness/country/t/thailand/THA.pdf.

17 "Doing Business 2020 of Vietnam," accessed October 25, 2019, https://www.doingbusiness.org/content/dam/doingBusiness/country/v/vietnam/VNM.pdf.

18 Lao Law on Resolution of Economic Dispute (2018), Art.1.

Private sectors in Laos are not yet familiar with international arbitration.[19] Occasionally, the Lao government has been involved in the dispute resolution proceedings of international arbitration centers, for instance, the ICC International Court of Arbitration (in France,)[20] the Asian International Arbitration Center (in Malaysia,)[21] and the Singapore International Arbitration Center (SIAC.)[22] Most of the cases arose from projects with high investment value, such as those in mining, construction, and hydropower projects.[23]

Due to the increase of domestic and foreign investments, more disputes will occur in Laos.[24] Other than court litigation, parties may choose arbitration for the resolution of economic disputes, especially, international commercial arbitration which is effective, cost saving and enforceable under *the New York Convention,* when a conflict arises between international parties. Both national courts and arbitral tribunals of Laos will have opportunities to resolve those international disputes arising out of international business and trade.[25] The *Model Law* is a uniform law providing the procedural basis of arbitration law resulting from the work of the UNCITRAL.[26]

The General Assembly of the United Nations created the UNCITRAL as a specialized commission in 1966 to harmonize and unify international trade law.[27] The secretariat described the

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19 Desuatels and William, "Lao People's Democratic Republic," 561.

20 Four cases involving the Laotian party were filed to its Court of Arbitration from 2005-2014 "ICC Arbitration in South-East Asia" (Workshop on International Commercial and Investor-State Arbitration, Vientiane, Laos, 2016).

21 "Laos Prevails in Hongsa Power Plant Court Case," *The Nations*, September 19, 2017.

22 Sanum Investments Limited and the Government of Lao PDR (Arbitral tribunal December 13, 2013); Sanum Investments Limited-v- the Government of the Lao PDR, Civil Appeal No. 139 and 167 of 2015 (the Court of Appeal of the Republic of Singapore 2016); Tan Jordan, "Singapore Court of Appeal: Sanum Investments Limited v The Government of the Lao People's Democratic Republic," *Kluwer Arbitration Blog* (blog), accessed April 25, 2016, available at http://kluwerarbitrationblog.com/2016/04/25/singapore-court-of-appeal-sanum- investments-limited -v-the-government-of-the-lao-peoples-democratic-republic/.

23 Desuatels and William, "Lao People's Democratic Republic," 561.

24 Civil and Economic Law Group, the Project on Human Resource Development in Justice Sector of the Lao PDR, *Manual on Economic Dispute Resolution*, 5.

25 *Ibid.*

26 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," 1985, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf The newly amended Model Law of 2006 version consists of 36 Articles.

27 Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary* (The Netherlands: Kluwer and Taxas Publishers, 1989), 4.

UNCITRAL as the core legal body on international trade law within the UN system. Its duties are to coordinate legal activities to avoid the duplication of effort, and promote efficiency, consistency, and coherence in the unification and harmonization of international trade law.[28] Thirty-six member states of the commission were selected to represent the world's various geographic regions and its principal economic and legal systems.[29] Other than the *Model Law on International Commercial Arbitration*, the UNCITRAL work includes the CISG,[30] *the UNCITRAL Model Law on International Credit Transfers 1992*,[31] the *UNCITRAL Model Law on Electronic Commerce 1996* and *the UNCITRAL Model Law on Cross-border Insolvency 1997*.[32]

Initiated by a proposal from the Asian African Legal Consultative Committee (AALCC,) the AALCC, an inter-government body, raised several questions concerning possible ways to make arbitration more effective.[33] One of the solutions was to initiate steps to prepare a model law. This action would not only lead to the establishment of uniform arbitral procedures tailored to the needs of international trade, but would also help achieve the universal standards of fairness that were one of the expressed goals of the AALCC.[34] In the preparation of the *Model Law*, many legal experts representing countries, international organizations, and regions, with different economic and legal systems participated in the drafting process.[35] Most of the world's leading experts were involved in the preparatory work, either in the commission or working group sessions or in conferences, seminars, or consultations accompanying the UN process.[36] With the aim to unify international commercial

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[28] *Ibid.*

[29] Binder Peter, *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction—An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration*, 1st ed. (Sweet & Maxwell, 2000), 5.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid*.

[33] Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 9.

[34] *Ibid*., 10.

[35] Lemay Timothy and Montineri Corinne, "Review of the Model Law's Implementation after Twenty-Five Years," in *The UNCITRAL Model Law after 25 Years: Global Perspectives on International Commercial Arbitration* (USA: JurisNet, LLC, 2013), 5.

[36] *Ibid.*

arbitration law, the 2021 data illustrates that 85 states and 118 jurisdictions adopted the *Model Law*.[37] Many countries adopted the original version of the *Model Law* of 1985.[38] *The Japanese Arbitration Law* enacted in 2003 was based on the *Model Law* of 1985.[39] Singapore also adopted the *Model Law* of 1985 with the English version into *the International Arbitration Act of Singapore*.[40]

The CEDR is a solely authorized organization capable of providing both arbitration and mediation services to parties in Laos.[41] Meanwhile, twelve provincial branch Offices of Economic Dispute Resolution (OEDR) can resolve disputes by mediation.[42] This Center and the Offices are under the supervision of the Ministry of Justice and the Provincial Justice Divisions located in each province.

The perspectives of the *LRED* and the *Model Law* are different. While the scope of application of the *Model Law* was designed for international commercial disputes as mentioned in Article 1,[43] the *LRED* seeks to resolve economic disputes domestically in Laos by mediation and arbitration. Lao arbitration law, however, has provisions related to international arbitration, such as the challenge of arbitral award (the setting aside of arbitral award) and the recognition and enforcement of foreign or international arbitral awards.[44] For instance, the *Instruction of the President of the People's Supreme Court* mentions a foreign or international economic dispute resolution organization (e.g. an international arbitration center) is an organization or a legal entity established under the law

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37 "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission on International Trade Law," United Nations, March 7, 2021, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

38 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)."

39 *Ibid.*

40 "Singapore International Arbitration Act" (2009), http://www.siac.org.sg/images/stories/Articles/rules/IAA/IAA%20Aug2016.pdf.; Gary F. Bell, "Singapore's Implementation of the *Model Law*: If at First You Don't Succeed…," in *The UNCITRAL Model Law and Asian Arbitration Laws—Implementation and Comparisons* (Great Britain: Cambridge University Press, 2018), 240.

41 *Ibid*. Lao Law on Resolution of Economic Dispute (2018), Art.59.

42 Civil and Economic Law Group, the Project on Human Resource Development in Justice Sector of the Lao PDR, *Manual on Economic Dispute Resolution*, 5.

43 For further details of the content of the law, please see Appendix 3.

44 Lao Law on Resolution of Economic Dispute (2018), Art.47, Art.53.

with its duty to resolve disputes related to business and commerce, foreign or international.[45] In addition, the *LRED* allows a party to select the foreign or international institute for economic dispute resolution including the right to choose arbitrators, the governing law, the rules of procedures, the language, and the location of arbitration with regard to the consents of the parties.[46]

2. Resistance for the adoption in other countries

2.1. Legal background and political system

Adopting the *Model Law* may have both advantages and pitfalls to domestic law and the national legal system. This section will discuss and explore the issues why countries may resist and refuse the adoption of this arbitration model law.

The first issue concerns legal background and political system in a particular country. Although the *Model Law* was drafted with the aim to provide a harmonized legal framework for international commercial arbitration worldwide, regardless of the difference in the legal system, politics, and economic structures,[47] the number of countries that have adopted it is not so high compared with other international conventions.[48] Although the *Model Law* is not an international convention, it could attract more jurisdictions with its positive aspects, as well as the recommendation of the UNCITRAL. Until 2021, around 43 percent of 194 countries of the current United Nations members adopted the *Model Law*. The list of adoptees covers 85 states and 118 jurisdictions.[49]

Countries have varied legal backgrounds, such as Western civil law (French group) and common law (Anglo-American law) and socialist, Islamic, Hindu, and Chinese law.[50] Legal

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45 "Instruction of the President of People's Supreme Court on Consideration of Results of Economic Dispute 1Resolution by People's Courts," July 2, 2019, 2, accessed June 7, 2019, http://laoofficialgazette.gov.la/.

46 Lao Law on Resolution of Economic Dispute (2018), art.5.

47 "United Nations General Assembly Resolution 40/72," n.d., 40 GAOR supp. No. 53. A/40/53, 308.

48 "List of Contacting States of New York Convention," www.newyorkconvention.org, February 6, 2020, http://www.newyorkconvention.org/countries.

49 "Member States | United Nations," United Nations, March 7, 2021, https://www.un.org/en/member-states/index.html; "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission on International Trade Law."

50 Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," *American Journal of Comparative Law* 15, no. 3 (1967 1966): 419,

background is one of the influential reasons for not adopting the *Model Law*. Divergence in legal backgrounds may hamper countries from developing their arbitration law according to the *Model Law,* and they may not be committed to adopting this new legal tradition. The prominent legal systems of civil and common law jurisdictions have different jurisprudential theories, legal doctrines, court procedures, and norms.[51] Some jurisdictions use a strategy to combine two legal systems. The court may apply both civil and common law tradition in the court litigation. For example, Quebec in Canada, Louisiana in the U.S., Scotland in the U.K., South Africa, and Sweden applied this concept. However, the combination of rules from two legal systems may complicate court practice.[52] In the implementation of the law, this approach may create problems for judges, arbitrators, experts, counsel, and disputing parties. Some jurisdictions may not be similar to the model law rules, which inherently requires the court to change its court practices, such as, the canons of interpretation, the application methodologies of judicial precedents and so on. In fact, a particular jurisdiction with a long history of legal development, such as those based on civil law or common tradition, may find it more consistent and coherent to adapt to the *Model Law,* such as the U.S., Germany, and Russia.[53] The current socialist law countries: China, DPR Korea, Vietnam, and Lao PDR may find it more difficult to adopt the *Model Law* into its national arbitration because many rules, principles, and legal practices are different and inconsistent with their political ideologies.[54] For example, "the Marxist argues that relations between

https://heinonline.org/HOL/P?h=hein.journals/amcomp15&i=435; Mariana Pargendler, "The Rise and Decline of Legal Families," *The American Journal of Comparative Law* 60, no. 4 (2012): 1060, https://doi.org/10.2307/41721695 Rene′ David (1950) asserted in his taxonomies that there were five legal families, Western law: French group, Anglo- American law, Socialist law, Hindu law Islamic law and Chinese law as classified by the ideology criteria.

[51] Dainow, "The Civil Law and the Common Law," 427; John Quigley, "Socialist Law and the Civil Tradition," *The American Journal of Comparative Law* 37, no. 4 (1989): 782, https://www.jstor.org/stable/840224.

[52] Chris Arnold, "Comparison of Civil Law and Common Law," *Common Law Review* 8 (2007): 435, https://heinonline.org/HOL/P?h=hein.journals/comnlrevi8&i=7.

[53] "Overview of the Status of UNCITRAL Convention and Model Laws," May 18, 2020, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table.pdf.

[54] Dainow, "The Civil Law and the Common Law," 419; Pargendler, "The Rise and Decline of Legal Families," 1060; Quigley, "Socialist Law and the Civil Tradition," 782 Rene′ David wrote in 1950 about socialist law that: " The socialist laws make up a third legal family, distinct from the previous two [common law and civil law]. To date, the members of the socialist camp are those countries which formerly belonged to the Romano-Germanic family, and they have preserved some of the characteristics of Romano-Germanic law. Thus, the legal rule is still conceived in the form of a general rule of conduct; the divisions of law and

the factors of production, particularly between capitalists (owners of capital) and landlords (owners of land), on the one hand, and workers (owners of labor), on the other hand, are inherently exploitative."[55] Politicians in socialist countries may hesitate to adopt the *Model Law* because they may feel that the *Model Law* shows a strong preference toward the capitalist' s interest which are usually rich people and creditors. This imbalance may hamper the workers' interest which are the majority of the society and are usually debtors and buyers. In many socialist countries, a state court is an only organization that has the powers to adjudicate the disputed case and the judges should apply the law strictly.[56]

Another critical element that can distract the process to incorporate the *Model law* into national law is the country's political system. Countries with a socialist legal background may hesitate to adopt the *Model Law*, because they may perceive such adoption as a program to expand international trade and commerce based on concepts derived from the Western countries.[57] In their perceptions, those experts from these jurisdictions regard the courts as totally different institutions from arbitration tribunals. They share the views that only the state court should have the power to make a judicial decision and only the court should decide civil cases. This power should belong to the state or state organizations; in other words, a court is an organ of state power and only the court should have the authority to decide disputed cases.[58] Secondly, the experts may observe that the international commercial arbitration principles that originated from Western countries were devised with the purpose to facilitate trade and commerce.[59]

However, in the past, the socialist countries also had similar international conventions or international legal instruments drafted for promoting international trade, such as *the General*

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legal terminology have also remained, to a very large extent, the product of the legal science construed on the basis of Roman law by the European universities."

[55] Raj Bhala and Eric Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," *Connecticut Journal of International Law* 35, no. 2 (2020): 112–13, https://heinonline.org/HOL/P?h=hein.journals/conjil35&i=97.

[56] Ikko Yoshida, "History of International Commercial Arbitration and Its Related System in Russia," *Arbitration International* 25, no. 3 (September 1, 2009): 378, https://doi.org/10.1093/arbitration/25.3.365.

[57] Dainow, "The Civil Law and the Common Law," 419.

[58] Yoshida, "History of International Commercial Arbitration and Its Related System in Russia," 378.

[59] Dainow, "The Civil Law and the Common Law," 419.

Conditions for Deliveries of Goods between Organizations of the CMEA countries 1968 (the GCD),[60] and *the Conventions for Solving by Arbitration of Civil Law Disputes arising from Relations of Economic, Scientific and Technology Cooperation* 1972 (the Moscow Convention).[61]

After the dissolution of the Soviet Union and Eastern European socialist countries, most of the communist countries initiated a reform policy allowing the operation of the private sector and various types of ownership, such as in China: the state instituted economic reform in prices, the ownership of enterprises, and the establishment of a market system.[62] The communist countries initiated the policy to transform their nations from the planned economy to the market economy to adjust to political changes and globalization. The legal reforms were initiated including the accession to international conventions and treaties with respect to alternative dispute resolution and international commercial arbitration, for example, *the New York Convention, the ICSID convention*.[63] Arbitration courts (*Arbitrazh* court) in Russia has a long history and can be traced back to the 14th century.[64] During the drafting process of the *Model Law*, the representatives from the former USSR also took part in the work of the UNCITRAL.[65] After the collapse of the Soviet Union, Russia decided to incorporate the *Model Law* into its arbitration law.[66] Since then, it has been reforming the arbitration law. They have arbitration law consisting of both domestic and international commercial arbitration.[67]

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60 This CMEA or Council for Mutual Economic Assistance includes USSR, Bulgaria, Hungary, Poland, Romania and Czechoslovakia (1949).

61 Yoshida, "History of International Commercial Arbitration and Its Related System in Russia," 388.

62 Zhang Jun, "China's Price Liberalization and Market Reform: A Historical Perspective," in *China's 40 Years of Reform and Development*, ed. Ross Garnaut, Ligang Song, and Cai Fang, 1978–2018 (ANU Press, 2018), 215–31, https://www.jstor.org/stable/j.ctv5cgbnk.20.

63 Tao Jingshou, "Arbitration in China," in *International Commercial Arbitration in Asia* (United States: JurisNet, LLC, 2006); The Notice of the Prime Minister Office of Lao PDR concerning the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards; "Overview of the Status of UNCITRAL Convention and Model Laws"; Alexey Yadykin, Martin C. Mekat, and Noah Rubins, "The Russian Arbitration Reform," *Arbitration International* 32, no. 4 (December 2016): 641–50, https://doi.org/10.1093/arbint/aiw028.

64 Yoshida, "History of International Commercial Arbitration and Its Related System in Russia," 401.

65 "Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration," March 19, 1985, 4, https://undocs.org/pdf?symbol=en/a/cn.9/263.

66 Yoshida, "History of International Commercial Arbitration and Its Related System in Russia," 368.

67 Yadykin, Mekat, and Rubins, "The Russian Arbitration Reform," 641.

China has recently become one of the world's largest economies, but it is not a model law jurisdiction.[68] China has become a member of various international conventions concerning alternative dispute resolution. The country also recognizes some international arbitration principles, such as the principle of severability of arbitration agreements. However, China does not adopt the principle of competence-competence in which arbitral tribunals have the power to rule on their own jurisdictions,[69] while its territories such as Hong Kong and Macao already follow the *Model Law* provisions. In Vietnam, although commercial arbitration law has many similar aspects to the *Model Law* and those rules can be found separately in the arbitration laws, the country has not adopted the *Model Law*.[70] Finally, the political system is subtly indispensable powers and factors behind the decision to enact the law based on the *Model Law.* The policymakers and legislatures must take into consideration the impact of political systems with regard to the adoption of the *Model Law*.

2.2. Economic perspectives and demands for international arbitration

From the economic dimension, developed countries are more committed to adopting the *Model Law*, whereas developing countries with lower incomes are reluctant to adopt it. According to the statistic conducted by Rafael La Porta and other authors, the developed countries have a better record in law enforcement. The reason for the better record is a higher income per capita is associated with better shareholder and creditor protection, more efficient debt enforcement, and a lower ratio of government ownership of banks.[71] The statistic illustrated that these countries would have better rules and regulations for protecting parties' rights in dispute resolutions. It is likely that promoting

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[68] "Overview: The World Bank in China," Text/HTML, World Bank, accessed May 26, 2020, https://www.worldbank.org/en/country/china/overview.

[69] Guo Yu, "Comparison between UN Model Law and Chinese Arbitration Law," in *The UNCITRAL Model Law and Asian Arbitration Laws— Implementation and Comparisons* (Great Britain: Cambridge University Press, 2018), 283.

[70] Dang Xuan Hop, "The Vietnamese Law on Commercial Arbitration 2010 Compared to the UNCITRAL Model Law on International Commercial Arbitration 2006," in *The UNCITRAL Model Law and Asian Arbitration Laws— Implementation and Comparisons* (Great Britain: Cambridge University Press, 2018), 383.

[71] Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, "The Economic Consequences of Legal Origins," *Journal of Economic Literature* 46, no. 2 (2008): 294, https://www.jstor.org/stable/27646991.

commercial arbitration law is one incentive to enhance the efficacy and consistency of arbitration procedures and the practice of international commercial arbitration.

Another reason for resistance to the adoption is the *Model Law* may be necessary for jurisdictions where many commercial disputes arise. The other side of the coin is that countries with fewer international disputes may hesitate to adopt the *Model Law* because arbitration are still not so convincing to potential disputants. Furthermore, there are already abundant international dispute resolution institutions around the world, such as in the United States, France, Sweden, and Singapore. These jurisdictions have well-known institutions and more mutual substantive law, sometimes with two regimes of arbitration laws. The rule of international commercial arbitration is well recognized with the international standards, which are able to provide a better choice for the disputing parties from developing countries.[72]

In summary, if there is no substantial business transactions and limited international disputes, one may argue for the reasons why one country should adopt the *Model Law*. The opposite views may want more attention to the investment in the education of legal sectors and judge training. Such actions may be more beneficial to the legal sector and legal infrastructure rather than the effort to rush for the sudden adoption of the *Model Law*. Ljiljana Biukovic pointed out that adopting the arbitration model law may not contribute to a country's development of alternative dispute resolution.[73] This assertion suggested that though a country enacts the arbitration rules based on the *Model Law*, such a move may not ascertain the successful results. The adoption of the *Model Law* may not ensure that the country would become a central and neutral venue for international dispute resolution.

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[72] Gary Born, Jonathan W. Lim, and Dharshini Prasad, "Sanum V Laos (Part I): The Singapore Court of Appeal Affirms Tribunal Jurisdiction under the PRC-Laos BIT," November 10, 2016, http://arbitrationblog.kluwer arbitration.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/; "Laos Prevails in Hongsa Power Plant Court Case."

[73] Lih Shyng Yang and Leslie Chew, "Arbitration in Singapore," in *International Commercial Arbitration in Asia* (United States: JurisNet, LLC, 2006); Ljiljana Biukovic, "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration," *Canadian Business Law Journal* 30, no. 3 (1998): 376–414, https://heinonline.org/HOL/P?h=hein.journals/canadbus30&i=394.

2.3. Existing national arbitration law

One assumption is that legal origin countries, the countries which their legal systems have been developed within their jurisdictions such as Britain or France, may not want to adopt this uniform law because they might feel that their existing arbitration law is already better off containing well-established and internationally accepted principles. Those countries may consider their arbitration laws effective and consistent to the international commercial arbitration. Consequently, these jurisdictions are arbitration-friendly. For instance, the French court has a strong pro-arbitration bias toward arbitration than court litigation. France is already a well-known jurisdiction for international commercial arbitration.[74]

The United Kingdom (England) is the mother of common law systems.[75] Its national arbitration center is called the London Court of International Arbitration (LCIA.)[76] The English *Arbitration Act* did not adopt the *Model Law*, but its territories of Scotland, Bermuda, and the British Virgin Islands did.[77] Nevertheless, the English court remains supportive of arbitration and keeps a pro-enforcement view toward the recognition and enforcement of foreign arbitral award under *the New York convention*.[78]

France enacted a new arbitration law in 2011, but it still did not incorporate the *Model Law* provisions.[79] Civil law tradition comes from France, in other word, France is a legal origin of the civil law tradition.[80] In the same manner, the ICC International Court of Arbitration whose headquarters is in Paris is a famous venue for international arbitration. French law maintains a dualist approach of distinguishing domestic and international arbitration to allow for a flexible regime for international

74 Gaillard Emmanuel, "France Adopts New Law on Arbitration," New York Law Journal, January 24, 2011, https://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-Article-France-Adopts-New-Law-On-Arbit__/FileAttachment/IA012411FranceAdoptsNewLawOnArbitrationegaillard.pdf.

75 Pargendler, "The Rise and Decline of Legal Families," 1043–74.

76 "The London Court of International Arbitration (LCIA)," accessed May 26, 2020, https://www.lcia.org/.

77 "Overview of the Status of UNCITRAL Convention and Model Laws."

78 "Global Arbitration Review: United Kingdom," Global arbitration review, October 19, 2015, https://globalarbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2016/1036964/united-kingdom.

79 Decree No. 2011-48 of13 January 2011 Gaillard, "France Adopts New Law on Arbitration."

80 Pargendler, "The Rise and Decline of Legal Families," 1043–74.

arbitration.[81] The law remains favorable for arbitration and the French court manifests an extreme pro-arbitration bias for all aspects of arbitration.[82] The French court will not interfere in the arbitration proceedings and when the court is authorized to set aside or enforce the arbitral award, it takes a limited scrutiny approach.[83] For example, when the case comes to a French court, the court may apply a *prima facie* test to consider the existence and validity of arbitration agreements. In this case, judges should not go beyond to consider the legal issue or the merits of the case.

Another leading international arbitration venue is Sweden. This country is a civil law jurisdiction with court procedures similar to the common law tradition. Sweden does not adopt the *Model Law* either. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) maintains a position as one of the leading centers for international arbitration resolving East-West disputes including the disputes from the U.S., Russia, and China.[84] According to the *Swedish Arbitration Act*, any matter on which the parties may reach a settlement is considered arbitrable. The Act includes disputes related to the effect of competition law between the parties. The arbitration agreement may be concluded before or after the dispute. However, the subject matter must be related to a specific legal relationship between the parties. The subject matter thus does not cover all future disputes, regardless of the contractual background between the parties.[85] For example, the Swedish law *may* not consider a tortious act as arbitrable despite the fact that the parties have determined the issue in their contract.

2. Reasons not to adopt the *Model Law* in Laos

3.1. Laotian legislation relating to arbitration

There are two reasons that Laos should not adopt the *Model Law*. This is the opposite view from the *Model Law* proponents. The first one concerns the legislation relating to arbitration in Laos.

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81 Gaillard, "France Adopts New Law on Arbitration."
82 *Ibid.*
83 *Ibid.*
84 "Global Arbitration Review: Sweden," Global arbitration review, October 19, 2015, https://globalarbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2016/1036960/sweden.
85 "Global Arbitration Review: Sweden."

Lao PDR's legal system has been influenced by several legal sources including Lao tradition and customs, French colonial administration, and Soviet-style socialist ideology.[86] One of the reasons why Laos should not adopt the *Model Law* is the fact that none of the socialist countries adopted the law. The attempt to adopt the *Model Law* is a radical reform in the field of alternative dispute resolution for a country with a small economy such as Laos, in spite of the ostensible recommendation of the UNCITRAL secretariat on the adoption of the law.[87] Second, there still has not been an urgent need to rush to adopt the *Model Law* in recent years. Even though there has been a substantial increase in business transactions and foreign investments in Laos, there are still limited cases using international arbitration. Occasionally, the Lao party selected the foreign arbitration center as the dispute resolution venue, for instance, in Hongsa power plant's case.[88] Suppose a dispute with international parties arises, the Lao disputant may opt for various international arbitration institutes to handle international or foreign-related arbitrations.[89] Therefore, Laos may not need to rush to upgrade the *LRED* with international standard and there may not need to establish the international arbitration center as similar with the one in other countries. Third, the current *LRED* is still effective and competent to deal with the resolution of economic disputes in Laos. The fact that the *LRED* does not distinguish between domestic and international arbitration confirms this perspective. Albeit many international principles do not exist in the laws, the *LRED* are still capable of being utilized to resolve domestic arbitration cases and find resolutions for foreign parties doing business in Laos.[90]

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86 Desuatels and William, "Lao People's Democratic Republic," 560.

87 The Secretary General of the UNCITRAL recommended that all states should give due consideration to the *Model Law on International Commercial Arbitration,* with the desire of the uniformity of the arbitral procedures and the application of *the Model Law.* "United Nations General Assembly Resolution A/40/72," December 11, 1985.

88 Thai-Lao Lignite (Thailand) co., Ltd. & Hongsa Lignite (Lao PDR) Co., Ltd., -v- Government of Lao PDR., 2011 U.S. Dist. LEXIS 87844 (United States District Court for the Southern District of New York 2011 2011); "Laos Prevails in Hongsa Power Plant Court Case."

89 Desuatels and William, "Lao People's Democratic Republic," 567.

90 Lao Law on Resolution of Economic Dispute (2018), art.6.

3.2. Current situation of international commercial arbitration for Laos

Another reason concerns the current situation in Laos. Various foreign institutions are available for international commercial arbitration, for example, the ICC International Court of Arbitration, [91] the Asian International Arbitration Center (Malaysia,) [92] and the Singapore International Arbitration Center (SIAC).[93] Therefore, the Lao party could file their claims with those centers for dispute resolution. In addition, there seems to be no strong demand for arbitration services in Laos, because the caseload in the CEDR itself is not as much as that of the courts. The case statistic demonstrates that in spite of the parties have chosen arbitration as their choice, most of the cases are domestic arbitration, with only a few cases filed to the international arbitration institutions.[94]

4. Reasons to adopt the *Model Law* for Laos

Although the CEDR periodically amended the *LRED*, the law may still be lagging behind other model law countries in the region in terms of the rules and principles set out for international commercial arbitration. The conditions for setting aside arbitral awards mentioned in Article 47 of the *LRED* differs substantially from Article 34 of the *Model Law*. In addition, the Lao law was drafted for the resolution of domestic economic disputes, not for international arbitration. Therefore, the well-established and internationally accepted principles do not exist in the current Lao law.[95] For instance, the *LRED* does not clearly mention the concept of public policy and international public policy.

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91 From 2005-2014, four cases involving the Laotian party were filed to its Court of Arbitration "ICC Arbitration in South-East Asia."

92 "Laos Prevails in Hongsa Power Plant Court Case."

93 Sanum Investments Limited and the Government of Lao PDR (Arbitral tribunal December 13, 2013); Sanum Investments Limited-v- the Government of the Lao PDR, Civil Appeal No. 139 and 167 of 2015 (the Court of Appeal of the Republic of Singapore 2016); Tan Jordan, "Singapore Court of Appeal: Sanum Investments Limited v The Government of the Lao People's Democratic Republic," *Kluwer Arbitration Blog* (blog), accessed April 25, 2016, available at http://kluwerarbitrationblog.com/2016/04/25/singapore-court-of-appeal-sanum- investments-limited -v-the-government-of-the-lao-peoples-democratic-republic/.

94 Civil and Economic Law Group, the Project on Human Resource Development in Justice Sector of the Lao PDR, *Manual on Economic Dispute Resolution*, 5; Desuatels and William, "Lao People's Democratic Republic," 567.

95 Joongi Kim, *Research Project on How Lao PDR Can Modernize Its Arbitration Related Legislation: Based Upon Korea's Experience of Amending Its Arbitration Law* (Republic of Korea: Yonsei University, 2016), 44.

Second, Laos has only the *LRED* drafted for domestic dispute resolution. In Singapore, they have two prongs of arbitration, domestic and international. Many jurisdictions with a good reputation as international arbitration forums have two regimes of arbitration law.[96] The international arbitration law encourages and promotes the alternative dispute resolution mechanism in the country. The *Model Law* is an international legal instrument created with the aim to harmonize international arbitration law and could fill the gaps in the Lao law.[97] Laos may consider to establish a new law on international commercial arbitration and the adopt the *Model Law*. There are two approaches for the adoption. First, Laos may examine the adoption by reference in which the contents of the new law refer to the entire provision of the *Model Law.* Secondly, Laos may choose the direct approach of the adoption of the *Model Law*. This approach enables the country to incorporate the *Model Law*'s key provisions and opt for changes to suit the social needs and circumstances.[98]

Third, adopting the *Model Law* is consistent with the development policy of the government of Laos. With the long-term development policy to transform Laos into an upper middle-income country and achieve the Sustained Development Goals by 2030, the government has initiated various measures to promote foreign investment, trade, and the electronic-commerce.[99] In the justice sector, with the incorporation of the *Model Law*, Laos may establish its first international commercial arbitration institute or the center. After that, both Lao and foreigner, operating the businesses and investments in the country may rely on such an international arbitration center to resolve their dispute in Laos. Parties could save time and expenses in resolving the dispute abroad. The center then may provide a higher standard of arbitration procedures as similar to countries in the ASEAN region.

Fourth, from the potential investor's perspective, investors view arbitration as more reliable than litigation in developing countries and arbitral awards are generally more easily enforceable than

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96 "Hong Kong Arbitration Ordinance (2014)" (2014), https://www.elegislation.gov.hk/hk/cap609; Singapore International Arbitration Act.

97 "United Nations General Assembly Resolution 40/72."

98 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 18.

99 Leeber Leebouapao et al., "E-Commerce Development in the Lao PDR: Some Policy Concerns," in *E-Commerce Connectivity in ASEAN* (Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia, 2020), 235.

foreign court judgments.[100] Foreign investors will be more willing to use arbitration than court litigation. Adopting the *Model Law* would bring about uniform arbitration rules and principles that the foreign parties might be familiar with. Furthermore, Laos is already a member of *the New York Convention*. Accordingly, foreign parties may request the Lao courts to enforce the foreign arbitral award. On the other hand, the Lao party can also request the foreign court of a contracting state of *the New York Convention* to enforce the arbitral award rendered in Laos.

5. The structure of the research

In 2016, the CEDR envisaged the consideration and analysis of the *Model Law* in order to improve the *LRED*.[101] The CEDR launched the cooperation project with its Korean counterpart to conduct the research on the development of Lao law through the experience of Korea (*the Korean Arbitration Act*) and the *Model Law*.[102]

When a country adopts any foreign law or any international instrument into its law, it is likely that the impact of such change could manifest itself by the increase or decrease of caseloads, the rate of enforcement of court judgements, and the change of court practices.[103] At the beginning of this dissertation, the author presents an introduction to domestic and international arbitration in Laos, the resistance to the adoption of the *Model Law* in other countries, and reasons to adopt and deny the incorporation of the *Model Law.* This dissertation will further clarify and analyze the impact of the adoption of the *Model Law* on the *LRED*, and in particular, on the way Lao courts read and apply the law. Not only will the researcher identify the impacts on the content of law, but also on the possible changes to court interpretations. This research will provide guidance and directives for the competent courts and relevant organizations on how to interpret the adopted arbitration law from both national

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100 "Arbitration Procedures and Practice in Japan: Overview," Practical Law, accessed May 28, 2020, http://uk.practicallaw.thomsonreuters.com/6-602-0046?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

101 Kim, *Research Project on How Lao PDR Can Modernize Its Arbitration Related Legislation: Based Upon Korea's Experience of Amending Its Arbitration Law*, 1–2.

102 *Ibid.,* 1–2.

103 Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "The Transplant Effect," *The American Journal of Comparative Law*, 1, 51 (2003): 167.

and international approaches. The research examines whether divergence of municipal laws and state sovereignty can be the basis for the national interpretation, and whether Article 2A of the *Model Law*, international interpretation practices, and a principle of comity could result in a harmonized interpretation by the Lao courts. In addition, this dissertation will analyze the international principles, judicial precedents, and the legislative history of the *Model Law*.

The research uncovers what would be the impact of the adoption of the *Model Law* to the *LRED* by focusing on the interpretation of rules of the *LRED* and the *Model Law* by the courts. Due to the fact that the attitude of the courts may change after the adoption, the research would underline how other countries have applied the *Model Law*. This dissertation will present the basis and suggestions on the interpretation Articles 34 and 16 of the *Model Law* by the Lao People's Court. These two provisions are the key provisions constituting the full adoption of the *Model Law.*[104] The research addresses how the court would deal with the diverged approaches of the national and international interpretation.[105] The international interpretive approach is equivalent to a delocalization approach[106] where the court may interpret the law in the light of international practices and a pro-arbitration attitude. The national approach may interpret the law in more restrictive ways based only the law of its jurisdiction with preference to the state courts.[107] This dissertation has five chapters pursuant to the following research structure.

Chapter I describes the objectives and structures of this research with the background information on domestic law and international commercial arbitration. The chapter reports on the

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104 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 13.

105 Loukas A. Mistelis and Domenico Di Pietro, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)," in *Concise International Arbitration* (United Kingdom: Kluwer Law International, 2010), 168.

106 Mistelis Loukas, "Delocalization and Its Relevance in Post-Award Review," in *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (United States: JurisNet, LCC, 2013), 168.

107 Gary Born, *International Arbitration— Cases and Materials* (Aspen Publishers, 2011), 473; The term "interpretation" is found in Gary Born's book which literally refers to a particular way in which something is understood and explained. A S Hornby, *Oxford Advanced Learner's Dictionary of Current English*, 9th ed. (Britain: Oxford University Press, 2015), 824.

resistance to the adoption of the *Model Law* in other countries and in Laos, and reflects good reasons to adopt the *Model Law.*

Chapter II touches upon the possible impacts of the adoption of the *Model Law* upon the *LRED*. This research examines two grounds for the national interpretation and divergence of municipal law and state sovereignty, and three grounds for the international interpretation, Article 2A of the *Model Law*, the international interpretation practice, and the principle of comity. The thesis will critically compare those two approaches.

Chapter III discusses the rules to set aside the award of arbitral tribunals. The dissertation begins with an analysis of the national and international approaches to the interpretation of Article 34. Article 34 has three subjects which have been frequently raised before the courts: (1) incapacity of parties and invalid arbitration agreements, (2) the scope of arbitration agreements, and (3) public policy. The thesis will show how the courts interpret and apply these matters as they would become a basis for the court interpretation of Article 34 of the *Model Law.* The chapter ends with the comparison and examination of these two interpretations.

Chapter IV analyses Article 16 of the *Model Law.* This article announces the rules on the competence of the arbitral tribunal to rule on its jurisdiction (the competence-competence) and the doctrine on the validity of an arbitration agreement despite the termination of an underlying contract (the separability of arbitration agreements.) The chapter clarifies the meaning of Article 16, followed by the national and international interpretation of this article. The research also present how the courts interpret these issues from the international practice. The dissertation will then provide the examination and comparison of the two approaches.

Chapter V presents the outcome of the research, findings, a summary of the problems of the *LRED,* the importance of the two articles of the *Model Law*, and the recommended approach for judicial interpretation. This dissertation finally presents the author's conclusions, the implications for the People's Supreme Courts, and recommendations for the court interpretation of the *Model Law* for Laos.

Chapter II: Possible Impact of the Adoption of the *Model Law*

There are two types of the adoption of the *Model Law*, namely, the direct adoption and the adoption by reference. The direct adoption is more appropriate for Laos. The adoption of the *Model Law* is hereby referred to the direct adoption of the *Model Law* into the *LRED.* This adoption may trigger two potential impacts to Lao law, the impacts to its content and the interpretation change. This chapter addresses the interpretation change. Even if the law is well-drafted, many issues still need judicial interpretation. For example, the court may need to interpret the disputed doctrine of competence-competence or *kompetenz-kompetenz,* the principle of separability and public policy. Some ambiguous terms extracted from the *Model Law* (with the presumption that the *Model Law* has already been incorporated into the Lao law) such as incapacity of the party, invalid arbitration agreements, the scope of arbitration agreements, may become subject to interpretation by courts. Provisions of law are written and inevitably subject to interpretation by legal interpreters. Legal interpreters or judges could interpret a legal term or provision in more than one way.[108] It is important, therefore, to stabilize the judges' way to interpret the *Model Law* provisions after their adoption. For this purpose, the dissertation identifies two competing approaches to the interpretation of the *Model Law* for a critical examination. These two interpretive methodologies are manifest as a basis for the court's interpretation: the national and the international interpretation.

This chapter examines and illustrates that the international approach, which is a harmonious approach, is better a choice for Lao judges. Fabien Gélinas has claimed that there are three possible scenarios of the results of the interpretation of the *Model Law*, the worst-case scenario (impliedly the national approach), the best-case scenario shows that the judge becomes an international judge. "The judge is keenly aware that he or she is applying a law intended to respond to the needs of a transnational community… her reference points and sources are global...our judge is a goddess...the judge is doing his or her work concerning international arbitration as any seasoned practitioner. They are experts on

[108] Jerome Frank, "Say It with Music," *Harvard Law Review* 61 (1948): 921.

their field." (the international approach)[109] Additionally, the realistic scenario illustrates that the author expected the judge will feel bound to the international normative context in which the *Model Law* is situated. The judge would use all of his knowledge and understanding to interpret this article with the cotemporary circumstances subjectively and objectively. In addition, the judge must be able to maintain between the perception to protect the public order on the one hand, and arbitrary behaviors on the other hand (impliedly the international approach.)[110]

The first section analyzes the national approach to establish that it is a restrictive interpretation of the arbitration law with a preference to a court litigation. This approach is represented by a divergence of municipal law and state sovereignty. Despite the fact that Article 2A of the *Model Law* suggested that judges should consider the international origin and the need to promote uniformity in its application of the *Model Law*. The judges will still interpret the *Model Law* as exactly as they will interpret a local law. This approach contradicts the international trends reinforced by *the New York Convention* favoring the arbitration of international commerce.[111]

The second section will demonstrate that an international interpretation has a pro-arbitration bias to the interpretation of the *Model Law*. The judge may interpret the law broadly and expansively with the desire for the uniformity of the application of the *Model Law*. This approach asks judges to behave as if they were transnational judges interpreting the uniform law with the recourse to the international concepts, doctrines, conventions, and case precedents.[112] This dissertation suggests that the international approach embodies three notions such as Article 2A, international interpretation practice, and the principle of international comity.

This chapter touches on the potential impacts of the adoption of the *Model Law* to Laos. The Lao parties and courts have experienced only a few cases of international arbitration and thus have a

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109 Fabien, 264.

110 *Ibid.*

111 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (Supreme Court of the United States 1985).

112 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 263–64.

very limited understanding of them.[113] If Laos actually adopted the *Model Law* soon, it will be very challenging for the country to confront the possible changes in the interpretation of a new arbitration law.

The target of the dissertation is Articles 16 and Article 34 of the *Model Law*. Related provisions of Article 16 of the *Model Law* are found in two legal provisions of the *LRED,* Articles 16 and 36. Article 16 of the *LRED* determines "an economic dispute" and Article 36 sets forth the recusal and challenge of arbitrators. The corresponding article of Article 34 of the *Model Law* is Article 47 of the *LRED*, which stipulates the challenge of the arbitral awards.[114]

The research focuses on the interpretation of the *LRED* by Lao judges. The thesis will describe the impacts of incorporation of the *Model Law* and analyze how judges deal with these two selected provisions as set out in the objectives of the research. If Lao judges would interpret the *Model Law* with the international approach, the Lao judges should apply the *Model Law* according to the intentions of the drafters, international practices and the experience of other *Model Law* jurisdictions.

Lewis Dean has categorized the uniformity desired by the *Model Law*'s drafters' intentions into two categories: textual uniformity and applied uniformity.[115] Textual uniformity is presumably an act to incorporate a uniform text of the *Model Law* into other jurisdictions, while applied uniformity is the action by the court to interpret the uniform text in the same way. From this classification, textual uniformity is a minimum requirement for the UNCITRAL jurisdictions to adopt similar provisions of the arbitration law. Applied uniformity is another one; it is a further expectation that the *Model Law* will be applied in a uniform way. This research will entirely focus on the interpretation changes that are closely related to applied uniformity.

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[113] Company X (claimant) v. Company Y (respondent 1), Bank Z (respondent 2), Company S (third party) (Court Judgement for the first instance of Commercial Court Chamber of Vientiane Capital People's Court, Lao PDR November 21, 2017); Thai-Lao Lignite (Thailand) co., Ltd. & Hongsa Lignite (Lao PDR) Co., Ltd., -v- Government of Lao PDR., 2011 U.S. Dist. LEXIS 87844; An interview with the judge from Vientiane Capital People's Court of Laos, March 2019.

[114] "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)"; Lao Law on Resolution of Economic Dispute (2018).

[115] Lewis Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore* (The Netherlands: Kluwer Law International B.V, 2016), 27.

According to the *Law on People's Court* and *the Lao Civil Code*, ordinary courts (Lao People's Courts) are not authorized to interpret the law. The People's Court has no power of interpretation. In the event that an inquiry into the meaning of a law becomes necessary, the court can request the People's Supreme Court to clarify the ambiguous text. The judgment or the instruction of the People's Supreme Court on the issue will become a court precedent, which other courts will follow until the law changes. The decisions of the cassation court can also become a court precedent if the Supreme Court renders the instruction. These are the current characteristics of legal interpretation in Laos.[116]

After the adoption, the court may adjust to a uniform practice of other model law countries. Facing the new legal texts, the court would apply the law with the recognition of the international origin and the need to promote uniformity of the *Model Law.* The Supreme Court may embrace the pro-arbitration attitude over court litigation and strengthen the doctrines related such as party autonomy and limited court intervention in the arbitration proceedings.[117]

Fabien Gélinas remarked that uniform legislation and uniform law are different. Uniform law is broader than the uniform legislation. According to Gélinas, "the informal part of legal harmonization refers to ... the context within which uniform legislation comes to life and is given its meaning." [118] Additionally, the experts broadly understood that the concept of interpretation was a good proxy for the range of issues. The understanding of these issues can help bridge the gap between the uniform legislation and uniform law.[119] The understanding of the relationship of these two uniformities should further clarify the difference between those concepts. Getting all countries and jurisdictions to adopt the *Model Law* without amendment would no doubt be a great achievement. The

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116 "Lao Law on People's Court (2017)," 09/NA § (2017), art.12, http://na.gov.la/?fbclid=IwAR2lrh2V7zf7oJJxN5CkzMsObMRdqWOn4Z0Pd_DkbGfyXUGCa-QlTYKaQnA; "Lao Civil Code," 55/NA § (2018), p. art. 374, https://laoofficialgazette.gov.la.

117 Shahla Ali, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong," in *The UNCITRAL Model Law and Asian Arbitration Laws—Implementation and Comparisons* (Great Britain: Cambridge University Press, 2018), 10.

118 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 263.

119 *Ibid,* 262.

uniform adoption of the *Model Law* brings the benefit to foreign parties in international arbitration.[120] Without going too far as to characterize uniform legislation, one can safely say that it is only a part of uniform law.[121] Similarly to both Dean and Gelinas' assertations, this dissertation pointed out the adoption of the *Model Law* would result in two impacts: the impact to the contents of the law (textual uniformity or uniform legislation) and the interpretation changes (applied uniformity or uniform law).

Gélinas further pointed out that the effort of uniform law stems from the recognition of international practices developed independently from municipal law. Because of the fact that the law of international arbitration was, at least partially, developed independently from national law.[122] This is the fact that the uniform law is developed from the deference to foreign law and foreign courts. The court practice presumably turns to be international practice such as the enforcement of a foreign judgment or a foreign arbitral award. Gélinas asserted that the implementation of a uniform law may not be the same as the one of the municipal laws.[123]

Article 39 of the Lao *Law on Drafting of Juristic Acts* determines that "… the report on the evaluation of the legal impact of the draft law is a report on the research on legal and financial impacts from [the process of] drafting and amending the law.…" [124] The proposal of adopting the *Model Law* must come with a report on financial and legal impacts of the *Model Law*. This dissertation considers that changes in the judicial interpretation by the court could be a legal impact from the adoption of the *Model Law*.[125] A country may adopt the *Model Law* verbatim, which is called to as the incorporation by reference. Another choice is a jurisdiction that may optimize the contents of the *Model Law*, which is called the direct approach.[126]

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120 *Ibid*.
121 *Ibid*.
122 *Ibid*.
123 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives."
124 "Lao Law on Drafting of Juristic Acts, No. 19/NA" (2012), Art.39, https://laoofficialgazette.gov.la.
125 *Ibid*.
126 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 17–18.

1. The interpretation changes

A French scholar, Antoine Mailher De Chassat divided legal interpretation into three kinds: (1) doctrinal interpretation by legal writers, (2) interpretation by usage or decided cases, and (3) interpretation by the legislature itself or authentic interpretation.[127] The adoption of the *Model Law* has influenced how judges read and apply a legal text, which is Mailher De Chassat's interpretation by usage or decided cases. This chapter is devoted to two interpretative approaches of the *Model Law*, the national and the international approach.[128] The nationalist approach is a local interpretation in which judges apply only municipal law and local doctrines. Due to the divergence in history and politics, social and economic structures, legal systems and court traditions, the judges in each jurisdiction may interpret the *Model Law* differently by applying local rules and principles. The decisions can be absurd and obscure conflicting with the intention of the *Model Law*'s drafters.[129] The judge may interpret the arbitration law with the mere recourse of the municipal laws without using discretion to value the international origin, the needs for uniformity, or the general principles of law.

The *travaux préparatoires of the Model Law* suggests that Article 2A was designed to facilitate the interpretation by reference to internationally accepted principles. This approach is useful and desirable because it can promote a uniform understanding of arbitration law.[130] The legislative history suggests that the UNCITRAL commission showed preference to the international approach, which was a good idea that ought to be facilitated by judges in *Model Law* jurisdictions.[131] Though it is not mandatory for the court to adopt the international approach, the *travaux préparatoires* indicated that the UNCITRAL commission recommended the court to consider the matters.

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[127] Bonnecase Julien, "The Problem of Legal Interpretation in France," *Journal of Comparative Legislation and International Law* 12, no. 1 (1930): 83, https://www.jstor.org/stable/753944.
[128] Mistelis and Pietro, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)," 168.
[129] Company X v. Company Y and Shareholder A in company Y, 3379/Civil/2014 (Qatari Court of First Instance, Civil and Commercial Matters, Ninth Circuit 2015).
[130] Frédéric Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," in *The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration* (United States: JurisNet, LLC, 2013), 232.
[131] *Ibid*., 234.

The impacts in the interpretation changes imply the adoption of a new approach by Lao courts to deal with arbitration law. When a Lao court encounters a case of international arbitration, the court should choose the interpretive approach. The international approach is inspired by Article 2A, international interpretation practices, and comity. The application of the transnational interpretive rule and judicial precedents are included under the notion of international interpretation practices.

Judges in different jurisdictions variously apply a doctrine of judicial precedent. In some civil jurisdictions, judges would hesitate to apply a strict doctrine of *stare decisis*. They would tend to rely on a written law from its jurisdiction and optionally apply the precedent, *jurisprudence constante*.[132] The varied application of judicial precedents has manifested the divergence of laws and court practices. The CEDR mentioned that it is not likely to refer to the arbitral precedents from other jurisdictions such as from Vietnam or Thailand, but in practice, it may refer to the prior decisions rendered by the Lao People's Courts.[133] The arbitrators of the CEDR may consider the arbitral precedents in its discretion of arbitral awards. The *LRED* provides that the arbitrators have duties to guarantee justice, speed, and compliance with the law. The arbitral award must be within the scope of a petition of the parties and rely on a majority of votes.[134] Though the *LRED* does not stipulate applying the precedents, the related law, Article 12 of *the Law on People's Court,* has set forth that Lao judges also apply the court precedent, rendered by the People's Supreme Court, on matters that do not exist in the law and have not been clearly defined. The judgment and the instruction of the Supreme Court would take effect as a court precedent. In summary, it is not mandatory for the arbitrators to follow the arbitral precedents or court precedents with regard to Lao law. Gary Born asserted the role of arbitral precedent in international arbitration:

> It is sometimes said that arbitral awards have no role as precedents: [I]n both [common and civil law] systems, the prior decision of an arbitral tribunal on a question of law has no

[132] Desuatels and William, "Lao People's Democratic Republic," 153; Michael Lorbacher, "The Model Law After Twenty-Five Years: A German Judicial Perspective on International Interpretation," in *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (United States: JurisNet LLC, 2013), 225.

[133] *Ibid.*

[134] Lao Law on Resolution of Economic Dispute (2018), Art.10, 43.

> precedential value. That is not correct, as a matter of practice, nor should it be true, as a matter of law or aspiration.[135]

The role of the arbitral precedent has less precedential weight than court judgments. Even so, the fact that arbitral awards have and should have precedential weight does not mean they enjoy binding authority in the same fashion that a higher court judgment would bind a lower court within a single legal system. One arbitral award (*SGS Societe Gen. de Surveillance SA v Republic of the Philippines, Decision on Jurisdiction, ICSID case no. ARB/02/6 (29 January 2004))* explained this:

> There is no doctrine of precedent in international law. The doctrine of precedent here is referred to a rule of the binding effect of a single decision. There is no hierarchy of international arbitral tribunals, and even if there were, there is no good reason for allowing the precedent of the arbitral award of the first tribunal to resolve issues for all later tribunals.[136]

The author's assertion is reasonable that the arbitral award has precedential value, but that its authority is not as binding as a court judgment related to international commercial arbitration. However, it is likely that the arbitral award may have no precedential weight, in particular, in the jurisdictions with civil law traditions.

In summary, if Laos adopts the *Model Law* into the *LRED*, the impacts from such adoptions will appear in two ways. First, it is likely that it will create changes in the legal provision of the *LRED*. Also, the second impact is the interpretation change, the ways the court interprets the adopted arbitration law, which is presumptively the deference to the concept of the uniform law that the UNCITRAL is aimed to achieve. The following sections will further analyze and explain the national and international interpretations as applied by judges.

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[135] Gary B. Born, *International Commercial Arbitration*, vol. 2 (The Netherlands: Kluwer Law International, 2009), 2965.
[136] *Ibid.*

2. Grounds of the national interpretation

A national interpretation is one type of interpretive approach when judges interpret the *Model Law* restrictively with a deference to the state court.[137] The national approach is based on a perception that judges should interpret the *Model Law* as if the *Model Law* were a municipal law.[138] Some legal experts today interchange the words national, localized, or territorial in regards to interpretation.[139] There are two issues for judges to examine: divergence of municipal law and state sovereignty. Besides the intrinsic ambiguity of the text of the *Model Law*, judges have to confront extrinsic matters such as the legal constraints from the divergence of the law and the state sovereignty issues. This approach instructs judges to interpret the *Model Law* from the perspectives of parochial principles, court practices, and rules of interpretation.[140] For example, in the context of a setting aside claim, the court can variously interpret the term "public policy" in Article 34 of the *Model Law*. The judges can legitimately apply public policy based on the interpretive tools, the local views, and their understanding of their own jurisdiction. Judges with a national approach may apply public policy broadly rather than narrowly, to cover a broader extent of public policy.[141]

Frédéric Bachand commented that since the *Model Law*'s objective and purpose are better served by the international approach, the adoption of this approach would significantly reduce the risk that domestic courts apply the *Model Law* in idiosyncratic and counterproductive ways.[142] Accordingly, this dissertation asserts that a national interpretation is a restrictive approach where the court applies its concepts and rules to interpretation. The fact is that more likely than not, domestic legislatures and courts tend to be perceived by the users of an international arbitration system as being

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137 Born, *International Arbitration— Cases and Materials*, 473. As similar with the interpretation of arbitration agreements, the judges may interpret the law with a pro-arbitration or a restrictive approach.
138 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264.
139 Jan Paulsson, "Arbitration in Three Dimensions," *The International and Comparative Law Quarterly* 60, no. 2 (2011): 292.
140 Lorbacher, "The Model Law After Twenty-Five Years: A German Judicial Perspective on International Interpretation," 225.
141 Party X v. Party Y, Party Z, Party A and Party B; Gaillard, "Gaillard's Chaos Theory Is Harmony in International Arbitration Overrated?, The International Journal of Commercial and Treaty Arbitration."
142 *Ibid.,* 237.

unable to properly understand and adequately respond to the needs of international business.[143] In other words, such statement contradicts with the intentions of the drafters of the *Model Law*. The drafters' the intention demonstrated that the *Model Law* should serve the international business by creating a unified legal framework.[144]

With the national interpretive approach, the judge may interpret the terms of the *Model Law* exactly as the judge would approach them as used with the local law. The judge may define the meaning of the text based on the local laws and jurisprudence. The judge may not apply international interpretation practices or precedents from other jurisdictions. Faced with difficulties, the judge may fall back on the general principles in spite of the instruction prescribed in Article 2A (2) of the *Model Law* which states that "questions concerning matters which are not expressly settled in it are to be settled in conformity with the general principles on which this law is based." [145] A national interpretive approach justifies its position on two grounds, the divergence of municipal law and state sovereignty. The following sections will explain how these two notions.

2.1. Divergence of municipal law

Each state possesses its own legal system, constitution, laws, regulations, and judicial acts. Municipal law is an internal law of a country, as opposed to international law.[146] Some may want to argue that if a country adopts the *Model Law*, the law may also take effect as a municipal law of the nation. The adoption of the *Model Law* may be similar to a phenomenon of the legal transplant. This phenomenon indicates the situation when a country receives new legal codes from another legal country.[147] Countries which have developed a formal legal order internally tend to develop a more effective legal system than those receiving from another country. Such effective legal systems occur

143 *Ibid.,* 236.
144 Ali, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong," 10; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 237.
145 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264.
146 Bryan A. Garner, in *Black's Law Dictionary* (United States of America: Thomson Reuters, 2014), 1176.
147 Berkowitz, Pistor, and Richard, "The Transplant Effect," 163.

in legal origin countries.[148] The recipient country may also have its own court practices, legal traditions, and customs. Therefore, adopting a new law can be difficult and challenging for its legal system. Lastly, the divergence of municipal law is a legal constraint that is derived from the diverged laws and practices of the forum which can affect the judicial interpretation of the *Model Law*.

The adoption of the *Model Law* is a process of legal transplantation. The *Model Law* may or may not be consistent with the local law, the existing rules, and the current court practices.[149] As Arthur Rossett noted, "though the adoption of the *Model Law* would unify the law, it may ignore the legal rules operating in a very particular social and political setting. If one focuses too hard on the unity of the text, one is quite likely to lose sight of the disparity of the result that is produced when that text is applied in a different system."[150] This utterance entails a challenge for practitioners to adjust themselves to a new foreign rule. The application of a foreign rule to the local context often creates new problems for local practitioners. The developing countries with less experience and a smaller number of legal experts on foreign law are vulnerable. The courts may consider it difficult and not applicable to introduce new principles and international practices because they are not familiar with them. Therefore, a legal interpreter with the national approach may have prejudice and indicate a negative attitude toward the uniform interpretation of the *Model Law*.

Differences in the political system, legal orders and cultures, and language of the *Model Law* may prevent uniform interpretation of the *Model Law*.[151] There are limited examples of the interpretation of the law from Laos on this divergence. In the United States, differences in political ideologies, backgrounds, race, and gender of judges have affected the results of court decisions. However, Judge Kavanaugh asserted the decision of judges should not vary according to those issues:

> The American rule of law, as I see it, depends on neutral, impartial judges who say what the law is, not what the law should be. Judges are umpires, or at least should always strive to be

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148 Quigley, "Socialist Law and the Civil Tradition," 781; Dainow, "The Civil Law and the Common Law," 419–35; Arnold, "Comparison of Civil Law and Common Law," 5–9; Berkowitz, Pistor, and Richard, "The Transplant Effect," 179.

149 *Ibid.*

150 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 262.

151 "United Nations General Assembly Resolution A/40/72."

> umpires. In a perfect world, at least as I envision it, the outcome of legal disputes would not often vary based solely on the backgrounds, political affiliations, or policy views of judges.[152]

In a famous case of *Church of the Holy Trinity (plaintiff) v. United States (defendant), 143 U.S. 457 (Supreme Court of the U.S.,)* this case concerns the judicial interpretation. The dispute was about the recruiting of a pastor in England to come to the U.S. for employment at a church.[153] The plaintiff was charged and convicted for violation of the federal law (the Act of February 26, 1885, 23 Stat. 332, c. 164.)[154] However, the United State Supreme Court reversed the judgment of the lower court and held that the petitioner did not violate federal law. The court held that the term "laborer" in the federal statute applied only to cheap unskilled labor and not to professional occupations, such as ministers and pastors. The court determined that it would be absurd for the law to apply in this instance, and reversed the petitioner's conviction.[155] This case is an example of the statutory interpretation applied the Supreme Court in the United States.

All of those mentioned are examples of the divergence of municipal law. They are hurdles and obstacles when the UNCITRAL attempts to create a unified legal framework of dispute settlement arising out of international commercial relations.[156] Civil law and common law systems belong to different legal families whose legal concepts, history of legal development, court practice, and the methods used by judges in legal interpretation are varied. Courts from civil law tradition tend to rely on written law rather than case law.[157] The court may not apply a strict doctrine of *stare decisis* which was abolished by the House of Lords in England in 1966 but the doctrine of precedents is still in use both in U.K. and U.S. courts.[158] Traditionally, case law is not as indispensable in continental European

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152 Mike Donaldson, "Will Clear Rules Fix Statutory Interpretation: Canadian Experience with Judge Kavanaugh's Proposed Rules of the Road," *International Journal of Legislative Drafting and Law Reform* 6 (2017): 4, https://heinonline.org/HOL/P?h=hein.journals/intjadr6&i=70.

153 Church of the Holy Trinity v. United States, 143 U.S. 457 (Supreme Court of the United States 1892).

154 Head Note 6 Church of the Holy Trinity v. United States, 143 U.S. 457.

155 *Ibid.*

156 "United Nations General Assembly Resolution A/40/72."

157 Dainow, "The Civil Law and the Common Law," 419.

158 On July 26, 1966, Lord Chancellor Gerald Gardiner announced that the House of Lords had resolved that it might "depart from a previous decision when it appears right to do so." Fellas John, "Who, as Between Courts and Arbitrators, Should Decide Objections to Arbitrability?," *New York Law Journal* 261, no. 58 (March 27, 2019): 807, https://advance.lexis.com/document/?pdmfid=1000516&crid=1e5004a6-

laws as it is in Anglo-Saxon laws. Such practices may be the reason why the CLOUT database is rarely used in German court judgments. Written submissions of parties referring to foreign law are also rare.[159] On the other hand, the common law system, for example in the U.S., relies substantially on judicial precedents. Their judges have relied on the reasoning (*ratio decidendi* and *orbita dictum*) of prior court judgments.[160] In this sense, it is likely the national approach advocates would prefer a local approach in which judges support the use of local practices and tradition rather than international conduct. The court may ignore international presumptions in favor of the international commercial arbitration.[161]

The doctrine of precedent surely exists in both civil law and common law systems, but its practice is varied. Common law judges have relied on case law and its legal tradition in its adjudication. Lower courts have to follow its upper court's decisions and the superior court will not deviate from its decisions.[162] Civil law judges follow a written law with certain powers of legal interpretation. A judge may consider judicial precedent depending on the law of the forum.

In contrast, the Lao People's Courts, except for the People's Supreme Court, do not interpret the law. Only the Supreme Court has the powers to interpret unresolved matters that the law does not determine or has not clearly defined. The court renders its judgment or directive after the Supreme Court's interpretation. Such judgments and instructions will become court precedents until the law

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159 Lorbacher, "The Model Law After Twenty-Five Years: A German Judicial Perspective on International Interpretation," 226.

160 Company X v. Company Y and Shareholder A in company Y, 3379/Civil/2014; OJSC Ukrnafta (Ukraine) v. Carpatsky Petroleum Corp. (United States) et al. (ICCA Yearbook 2018), 43 Civil Action H-09-891 (United States District Court, Southern District of Texas, Houston division 2017); Telenor Mobile Communications AS (Norway)-v- Storm LLC (Ukraine), 548 Federal Reporter, Third Series (2nd Circuit), 396 et seq.: 2009 U.S. App. Lexis 22156 Yearbook XXXV 2010 (United State Court of Appeal 2009); Born, *International Commercial Arbitration*, 2009.

161 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 37; Ali, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong," 10.

162 Born, *International Commercial Arbitration*, 2009, 2:2951–70.

regulates those matters.[163] The courts in a socialist law system "mechanically apply the laws of state" and the role of the courts is in some regards diverged from civil law traditions.[164] The Lao court adjudicates a case in a panel and applies the law strictly according to Article 94 of the Constitution.[165] In its adjudication, Lao judges render a decision with regard to the facts and evidence according to the law. There is no doctrine of *stare decisis* in Lao law, which was also influenced by French civil law during the colonial periods.[166]

The Constitution stipulates that the "Lao People's Court is a judiciary organ. Only the court has the right to render decisions and judgments in Lao People's Democratic Republic.[167] The court decides cases in different levels as first instance, appeal, and cassation." [168] The Lao courts collectively renders its decision in a panel. The court must be independent and only apply the law strictly.[169] The constitution has clearly provided that "the court must apply the law strictly." However, it is not clear how much this phrase extends. With Article 12 of the Law on People's Court, the judge may interpret the law and apply court precedents, evidence, customs, and judicial principles in its adjudication. The law does not clearly explain what rules the court should rely on when it interprets the law, whether they are the English canons of interpretation, the American statutory interpretation, the French teleological interpretation, or the modern statutory interpretation.[170]

Official publications and databases of judicial or arbitral precedents in Laos are limited and unavailable; conversely, the international and foreign databases are available in various sources such

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163 Lao Law on People's Court (2017), art.12; Lao Civil Code, Art.374.

164 Quigley, "Socialist Law and the Civil Tradition," 792.

165 The constitution of the Lao PDR of 2015, Art.94.

166 Desuatels and William, "Lao People's Democratic Republic," 560; Lao Law on People's Court (2017), Art.12.

167 The constitution of the Lao PDR of 2015, Art.90.

168 *Ibid.*

169 *Ibid.*, Art.94.

170 E. A. Driedger, "Statutes: The Mischievous Literal Golden Rule," *Canadian Bar Review* 59, no. 4 (1981): 780–86, https://heinonline.org/HOL/P?h=hein.journals/canbarev59&i=788; Rupert Granville Glover, "Statutory Interpretation in French and English Law," *Canterbury Law Review* 1, no. 3 (1982 1980): 195–206, https://heinonline.org/HOL/P?h=hein.journals/cblrt1&i=389; Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 124; Donaldson, "Will Clear Rules Fix Statutory Interpretation: Canadian Experience with Judge Kavanaugh's Proposed Rules of the Road," 10.

as the collection of the Singapore Supreme Court judgments, the UNCITRAL databases, CLOUT, the ICCA Yearbook, and others.[171] However, these foreign sources of judicial precedents have not been used by Lao judges. Additionally, the national approach of the interpretation of the *Model Law* respects the nature of municipal law. The judge cannot deviate from the mandatory rules of the *lex fori.* The CEDR is mandated to supervise the resolution of economic disputes in Laos by mediation and arbitration.[172] The CEDR, equivalent to a department under the supervision of the Ministry of Justice, appoints arbitrators in certain cases. For example, if the parties are unbale to select the arbitrators from the list provided, the CEDR will appoint arbitrator for the parties within 15 days.[173] The court however has the powers to choose the arbitrator under the from *Model Law* rules.[174]

Divergence of law reflects the real circumstances of national laws, court practice, and a position of the jurisdiction; such divergences may affect how the courts read and apply the law. Some countries have a dual regime of an arbitration law. They have both the law for domestic and international arbitration, such as Hong Kong and Singapore. Many countries have only one regime of arbitration law.[175] Chinese arbitration law distinguishes locally conducted arbitration that is purely domestic, and those that have an international aspect. Under *the New York Convention,* the arbitral award may be enforced if it is rendered in another contracting state. The enforcement would be affected by the category of "foreign-related arbitrations according to the Chinese arbitration law." [176] Singapore is more arbitration-friendly as a well-known SIAC is located there and its arbitration law is divided into two laws, *the Arbitration Act* and *the International Arbitration Act*.[177]

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171 "Supreme Court Judgments of Singapore," Supreme Court Judgments, November 6, 2020, https://www.supremecourt.gov.sg/news/supreme-court-judgments; "Lexis Advance," Lexis Advance, November 6, 2020, https://advance.lexis.com/firsttime?crid=76c43b5e-593a-4a97-b050-041461276f5a; "The Case Law on UNCITRAL Texts (CLOUT)," accessed December 5, 2018, http://www.uncitral.org/uncitral/en/case_law.html; Albert Jan Van Den Berg, ed., *ICCA Yearbook Commercial Arbitration (2010)*, vol. 35, 2010 (The Netherlands: Kluwer Law International BV, 2010); "ICC Digital Library," ICC Digital Library, November 6, 2020, https://library.iccwbo.org/dr-awards.htm.

172 Lao Law on Resolution of Economic Dispute (2018), Art.2.

173 *Ibid.*, Art. 35.

174 "The UNCITRAL Model Law on International Commercial Arbitration" (2006), Art. 11.

175 Hong Kong Arbitration Ordinance (2014); Singapore International Arbitration Act.

176 Jingshou, "Arbitration in China," 11.

177 Lim Wei Lee and Yeo Alvin, "Singapore," in *Asia Arbitration Handbook* (Great Britain: Oxford University Press, 2011), 673.

At first glance, there are instances when local judges apply domestic law and rule with the international case entailing the unfair and unconscionable decisions. The state courts could impose a stricter condition on the foreign parties.[178] If the court interprets the arbitration law with the localized or national approach regardless of the considerations of the harmonious approach, this interpretation may give rise to the violation of internationally accepted principles such as due process and a fair trial. The national court may interpret the *Model Law* with a particular rule of interpretation and render an absurd and unreasonable judgment. This court practice may discredit the confidence of foreign parties toward the national legal system in international commercial arbitration. This legal tradition is inconsistent with the international normative context, international principles, and international conventions, such as *the New York Convention* and *the Vienna Convention*.[179]

Divergence in municipal law is the legal constraint for judicial interpretation. This constraint covers various practices of the common and civil law tradition, the divergence of the local laws, the interpretation of the adopted law as the municipal law, and diverged court practices. Civil law tradition prefers the recourse to written law than to precedents; common law courts prefer legal interpretation and, in some jurisdictions, the strict application of judicial precedents. The court may not scrutinize general principles, international conventions, treaties, or the global consensuses in its interpretation. The English rules of interpretation enable judges to consider various interpretations such as the literal, golden, and the mischief rule.[180] In some jurisdictions, the judge cannot interpret the law and only the competent court is empowered to make such interpretations. The specific rule of interpretation varies in each jurisdiction, whether it is the English rules of interpretation (textualism, contextualism, or

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178 K.D. Kerameus, "Waiver of Setting-Aside Procedures in International Arbitration," *The American Journal of Comparative Law* 41, no. 1 (1993): 83, https://www.jstor.org/stable/840507.

179 "The United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention)" (1958); "Vienna Convention on Law of Treaties (VCLT)," 1970, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

180 Jeffrey Barnes, "Contextualism: The Modern Approach to Statutory Interpretation" 41 (2018): 1083–86.

purposivism)[181] or the French teleological approach.[182] Regarding the interpretation of the *Model Law*, Dean implied that we could view the approach applied by the English court as a national approach. The national approach would indicate if such an approach is inconsistent with the purpose and object of the *Model Law,* the intention of the drafters; and the international uniformity and harmonization the *Model Law*.[183]

2.2. State sovereignty

This dissertation views that a national judge may consider the issues of the state sovereignty in its legal interpretation. Each state has its sovereignty which is "a supreme political authority of an independent state." [184] With this authority an independent state establishes a constitution, enacts statutes and laws to regulate the society and has regard to the rights and duties of its citizens depending on the characteristics of each nation.

The word "sovereignty" was used in the legal documents of the former Soviet Union for the recognition and execution of the decisions of foreign courts and arbitral tribunals. Such an arbitral award or court decision would not be enforced if "… the execution of the decision would be contrary to the sovereignty of the USSR or would threaten the security of the [country], or would be contrary to the basic principles of Soviet legislation." [185] This article provided the mandatory rule akin to the principle of public policy found in the international conventions on the recognition and enforcement

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[181] *Ibid.*

[182] Glover, "Statutory Interpretation in French and English Law," 389. The approach of statutory interpretation by the French court provided an example of how the civil law court interprets the law as asserted by Francois Geny that in applying the law, the judge must be guided by the contemporary needs and idea of society and must act as the legislator himself if he faced the same problem. The tribunal must always rely first and foremost on the law, but in giving effect to it, must reach solution which accord with social climate. This is called as teleological approach. However, the judge must base his decision upon the law, so that his creative powers are always within the limitation of the starting point in the legislation. In addition, any interpretation remains subject to ultimate control by the court of cassation, thereby assuring the uniformity of decision-making in other similar cases.

[183] Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 89.

[184] Garner Bryan A., in *Black's Law Dictionary* (the United States of America: Thomson Reuters, 2014), 1612.

[185] "Edict of the Presidium of the USSR Supreme Soviet," June 21, 1988, Vedomosti SSSR (1988), no. 26, item 427.

of foreign arbitral awards. The sovereignty is one of indispensable conditions reflecting the constituent of the supremacy of an independence state.[186]

Gunther Teubner claimed that "when a foreign rule is imposed on a domestic culture…the internal context will undergo fundamental changes."[187] The change that Teubner mentioned may also refer to municipal laws, state sovereignty, or the public order of a state. This statement implies that a state's sovereignty would be affected by a legal transplantation. Furthermore, the majority of Western scholars regard the exercise of state sovereignty by European powers and the U.S. to be generally in compliance with international law.[188] However, this one-way direction is not surprising, as it was European powers and later the U.S. that shaped the development of international law.[189] International legal order in its current form enables weak states to buttress their state sovereignty, while strong states have a fundamental self interest in maintaining their stability as they hold disproportionate influence.[190] The negative attitude of national approach proponents toward international legal instruments may affect how a judge interprets the *Model Law.* A more powerful foreign party may use this lacuna to benefit from transnational arbitration with a smaller country. The *Model Law* could be used with preference to the foreign parties, and the local parties may lose their advantages because of the imbalance of powers of the parties; this scenario gives rise to the inequity and injustice of the arbitration proceedings. For example, in the case that the foreign rule of interpretation is applied, it may complicate the proceedings as judges do not understand or are unfamiliar with the rule.

The territorial school of thought claimed that arbitration is within the legal order of the municipal law of the state.[191] Many countries have a policy to control an arbitration institution under the supervision of a state organization. In Laos, the CEDR belongs to the supervision of the Ministry

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186 Garner Bryan A., in *Black's Law Dictionary* (the United States of America: Thomson Reuters, 2014), 1612.

187 Teubner Gunther, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences," *The Modern Law Review* 61, no. 1 (1998): 11–32, https://www.jstor.org/stable/1097334.

188 Phil C.W. Chan, *State Sovereignty and International Legal Order*, vol. 2 (Koninklijke Brill NV, Leiden, 2015), 2–3.

189 *Ibid.,* 2:2.

190 *Ibid.,* 2:13.

191 Paulsson, "Arbitration in Three Dimensions."

of Justice.[192] In China, disputes between two Chinese entities, economic or otherwise, must be decided by a Chinese arbitration commission according to its rules. The China International Economic and Trade Administration Commission (CIETAC) and Chinese Maritime Arbitration Commission (CMAC) are responsible for international disputes.[193] The state has controlled the dispute resolution organizations in most of the communist countries.

The state organization supervises the arbitration center in Laos because the *LRED* was initially drafted to serve domestic resolution of economic disputes. The *LRED* determines that the Center for Economic Dispute Resolution (CEDR) is intrinsically equivalent to a department of the Ministry of Justice,[194] "an organization that has professional, social and legal characteristics with independent technical competence, under supervision of the ministry, that creates favorable conditions for disputing parties, mediators and arbitrators to resolve economic disputes." [195]

The state sometimes regulates a policy to control arbitration within the powers of the state. However, the state cannot impose a more onerous rule with regard to *the New York Convention* to prevent the enforcement of a foreign arbitral award. The procedure for enforcing an arbitral award varies in each jurisdiction. A contracting state may enforce arbitral awards in accordance with local rules and practice; however, it cannot impose any higher fees or any more restrictive conditions on the process than those applying for the domestic award, for example, to stipulate a strict standard of court review of the arbitral award.[196]

Two provisions of the *Civil Procedure Law* of Laos, Articles 362 and 366, apply to the recognition of foreign judgments. Article 362 Paragraph 1 item 2 states that the judge will not enforce a foreign judgment if it is contrary to the state sovereignty of Lao PDR. Article 362 reads as follows:

> The Lao PDR recognizes and implements a foreign judgement via embassies, a consulate or a representative office of the Lao PDR abroad, the court of the Lao PDR must recognize according to the following circumstances:

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192 Lao Law on Resolution of Economic Dispute (2018), Art.76.

193 Arthur Ma, Benjamin Miao, and Helen Shi, "People's Republic of China," in *Asia Arbitration Handbook* (United States: Oxford University Press, 2011), 124.

194 Lao Law on Resolution of Economic Dispute (2018), Art.59, 76.

195 *Ibid.*, Art.58.

196 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), 207.

(1) Be judgment of the country which is a party to treaties which Laos is also a member state.
(2) Such judgment is not contrary to state sovereignty and the laws of Lao PDR.
(3) Such judgment does not violate peace and order of the Lao society.

The recognition and enforcement of foreign arbitral awards shall operate the same as the recognition of foreign judgments.[197]

Foreign court judgements should not be enforced if they violate the state sovereignty of Laos. The same conditions apply with the enforcement of foreign arbitral awards in the country.

The court may or may not recognize a foreign judgment or foreign arbitral award, if it finds that such a decision or an arbitral award falls under these conditions.

(1) Such judgment is in the adjudication process which is not yet binding.
(2) The losing party in that foreign judgment has not participated in the proceedings. The court renders a decision without his or her participation.
(3) The case [at issue] seized by the foreign court falls into the jurisdiction of the Lao PDR.
(4) Such judgment is contrary to the constitution and the law of Lao PDR.
(5) Other matters relating to foreign judgments.[198]

These articles indicate that state sovereignty is among the grounds that the court will scrutinze in refusing the enforcement of foreign judgements in Laos. In legal interpretation, the judge may be reluctant to adopt the foreign interpretation rule. For example, French judges may be reluctant to adopt and be unfamiliar with the English rules of interpretation: the mischief, golden and literal meaning rules belonging to a common law tradition. The mischief rule asks what defect or mischief existed in the commonwealth that needed to be remedied, and what remedies Parliament intended to apply in creating the statute.[199] The golden rule instructs a court to interpret a statute "giving the words their ordinary signification," unless an absurd result is produced. Finally, the premise of the literal rule is that a statute be read literally, regardless of an absurd result.[200] The literal rule assumes

[197] "Lao Civil Procedure Law, No. 13/NA" (2012), art.362, https://laoofficialgazette.gov.la.
[198] *Ibid.*, art.366.
[199] Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 93.
[200] *Ibid.*

it is not the job of a court to avoid an outcome the legislature did not desire.[201] In the same manner, English judges may not be competent with the French teleological approach in the interpretation of the law. The French major method of interpretation is exegetic and teleological according to the French scholarship, in which judges should also examine the legislative history and the social objectives of statutes.[202] If Lao judges apply a foreign interpretation rule, such action is subject to the violation of the Lao law. The application of a foreign rule may give rise to the issue of state sovereignty and the supremacy of its independence in court practices.

It is noteworthy to examine the extent of state sovereignty and its effects on this issue. In many countries, the state wishes to keep arbitration under its supervision. The state's sovereignty is a tool to supervise international arbitration. Therefore, state sovereignty is an important matter in the interpretation of the *Model Law*. Furthermore, considering the national approach, judges may view the *Model Law* as a foreign law that may bring inconsistent foreign rules to the national arbitration law and its local practices. The adoption of the *Model Law* may affect the state's sovereignty or even the political system of a nation.

2.3. Summary

This chapter illustrates two competing approaches when courts interpret the *Model Law*. The national approach of the interpretation of the *Model Law* represents a restrictive and narrow perception in the interpretation of the arbitration law in favor of a state court. There are two issues associated with the national approach such as the divergence of municipal law and state sovereignty. Theories of jurisprudence, municipal law, arbitration law, court practices, and the canons of interpretation are varied and diverged according to the legal family, whether it is a common law or civil law system. Therefore, domestic courts will have their own approach to judicial discretion, and diverged

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[201] *Ibid.*

[202] Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–86; Glover, "Statutory Interpretation in French and English Law," 385–92; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–1113; Claire M. Germain, "Approaches to Statutory Interpretation and Legislative History in France," *Duke Journal of Comparative & International Law* 13, no. 3 (2003): 197, https://heinonline.org/HOL/P?h=hein.journals/djcil13&i=679.

methodologies to the statutory interpretation and the interpretation of the *Model Law*'s provisions. Nevertheless, national law effectuates the legitimacy of arbitration. If there is no national law, there is no legal order to empower arbitral proceedings. In other words, international arbitration still needs the authority from the state courts to give effect to the arbitration proceedings, render a protecting measure, and enforce the arbitral award.[203]

State sovereignty demonstrates the supremacy of an independent state and is another issue of the national interpretation. European countries and the United States have strongly influenced international public law and the international legal order, while the Asian and African roles have been delegated.[204] Likewise, courts in Asia and Africa may be reluctant to follow the *Model Law* rules. Sometimes, judges may view international arbitration as a foreign party-oriented method. They designate the rules to facilitate foreign parties and investors, and align with a pro-arbitration bias and the presumption to always promote the international commercial arbitration.[205] In the interpretation of investment arbitration cases under *the ICSID Convention*, giving too much weight to the purpose of the international convention, promotion and protection of investments, may be unfair to the parties. This undue emphasis may affect the object and purpose of a treaty and in an extreme case, it will even deny the relevance of the intention of the parties.[206] This statement means that giving too much emphasis to the objective and purpose of the treaty or the law, judges will ignore the true intention of the parties.[207] This practice may trigger the unconscionable and unfair treatment of the parties in the arbitration proceedings. Adopting foreign rules (the common law tradition) may give rise to the pro-creditor bias as most of the civil law countries posit a pro-debtor's benefit.[208] The judges of the

[203] Paulsson, "Arbitration in Three Dimensions."
[204] Chan, *State Sovereignty and International Legal Order*, 2:3.
[205] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614.
[206] Sanja Djajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration Special Issue of International Investment Treaties," *International Review of Law* 2016, no. 3 (2016): 27–28.
[207] "Vienna Convention on Law of Treaties (VCLT)," Art.31.
[208] Arnold, "Comparison of Civil Law and Common Law," 8,9.

national approach may tend to reject the enforcement of foreign judgement which affects the right of its citizens and when there is no reciprocity between their countries.[209]

As legal interpreters, judges should understand the divergence of law which may affect and restrict the result of the interpretation. State sovereignty may affect the court decision in some extent. Judges would have to consider this particular issue, when confronts with the foreign uniform law. The national approach may mislead judges to read and apply the *Model Law* resulting in absurd and counterproductive decisions. Judges may have the negative attitude toward the uniformity of the interpretation of the *Model Law.* They do not have the pro-arbitration bias and cannot ignore the legal rule which operates in a very particular social and political setting.[210] These national approach proponents understand the possible differences of the results of interpretation of legal texts in different legal system. The judge may therefore show preference toward the national approach of the interpretation.

3. Grounds of the international interpretation

The international interpretation is an approach where judges interpret the *Model Law* broadly and expansively with a preference to international commercial arbitration and the uniform application of the *Model Law*.[211] This method is equivalent to a delocalization position.[212] There are various approaches in the interpretation of contracts, statutes, constitutions, and treaty.[213] Various jurisdictions have different rules of interpretation as derived from common law, civil law or socialist law. Many scholars view the international approach to the interpretation of the *Model Law* as a better

[209] Hilton v. Guyot, 159 U.S. 113 (Supreme Court of the United States 1895).
[210] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 262.
[211] "United Nations General Assembly Resolution 40/72"; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.
[212] Loukas, "Delocalization and Its Relevance in Post-Award Review," 168.
[213] Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–86; Glover, "Statutory Interpretation in French and English Law," 385–92.

approach.[214] This approach is close to the common law rules interpretation and the civil law interpretive approach.[215]

The modern approach of statutory interpretation may align with contextual interpretation.[216] These modern approaches have been applied by courts in common law countries such as, Canada, Australia and the US.[217] Article 2A of the *Model Law* urges judges to pay attention to the international origin of the *Model Law* and the need to promote uniformity in its application.[218] Article 2A is one provision within the *Model Law*. This article reflects the approaches of the contextual and purposive interpretation. The contextualism seems to be more relevant thanks to Articles 31 and 32 of *the VCLT*. Bachand mentioned in his book that identical legislation can be applied differently depending on the interpretive approaches being deployed.[219] The interpretive approaches are by no means uniform across legal traditions and jurisdictions. To achieve the uniform interpretation, the process of interpreting transnational normative instruments is, as much as possible, subjected to uniform rules. Those rules require judges to engage in "judicial internationalism." [220]

Elmer Driedger proposed a modern rule of statutory interpretation. This rule combines elements of textualism, equitable interpretation, interpretive canons and the absurdity doctrine into a single rule.[221] The Supreme Court of Canada observed this rule as the fundamental interpretive rule

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214 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 263–64; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–50; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–1113.

215 Sanja V. Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," *Zbornik Radova* 49, no. 2 (2015): 27, https://heinonline.org/HOL/P?h=hein.journals/zborrado49&i=599; Germain, "Approaches to Statutory Interpretation and Legislative History in France," 195–206.

216 Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1084.

217 Barnes, 1084; Brett M Kavanaugh, "Fixing Statutory Interpretation," *Harvard Law Review* 129 (2016): 2163; Driedger, "Statutes: The Mischievous Literal Golden Rule," 385–92.

218 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.

219 *Ibid.*, 231.

220 Bachand, 232.

221 Donaldson, "Will Clear Rules Fix Statutory Interpretation: Canadian Experience with Judge Kavanaugh's Proposed Rules of the Road," 10.

that Canadian courts are required to apply in all cases. This modern rule can be an essential basis for the interpretation of the *Model Law* as well. The rule is as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament.[222]

In practice, a legal interpreter or judge would first determine the plain meaning of the text. Judges must also examine the object and purpose expressed by the *Model Law*'s drafters.[223] The objective and purpose of the *Model Law* provides the important characteristic on how judges should interpret the *Model law* toward the international uniformity. According to the French teleological approach, when applying the law, judges must be guided by the contemporary needs and ideas of society. They must act as the legislator themselves would act if they faced the same problem.[224] This dissertation has focused on how the judge would interpret the *Model Law* with the problems outside the text: the entire context of the law, the objective and purpose of the law, and the contemporary needs of the society. Therefore, the dissertation will look at the scheme of the law. This approach may also correspond with the modern approach, contextual interpretation, when the Canadian and Australian courts interpret their statutes.[225]

This following case shows how the modern approach is applied in common law jurisdictions. This approach is similar with the Driedger's approach and may be relevant for the interpretation of Article 34 of the *Model Law*, at least to give an example of how those courts interpret their statutes. In *CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384*, the High Court of Australia famously referred to the modern approach to statutory interpretation as:

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern

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[222] *Ibid.*, 11.

[223] Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 35; Driedger, "Statutes: The Mischievous Literal Golden Rule," 780.

[224] Glover, "Statutory Interpretation in French and English Law," 389.

[225] Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–86; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–1113.

the statute was intended to remedy.[226]

The judge must read a word, phrase, and paragraph of the law thoroughly, determine the context of the whole law first, and then look at the intention of the drafters and the objectives and purpose of the *Model Law*. After that the judge must decide whether the meaning is rational or absurd, and choose the appropriate meaning for the interpretation.[227] Unlike using the plain meaning of the textual approach, the contextual method proponent will avoid a possible absurdity in the legal text.[228]

The purposive or pragmatic approach looks at the objective and purpose of the statute and the drafter's intention. The pragmatic method is the broadest category. It covers any method for imparting meaning to a term that is beyond the text or context of that term.[229] An American Judge, Brett Kavanaugh, provided insightful implications for judges to interpret statutes and the suggestion is rather similar to the contextualist rather than the purposive approach. He determined that:

> First, find the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any appropriate semantic canons. Second, apply any applicable plain statement rules, and ensure that the interpretation is not absurd.[230]

This suggestion reflected the practice of the U.S. court's paradigm to fix the statutory interpretation problem. The wording is quite straight forward that the judge should find the best reading by interpreting the words and scrutinize the context of the whole law, and apply the semantic canons. Later, the judge must apply the applicable plain reading rule to look for possible absurdity.

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226 Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1084.

227 Kavanaugh, "Fixing Statutory Interpretation," 2163.

228 Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 62. They define "textual" to cover methods that derive the meaning of a disputed term internally, from within a legal text, with no reference to any extrinsic source other than common sense and a dictionary. These methodologies are the narrowest of all, as they look for nothing more the ordinary or plain meaning of a controversial term. "Contextual" methodologies may be internal or external of the text. It looks to uncover the meaning of a disputed term by examining the position of that term in its sentence, paragraph, provision, or surrounding provisions of its treaty…, including the history and circumstances of the drafting of that text and the intention of the drafters.

229 Bhala and Witmer, 63.

230 Kavanaugh, "Fixing Statutory Interpretation," 2163.

Frédéric Bachand claimed that judges may use the global consensus and transnational interpretive rules to resolve questions on the interpretation of the *Model Law*.[231] Judges may also apply judicial precedents (*jurisprudence constante*), look for the recourse to the international conventions on the interpretation of treaties, *the Vienna Convention on Law of Treaties (VCLT)*, the legislative history, or the analytical commentary of the *Model Law.*[232]

Although it is debatable whether awards granted by arbitration tribunals have a precedential value for international arbitration, Gary Born wrote that "it is not correct that the arbitral award has no precedential value, as a matter of practice, nor should it be true, as a matter of law or aspiration," [...] in practice, arbitral awards frequently serve as a decisive authority." [233] When judges apply judicial precedents with a state's laws, the precedent should have the same binding effects in international arbitral proceedings as similar with the proceedings in national court. If a national or international legal system accords binding, precedential weight to judicial decisions, then arbitral tribunals should give those decisions no less legal effect than would a court in that system. The application of the judicial precedent by arbitrators are arbitrators' adjudicative function of applying the law to the evidence.[234] Judicial precedent is important for the court and international commercial arbitration; its application is highly admissible for international arbitrators in dealing with the international disputes. The international trend supports the notion of comity or reciprocity of states to the recognition of foreign arbitral awards and the promotion of international commercial arbitration. The US Supreme Court opined that:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.[235]

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[231] Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–42.

[232] Born, *International Commercial Arbitration*, 2009, 2:2951 This is the doctrine of deference to prior court decisions in common law countries, the lower court should follow the upper court decision, some common law countries abandoned the doctrine, while others still follow suit.

[233] *Ibid.*, 2:2965.

[234] *Ibid.*, 2:2963.

[235] *Ibid.*, 2:2963; Scherk v. Alberto-Culver Co., 417 U.S. 506, 417 U.S. 506 (Supreme Court of the United States 1974).

Though Article 2A of the *Model Law* does not authorize judges to adopt the internationalist approach that is conducive to the achievement of legal uniformity,[236] the words "regard is to be had to" which is written in Article 2A (1) is much more consistent with the idea that judges are required to always take into consideration the *Model Law*'s international origin and the need to promote uniformity of its application.[237]

3.1. Article 2A

Article 2A was newly added to the *Model Law in 2006.*[238] This article provides four key rules for the interpretation of the *Model Law.* They are (1) the international origin of the *Model Law*, (2) the need to promote uniformity, (3) the observance of good faith, and (4) the general principles. Fabien Gélinas claimed that *the Model law* did not dictate to the judges of its jurisdictions to interpret its provisions with any interpretive approach. Gélinas asserted that before the inclusion of Article 2A, the *Model Law* was silent about the interpretive approach.[239] On the other hand, after the inclusion of Article 2A, the *travaux préparatoires* suggested the UNCITRAL commission had no difficulty concluding that the adoption of a provision "is designed to facilitate interpretation by reference to internationally accepted principles…would be useful and desirable because it would promote a more uniform understanding of the arbitration model law." [240] This legislative history confirms that judges must take account the need to promote international harmonization in the interpretation of the *Model Law.*

While Article 2 has set out the definitions and rules of interpretation of the *Model Law*, Article 2A provides some key indicators for the international harmonization.[241] J. Nelson referred to the

[236] Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.
[237] *Ibid.*
[238] Please see Appendix 2.
[239] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 261.
[240] *Ibid.,* 232.
[241] *Bachand, supra* note 232.

addition of Article 2A as "an appreciation of the international normative context" in which the *Model Law* was drafted. Other appreciations are the judicial scrutiny by courts and the *travaux prėparatoires*.[242] Lewis Dean argued the international approach of the UNCITRAL was obvious even before the inclusion of Article 2A. The nature of the *Model Law* arguably requires international interpretation in any event regardless of Article 2A. Dean observed that from the analyses of hundreds of cases in Hong Kong, Singapore, and Australia, that Article 2A had not been used as a reference in the court decisions, even though this article expressly provides the underpinning for international interpretation.[243] There are two reasons for no reference to Article 2A. First, this article was only introduced to their laws recently, in Australia in 2010 and Hong Kong in 2011, leaving little time for citation. Second, Article 2A has not been adopted in Singapore. However, this finding confirms that the internationalist interpretation had existed before the inclusion of Article 2A.[244]

Dean proclaimed that the word "origin" is stronger than "character." [245] Character is a term used in *the CISG*. Article 7 of the CISG mentioned that "... regard is to be had to its international character and to the need to promote uniformity in its application...." [246] A statute with international characteristics still can be interpreted according to municipal methodology with some regard to those characteristics.[247] If judges need to examine the international origin of the law, this suggests that the law must be interpreted with the international approach.[248]

Article 2A provides the guidance for courts to read and apply the *Model Law* in accordance with international harmonization on international commerce. There was argument by two authors. Gélinas said that the original text of the *Model Law* had been silent about the interpretive approach,

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[242] Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 51.
[243] *Ibid.*, 129.
[244] *Ibid.*
[245] Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 38.
[246] "The Convention on International Sale of Goods (CISG)," April 11, 1980, Art.7, https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.
[247] Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 38.
[248] *Ibid.*

whereas Dean argued that it in fact existed before the inclusion of Article 2A.[249] The U.S. court has preferred to interpret the *Model Law* with the international approach, with the presumption to promote *the New York Convention* in the recognition and enforcement of foreign arbitral award and the international commercial arbitration.[250] In conclusion, regard is to be had to international origin and the need to promote uniformity in its application indicate the idea that judges should interpret the *Model Law* with the international approach.[251]

The phrase "the need to promote uniformity" also appears in Paragraph 1 of Article 2A. Paragraph 1 instructs the judge that the law was drafted in order to promote uniform rules and application of the *Model Law.*[252] Consequently, the judge should make a decision to circumvent the deviation from the *Model Law* drafter's intention. The resolution adopted by *the General Assembly No.40/72* sets fort that:

> ... Recommends [ ] that all states give due consideration to the *Model Law on International Commercial Arbitration*, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.[253]

The travaux préparatoires reported that the commission had no difficulty concluding that the adoption of a provision "designed to facilitate interpretation by reference to internationally accepted principles would be helpful and desirable because it would promote a more uniform understanding of the arbitration *Model Law."* [254] "Observance of good faith" in Paragraph 1 of Article 2A has ensured equity and justice to the arbitration proceedings. Judges should use discretion to serve the principle of good faith.

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249 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 261; Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 129.

250 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614; Scherk v. Alberto-Culver Co., 417 U.S. 506, 417 U.S. 506.

251 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.

252 "Resolution Adopted by the General Assembly 40/72," November 12, 1985, https://digitallibrary.un.org/record/196028?ln=en.

253 *Ibid.*

254 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.

An arbitration agreement imposes a general obligation of good faith on both parties to collaborate to form an "ideal procedure." "Observance of good faith" is the statutory support for this understanding. This wording in generic terms has meant that the parties are under a duty actively to take part in the proceedings to have the dispute settled expeditiously and cost effectively. Arbitration is an adversarial process and a duty of good faith may not always apply to the parties in that process. J. Choong and J. Weeramantry identify this concept as "the legal and professional obligations upon parties, counsel, arbitrators and the courts." [255] Arbitration is based on a contract on procedure —an arbitration agreement and all contracts are subject to the duty of good faith.[256] The court must interpret the wording of the *Model Law* with good faith to ensure the justice of the arbitral proceedings.

"The general principles" are mentioned in Paragraph 2 to settle "questions concerning the matters governed by this law which are not expressly settled in it." [257] If there is a question on the interpretation of this law, the general principles in which the law was based upon would be used to resolve that issue. For example, in private international codifications, Judges may apply the general principles if the law is silent. The Austrian Civil Code 1811 authorizes the judges to decide the case before him based on "the principles of natural law," if neither the wording nor the analogy of the code provision can provide a hint and a solution to the problem. The Spanish civil code enables the court to refer to "the general principles of law," while the Egyptian court can take recourse first to customs and the principle of Moslem law.[258]

This explanation refers to the general principles in which the law in each jurisdiction enables judges to find a solution to the disputed word, phrase and paragraph of the law with his or her discretion.

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255 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 47.

256 Kurkela Matti S. and Snellmann Hannes, *Due Process in International Commercial Arbitration* (United States: Oceana Publications, Inc., 2005), 81.

257 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," Art.2A.

258 Werner Lorenz, "General Principles of Law: Their Elaboration in the Court of Justice of the European Communities," *The American Journal of Comparative Law* 13, no. 1 (1964): 1, https://doi.org/10.2307/838341; Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, CILE Studies, volume 6 (New York, NY: Oxford University Press, 2017) (Book review by The European Journal of International Law Vol. 30 no. 2).

The general principles are principles related to various doctrines for dispute resolution and further interpretation should be left for the court discretion on the problem.

3.2. International interpretation practice

This section will explore another subject of the international approach. In this dissertation, international interpretation practice includes judicial precedents and transnational interpretive rules. The application of precedents can be useful for judicial interpretation and refers to a doctrine in which courts follow previous court decisions by applying the same rule to similar cases. Lower courts usually follow their higher courts' rulings in their adjudication. In the determination of French law, a precedent is also called "jurisprudence." [259] A series of decisions adopting the same rule (jurisprudence) is a source of law *(source de droit)* which judges (or arbitrators) may refer to.[260] As in France, Germany, Spain and other civil law jurisdictions, courts apply the doctrine that parallels the principle of *stare decisis,* variously referred to as *jurisprudence constante.*[261] The Swiss courts apply this doctrine in which a series of decisions that decide a particular issue are accepted as stating a rule of limited binding character. The more frequently used and established the decision is, the most precedential authority the decision has. A single decision is also capable of constituting a binding precedent depending on the court that decides the case and the nature of its decisions.[262]

The current court practice reveals the acceptance of the application of precedents. Judicial precedent is applied by the courts with cases concerning the international commercial arbitration.[263] The common law countries apply the doctrine of precedent (the *stare decisis)* in the court proceedings by which the lower courts are bound by prior decisions of the higher courts in the same jurisdiction.[264]

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[259] Marc Ancel, "Case Law in France," *Journal of Comparative Legislation and International Law* 16, no. 1 (1934): 01, https://www.jstor.org/stable/753975.
[260] Born, *International Commercial Arbitration*, 2009, 2:2958.
[261] *Ibid.*, 2:2957.
[262] *Ibid.*, 2:2958.
[263] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005 21 (Singapore Court of Appeal 2006); Gaillard, "Gaillard's Chaos Theory Is Harmony in International Arbitration Overrated? The International Journal of Commercial and Treaty Arbitration"; OJSC Ukrnafta (Ukraine) v. Carpatsky Petroleum Corp. (United States) et al. (ICCA Yearbook 2018), 43 Civil Action H-09-891.
[264] Born, *International Commercial Arbitration*, 2009, 2:2953.

English law adopts an approach to precedential authority that is broadly similar to that in the United States. Some English courts generally accord less weight to the importance of judicial authority, warning that too rigid adherence to precedent may lead to injustice in a particular case and restrict the proper development of law.[265] Civil law systems treat previous judicial precedents in ways that are broadly similar to those in common law jurisdictions, for example, in France, Germany, and Spain.[266] However, this principle is flexible with courts taking into account many factors, such as the extent to which a precedent is well-settled, (the number of prior decisions and their ages), the extent of a quality of judicial reasoning, the reputation of courts and judges; and the subject matter.[267]

To apply the international interpretation, judges should be able to use their court precedents and international practices. Laos may need a specific regulation on the interpretation of the *Model Law.* Furthermore, the transnational interpretive rule is a guideline and directive for the interpretation of international conventions and treaties. The transnational interpretive rule may also cover the internationally accepted principles, standards and doctrines enshrined in conventions such as *the CISG* and *the Vienna Convention*.[268] Judges may use these materials to resolve the problems of an ambiguous text, including the *travaux préparatoires*.[269]

Article 7 of *the CISG* can provide useful aids for judges to interpret international contracts and arbitration law. Additionally, Article 31, 32 and 33 of the *Vienna Convention* embodies the transnational interpretive rule which is vital for international interpretation. Bachand mentioned that if a worldwide consensus is not available, the court may find the solution with the recourse to the transnational interpretive rule, which would be used as the basis for the interpretation, for example, *the Vienna Convention*.[270]

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265 *Ibid.,* 2:2955–56.

266 *Ibid.,* 2957.

267 *Ibid.,* 2959.

268 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–51; "Vienna Convention on Law of Treaties (VCLT)"; "The Convention on International Sale of Goods (CISG)."

269 *Ibid.,* 251.

270 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 43; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 251.

3.2.1. Article 7 of *the CISG*

Elucidation of the international conventions related to the *Model Law* can be a basis for judicial interpretation. One of those conventions is *the Convention on International Sale of Goods of 1980 (CISG).* Article 2A has paralleled the contents of Article 7 of the CISG. The convention's provisions were implemented five years ahead of the *Model Law.*[271] *The Convention on International Sale of Goods* entered into force for Laos in 2020.[272] It is noteworthy that Article 7 of *the CISG* has similar contents with Article 2A on the interpretation. This article would help judges understand key features to the interpretation of the *Model Law*.[273]

The *Model Law* is neither an international convention nor a treaty; it is an international model law drafted and recommended by the secretariat of the UNCITRAL for universal adoption by member states.[274] A convention requires ratification by countries,[275] and sometimes it also calls on specific legislation for its implementation. For instance, the contracting states of *the New York Convention* will enforce arbitral awards in light of the specific rules rendered by the state.[276]

Article 2A of the *Model Law* and Article 7 of the *CISG* have some divergences.[277] The first difference is the *Model Law* was designated for providing a unified legal framework for the dispute resolution mechanism arising out of international trade. The CISG was drafted to provide a uniform rule to govern contracts for the international sale of goods, while taking into account different social, economic, and legal systems. The Convention would contribute to removal of legal barriers in international trade and promote the development of trade.[278]

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271 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 26.
272 "Laos Becomes Party to Two More UN Treaties."
273 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 43.
274 "Resolution Adopted by the General Assembly 40/72."
275 Article 2 of the VCLT: Use of Terms[...] "ratification", "acceptance", "approval" and "accession" means in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty. [...]
276 Moses, *The Principles and Practice of International Commercial Arbitration*, 207.
277 Please see Appendix 2 and Appendix 4.
278 Please see Preamble "The Convention on International Sale of Goods (CISG)," 1.

Another difference of Article 7 of *the CISG* and Article 2A of the *Model Law* is *the CISG*'s phrase "regard is to be had to its international character" that the *Model Law* wrote as "regard is to be had to its international origin." Lewis Dean claimed that the word "origin" is stronger than "character." [279] Judges can still interpret the law with international character according to the municipal or national approach with some regard to those characteristics.[280] However, with the word international origin which is claimed to be stronger, judges must interpret the law with the international approach.[281] By virtue of *the CISG*, a judge must examine the "international character" of the convention in the interpretation of an international contract. Besides, the wording of *the CISG* by virtue of the rules of private international law differs from the wording of Article 2A. The convention provides that in case the law does not determine the general principles, judges may take into account the rules of private international law. The *Model Law* does not mention this particular rule. *The CISG*'s provision has further designated the rules beyond the general principles which may also include other rules provided by the civil code, principles of natural law, customs, or religious rule.[282]

Article 7 of *the CISG* determines grounds for judicial scrutiny and they are key issues, such as the international character of the convention, the need to promote uniformity, and the observance of good faith in international trade, and the recourse to the rules of private international law. Lewis Dean commented that Article 7 does not direct legal interpreters as to what to do with foreign case law, as it is not clearly stated. Fabien Gélinas wrote that when judges interpret the *Model Law,* judges become the international judges addressing the problem of the interpretive community.

> The judge has become an international judge to respond to the need of a transnational interpretive community. She thinks in terms of applying an international instrument; her reference points and sources are global. She is part of a transnational interpretive community, she decides accordingly.[283]

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279 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 38.
280 *Ibid.*
281 *Ibid.*
282 Lorenz, "General Principles of Law," 1; Kotuby and Sobota, *General Principles of Law and International Due Process* (Book review by The European Journal of International Law Vol. 30 no. 2).
283 Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264.

Though the methodology of the internationalist approach is not certain, the majority views have supported that the international approach requires courts to take into consideration the decisions from other foreign jurisdictions. For example, in a practical sense, the Australian courts should consider decisions of overseas courts applying and interpreting the *Model Law*.[284] The application of foreign judicial precedents may be possible in a court with comparable jurisdictions.

Article 7 of the *CISG* has provided judges an understanding of the *Model Law* including the international character of both legal instruments. Therefore, the international trend and rules may convince the judges to interpret international contracts and the *Model Law* with the internationalist interpretation with regard to the recommendation by the UNCITRAL secretariat to promote the uniformity of arbitration procedures and the uniform application of the *Model Law*.[285]

3.2.2. Article 31, 32 and 33 of *the VCLT*

The Vienna Convention on the Law of Treaties of 1969 (VCLT) is an important international convention in which the transnational interpretive rule is enshrined.[286] Laos is a party to *the Vienna Convention*.[287] Even though the *Model Law* is not a treaty, the content of *the VCLT* has provided grounds to clarify unresolved matters. Academics and practitioners mentioned *the VCLT* as an essential basis for the interpretation of treaties and the *Model Law.*[288] Articles 31, 32 and 33 of the convention determine the grounds for interpretation of the treaties.[289] Therefore, *the Vienna Convention* rules can also be used for the interpretation of the *Model Law*. According to Bachand, the most important

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284 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 43–45.

285 "United Nations General Assembly Resolution 40/72."

286 "Vienna Convention on Law of Treaties (VCLT)."

287 "Member States of the Vienna Convention on the Law of Treaties of 1969," United Nations Treaty Collection, accessed September 7, 2019, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

288 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–350; Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," 27.

289 Julian Davis Mortenson, "The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?," *The American Journal of International Law* 107, no. 4 (2013): 780–81, https://doi.org/10.5305/amerjintelaw.107.4.0780.

constituents of international interpretive rules are global consensuses that have emerged on the interpretation of the *Model Law*. If a global consensus is not available, the court may find solutions by its own efforts. One of the methods to revolve the problem to interpretation is to consider the transnational interpretive rule of *the VCLT*.[290]

Article 31 of *the VCLT* provides that treaties should be interpreted in good faith as to their objectives and purposes.[291] Such an interpretation should respect its preamble and annexes. Article 32 of *VCLT* mentions a supplementary means of interpretation if the treaties are ambiguous, manifestly absurd, or unreasonable.[292] The supplementary means include the legislative history of the discussion, drafting, and conclusion of the treaties. In other words, *the travaux preparatoires* should be used; if there is an absurdity produced by the interpretation, judges should avoid such meaning. This practice is the contextual approach which states that the judge should pay attention to the entire context and the objective of the law. This wording is in the light of *the Vienna Convention*.

In Article 33, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless it is provided that one language should prevail in case of divergence.[293] This article addresses the questions of language used concerning the interpretation of the *Model Law.* Judges may need, however, other rules to resolve problems such as the general principles as mentioned in Article 2A.

In conclusion, the purpose and preamble of the treaties are essential for the court interpretation. Those sections of the convention convey the initial intentions of the drafters. The judges should take due consideration when dealing with the circumstances of a case to overcome the dilemma of the interpretation. In conformity with this international trend, this dissertation recommends for the courts to interpret the *Model Law* harmoniously according to international arbitration practices. Not only should the judges elucidate the national law and related principles, but also the consensus from

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290 *Ibid.*
291 Please see Article 31, 32 and 33 of the VCLT in Appendix 4.
292 *Ibid.*
293 *Ibid.*

the model law jurisdictions as the purpose of the *Model Law* is to encourage universal adoption and application.[294]

3.3. A principle of comity

In the U.S., a principle of comity means deference to foreign law and foreign courts. For instance, the recognition and enforcement of foreign judgments, the foreign government's legal statement.[295] US scholars and courts have categorized international comity inconsistently as a choice of law principle, moral obligation, reciprocity, utility, or diplomacy.[296] Other jurisdictions deploy the term as diplomatic immunity.[297] Therefore, international comity is an instance when a court of one jurisdiction recognizes a judicial act of other jurisdictions.[298] Foreign law could also provide a factual ground or even a legal basis for court interpretation depending on the *lex fori.* The German and Austrian legal systems regard foreign law as a matter of law; consequently, courts must ascertain the content of foreign law *ex officio*.[299]

Comity refers to the obedience to the international law and international conventions that the parties are subject to. The international convention emphasizes the reciprocity of the parties.[300] Comity and reciprocity possess a similar meaning. As mentioned above, reciprocity is needed for the application of the principle of comity in the recognition of foreign court judgements. The international

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294 "United Nations General Assembly Resolution 40/72."

295 Animal Science Products inc., v. Hebei Welcome Pharmaceutical co. ltd., 138 S. Ct.1865, Lexis Nexis (Supreme Court of the United States 2018); Julie Bedard et al., "US Supreme Court To Consider Degree of Deference Courts Should Give Foreign Countries' Interpretation of Their Laws | Insights | Skadden, Arps, Slate, Meagher & Flom LLP," Sakadden, January 25, 2018, https://www.skadden.com/insights/publications/2018/01/us-supreme-court-to-consider-degree-of-deference.

296 Joel R. Paul, "The Transformation of International Comity," *Law and Contemporary Problems*, Transdisciplinary Conflict of Laws, 71, no. 3 (2008): 20.

297 Paul, 20; Hilton v. Guyot, 159 U.S. 113; OJSC Ukrnafta (Ukraine) v. Carpatsky Petroleum Corp. (United States) et al. (ICCA Yearbook 2018), 43 Civil Action H-09-891.

298 Garner, 324.

299 Carlos Esplugues, José Luis Iglesias, and Guillermo Palao, *Application of Foreign Law* (Munich, Germany: european law publishers, 2011), 101.

300 Born, *International Commercial Arbitration (Vol. II)*, 2:1128 Article 3, 5 and 6 of the New York Convention; Article 34, 35 and 36 of the Model Law; and section 69 and 103 of the 1996 English Arbitration Act; the French Code of Civil Procedure, Article 1502.

comity principle enshrined in *the New York Convention* strongly encourages judges to recognize and enforce foreign arbitral award.[301]

Sometimes, a foreign court has also provided legal grounds for its decision. For instance, foreign courts have applied standards roughly comparable to American constitutional standards in similar circumstances. In the same manner, US courts have also followed foreign court decisions. Former Justice Sandra Day O'Conor commented that:

> Although international law and the law of other nations are rarely binding upon our decisions in U.S courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. This is sometimes called "transjudicialism.[302]

In *Harvard College (plaintiff) v. Canada (Commissioner of Patents) (defendant), [2002] 4 SCR 45, the Supreme Court of Canada,* the Supreme Court followed the decision of the foreign court, which was the United States, in a suit involving the patenting of an animal used in a laboratory. This case illustrates the application of foreign court decisions from comparable jurisdictions.[303] Harvard College had created a genetically modified mouse, known as the "oncomous." The invention was particularly susceptible to developing cancer, and thus ideal for oncology research. The Plaintiff requested a patent for both the procedure of the creation and also the mouse itself.[304] The oncomouse patenting was rejected by the Commissioner of Patents. The Plaintiff brought the lawsuit against the defendant and this case was later brought to the Supreme Court of Canada. However, the patenting of the oncomouse was finally granted.[305] Judge Binnie advised that judges should follow similar results from comparable jurisdictions. In this case, the comparable jurisdiction, the US courts, resolved the

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[301] Aloe Vera of America, Inc (US) v. Asianic Food(S) Pte Ltd (Singapore) and Another (ICCA Yearbook 2007), XXXII Suit No. OS 762/2004, RA 327/2005 (Supreme Court of Singapore, High Court 2006).
[302] Myra J. Tawfik, "No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law," *Queen's Law Journal* 32, no. 2 (2007 2006): 578, https://heinonline.org/HOL/P?h=hein.journals/queen32&i=583.
[303] Harvard College v. Canada (Commissioner of Patents), [2002] 4 SCR 45 (the Supreme Court of Canada 2002).
[304] *Ibid.*
[305] Ai Randy, "CanLII Connects," *CanLII Connects*, May 4, 2015, http://canliiconnects.org.

meaning of "invention" in that it was broad enough to include the oncomouse. The judge felt that the Canadian courts should arrive at "similar results."

> The appellant commissioner's principal argument is that to allow the oncomouse patent would be to "expand" the proper scope of *the Patent Act*…but the opposite conclusion reached in so many countries with comparable legislation suggests the contrary. In those jurisdictions, patents for the oncomouse have been issued without any need for legislative amendment, including the United States where the language of our definition of "invention" originated.[306]

Furthermore, *the New York Convention* regarding the recognition and enforcement of foreign arbitral awards has played a major role to enhance the enforceability of a foreign arbitral award. Drafting the *Model Law* was among many efforts by the UNCITRAL to achieve two targets. First, to provide the uniform legal framework for international arbitration practice. Second, to clarify and provide support to *the New York Convention*.[307] By the virtue of *the New York Convention*, the enforcement of the foreign arbitral award is more convenient than the enforcement of foreign judgement on the civil and commercial matters.[308]

Hilton (plaintiff) v. Guyot (defendant), a U.S. Supreme Court case of 1895, shows an illustrative example of two courts argued on the reciprocity among their countries to recognize the foreign court judgement. The plaintiffs sued the defendants in a French court under a contract claim.[309] The defendants alleged fraud by the plaintiffs and sought an injunction from bringing suit, but the court would not admit the evidence and granted a directed verdict for the plaintiff. The court judgment was affirmed by a French Appeal Court. The defendants later sought a review in the United States.[310] The U.S. Supreme Court announced that comity was reciprocal. However, since France did not recognize the judgment from the U.S., the court would not try such judgments anew; the French judgements would be given the same treatment. Thus, the Supreme Court remanded the case for a new

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306 Tawfik, "No Longer Living in Splendid Isolation," 588.
307 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 1160.
308 *Ibid.*
309 Hilton v. Guyot, 159 U.S. 113.
310 *Ibid.*

trial, because comity was not afforded to foreign judgments when the country did not reciprocate the comity.[311]

During the drafting process of the *Model Law*, the Czechoslovakia delegation suggested that when two countries have a reciprocal agreement, they should recognize arbitral awards. They commented that "…the arbitral award made in a country other than the country where the recognition or enforcement (the secondary jurisdiction) is sought may be recognized and enforced if reciprocal treatment is assured." [312] Upon receipt of the arbitral award at the place of arbitration, the party may seek the recognition and enforcement of an arbitral award in other model law jurisdictions, if there is reciprocal treatment among the parties. The reciprocal treatment or reciprocity was discussed in the preparatory work of the *Model Law*.

In *Swiss Singapore Overseas Enterprises Pvt. Ltd (claimant) v. M/V African Trader (defendant) (nationality not indicated)*, the claimant chartered the defendant for carrying Gabonese hard wood from Gabon to India.[313] The Fixture Note enumerates certain terms of the charter and then states: "other terms as per GENCON Charter Party Revised 1994".[314] Clause 19(a) provides that the charter party shall be governed by and interpreted under English law. The article refers the disputes to arbitration in London[...]The Fixture Note itself provided for "Durban Arbitration and English Law to apply." [315] In 2004, Swiss Singapore (the claimant) commenced an action in India seeking certain payments and the arrests of the M/V African Trader (the defendant.) Arrest was granted and subsequently lifted upon the posting of security.[316]

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311 *Ibid.*

312 Analytical compilation of comments by governments and international organizations on the draft text of a model law on international commercial arbitration "Report of the Secretary General, A/CN.9/263," 1985, 51.

313 Swiss Singapore Overseas Enterprises Pvt. Ltd v. M/V African Trader (High Court, Gujarat February 7, 2005).

314 GENCON 1994 is a standard voyage charter party. It is a general-purpose agreement for the services of a ship in exchange for freight and can be used in a variety of trades. "Bimco," Bimco Contracts, July 24, 2020, https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-1994#.

315 Swiss Singapore Overseas Enterprises Pvt. Ltd v. M/V African Trader.

316 *Ibid.*

The High Court of Gujarat rejected the defendant's application to refer the dispute to arbitration in Durban. The court first dismissed the claim that the defendant accepted the jurisdiction of the court by furnishing security to have the arrest lifted, holding that the mere furnishing of security does not amount to submission to court jurisdiction.[317] The court then held that any award rendered in Durban between the parties could not be recognized in India under Sect.44 of *the Indian Arbitration Act 1996.* Sect.44 mirrors Article 1 of *the 1958 New York Convention*. Durban, South Africa was not a reciprocating contracting state to *the New York Convention,* because the Indian central government did not issue any notification in this regard. As an award made in Durban could not be recognized in India, "there was no justification in driving the parties to such an arbitration." [318] There is no reciprocity under the convention between those two countries.[319]

The principle of comity encourages the international interpretation of the *Model Law*. The court may recognize that *the New York Convention* and the *Model Law* were created to provide a harmonious legal framework for international commercial arbitration, and ascertain the enforceability of foreign arbitral awards. In addition, international comity refers to various subjects as the choice of law rule to the reciprocity and diplomacy.[320] International comity can authorize the courts to enforce foreign judgements and ascertain a continuation of court proceedings. The notion refers to a reciprocity among countries to enforce the court judgment in the light of the international conventions and treaties which they are party to. After the enactment of *the New York Convention*, the contracting states have had a firm legal basis for the enforcement of foreign arbitral awards, and the Convention has made international arbitration proceedings reliable and predictable for the parties.

317 *Ibid.*
318 *Ibid.*
319 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2010)*, 35:398.
320 Paul, "The Transformation of International Comity," 20.

3.4. Summary

The international approach consists of three grounds, Article 2A, international interpretation practice, and the principle of comity. Article 2A is an overriding aspect guiding the court to the international interpretation. One view is the incorporation of Article 2A encourages courts to interpret the *Model Law* with international harmonization in mind, which always takes account of the *Model Law*'s international origin and the need to promote uniformity in its application.[321] The principle of good faith ascertains the equitable and just conduct of the judicial interpretation. The international approach calls on judges to take recourse to the general principles in which the law is based when faced with the difficult questions of interpretation.

Second, the international interpretation practice contains two inherent notions, judicial precedent and the transnational interpretive rule. The doctrine of precedent is an application of previous court decisions which can be used for the courts' interpretation. The transnational interpretive rule is a salient notion of the international methodology. Judges may use these interpretive rules embedded in the international convention and treaties, such as *the VCLT* and *the CISG*. Article 31 and 32 of *the VCLT* provide useful grounds for resolving the ambiguous, obscure, and absurd texts of treaties (or assertively the *Model Law*) and resort to the *travaux préparatoires.* Article 33 concerns the authentic language of treaties. Finally, the principle of comity can encourage the international interpretation of the *Model Law,* which is the deference to foreign laws and courts, particularly in comparable jurisdictions or with the jurisdiction which has the comparable legislation. The action to defer to judicial judgments of the comparable jurisdiction is called to as transjudicialism.[322] Moreover, *the New York Convention* urges judges to respect the reciprocity of the contracting parties and the objective and purpose of the convention.

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[321] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 261.

[322] Harvard College v. Canada (Commissioner of Patents), [2002] 4 SCR 45.

4. Examination of the two approaches

The discussion so far has shown that there are two competing methods concerning how judges should interpret the *Model Law*. The national interpretation promotes the strategy for interpreting the *Model Law* provisions to allow local variations. The international interpretation, in contrast, advocates the approach for interpreting the *Model Law* to achieve a harmonized legal framework for dispute settlement in international commercial relations. Each side justifies itself on different grounds. This section examines the grounds of the two approaches to establish that the international approach is relevant for Lao judges.

Considering scholarly writings, court decisions and the international trends, the international approach has gained support from legal experts. Also, the courts in various jurisdictions have frequently ruled in favor of the arbitration of international commerce.[323] The opposite side is the national interpretive approach reflected by municipal law, principles, and the particular rule of interpretation. As Arthur Rossett mentioned, "if one focusses too hard on the unity of the text, one is quite likely to lose sight of the disparity of results that is produced when that text is applied in different systems."[324] This statement means that the local law and setting are different in many jurisdictions. Uniform law may be good for international contexts, but it may affect local rules, customs, and traditions of a particular society. The territorial school of thought claimed that arbitration is within the legal ordering of a national law of the state.[325] Arbitration itself also needs the power of state law to give effect to the arbitration proceedings. The radical deviation from the state's control may bring about arbitrary and unlawful impacts to the dispute resolution of the country.

With the interpretation of the *Model Law*, the Lao People's Court may have to choose one interpretation among the two approaches for its adjudication. The national approach justifies local

[323] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–50; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614; Scherk v. Alberto-Culver Co., 417 U.S. 506, 417 U.S. 506.

[324] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 262.

[325] Paulsson, "Arbitration in Three Dimensions."

variations based on the recognized divergence of municipal law and state sovereignty. The approach reflected fundamental matters of divergence of municipal law and state sovereignty. As mentioned previously, the divergence of municipal law is manifest when there exists the divergence of laws, rules and court practices. This method advocates a restrictive and narrow interpretation of the *Model Law* in support of the state court. Some scholars' assertions reveals that Western powers has influenced international public law and the international legal order. The *Model Law* is part international legal order. The imbalance of the powers may affect state sovereignty. For example, a legal rule and mandatory rule of the state. The legal framework may be unfair and unequitable to a domestic party; the host state may be vulnerable to the *Model Law*.[326] Furthermore, the international uniformity of the application of the *Model Law* may only be consistent and efficient in certain jurisdictions which are well prepared for its adoption.

The national approach proponents are worried and skeptical about those negative impacts. They require the balance of the interpretation methodologies. The court may be unfamiliar with the foreign rule which many international scholars consider as a harmonious or uniform approach. Domestic parties should be protected against the influence of stronger foreign parties if Laos is to adopt the *Model Law*. The judges should not ignore these issues and must try to balance between these two approaches, the national and international approach. For example, the harmonious interpretation indicates the conflict between party autonomy, on the one hand, and the protection against arbitrary behavior, on the other hand. This statement demands the maintenance of public order by interpreting the local standards, while also considering the international interpretation.[327] The international approach proponents advocates the interpretation for a harmonized legal framework on the grounds of Article 2A, the international interpretive practice, and the notion of international comity. Article 2A is the essential ground for the international approach. The article persuades judges to consider the international character and uniform application of the *Model Law*.

[326] Chan, *State Sovereignty and International Legal Order*, 2:13.
[327] *Ibid.*

Other issues concerning Article 2A are the principle of good faith to ensure fairness and justice of arbitral proceedings and if the law is silent, judges may apply the general principles. The Austrian and Spanish civil codes enable the court to refer to "the principles of natural law" and "the general principles of law," while the Egyptian court can take recourse first to custom and the principle of Moslem law.[328] Second, international interpretation practice includes the two notions of judicial precedent and transnational interpretive rules. Judicial precedent is essential for court interpretation. For example, in *PT Asuransi Jasa Indonesia (Persero)*'s case, the Supreme Court of Singapore ruled that "although the concept of public policy of the state is not defined in the *[Singapore International Arbitration] Act*[329] or the *Model Law*, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope." [330] In other words, the judge must apply a narrow scope of public policy, known as international public policy. The transnational interpretive rule is the overriding tool for judicial interpretation. As suggested by Frédéric Bachand, the court may rely on *the VCLT* and *the CISG* when there is no global consensus.[331] The legislative history of the *Model Law* may also be applicable. Finally, the principle of comity is the deference to foreign laws and courts, and the strong presumption of the recognition of foreign arbitral awards. In *Harvard College's* case, the Canadian court arrived at "similar legal results" with the U.S court affirming that the meaning of "invention" was broad enough to include the oncomouse and the Canadian court upheld the patenting of animals in the light of the US court ruling.[332] In case that there is a reciprocity of two jurisdictions, courts will recognize and enforce other nation judgements. In the same manner, *the New York Convention* has given arbitration an advantage over court litigation and played a crucial role to ascertain the enforceability of a foreign arbitral award. Courts should not ignore this responsibility and

[328] Lorenz, "General Principles of Law," 1; Kotuby and Sobota, *General Principles of Law and International Due Process* (Book review by The European Journal of International Law Vol. 30 no. 2).
[329] Singapore International Arbitration Act.
[330] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.
[331] Bachand Frédéric, *The UNCITRAL Model Law after Twenty-Five Years—Global Perspectives on International Commercial Arbitration* (JurisNet, LLC, 2013), 239–50.
[332] Nicola M Shiels, "Canadian Appeals Court Permits Harvard Mouse Patent: Is the Intellectual Property Provision in the North American Free Trade Agreement Superfluous," *Law and Business Review of America* 7, no. 3 (2001): 37.

the obligation to the international convention.[333] Recently, courts have placed greater weight on international sources as persuasive authorities and sometimes, used the foreign judgement as the legal basis for their judicial discretion.[334]

In summary, the Lao court can apply the international approach in light of the international harmonization of the *Model Law.* The reasons are because many scholars view the international approach as a harmonious approach, which may bring the better result for judicial interpretation and this approach is supported by the UNCITRAL secretariat for the court interpretation of the *Model Law*.[335] The approach is close to the combination of the modern statutory interpretation and the teleological approach.[336] The judge examines words and terms of the law in their entire context and looks at the objectives and purposes of the *Model Law*. The judge also takes into consideration the national circumstances and contemporary social needs. Furthermore, the judge may apply the transnational interpretive rules. This recourse enables judges to look for a solution from the legislative history, for example, the official discussions and committee reports of *the Model Law.*

[333] In the court adjudication with regard to a foreign law, judges should know whether the foreign law is applicable. It falls under the Roman procedural principle of *iura novit curia*, which is the court knows the laws. Accordingly, the parties need only to present the facts of their cases and could then assume that the court was aware of the appropriate foreign norms to apply to their dispute. The principle is opposite with another doctrine of *impossiblilium nulla est* obligation, since the court usually does not know the content of foreign law, it cannot have an obligation to apply foreign norms to a dispute—at least not without some external assistance. Esplugues, Iglesias, and Palao, *Application of Foreign Law*, 104.

[334] Tawfik, "No Longer Living in Splendid Isolation," 573.

[335] Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264; "United Nations General Assembly Resolution 40/72."

[336] Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," 27; Germain, "Approaches to Statutory Interpretation and Legislative History in France," 195–206.

Chapter III: Rules to Set Aside the Arbitral Award

The dissatisfied party may challenge the arbitral award before a domestic court in the state where the award was rendered. The party can ask the court to set aside the award. The relevant provisions on this issue in Laos are Article 34 of the *Model Law* and Article 47 of the *LRED*. This chapter first compares these two provisions to identify the differences between the two laws. Then, it discusses how the Lao judges should interpret Article 34 of the *Model Law* when Laos decides to integrate this provision in the future *LRED*. The author argues for the use of the international approach of Article 34 and recommends the reform of the current approach to interpretation. Furthermore, this chapter will provide practical examples of how the courts would interpret three subsections of Article 34 with national and international interpretations. There are three subject matters: the incapacity and invalid arbitration agreements, the scope of arbitration agreements, and public policy. These three issues have been frequently raised before the court in international practice.

1. Analysis of Article 34 of the *Model Law* and Article 47 of the *LRED*

Article 34 of the *Model Law* provides that an application for setting aside the arbitral award is the party's only resort to challenge a tribunal award at the primary jurisdiction.[337] Article 34 lists six grounds for the setting aside application and two more paragraphs on the time limit and suspensions of the setting aside proceedings.[338] To compare Article 34 and Article 47, this section examines the six grounds allowed by Article 34 and compares each cause with Article 47 of the *LRED*.[339]

Paragraph 2 is an essential part of Article 34 which identifies the grounds for setting aside arbitral awards. The grounds of Paragraph 2 parallel the famous text of Article V of *the New York Convention* to "help prevent an international award from falling victim to local particularities of law."

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[337] "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," Art.34; Company X v. Company Y and Shareholder A in company Y, 3379/Civil/2014.
[338] Please see Appendix 3.
[339] *Ibid.,* 2.

[340] Many scholarly writings exclusively examine the conditions provided in Paragraph 2 of Article 34.[341] This research puts more emphasis on Paragraph 2, while Paragraphs 1, 3 and 4 have already displayed the comprehensive contents of this claim. Likewise, Paragraph 2 contains six main conditions, which the court may refer to on the request for the setting aside of the arbitral awards.[342] This chapter will present the specific analysis and the example of national and international interpretations only in three selected subject matters, such as the incapacity and invalid arbitration agreements, the scope of arbitration agreements, and public policy. Other three more issues of Paragraph 2, this chapter will not go on to discuss the example of court interpretations. Those three subject matters include irregularity in arbitration proceedings, the composition of the tribunal, and arbitrability. However, there are still descriptions and explanations on the content of each subject matter in Paragraph 2 of Article 34 of the *Model Law.*

There are three differences between Article 47 of the *LRED* and 34 of the *Model Law.* The *Model Law* has separated the conditions that courts may contemplate after the parties' claim and the ones the court may adjudicate *ex officio.* The *LRED* does not make this distinction and this is the first difference. This difference shows the extent of divergence of the *LRED*'s legal rules and international standards. Lao judges may not be aware of this legal basis in concordance with the international instruments such as *the New York Convention* and the *Model Law.* Those rules of Article 34 are well-established rules of international commercial arbitration. Even if the party does not raise those matters, for example, arbitrability and public policy in his or her petition in the arbitration proceedings, the court still has obligations and duties to examine the matter based on this article. Second, the duration for the plea of the setting aside is varied. The *Model Law* stipulates a period of three months after the receipt of the arbitral award, while the *LRED* allocates thirty days (one month.) Providing a longer time may enable the dissatisfied party to examine the arbitral award and prepare for the setting aside.

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[340] Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 911.

[341] Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (The Netherlands: Kluwer Law and Taxation Publishers, 1990), 186–207.

[342] It requires the dissatisfied party to prove one of four conditions and the last two conditions, the court may consider *ex officio*.

Third, under the *Model Law,* the court may suspend the setting aside proceedings where it finds appropriate to do so, or there is a request by the party to enable the arbitral tribunal to resume the proceedings or take another action. Article 47 of the *LRED* is silent on this point. The *Model Law*, therefore, has clearly provided the powers to the court to supervise the arbitral proceedings and whether to suspend or to resume those proceedings. For example, if there is an irregularity in the arbitration proceedings and requires the arbitral tribunal to reexamine the arbitral award, the court may suspend or resume the arbitration proceedings accordingly.

1.1. Incapacity of parties and invalid arbitration agreements

The purpose of this section is to clarify the differences between incapacity of the parties and invalid arbitration agreements, and show how the court would interpret those subject matters with two different interpretations. The *LRED* and *the Law on Contract and Tort* recognize similar grounds for the capacity of parties to the contract as determined in Article 34(a)(i) of the *Model Law.* In this article, the first ground to set aside an award is a party's incapacity or an invalid arbitration agreement. After checking the international cases as available in the law library of Nagoya University, the researcher discovered that these two conditions have been among the most frequently invoked by parties seeking arbitration according to the ICCA Yearbook from 1995-2010.[343] Article 34(a)(i) whose relevant text reads "a party to the arbitration agreement … was 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 this state…." [344]

This subsection of Paragraph 2 of Article 34 contains two conditions for the court to set aside the arbitral award: (1) incapacity of the parties: a party has no legal capacity to be a party of arbitration because he or she is under-age, a minor, not of sound mind or disqualified by the law, and

[343] Please see Appendix 1. The ICCA Yearbooks from 1985-2010 reveal that the public policy, the incapacity of parties and invalid arbitration agreement, and the scope of arbitration agreements respectively are the subject matters which have been frequently raised by the parties with regard to the court decisions on arbitration, *the New York Convention 1958* and *the Model Law on International Commercial Arbitration*.
[344] *Ibid.,* Art.34.

a party is not authorized to be a party of a civil case or (2) invalid arbitration agreement: an arbitration agreement is not valid, null and void or inoperative.[345] Those two conditions represent two subject matters for the court interpretation. The first subject matter is "a party to the arbitration agreement … was under some incapacity," and the second one is "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 this state.…"

Regarding the first subject matter, the capacity of the parties to enter a contract, the age of majority for parties to enter into a contract, varies from jurisdiction to jurisdiction. The age of majority is one mandatory rule for parties to fulfill a contract according to Lao law. A person will be deemed to have legal capacity when he or she is 18 years old and is not mentally incompetent.[346] The *Singapore Civil Law Act* in 2009 lowered the full contractual capacity from 21 to 18 years old to encourage entrepreneurship among the young.[347] This amendment reflects the approach imposed by the state of Singapore to promote younger parties to engage in commercial contracts.

The second subject matter is invalid arbitration agreements. Under Article 47 of the *LRED,* a party can request the People's Court to set aside an arbitral award if "... the disputing parties did not agree to arbitrate the dispute, or the agreement was canceled..." [348] The word "the agreement" in this article may refer to "the arbitration agreement." Accordingly, if "the arbitration agreement was canceled," the arbitration agreement is null and void, or inoperative, or does not exist; the court will set aside the arbitral award. Article 47 of the *LRED* recognizes the ground of invalid arbitration agreement of Article 34, but there is no mention of the incapacity of the parties. Article 10 of the *Lao Law on Contract and Tort* recognizes the capacity of the party as one essential condition to conclude the contract by the parties. Without the condition to fulfill the contract, the contract would become

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345 Pietro Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," in *UNCITRAL Model Law on International Commercial Arbitration - A Commentary* (Cambridge University Press, 2020), 866; Oak Crest Manor Nursing Home, LLC v. Barba, 2016 Tex. App. LEXIS 12710, 2016 Tex. App. LEXIS 12710 (Court of Appeals of Texas, Third District, Austin 2016).

346 "Lao Law on Contract and Tort, No. 01/NA" (2008), Art.12, https://laoofficialgazette.gov.la.

347 Wee Ling Loo, "Full Contractual Capacity: Use of Age for Conferment of Capacity," *Singapore Journal of Legal Studies*, 2010, 1, https://www.jstor.org/stable/24870501.

348 Lao Law on Resolution of Economic Dispute (2018), Art.47.

invalid, leading to the setting aside of the arbitral award.[349] In summary, the *LRED* and *Law on Contract and Tort* recognize the two grounds on incapacity of parties and invalid arbitration agreements as determined in Article 34(a)(i) of the *Model Law.*

However, the *LRED* does not clearly mention "arbitration agreement." The law just determines the word "agreement." [350] Therefore, on this condition, both laws are moderately different. The *LRED* does not completely designate the same grounds for the setting aside of… as determined in Article 34. In summary, the *LRED* only recognizes the second subject matter of Article34(a)(i) within the scope of Article 47 of the *LRED*.

1.1.1. National interpretation

The question arises on how the Lao courts will apply the phrase of Article 34(a)(i): "the said agreement is not valid under the law to which the parties have subjected it." Suppose this phrase is the target for interpretation. To break it down, there are two smaller subject matters: "the said agreement is not valid" and "under the law to which the parties have subjected it." There are now two more issues for clarification and interpretation of the invalidity and the applicable law.

For example, the Lao court may likely first consider the ordinary meaning of the legal text to find an applicable law (or the meaning of the wording "…under the law to which the parties have subjected it") for both incapacity and invalid arbitration agreements. Later, the true meaning of incapacity and invalid arbitration agreement would be determined with the consideration of the law. The phrase "under the law to which the parties have subjected it" may refer to the *Model Law*, foreign law, or other law of the seat of arbitration. As the nature of a national approach is a restrictive interpretation toward international arbitration, the court may only apply the municipal law and its

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[349] "Lao Law on Contract and Tort, No. 01/NA" (2008), Art.10, https://laoofficialgazette.gov.la. Article 10: Condition of contracts provided that Contract shall fulfill the following conditions:

> Voluntary of the parties; Capacity of the parties; purposes of contract must be precise, exist and legal; A basis of contract must be legal; and, the form of contract must comply with the laws.

[350] Article 47 provides "...The disputing parties did not agree to arbitrate the dispute, or the agreement was repealed."

domestic principles. Judges may not apply international principles, a choice of law rule, or the *travaux préparatoires of* the *Model Law.* In the worst case, judges may not even consider international conventions such as *the VCLT,* which can provide a useful basis for the interpretation of treaties and can be applied to the *Model Law*.[351] Therefore, the result of the interpretation of article 34(a)(i) may vary depending on the analysis and judicial discretion of the national court.

In Laos, the choice of law question would be decided by the Supreme Court as it has the powers to do so. In the clarification and interpretation of the municipal law, the Lao court may rely on Article 12 of *the Law on People's Court* and related domestic legal principles embedded in the law.[352] In its adjudication and interpretation, the Lao People's Courts[353] will consider the information and evidence of the dispute and decide according to the law, judicial principles, and case precedents.[354] Section 10 of *the Lao Constitution* stipulates that the judges must be independent and only apply the law strictly.[355] The judge may not consider foreign precedents, international conventions, or the content of Article 2A of the *Model Law*. Article 374 of the newly established *Lao Civil Code* states that "if the parties have a dispute over the content of a contract, the parties or the court may interpret the meaning of the contract in accordance with the parties' intention or court precedents which do not conflict with the law."[356] With a restrictive court application of the law, Lao judges would analyze the case with regard to "parties' intention or court precedent" and render a decision whether the arbitration agreement is valid or not. These are the approaches the Lao court would apply as an application of the national interpretation.

The Italian court had applied the restrictive approach to interpret the Italian law concerning the capacity of the parties to a sale contract. This case entails the court to rule that the arbitration agreement was invalid because the court did not recognize the oral power of attorney according to

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[351] Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–50.
[352] Lao Law on People's Court (2017), Art.12.
[353] Those competent courts include the People's Zone Court decided as the cassation court or the People's Supreme Court.
[354] *Ibid.*
[355] The constitution of the Lao PDR of 2015, Art.94.
[356] Lao Civil Code, Art.374.

Italian case law. [357] The case was between *Louis Dreyfus Commodities (nationality not indicated/plaintiff) v. Cereal Mangimi s.r.l. (Italy/defendant)*. The parties signed a contract for the sale of French corn and the contract referred to the INCOGRAIN Terms No. 12, containing an arbitration clause. When a dispute arose, the defendant filed a suit against the plaintiff seeking damages for this contract and another contract which did not have the arbitration clause. The court found that both allegations were subject to jurisdiction by the Italian courts. Both the Appeals Court and the Supreme Court upheld the court of first instance's decision.[358]

Pursuant to *the New York Convention* and Article 808 of the CCP,[359] disputes that have not yet arisen may be referred for preliminary and possible decisions to foreign arbitrators. Such process is a so-called foreign arbitration by an arbitration clause concluded in writing "*ad substantiam*" (or essential procedure requirement)[360] and that exactly identifies the future disputes arising out of the main contract. "Agreements derogating from the jurisdiction of state courts must be interpreted restrictively and in case of doubt it must be deemed that those courts have jurisdiction. Hence, a contractual clause in the main contract which derogates from an Italian jurisdiction in favor of a foreign arbitrator does not extend to disputes concerning a related contract." [361]

In this case, there are both issues of Article 34(a)(i): incapacity and invalid arbitration agreement. The Italian court's decision should be aligned with the national approach in which the court interpreted the law restrictively. First, Article 3 of the Italian *Code of Civil Procedure* states that "the validity of the arbitration clause shall be evaluated independently from the underlying contract: nevertheless, the capacity to enter into the contract includes the capacity to agree to the arbitration clause." [362] The representative of the party has no capacity to make the contract in this case. The oral

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[357] Albert Jan Van Den Berg, ed., *ICCA Yearbook Commercial Arbitration (2009)*, vol. 36 (The Netherlands: Kluwer Law International, 2009), 649.
[358] Louis Dreyfus Commodities (nationality not indicated) v. Cereal Mangimi s.r.l. (Italy) (ICCA Yearbook 2009), 36 11529 (Corte di Cassazione [Supreme Court] 2009).
[359] Please see Appendix 5.
[360] "Ad Substantiam - Translation into English - Examples Italian | Reverso Context," Reverso context, January 19, 2021, https://context.reverso.net/translation/italian-english/ad+substantiam.
[361] Van Den Berg, *ICCA Yearbook Commercial Arbitration (2009)*, 36:651.
[362] *Ibid.*, 650.

power of attorney was considered invalid under the Italian law, although it would be considered acceptable and valid in respect of contracts stipulated in France or Great Britain. Those countries do not require the written form for the mandate to conclude the arbitration agreement. However, the Italian Supreme Court observed that a general reference such as the reference to the INCOGRAIN Terms in the contract between the parties does not suffice for the written form requirement according to the Italian law.[363] Also, the court held that the state court had jurisdiction over both claims and the arbitration clause was invalid under the written form requirement by the Italian law and Article 2 of *the New York Convention*. The court admitted that this was an extremely difficult case in which the court had to decide on the arbitration clause contained in a separate contract.[364]

In the previous case the Italian courts applied the restrictive interpretation and found that the arbitration agreement was invalid because, *inter alia*, the representative of the parties lacked legal capacity. In the following case, the lower court decided that the party's attorney had the legal capacity to conclude the contract and the arbitration agreement was valid; however, the Turkish Supreme Court later overruled in favor of the arbitration agreement. The Turkish courts had interpreted the same law differently. As already mentioned, this case shows the example of the national interpretation of a municipal law. In *Buyer (nationality not indicated/plaintiff) v. Seller (nationality not indicated/defendant,)* the Turkish Supreme Court overruled the lower court's decision, on the ground that the Turkish Code of Obligation determines that specific authorization must be given to attorneys for concluding an arbitration agreement.[365] The court provided further reasons including:

> Pursuant to Article 4 of the International Arbitration Act, "an arbitration agreement shall be in writing." Article 388(3) of the Code of Obligations provides that "an attorney shall not file a legal action, make a settlement or arbitrate without special authorization.[366]

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[363] *Ibid.*

[364] *Ibid.*

[365] Buyer (nationality not indicated) v. Seller (nationality not indicated) (ICCA Yearbook 2009), 36 No.E.2007/380 K. 2007/514 (Yargitay [Supreme Court], 19th Civil Chamber 2007).

[366] *Ibid.,* 829.

Judges deemed inappropriate to make a ruling without reviewing the defendant's objection as to the absence of the authorization of the claimant's attorney, who is not involved in the dispute but who has signed the agreement including the arbitration clause, to conclude an arbitration agreement.

With those reasonings, the court decided to overrule the decision by the court of first instance to the defendant's benefit. The court decided that the arbitration agreement, therefore, was invalid and refused the enforcement of the arbitral award.[367] This is another case where the court may interpret the law restrictively and may transpose those same approaches to the interpretation of Article 34 of the *Model Law* which may affect the outcome of arbitration proceedings.[368]

1.1.2. International interpretation

The international approach, on the other hand, deals with Article 34 with a narrow scope of interpretation in favor of a pro-arbitration attitude with the consideration of the context and the teleological method, for example, the target subject matter is an "invalid arbitration agreement." For invalid arbitration agreement, the judge should interpret this phrase expansively in favor of international arbitration. The judge may consider Article 2A and various tools of interpretation. For example, the transnational interpretive rule suggests that the court consider a principle of good faith, the context with the whole law, and its objective and purpose. Article 31 and 32 of *the VCLT* expressly designate on this rule.[369] Furthermore, if the interpretation problems are not resolved, the judge may apply the exegetic and teleological methods.[370] This method suggests the consideration of the legislative history of the *Model Law* to find the initial meaning of the invalid arbitration agreement. Also, the judge may look at the purpose of the *Model Law.*[371]

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[367] Van Den Berg, *ICCA Yearbook Commercial Arbitration (2009)*, 36:829.
[368] Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," 886.
[369] Driedger, "Statutes: The Mischievous Literal Golden Rule," 780; "Vienna Convention on Law of Treaties (VCLT)," Art.31.
[370] Germain, "Approaches to Statutory Interpretation and Legislative History in France," 197.
[371] *Ibid.*

To determine the law applicable to the incapacity of parties and invalid arbitration agreements, the *travaux préparatoires of* the *Model Law* mentioned that the contents of Article 34 had inherited the provisions of Article V(1)(a) of *the New York Convention*. There was a debate where, who? about whether to retain the similar wording of such an article. The delegation of the Hague Conference proposed that "it did not seem right that the validity of an arbitration agreement should be governed by the law of the country of arbitration since the place of arbitration was not necessarily connected with the main contract or the parties to it." He proposed deleting the words "under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State." The proposal was endorsed by the delegates of Australia and France, but rejected by Finland, Sweden, and the US.[372] The Commission decided to amend the first part of the subparagraph and retained the wording of the second part contained in the Working Group draft. The Commission Report noted that the amended draft had the identity with the wording of *the New York Convention*. The new draft also recognized party autonomy and used the place of arbitration as a secondary criterion. This wording provided the parties with a degree of certainty which was lacking under the formula proposed by the Hague Conference.[373] In summary, the *travaux préparatoires of* the *Model Law* suggested that the applicable law to determine the incapacity of parties and invalid arbitration agreements is the law of the seat of arbitration.

This following case shows the international interpretation and concerns the issue of the capacity of a person who signs a contract (the signatory). Reference to a national law was not suitable for examination of this question. Judges examined this question with a material rule based on the common intention of the parties, good faith and on the legitimate belief in the power of the signatory.[374] This case is between *Société d' etudes et représentations navales et industrieslles (Soerni) (France/claimant) et al. v. Air Sea Broker Limited (ASB) (Switzerland, defendant)*. Soerni (the claimant) entered into a contract with Air Sea Broker Limited (ASB) (the defendant) for the transport

[372] Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, 190–91.
[373] *Ibid.*
[374] Van Den Berg, *ICCA Yearbook Commercial Arbitration (2010)*, 35:356.

of a boat between two ports in Gabon. The parties signed a Hold Harmless Letter which referred all disputes to arbitration as provided for the CLS bill of lading. The defendant sent a transport contract to the plaintiff's broker which referred to the CONLINEBILL Liner bill of lading.[375]

When the boat sunk, a dispute arose between the parties; arbitration proceedings began in London. In 2006, the arbitral tribunal found that it had jurisdiction under the arbitration clause in the CLS bill of lading, which it deemed to be applicable; on the merits, it ordered Soerni (the claimant) to indemnify ASB (the defendant). ASB sought and obtained from the President of the Paris Court of Appeal, in France, an enforcement order for the London award. In turn, the claimant launched criminal law proceedings, alleging forgery and use of a forged document and claiming civil law damages.[376]

With regard to the incapacity of the parties, the French Supreme Court denied the allegation of the claimant that the court of appeal erred in finding that Y, the junior employee who signed the Hold Harmless Letter, had the power to bind Soerni, because during the negotiations of the contract, he was the only person with whom ASB had been in contact. The claimant argued that the court of appeal should have examined and denied Y's capacity under French law, which applied because the claimant was a French company.[377]

The Supreme Court disagreed, arguing that the question of capacity could not be examined by reference to national laws (the French law.) Instead, a substantive rule applied that stems "from the principle of the validity of the arbitration agreement based on the common intention of the parties, on good faith, and on the legitimate belief in the power of the clause's signatory to carry out an act of ordinary administration binding the company." The French court of appeal correctly found that the defendant was not informed that Y lacked the capacity to bind the claimant to the arbitration clause. Y was the only claimant's employee that the defendant had contact with.[378] The Supreme Court added that the claimant tacitly ratified Y's acts by asking the defendant for an estimate

375 Société d' etudes et représentations navales et industrieslles–Soerni (France) et al. v. Air Sea Broker Limited– ASB (Switzerland), 956 (Cour de Cassation [Supreme Court] 2009).
376 *Ibid.,* 357.
377 *Ibid.*
378 *Ibid.*

for supplementary insurance. The claimant's intention to arbitrate clearly resulted from the reference to arbitration in the Hold Harmless Letter. Finally, the court also dismissed other contentions of the claimant. The decision by the French court decision supported the international arbitration. The court had relied on the material rule based on the common intention of the parties, good faith and on the legitimate belief in the power of the signatory.[379]

In *Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated)*, a German court applied the more-favorable-right principle which allowed for the application of formal requirements of national law that are less strict than the *New York Convention*'s provision. The court announced that an appellate award of the International Cotton Association (ICA) was enforceable.[380] The court held that while the arbitration agreement was not "in writing" under *the New York Convention*, it was valid under German law, which applied pursuant to the more-favorable-right rule in the convention. Article V(1)(a) of the convention determines that if parties do not specify an applicable law, the law of the country of rendition of the arbitral award would govern an arbitration agreement. However, the Supreme Court explicitly ruled that the German law, which was not the law of the country of rendition of the award, would apply.[381] The decision was in favor of international arbitration. Besides, there was no procedural defect or violation of due process (Article V(1)(d)) on the issue that defendant had to choose its arbitrator from an ICA list. The ICA appointment system did not violate the fundamental right to appoint one's own arbitrator. The defendant's acceptance of the ICA arbitration illustrated that the parties also agreed to the appointment system.[382] This judgement indicated on how the court determined the invalidity of an arbitration agreement with preference toward international arbitration.

The parties in the German case had entered into a contract for the sale and purchase of a significant quantity of cotton. The claimant had made a phone call and then gave the defendant the

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379 Société d' etudes et représentations navales et industrieslles–Soerni (France) et al. v. Air Sea Broker Limited– ASB (Switzerland), 956 at 356.

380 Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated), 26 Sch H03/09 (Oberlandesgericht [Court of Appeal], Frankfurt 2009).

381 *Ibid.*

382 *Ibid.*

signed purchase contract. The purchasing contract stated that if not returned within fifteen days, the contract would be considered valid. The defendant later told the claimant that as no contract had been signed between the parties, it would not supply any cotton. The arbitration took place and concluded with an arbitral award in the claimant's benefit.[383] The Frankfurt Court of Appeal declared the award enforceable. The court reasoned at the outset that while there was no "agreement in writing" as provided by Article V(1)(a) of *the New York Convention,* this was irrelevant as the court applied the German arbitration law (Section. 1031)[384] which was less strict than the Convention.[385] The Federal Supreme Court had indicated that the more-favorable-right principle should be given a broad, recognition-friendly reading.[386] The court of appeal shared this broad interpretation, stressing that a different approach would be at odds with the purpose of *the New York Convention*, which is to make the recognition of arbitral awards and arbitration agreements easier. The court concluded that recognition of an award or arbitration agreements should be denied under these contentions if it is allowed under domestic law.[387] The German court had applied the international interpretation.

Frédéric Bachand asserted that the international approach encourages courts to seek out a global consensus to the interpretation of the *Model Law.*[388] These two cases reflect the broad interpretation by the courts in international practice. Furthermore, the court may find the basis for interpretation from related materials, such as the preparatory work of the *Model Law, the Vienna Convention, the New York Convention*, and case law from the international database. This basis may be the ground for the Lao People's Supreme Court and the competent court's judges to consider how they would interpret Article 34(a)(i) of the *Model Law.*

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383 Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated), 26 Sch H03/09 at 378.
384 Please see further details of this section of the German arbitration law in Appendix 5.
385 Klaus Peter Berger, "Zivilprozessordnung - German Code of Civil Procedure," accessed January 12, 2021, https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/.
386 Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated), 26 Sch H03/09 at 378.
387 *Ibid.*
388 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–50.

1.2. Irregularities in arbitration proceedings

Article 34(a)(ii) stipulates the second ground to set aside the award. This ground provides two possible reasons to challenge the arbitral award: (1) the failure to notify a party about the appointment of arbitrators and the arbitral proceedings, and (2) a party is not given an opportunity to present one's case, though one is informed about such an appointment and an arbitral proceeding.[389] The text refers to the case where "…the party making the application was not given a proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case…." [390] The *LRED* determines about the notice and the information by the CEDR on the petition for resolution of an economic dispute. Also, the parties are given an opportunity to join in the arbitration proceedings, select the arbitrators, and present evidence and arguments in the resolution of the dispute, as Article 20 sets out that "within five days from the date of receipt of the claim, the CEDR or OEDR will examine the request and ask the parties to select the type of dispute resolution.[391]

One party may plead that he or she did not have an opportunity to present the case. One may wonder if the party to arbitration has received the experts' report and never expressed his intention to object to the report. In the arbitration proceedings, that party later claims that he is unable to present his case. This instance may ask judges whether it falls under the condition of one party is "unable to present his case" under Article 34(a)(ii) of the *Model Law.* A Hong Kong High Court decision, *Heibei Import & Export Corp v. Polytek Engineering Co Ltd (9 February 1999)*, shows one interpretation, emphasizing the opportunity to deal with an expert report. The respondent in these setting aside proceedings claimed that he was unable to present his case because he was not invited to attend the inspection of the equipment in dispute by the expert and the arbitral tribunal.[392] The respondent claimed that was in violation of the right to present one's case and also constituted a departure from

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389 Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," 872.

390 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," Art.34.

391 Please see Article 20 of the LRED in Appendix 2.

392 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 394.

natural justice and apparent bias on the part of the arbitral tribunal. The court observed that the respondent was afterward given a copy of the experts' report and an opportunity to deal with it. However, the respondent had never expressed his intention to object to the report, to call any other people or experts as witnesses, to question the experts, or to arrange a re-inspection. Finally, the Hong Kong court ruled that the respondent's right to present its case was therefore not violated.[393]

1.3. Scope of arbitration agreements

The third ground to set aside an award is if the award exceeds the scope of an arbitration agreement *(ultra petita)*. Also, if the award contains the decision which is less than the parties' submission to arbitration (*infra petita*).[394] In theory, the arbitral tribunal contemplates only the matter agreed upon by both parties. A wrongful act of the tribunal beyond the scope of arbitration agreements would violate this condition, and the court may set aside the arbitral award.[395] Article 34, Paragraph (2)(a)(iii), therefore, provides that an award that deals with a dispute outside the scope of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement will be set aside. 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 beyond the scope of the arbitration agreement will be set aside.[396]

As far as the two interpretive approaches of the *Model Law* is concerned, the court may opt for a narrow or broad interpretation of the arbitration clause according to case law and international practices. The narrow interpretation reflects the restrictive approach of the court; for example, the court may only recognize the wording "the dispute arises under the contract…" which is narrower than the wording "arising out of the contract…." However, recognizing the latter would enlarge the scope

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393 *Ibid.*

394 Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," 879.

395 Condition 6 of Article 47 of the *LRED* determines a similar provision with paragraph (2)(b)(iii) of *the Model Law*, it provides that [the court will set aside the arbitral award if] "the award exceeded or was less than the claim of the disputing parties."

396 Please see Appendix 3.

of arbitration agreements in favor of arbitration.[397] On the international level, courts have supported this broad interpretation of the scope of arbitration agreements.[398] This approach is an expansive approach with preference to international commercial arbitration.

1.3.1. National interpretation

The clause "only ...decisions [] on matters not submitted to arbitration may be set aside" can be extracted for judicial interpretation. This phrase conveys the meaning that only the part that was not agreed upon by the parties in arbitration agreements may be set aside. This wording is quite comprehensive; it is only the scope of submission that is subject to interpretation. Two grounds of the national interpretation, the divergence of municipal law and state sovereignty, can further contribute to inconsistent court practices.

The phrase "only ...decisions on matters not submitted to arbitration may be set aside" refers to the arbitral award that the tribunal decides beyond the scope of the arbitration agreement. Iren Welser and Susane Molitoris wrote that from Austrian case law, there are five situations when the arbitral tribunal may decide on the dispute beyond or less than the scope of an arbitration agreement. The first situation concerns the disputes on contractual obligations. This situation is when the applicant in arbitral proceedings bases his claim on rights conferred to him by the contract which also contains the arbitration agreement.[399] Second, the arbitral tribunal may decide beyond or less than the arbitration agreement when the disputes concern non-contractual obligations. This situation is when a claim is based on the non-contractual obligations. For example, the party bases his claim on tort and the action is connected to form the contractual obligations.[400] The next situation is when the dispute concerns supplementary agreements. The Austrian Supreme Court distinguishes between agreements

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397 Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF (Court of Appeal (Civil Division) 2007).

398 Irene Welser and Susanne Molitoris, "Wording and Interpretation of Arbitration Clauses," in *Austrian Yearbook on International Arbitration*, vol. 17, 2012, 19.

399 Welser and Molitoris, 22.

400 *Ibid.*, 23.

that have been anticipated in the original contract and those that have not (supplementary agreements and additional contracts).[401] The fourth situation is when the modification of the contract arises. questions as to the scope of an arbitration clause arise when the contract includes the arbitration clause which is later adapted or modified. The arbitral tribunal may decide beyond the scope of the arbitration agreement because those modification of the contract.[402]

There are few cases showing the scenario in which the court applied only the national interpretation from international practice.[403] Therefore, this dissertation looks at the national approach aspect of the following case, though it also shows an international interpretation. In a ruling decided by an Italian court between *Heraeus Kulzer GmbH (Germany/plaintiff) v. Dellatorre Vera SpA (Italy/defendant)*, the court of appeal decided in favor of the state court; however, it was later overruled by the Supreme Court. The approach applied by the court of appeal reflects the national interpretation of the law. The court may have applied the case law stating that the derogation of the state court should be interpreted restrictively.[404]As mentioned above, in the *Louis Dreyfus Commodities* case, the court provided the reasoning that:[405]

> Agreements derogating from the jurisdiction of state courts must be interpreted restrictively and in case of doubt it must be deemed that those courts have jurisdiction. Hence, a contractual clause in the main contract which derogates from Italian jurisdiction in favor of a foreign arbitrator does not extend to disputes concerning related contract.[406]

In this case, Kulzer (the plaintiff) and Dellatorre (the defendant) entered into a distributorship agreement of dental products in Italy. The contract included an agreement for arbitration outside Italy. The dispute arose when the products were found defective. The owner of an orthodontic laboratory (the buyer) commenced an action in the court of first instance against the

401 *Ibid.*, 25.
402 *Ibid.*, 27.
403 Please see Appendix 1.
404 Heraeus Kulzer GmbH (Germany) v. Dellatorre Vera SpA (Italy), 33 ICCA Yearbook 2008 (Corte di Cassazione [Supreme Court] 2007).
405 Louis Dreyfus Commodities (nationality not indicated) v. Cereal Mangimi s.r.l. (Italy) (ICCA Yearbook 2009), 36 11529 at 649.
406 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2009)*, 36:651.

distributor company of the plaintiff (Merident.) Merident joined the defendant, from which it had bought the product in the proceedings. The defendant, in turn, joined the plaintiff (the product's manufacturer), seeking to be held free of any sum it may be directed to pay (in a related case.)[407]

The plaintiff objected to the jurisdiction of the Italian court based on the arbitration agreement. The court of first instance ruled in the plaintiff's favor in respect of its relationship with the defendant. The Court of Appeal reversed the lower court's decision holding that the Italian courts had jurisdiction. However, the Supreme Court again granted the plaintiff's appeal.[408]

The Court of Appeal found that the arbitration clause in the distributorship contract did not apply because the dispute in the court of first instance was between parties who had no connection to the parties to the arbitration clause. The Supreme Court disagreed, providing reasons that the defendant joined the plaintiff in the proceedings on the basis of a distributorship contract containing the arbitration clause and filed its appeal exclusively against the plaintiff. Therefore, the examination of whether the defendant's claim against the plaintiff fell under the scope of the arbitration agreement was necessary to the examination of the claim itself by the Court of Appeal.[409]

The Court of Appeal held on this point that the arbitration agreement in the distributorship contracts between the parties could not extend the derogation from the jurisdiction of the Italian court. The referral to arbitration of the disputes only indirectly connected to that contract. Though loosely falling within the scope of the parties' relations, the dispute concerned separate relationships.[410] These reasoning came from the Court of Appeal but they were later overruled by the Supreme Court.

The restrictive interpretation applied by the Italian courts reflected the willingness to protect its local parties and state sovereignty. This utterance restates that judges or courts using the national approach would likely apply their municipal and case law to the interpretation of the *Model Law*. The

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407 *Ibid.,* 596.
408 *Ibid.*
409 *Ibid.*
410 *Ibid.,* 599.

national approach proponent would apply the narrow interpretation of the scope of the arbitration agreement in Article 34(2)(a)(iii).

1.3.2. International interpretation

The phrase "only ... decisions on matters not submitted to arbitration may be set aside" can become a disputed text for interpretation. Similarly, with the tone of this wording, international judges would prefer a broad interpretation of the scope of arbitration agreements. Judges interpret this provision with a pro-arbitration attitude and apply an expansive or extensive interpretation.[411] The judge would tend to enable the part of the award which falls under the scope of the arbitration agreement to be implemented and enforced. Lord Hoffmann reasoned in the following *Yuri Privalov*'s case that when businessmen enter into an agreement, they are assumed to have done so to achieve some rational commercial purpose. The parties entered into an arbitration agreement to have the disputes decided by arbitrators, they must be deemed to have expressed his clear intention. The parties' intention is not likely to have meant that only some of the question arising out of their relationship are to be submitted to arbitration and others are to be decided by national courts.[412]

Irene Welser and Susanne Molitoris wrote that besides the international tendency favoring the broad interpretation of arbitration agreements, the prevailing opinion in Germany, as well as Switzerland, facilitates a wide interpretation of broadly-worded arbitration clauses that creates an all-encompassing jurisdiction of the arbitration tribunal. Arbitration clauses dealing with future contractual disputes are therefore generally believed to also encompass a dispute arising from the non-contractual obligations of the parties insofar as these relate to the execution of the contract.[413] This kind of interpretation falls under the international approach. This wide interpretation maybe even broader than the scope of the previously discussed international interpretation since it also covers the non-contractual obligations of the parties to the contract.

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411 Welser and Molitoris, "Wording and Interpretation of Arbitration Clauses," 22.
412 Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF at 657.
413 Welser and Molitoris, "Wording and Interpretation of Arbitration Clauses," 19.

In an English case between *Yuri Privalov (nationality not indicated) and others [appellant/defendant] v. Fiona Trust Holding Corporation (British Virgin Islands) and others [respondent/claimant,]* concerns the scope of arbitration agreement with respect to the interpretation of words used to determine the scope of the arbitration agreement by the parties. In the charter parties (the contracts to hire ships), there were questions as to whether the phrase "arise under this charter" in the main clause or the one "arise out of this charter" in the sub-sub clause would prevail before the English Court of Appeal. The "arise out of this charter" should represent the broader scope of arbitration agreement.[414]

Fiona Trust Holding Corporation (Fiona Trust/respondents) and seven other foreign subsidiaries of Sovcomflot, a Russian state-controlled entity (the shipowners), entered into eight charter parties with three chartering companies (the charterers) on the SHELLTIME 4 form. Clause 41 of the form provides for the application of English law and arbitration of all disputes "arising under" the charter party in accordance with the rules of the London Maritime Arbitrators' Association. The respondent alleged that the charter parties (the contracts) contained terms that were induced by bribery and highly favorable to the charterers.[415]

The shipowners (claimants) sought damages in the High Court in London, arguing that they had rescinded the charter parties on grounds of bribery. The charterers objected that the English court lacked jurisdiction because of the arbitration clause in the charter parties. They commenced arbitration proceedings in London. The shipowners applied to the court for an injunction to restrain the arbitration under Sect. 72 of the English Arbitration Act 1996. In 2006, the High Court granted the anti-arbitration injunction and denied a stay of court proceedings. However, in 2007, the Court of Appeal reversed the lower court's decision on the ground that the bribery claim fell within the scope of arbitration clause in the contract.[416]

414 Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF.
415 *Ibid.*
416 *Ibid.*

There was an argument about terms used in the charter parties. The counsel for the charterers submitted that the term "arises out of" has a wider meaning than "arise under of." The parties *ab initio* intended a wide meaning to be given to the clause. The counsel for the shipowners argued that "arise under of" had a narrow meaning, and was the primary words in the clause. He mentioned that the phrase "arise out of," since it appeared only second and in a sub-sub clause could not convey the intended meaning by the parties. On the other hand, the counsel for the shipowners argued for the meaning of "arise under of." The counsel for the shipowners reasoned that in any event "arise out of" itself had a narrow meaning. The Court of Appeal concluded that a dispute whether the contract can be set aside or rescinded for alleged bribery does fall within the arbitration clause in its true interpretation. The claim to rescission was stayed and the application under Sect. 72 of the 1996 Act was dismissed.[417]

The English court showed preference toward the international approach. Generally, the court may prefer the phrase "arise out of" because it conveys a meaning that the arbitration clause enables the resolution by arbitration for a dispute arising out of the charter party. The court reasoned that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover every dispute, except a dispute as to whether there was ever a contract at all. (see *Mustill and Boyd, Commercial Arbitration, 2nd ed. p.120.*)[418] If the court had taken the national approach, the restrictive approach to the interpretation of statue, the court would have preferred a narrow wording of "arise under" which is in favor of the shipowner, as the shipowner claimed that it was the initial intention of the parties to use this word. The shipowners argued for the meaning "arising under the charter party," because the shipowners had rejected the arbitration proceedings. They claimed that the contract was entitled to be rescinded including its arbitration agreement because it was induced by bribery. The decision was appealed to the House of Lords where

[417] *Ibid.*
[418] Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF at 660.

three Law Lords held that the appeal was dismissed.[419] In conclusion, the arbitration agreement was valid, and the arbitral proceedings prevailed over the court proceedings.

The Austrian Supreme Court tends to interpret arbitration agreements in *favor validitatis* and favors an expansive interpretation of the scope of arbitration agreements. An extensive interpretation finds its limits where certain disputes are either expressly excluded from the arbitration clause or where the contract containing the arbitration agreement does not exist.[420] In an Austrian case: OGH, 5 February 2008, docket no. 10 Ob120/07f, the problem of validity was dealt with by the Supreme Court. A service contract for the construction of a sewerage facility contained an arbitration clause. The clause wrote that "any and all disputes arising out of the contract as well as out of future supplementary contracts" had to be dealt with by arbitration.[421] In court proceedings to set aside the arbitral award based on the arbitration agreement, the claimant argued that the arbitration clause had not entered into force as the contract itself was invalid due to dissent between the parties. The Austrian Supreme Court, however, decided that the arbitration clause was clearly worded and intended to cover any possible dispute arising out of the contractual relationship between the parties; there could be no doubt that the question of the validity of the contract itself was covered by the clause.[422]

This example indicates a broad interpretation or international interpretation as asserted by the Austrian Supreme Court. The court reasoned that the question of the validity of the contract itself was also covered by the arbitration clause.[423] The phrase "any and all disputes arising out of the contract…had to be dealt with by arbitration" is a wise wording to cover all disputes. As already mentioned in the English case,[424] the phrase "arise out of" conveys the broader meaning of the scope of arbitration agreements and the wording of the arbitration agreement also reflects a broad arbitration agreement in supporting the international commercial arbitration.

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[419] *Ibid.*
[420] Welser and Molitoris, "Wording and Interpretation of Arbitration Clauses," 21.
[421] *Ibid.*
[422] *Ibid.*
[423] *Ibid.*
[424] Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF.

1.4. Composition of the tribunal

Article 34(2)(a)(iv) is the fourth condition for setting aside an arbitral award. The phrase reads as follows. "The composition of the arbitral tribunal or the arbitral procedure was not in conformity with the agreement of the parties…" [425] The key phrases are "was not in conformity with the agreement of the parties" and "unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate.…" These phrases are subject to interpretation. The focus of the fourth condition is that the court will set the arbitral award aside if the composition of the arbitral tribunal or the arbitral proceedings conflicts with the parties' agreement or if such an agreement is not in accordance with the mandatory rule of this law.[426]

For example, a German court reviewed a case where one party had appointed all the arbitrators (*Oberlandesgericht Köln* 19 Sch 15/99, 22 December 1999.)[427] The agreement of the parties included a provision to the effect that one party could appoint all arbitrators only if the other party did not participate in the appointment process. The issue was whether the appointment of all the arbitrators by one party is in conformity with the agreement of the parties. The Higher Region Court of Cologne rejected the objection by the defendant with regard to Article 34(2)(a)(iv) of the *Model Law* that the arbitral tribunal was not properly formed because the defendant did not appoint its arbitrator within the time provided in the arbitration agreement. Also, the claimant appointed the arbitrator for the defendant in light of the parties' agreement.[428] The court ruled that the procedure adopted was in line with the agreement of the parties. The rule provided that only if one party did not participate in the appointment process, other party could appoint the arbitral tribunal.[429]

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425 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," art.34.
426 Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," 883–91.
427 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 398.
428 *Ibid.*
429 *Ibid.*

1.5. Arbitrability

Another condition for the court interpretation concerns the arbitrability of a dispute. The subparagraph is laid down as "the subject matter of the dispute is not capable of settlement by arbitration under the law of this state." As mentioned earlier, Article 47 of the *LRED* does not set forth whether the court will examine *ex offico* the arbitrability of…. To a broad extent, Articles 2 and 16 of the current *LRED* determined that the CEDR will accept only certain disputes such as an economic dispute; but it is different from Article 34 of the *Model Law*.[430] Therefore, the *LRED* does not cover the notion of arbitrability to enable the court to decide about the arbitrability on its own initiative.

In some jurisdictions, certain disputes cannot be resolved by arbitration. Article 1(5) designates that the *Model Law* will not affect any law of the adopting state that circumscribes particular issues of the right to arbitration.[431] The *Model Law* does not affect other mandatory rules related to the arbitrability of national law. However, courts will not enforce an arbitral award if the award contains subject matter that is not arbitrable under the law at the place of arbitration.[432] Article 34 (2)(b)(i) provides that the court may consider *ex officio* to set aside an award, if "... the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of this state…."[433] This Article sets out the grounds to challenge the arbitral award on the ground of arbitrability by parties.[434]

In *Salini Constructtori S.P.A (nationality not indicated) v. Kingdom of Morocco*. A U.S. court granted the practitioner's motion to enforce part of the ICC arbitral award, ordering the respondent to reimburse the petitioner for various taxes paid throughout a road construction project. This case involved international parties and arbitration.[435] The place of arbitration was France and the arbitral

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430 Please see Article 2 of the *LRED* in Appendix 2.

431 Peter, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions—An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration (2000)*, 213.

432 Born, *International Commercial Arbitration*, 2009, 1:777.

433 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," Art.34.

434 *Ibid.*

435 Salini Constructtori S.P.A v. Kingdom of Morocco, Civil Action H-09-891 (United States District Court, District of Columbia 2017).

award was annulled in Morocco but was later enforced in the United States. The District Court of the District of Columbia dismissed Morocco's claim that the U.S. "revenue rule" prevented the U.S. court from enforcing a tax judgment of another sovereign state because the main issue in the arbitration was the enforcement of a contract, not of a foreign revenue law.[436] In this case, the damage related to the taxes was also deemed as an arbitrable subject in the U.S. court. The case between *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* has been cited in many other cases with respect to the attitude toward international commercial arbitration. The U.S. Supreme Court reversed the decision that the antitrust claim is not arbitrable, providing that the antitrust alone does not invalidate the forum selection of arbitration clause. There was a strong presumption reinforced by *the Federal Arbitration Act* and *the New York Convention* favoring arbitration in international commerce.[437]

1.6. Public policy

Public policy is the most common ground invoked by a dissatisfied party in a setting aside defense. Article 34 (2)(b)(ii) provides that the arbitral award will be set aside if the award conflicts with the public policy of a state. This notion refers to the public policy of the country of rendition of the arbitral award.[438] This statement means that the court has the burden of proof to set aside the arbitral award even without any request by the party. In the case of Laos, the Supreme Court will decide on the disputed text or the unresolved matter which does not exist in the law or is not clearly determined in the law. Such judgment of the Supreme Court will take effect as a court precedent that all People's Courts will comply with in the future. The court will not adjudicate an action that the law does not determine as an offense. Decisions by a cassation court of the People's Zone Court may also take effect as precedent, if there is an instruction rendered by the People's Supreme Court about such matters.[439]

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436 *Ibid*., 607.
437 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614.
438 "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," art.34.
439 Lao Law on People's Court (2017), Art.12.

The ground of public policy works under *the New York Convention*. Many scholars observed that even if there is a success in rendering the award, it is still difficult to enforce it.[440] Despite the pro-enforcement language of the convention, the implementation of the awards remains problematic in many countries.[441] Many jurisdictions have variously defined public policy which is a broad and undefined concept. Some countries mentioned the concept of international public policy in their arbitration laws. Public policy is also divided into two notions, internal and international public policy; the notion of international public policy itself differs in each country.[442] The UNCITRAL Commission mentioned that public policy has two sides: the procedural and the substantive. Judges might not interpret the term public policy to include procedural justice in the common law tradition. In the civil law tradition inspired by the French concept of *ordre public,* judges interpret public policy to cover the principles of procedural justice.[443] Procedural public policy includes fraud and corrupt arbitrators, breaches of natural justice or due process, lack of impartiality, lack of reasons in arbitral award, manifest disregard of law and the facts, *res judicata*, and the annulment at the place of arbitration. Substantive public policy includes the issues of mandatory law, fundamental principles of law, good morals or *public order*, national interest, and foreign relations.[444]

The public policy notion was mentioned in the *travaux preparatoires* where the working group of the draft suggested two alternative approaches for the interpretation of public policy. The

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440 Paulsson Jan, "The New York Convention in International Practice—Problems of Assimilation in the New York Convention of 1958," *ASA Special Series*, 9, 1996, 113.

441 This Master thesis was published in the Annual Report on Research and Education 2012, 2013, Nagoya University. Vongsavan Nuannavong, "The Condition for Recognition and Enforcement of Foreign Arbitral Award: Public Policy" (Master's Thesis, Japan, Nagoya University, 2012), 10; Karen Mills, "Enforcement of Arbitral Awards in Indonesia and Other Issues of Judicial Involvement in Arbitration" (Jakarta, Indonesia: KarimSyah Law Firm, 2005), 1–2, http://www.arbitralwomen.org/files/publication/4310102632224.pdf.

442 George A. Bermann, "International Arbitration and Private International Law-General Course on Private International Law," n.d., 326–29.

443 "Report of the UNICITRAL Commission on the Work of Its Eighteenth Session (Vienna, 3-21 June 1985) Commenting on Public Policy as Understood in the New York Convention and Model Law" (Vienna, 1985), para. 926.

444 Nuannavong, "The Condition for Recognition and Enforcement of Foreign Arbitral Award: Public Policy," 18–43.

drafters of the *Model Law* mentioned in their legislative history that there were two notions of public policy; the first one was the application of the concept of "international public policy" and the other one was the court would retain the traditional concept of public policy. One of the findings of the ILA reports was that the prevailing standard for international arbitration was international public policy rather than national public policy.[445]

Howard M. Holtzmann and Joseph E. Neuhaus pointed out that the concept of public policy in the *Model Law* is in conflict with the notion found in *the New York Convention*. They suggested that the notion of international public policy might not be necessary.[446] "Under another view the introduction of a concept of international public order was unnecessary and could give rise to difficulties in interpretation. The conflict between the grounds to set aside the award for the violation of international public policy under the *Model Law* and to recognize and enforce foreign arbitral awards by public policy under *the New York Convention.*" The doctrine was applied differently in various jurisdictions.[447] The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S*A illustrated a narrow approach to interpret the scope of public policy. The narrow approach referred to the international public policy of *the International Arbitration Act* applied by the court.[448]

The international scholars perceived the term "public policy" that was not equivalent to the political stance or international policies of the state but comprised the fundamental notions and principles of justices. The experts understood that the term "public policy," which was used in the *1958 New York Convention* and many international treaties, has covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption,

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445 Nuannavong, 13–14; Stefan Kroll, "The Public Policy Defense in the Model Law Jurisprudence: The ILA Report Revisited," in *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (United States: JurisNet LLC, 2013), 141.

446 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 930.

447 *Ibid.*

448 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.

bribery or fraud, and other serious cases would constitute a ground for setting aside the arbitral award.[449] Public policy covers fundamental principles of law and justice including bribery or fraud which is the ground for the setting aside.

Furthermore, different views existed as to whether the violation of public policy must be manifest and ostensible. The interpretation of public policy requires a narrow interpretation of the condition in *the New York Convention*.[450] For instance, in a Japanese case between *Company X (plaintiff) v. Company Y (defendant), (the Tokyo High Court, 2016 (RA) 497, August 19, 2016,)* the arbitral tribunal's mere misinterpretation of the parties' agreement in violation of the mandatory laws was not considered as a breach of public policy.[451] The defendant could not persuade the Japanese judge to decide that the misinterpretation by the arbitral tribunal was a violation of public policy and was against *the Arbitration Act*. The Japanese law may have left the matters for judicial interpretation and the law does not specifically list the issue. This is the reason why the court rejected setting aside the arbitral award on the ground of public policy. This decision is also similar to the French approach in which the mere misinterpretation of factual and legal elements does not normally constitute a violation of French international public policy.[452]

To answer the inquiries on how to determine which country is applying the international public policy, the answer lies on the court's decision on a case-by-case basis. The arbitral award and the court decision should indicate the application of public policy in the setting aside claim and the claim to enforce the foreign arbitral award. For instance, there was a case concerning the ICC arbitral award pursuant to the mining concession by two foreign companies in Laos. The Paris Court of Appeal rejected the enforcement invoked by the claimant for the reason that the arbitral award violated the

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449 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 914.

450 *Ibid.*

451 Koki Yanagisawa and Takiko Kadono, "Setting Aside Arbitral Awards before Japanese Court: Consolidating Japan's Position as an Arbitration-Friendly Jurisdiction?," *Kluwer Arbitration* (blog), 2018, http://arbitrationblog. kluwerarbitration.com/2018/01/22/post-2/.

452 Kuhner Detlev, "Annulment and Enforcement of Arbitral Awards in France" (Wolters Kluwer), 8, accessed November 24, 2020, https://bmhavocats.com/assets/uploads/2018/10/CEPANI-Detlev-K%C3%BChner-Brussels-2018.pdf.

mandatory laws and the UN resolution constituting the violation of international public policy.[453] The French court is applying French international public policy according to article 1514 of the French Code of Civil Procedure. The pro-arbitration bias and the international interpretive approach of the arbitration law may persuade the judge to give effect to international public policy.

Hong Kong, Singapore, and Australia are *Model Law* jurisdictions with common law backgrounds. One expert recognized that the arbitration practice in these countries are more mature than others in the region; they may be considered as the pro-arbitration jurisdictions and apply a more liberal approach to the interpretation of the *Model Law*.[454] In many Western countries with high standards of international arbitration such as the United Kingdom, the United States, Sweden, Germany, and France, their courts would tend to interpret the arbitration laws more liberally and be more likely to apply international public policy to international disputes. Of course, this interpretation may not really be of relevance to domestic disputes, depending on the nature of the case. Daniel A. Farber found that the interpretation method in Western countries such as the U.S, France, and Germany have some common values. These values include the importance of ordinary meaning, the significance of judicial precedent, the relevance of evolving understandings of statutory purpose, and the need to put a particular provision into its statutory context.[455]

The Western jurisdictions recognize the presumptive views to promote the arbitration of international commerce and the enforcement of foreign arbitral awards under *the New York Convention.*[456] These jurisdictions have adopted well-established principles in arbitration such as the principle of competence-competence, the separability of arbitration agreements, due process, party

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453 Company X (claimant) v. Company Y (respondent 1), Bank Z (respondent 2), Company S (third party); Gaillard, "Gaillard's Chaos Theory Is Harmony in International Arbitration Overrated? The International Journal of Commercial and Treaty Arbitration."

454 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 129.

455 Daniel A. Farber, "Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective Book Review," *Cornell Law Review* 81, no. 2 (1996 1995): 516, https://heinonline.org/HOL/P?h=hein.journals/clqv81&i=540.

456 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614; "Global Arbitration Review: United Kingdom"; "Global Arbitration Review: Sweden"; Peter Berge Klaus, "The Implementation of the UNCITRAL Model Law in Germany," *Mealey's(R) International Arbitration Report* 13, no. 1 (January 28, 1998), https://advance.lexis.com/.

autonomy, estoppel, and minimum court intervention. For example, French courts refrain from intervening in the arbitration proceedings until the court is seized jurisdiction over the dispute.[457] Judges apply international public policy in their court decisions on the recognition and enforcement of foreign arbitral awards. Judges should construe public policy narrowly as different from domestic public policy.[458] In *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S*A, the Singaporean Supreme Court applied a narrow scope of public policy as though there was no clear definition.[459] The court said, "although the concept of public policy of the state is not defined in the *[Singapore International Arbitration] Act*[460] or the *Model Law*, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope[...]where it violates the forum's most basic notion of morality and justice" (See *Parsons &Whittemore Oversea Co. Inc v. Societe Generale de L'Industrie du papier (RATA) 508 F 2d, 969 (1974) at 974)*. The court has applied the narrow interpretation which is the application of the international public policy by the Singaporean court.[461]

In conclusion, public policy was deemed as a very important and difficult condition, the so-called an unruly horse, because this condition is still at risk and can easily be attacked in courts.[462] The international public policy is applied variously in each country with regard to international commercial arbitration.[463] This section will further provide the discussion of the national and international interpretation as follows.

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457 Gaillard, "France Adopts New Law on Arbitration"; "Global Arbitration Review: United Kingdom"; "Global Arbitration Review: Sweden"; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614; Arnold, "Comparison of Civil Law and Common Law," 5–9.

458 Kroll, "The Public Policy Defense in the Model Law Jurisprudence: The ILA Report Revisited," 141.

459 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.

460 Singapore International Arbitration Act.

461 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.

462 Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 404.

463 Bermann, "International Arbitration and Private International Law-General Course on Private International Law," 326–29.

1.6.1. National interpretation

The national approach reflects the divergence in law and the supremacy of state sovereignty, and it is aligned with a restrictive interpretation of the *Model Law.* Judges would not follow the international trend in judicial interpretation. In other words, judges may interpret this defense of article 34 (2)(b)(ii) according to national variations, local rules, and circumstances. For example, in Switzerland, the court only permits compensatory damages to the parties, and will not award punitive damages. Imposing punitive damage as the punishment of wrongdoers is against Swiss public policy.[464] Furthermore, the court in some Islamic countries will not permit arbitral awards involving an interest, as interest or dealing with the concept of profit is considered offensive in some Islamic countries. Such an activity would violate religious law (*Moslem Shari´a*) and constitute a violation of substantive public policy.[465]

Therefore, it is likely that courts would interpret the term "public policy" as referring to domestic public policy, albeit this may only be consistent within a national context. For example, the Turkish Supreme Court in 1995 refused to enforce an ICC arbitral award by a tribunal in Zurich, Switzerland. The tribunal in Zurich applied Turkish substantive law, but it used the procedural law of the canton of Zurich. The Turkish Court held that by not applying both the Turkish substantive law and Turkish procedural law, the arbitrator had violated Turkish public policy. According to international scholars, not only did this appear incorrect, but there was no material difference in the procedural law of Turkey and the procedural law applied.[466] The Turkish court used public policy simply to refuse the recognition and enforcement of the foreign arbitral award. The court practice appears to be the unfortunate use of public policy defense by the Turkish court.[467] The Turkish court

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[464] Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* (New York, United States: Routledge, 2017), 121.
[465] *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards. Committee on International Commercial Arbitration of International Law Association*, 21.
[466] Nuannavong, "The Condition for Recognition and Enforcement of Foreign Arbitral Award: Public Policy," 12; Moses, *The Principles and Practice of International Commercial Arbitration*, 218; Michael Kerr, "Concord and Conflict in International Arbitration," *Arbitration International* 13, no. 2 (1997): 140.
[467] *Ibid.*, 219.

had applied the concept of domestic public policy; The scope of its application is not considered as universal with international practice.

Tyco Services Singapore Pty Ltd v Leighton Contractors (VN) Ltd [2003] Decision no. 02/PTDS dated 21/01/2003 of the Appellate Court in Hochiminh is the case of an Australian arbitral award resolving a dispute arising from a construction contract performed in Vietnam. The arbitrator issued two awards in favor of Tyco, who then sought enforcement in Vietnam. While the first instance court granted enforcement, the Court of Appeal reversed this decision.[468] First, the court found that under Article 8 of the 1989 Ordinance on Economic Contracts of Vietnam, the contract was invalid, since Tyco had not been issued with a foreign construction contractor license by the Ministry of Construction under Vietnamese regulations. Second, the contract between the parties expressly provided that Tyco was not subject to Vietnamese tax law. The court observed that such a provision "negatively affected" the interests of Vietnam by showing a failure on the part of the plaintiff to respect local law. The Appellate Court thus decided to reject the recognition and enforcement of these arbitral awards with regard to Article 16.2.b of the 1995 Ordinance.[469]

This case illustrates a broad interpretation of public policy. The Vietnamese Court of Appeal held that "basic principles" of the local law had been breached because Tyco, a Singaporean company, did not possess a foreign construction contractor's license under the national regulations, and that the contract provided that Tyco was not subject to the tax law of Vietnam.[470] Some scholars criticized this broad interpretation of public policy and stated that the result in this case was also likely to be inconsistent with that country's obligations under the *New York Convention*, given its excessively wide interpretation of basic principles of Vietnam law. The approach applied by the Vietnamese court

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468 Tyco Services Singapore Pty Ltd v. Leighton Contractors (VN) Ltd, 02/PTDS (Appellate Court in Hochiminh 2003).

469 Dzung Nguyen Manh and Trang Nguyen Thi Thu, "Countries Report on the Public Policy Exception in New York Convention, Vietnam" (Dzungsrt & Associates LLC, March 15, 2016), 9.

470 Richard Garnett and Kien Cuong Nguyen, "Enforcement of Arbitration Award in Vietnam," *Asian International Arbitration* 2, no. 2 (2006): 137; Quang Chuc Tran, "Recognition and Enforcement of Foreign Awards in Vietnam-Shortcomings and Suggested Remedies," *Journal of International Arbitration* 22, no. 6 (2005): 487.

effectively requires a foreign arbitral award to comply with every provision of Vietnamese law which directly conflicts with the convention drafters' intention. The recognition and enforcement of a foreign arbitral award cannot be rejected because of non-compliance with local law.[471]

Those court decisions are instances when the court interprets public policy broadly. The violation of the mandatory law of the forum does not necessarily constitute the violation of international public policy, which is a universal concept. These decisions fall under the scope of domestic public policy which should be applied only to national disputes.

1.6.2. International interpretation

The international interpretation of the *Model Law* asks judges to interpret public policy defense narrowly. Three issues of international interpretation asserted by this dissertation already reflect the importance of the context of the law and its purposes and objectives. These issues should be more consistent with the interpretation of the *Model Law* by the Lao court.[472] These implications could be the basis for the court interpretation of Article 34 on setting aside claims.

The French Code of Civil Procedure manifestly determines that in the recognition and enforcement of foreign arbitral awards, the law determined that public policy should be international public policy. As Article 1514 sets fort that an arbitral award will be recognized or enforced in France if the party can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.[473] French international public policy is narrower than the concept of domestic public policy. Emmanuel Gaillard and John Savage asserted that international public policy

[471] Garnett and Nguyen, "Enforcement of Arbitration Award in Vietnam," 147.
[472] Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–86; Glover, "Statutory Interpretation in French and English Law," 385–92; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–1113; Germain, "Approaches to Statutory Interpretation and Legislative History in France," 197.
[473] *French Code of Civil Procedure (Book IV: Arbitration) (amended)*, 2011.

is in fact at the heart of domestic public policy. A rule which is not even a matter of domestic public policy could not be considered as belonging to international public policy.[474]

The following two cases manifest the instance of the international interpretation of public policy. The purpose and objective of the *Model Law* may persuade judges to interpret it with a more expansive or liberal approach and in promoting the international commerce arbitration. The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S*A (2006) applied the narrow approach in interpreting the scope of public policy. The court provided reasons in the setting aside case whether arbitral award was conflicting with public policy.[475] The court emphasized the general consensus to give effect to the public policy only when the enforcement of the particular arbitral award will "shock the conscience," or is "clearly injurious to the public good or… wholly offensive to the ordinary, reasonable fully informed member of the public."[476]

The interpretation by the Singapore Court of Appeal is consistent with the concept of public policy shared by the drafters of the *Model Law*. The relevant part of the *travaux préparatoires* of the *Model Law (the Commission Report (A/40/17) [para. 297]* provides that in discussing the term "public policy," the UNCITRAL Commission understood that public policy was not equivalent to the political stance or international policies of a state but comprised the fundamental notions and principles of justices. It was understood that the term public policy, which was used in *the 1958 New York Convention* and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Therefore, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.[477]

The Tokyo High Court of Japan dismissed to set aside the arbitral award in *Company X v. Company Y, (the Tokyo High Court, 2016 (RA) 497, August 19, 2016)* on the ground of violation of

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474 Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Netherlands: Kluwer Law International, 1999), 954.
475 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.
476 *Ibid*., Paragraph 59.
477 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 914.

public policy. The court implied to apply the international approach to interpretation of public policy, and the irregularity of the composition of the tribunal and arbitral proceedings according to the laws of Japan.[478]

The arbitral award ordered party X to pay company Y indemnity costs, *inter alia*, the compensation for damage that occurred from X's breach of the obligation under a distributor agreement. X filed their petition on two grounds. First, the arbitral tribunal's interpretation of the distributor agreement violated the EU competition law and therefore the public policy of Japan. Secondly, the arbitral tribunal's interpretation of the burden of proof was not justified under Japanese law. In the end, the court refused X's petition to set aside the arbitral award.[479]

As already mentioned, in this case, the court announced that the arbitral tribunal's mere misinterpretation of the distributor agreement in violation of the mandatory laws would not necessarily constitute a breach of public policy under Article 44, 1-8 of *the Japanese Arbitration Act.* Like the Singapore court's judgment in *PT Asuransi Jasa Indonesia (Persero,)* the court read public policy narrowly. The Japanese public policy applied by the court is akin to the French approach in the interpretation of international public policy. Not every rule of law that belongs to domestic public policy is necessarily part of international public policy.[480] If the court interprets public policy narrowly, it will manifest a pro-arbitration attitude. In this case, the opportunity to set aside the arbitral award will be smaller since the chance to violate public policy shrinks accordingly. Professor Sanders stated that "international public policy, according to a generally accepted doctrine is confined to violation of really fundamental conceptions of legal order in the country concerned." [481] However, if the *order public* or public policy is expansively interpreted, the rate to set aside awards would be

[478] Yanagisawa and Kadono, "Setting Aside Arbitral Awards before Japanese Court: Consolidating Japan's Position as an Arbitration-Friendly Jurisdiction?"
[479] *Ibid.*
[480] *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards. Committee on International Commercial Arbitration of International Law Association*, 6.
[481] *Ibid.*

higher and that would undermine the pro-arbitration bias and the French expert seemed to view this bias as acceptable from the international practice.[482]

The legislative history of the *Model Law* also confirms that there existed two notions of public policy, international and national public policy. Domestic public policy is a broader concept covering fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud, and similarly serious cases would constitute a ground for its violation.[483] Nonetheless, it depends on the judicial discretion of the court on how to interpret public policy taking into consideration *the lex fori* and the circumstances of the case. Judges may apply the internal public policy to the setting aside case of domestic disputes. The domestic public policy might be of relevance because there is no international constituent existed in the proceedings. However, in the international context, the prevailing standards would be to refer to international public policy.[484]

Farshad Ghodoosi has commented on the distinction between transnational and domestic public policy stating that national courts have shown a tendency to apply a limited version of public policy. The encounter between arbitral awards and courts in the context of international arbitration is quite limited.[485] In *Grands Moulins de Strabourg*, the French Court of cassation declared that international public policy is a less strict notion of public policy than the notion applied by French domestic law. Domestic public policy at times aims to control market behavior by imposing restrictions and policies from manufacturing to consumption. This fact is in contrast with the proponents of transnational public policy who would seem to dictate certain rule of globalization via such a vague notion.[486]

Therefore, national courts would consider international public policy as the fundamental principle of law of the forum which is more universal than the domestic one. The mentioned

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[482] Gaillard.

[483] Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 914.

[484] Kroll, "The Public Policy Defense in the Model Law Jurisprudence: The ILA Report Revisited," 141.

[485] Ghodoosi, *International Dispute Resolution and the Public Policy Exception*, 128–29.

[486] *Ibid.*

transnational public policy also referred to the international public policy. The kind of public policy is the scope of domestic and international one. This may be specifically referred to the common values among nations, national courts' international public policy and *lex mercatoria*.[487] In short, the domestic public policy is at the center of all kinds of public policy. This notion forms part of the *ordre public international.*

2. Comparison and examination of the two interpretations of the *Model Law*

The current Lao law has no legal provision designating clear rules of interpretation similar to the ones in Britain, the US, or Australia.[488] The international scholars seemed to widely discuss about the contextual and teleological approach and recommended for legal interpretation. *The VCLT* combined some parts of those rules and would become a basis for the state court's interpretation of treaties as well as the *Model Law*.[489] The People's Supreme Court only instructed judges to apply the facts and evidence according to the law in rendering its decision. For matters that the law does not determine, the competent court will handle the dispute with judicial principles and case precedents in its adjudication.[490] However, for the purpose of the adoption of the *Model Law*, Laos may need to adapt the international approach of Article 34 and reform its current approach to legal interpretation.

The margin of the national and international interpretation of Article 34 is not so wide, but it still poses a risk to the international uniformity of the interpretation of the *Model Law*. Courts in many countries have applied the international approach in using the *Model Law* illustrated by the court' decisions and these include those from the *Model Law*'s jurisdictions. This chapter has specifically

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487 *Ibid*., 119.

488 Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–86; Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–81; Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," 27–28; Glover, "Statutory Interpretation in French and English Law," 1083–86.

489 Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 124; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1084; Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 53.

490 Lao Law on People's Court (2017), art.12.

drawn on three instances where the courts interpret matters belonging to Article 34, and examined whether to set aside the arbitral award. These include (1) incapacity and invalid arbitration agreements, (2) the scope of arbitration agreements, and (3) public policy. The following section explains how the courts in many countries interpret these instances.

2.1. National interpretation of Article 34

As already mentioned, there are very limited cases showing instances when the courts interpret the arbitration law and the *Model Law* with the so-called national approach. This dissertation presumes that the national approach would be reflected by two issues: divergence of municipal law and state sovereignty. In the interpretation of Article 34 of the *Model Law,* the divergence of municipal law may influence the way the court deals with arbitration law, whether subjectively or objectively. Courts may face legal constraints as they will have to apply local theories, jurisprudence, principles, and laws to the interpretation of the *Model Law.* In addition, the national courts would tend to interpret and apply the law strictly with preference to its state sovereignty with the aims, *inter alia*, to protect its domestic parties from foreign rules. The following cases show how courts interpret their arbitration laws with a restrictive or broad interpretation reflecting the national approach.

In the issue of capacity and invalid arbitration agreement, the national approach reflects the restrictive interpretation favoring the state court when they interpret two subject matters of incapacity and invalid arbitration agreement. There were few cases of the national approaches enumerated in the ICCA Yearbook. The Italian and Turkish courts interpreted the law restrictively to prevent the execution of arbitration agreements on the ground of incapacity and invalid arbitration agreements. For example, in the Italian case, judges would interpret the agreement restrictively if such an agreement derogated from the jurisdiction of the state court.[491] The Supreme Court held that the state court had jurisdiction over the claims and the arbitration clause was invalid under the written form

[491] Louis Dreyfus Commodities (nationality not indicated) v. Cereal Mangimi s.r.l. (Italy) (ICCA Yearbook 2009), 36 11529 at 649.

requirement in Italian law and Article 2 of *the New York Convention*.[492] In the second case, the Turkish courts strictly applied the Turkish Code of Obligation that specific authorization was given to attorneys for concluding an arbitration agreement. The Supreme Court later decided that the arbitration agreement, was therefore invalid and refused the enforcement of the arbitral award.[493]

In the scope of arbitration agreements, there exist two kinds of interpretations applied by the courts from the international interpretation tendencies. They are a narrow or a broad interpretation of the scope of arbitration agreement.[494] The narrow interpretation demonstrates the national approach as shown in the case in this analysis. In *Heraeus Kulzer GmbH's case*, the appellate court found that the arbitration clause in the distributorship contract did not apply because the dispute in the court of first instance was between parties who had no connection to the parties in the arbitration clause, and held that the Italian court had jurisdiction over the claim.[495] The Supreme Court noted that the two lower courts erred in holding that the validity of an arbitration clause is a jurisdictional rather than substantive issue.[496] The appellate court may have applied the restrictive interpretation from the Italian case law, judges would interpret the agreement restrictively if such an agreement derogated from the jurisdiction of the state court and in case of doubt it must be deemed that those courts had jurisdiction.[497] This case law should have been cited in the following cases related to the interpretation of arbitration agreements which a restrictive approach.

Finally, the subject matter of public policy has two sides: procedural and substantive.[498] Additionally, the court has applied public policy into two notions: domestic and international public

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[492] *Ibid.*

[493] Buyer (nationality not indicated) v. Seller (nationality not indicated) (ICCA Yearbook 2009), 36 No.E.2007/380 K. 2007/514 at 827.

[494] Welser and Molitoris, "Wording and Interpretation of Arbitration Clauses," 19.

[495] Heraeus Kulzer GmbH (Germany) v. Dellatorre Vera SpA (Italy), 33 ICCA Yearbook 2008 at 596.

[496] Albert Jan Van Den Berg, *ICCA Yearbook Commercial Arbitration 2008*, vol. 33 (The Netherlands: Kluwer Law International, 2008), 597.

[497] Van Den Berg, *ICCA Yearbook Commercial Arbitration (2009)*, 36:651.

[498] "Report of the UNICITRAL Commission on the Work of Its Eighteenth Session (Vienna, 3-21 June 1985) Commenting on Public Policy as Understood in the New York Convention and Model Law," para. 926.

policy. The international public policy differs in each country.[499] A broad interpretation reflects the national approach and that would fall under the category of domestic public policy, which should be against international practice. The Turkish court refused to recognize and enforce the arbitral award rendered in Switzerland because the arbitral tribunal applied Turkish substantive law and the procedural law of the canton of Zurich. The court held that the award violated Turkish public policy by not applying both Turkish substantive and procedural law.[500] Courts applied domestic public policy when they considered that the scope of its application was not universal with the international practice. In *Tyco Services Singapore Pty Ltd.'s case*, the Vietnamese court found that under the Vietnamese ordinance, the contract was invalid because the plaintiff had not been issued with a foreign construction contractor license by the Ministry of Construction as required by its regulations, and the contract was not subject to Vietnamese tax law. The Appellate Court decided to refuse the enforcement of the arbitral awards.[501] In addition, the international scholars criticized these cases when judges applied the broad interpretation of public policy.[502]

2.2. International interpretation of Article 34

The research has found that courts from various jurisdictions have shown a preference toward the international interpretation. This dissertation claims that three issues of the international approach such as Article 2A, the international interpretation practice, and the international comity indicate the expansive interpretation of the *Model Law*. At the same time, these three issues can guide judges to interpret Article 34 with the international interpretation. If courts touch upon these issues in their interpretation and adjudication, the courts are using the international approach. This utterance

[499] Bermann, "International Arbitration and Private International Law-General Course on Private International Law," 326–29.
[500] Moses, *The Principles and Practice of International Commercial Arbitration*, 219.
[501] Tyco Services Singapore Pty Ltd v. Leighton Contractors (VN) Ltd, 02/PTDS.
[502] Richard Garnett and Kien Cuong Nguyen, "Enforcement of Arbitration Award in Vietnam," *Asian International Arbitration* 2, no. 2 (2006): 137; Quang Chuc Tran, "Recognition and Enforcement of Foreign Awards in Vietnam-Shortcomings and Suggested Remedies," *Journal of International Arbitration* 22, no. 6 (2005): 487.

seems to be the case of the interpretation of Article 34, since most of the courts tend to interpret and apply those subject matters with the consideration to its context, objective and purpose, the legislative history, and the international comity.[503] The US courts have a strong presumption reinforced by the *Federal Arbitration Act* and *the New York Convention* in favor of the arbitration of international commerce.[504] In *Yuri Privalov's case*, an English Lord Hoffmann reasoned in the earlier case that "when businessmen enter into an [arbitration] agreement, they are assumed to have done so to achieve some rational commercial purpose that only disputes arise out of their relationship are to be submitted to arbitration and others are to be decided by the national courts." [505] The international courts, including the ones from the *Model Law*'s jurisdictions, interpret these matters of incapacity of parties and invalid arbitration agreements expansively with a pro-arbitration attitude, and the maximum degree of party autonomy.[506] The international interpretation tendency demonstrate that the courts have preferred a broad interpretation of the scope of arbitration agreements. However, the international judges apply the narrow interpretation of public policy doctrine which is the international public policy. This prevailing standard for international arbitration may also be applied with setting aside claims.[507] All of those cases align with the international approach. The following cases summarize how the international courts interpret these subject matters with the international interpretation.

First, for incapacity and invalid arbitration agreements (Paragraph 2(b)(i),) the international courts have interpreted and applied the law on the incapacity of parties and invalid arbitration agreement with a pro-arbitration attitude and according to international practice. In the French Supreme Court's decision, the defendant argued that the claimant's employee did not have the legal

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503 Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–86; Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–81; Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," 27–28; Glover, "Statutory Interpretation in French and English Law," 1083–86.

504 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614.

505 Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF.

506 Klaus, "The Implementation of the UNCITRAL Model Law in Germany," 2.

507 Nuannavong, "The Condition for Recognition and Enforcement of Foreign Arbitral Award: Public Policy," 13–14; Kroll, "The Public Policy Defense in the Model Law Jurisprudence: The ILA Report Revisited," 141.

capacity to enter a contract; however, the court granted the enforcement of the foreign arbitral award rendered in England. Though the claimant was also a French company, the French court did not rely on its law. The court did not examine the issue of capacity of signatory by reference to a national law but rather under a material rule based on the common intention of the parties, good faith, and on the legitimate belief in the power of the signatory.[508] In one German case, the court applied the formal requirements of national law that are less strict than *the New York Convention*'s provision. The court held that though the arbitration agreement was not "in writing" under the convention, it was valid under German law, which applied because of a more-favorable-right rule under the convention. These cases illustrated how the court interpreted the subject matter of the invalidity of the arbitration agreement and showed preference toward arbitration.[509]

Second, in the scope of arbitration agreement (Paragraph 2(b)(iii),) as shown in *Yuri Privalov's case*, there was the argument, *inter alia,* about terms used in the arbitration clause of the charter parties to include a bribery claim. There was a question whether the parties *ab initio* intended a wider meaning to be given to the clause, and whether the wording "arising under" was to be applied since it appeared first, or the word "arising of out" would apply because it appeared later.[510] The Court of Appeal reversed the lower court's decision by the examination of whether the bribery claim fell within the scope of the arbitration clause in the contract. The English Court of Appeal applied a broad interpretation in support of arbitration. The judge chose the wording "arising out of." [511] In the Austrian case: OGH, dated 5 February 2008, the Austrian Supreme Court tends to interpret arbitration agreements in *favor validitatis* and favors an expansive interpretation of the scope of arbitration agreements. An extensive interpretation finds its limits where certain disputes are outside the scope of arbitration agreements or there is no consent by the parties to the agreement containing the arbitration

[508] Société d' etudes et représentations navales et industrieslles–Soerni (France) et al. v. Air Sea Broker Limited– ASB (Switzerland), 956 at 356.
[509] Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated), 26 Sch H03/09.
[510] Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF.
[511] *Ibid.*

clause.[512] In summary, the international courts have interpreted the scope of arbitration agreements liberally and expansively according to the international approach.

The last issue concerning international interpretation is public policy (Paragraph 2(b)(ii)). In *PT Asuransi Jasa Indonesia's case*, the Singapore Court of Appeal showed an instance when the court applied a narrow interpretation of public policy.[513] Though the concept of public policy is not defined in the law or the *Model Law*, the court ruled that the arbitral award will be refused only if it violates "the forum's most basic notion of morality and justice." In another case from Japan, the Tokyo High Court dismissed the setting aside claim holding that the mere misinterpretation of the distributor contract in violation of the EU competition law would not constitute a violation of the Japanese public policy. The narrow interpretation applied by the courts is comparable to the concept of international public policy.[514]

Though there is a clear distinction between the national and international approaches, the margin between those approaches is narrow. Judges had applied these keywords, such as strict, restrictive, and broad to reflect the national interpretation. On the other hand, the international approach proponents frequently used the keywords, such as extensive, expansive, liberal and narrow in their interpretations as shown in the collection of courts decisions.[515] The cases raised in this chapter indicate that many international courts have applied the international interpretation. Judges can transpose these approaches to the interpretation of the *Model Law,* in particular, the interpretation of Article 34.[516]

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512 Welser and Molitoris, "Wording and Interpretation of Arbitration Clauses," 22.

513 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005.

514 Yanagisawa and Kadono, "Setting Aside Arbitral Awards before Japanese Court: Consolidating Japan's Position as an Arbitration-Friendly Jurisdiction?"

515 Please see Appendix 1. Those words have a similar meaning but it is not exactly the same. In determining the ordinary meaning in the US courts, judges had applied the Corpus Linguistics which is the databases of natural language use. Derek Sinko, "The Use of 'Use': Legislative Intent, Plain Meaning, & Corpus Linguistics," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 4, 2015), abstract, https://doi.org/10.2139/ssrn.2560305.

516 Ortolani, "Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award," 886.

In conclusion, if Laos adopts Article 34 of the *Model Law*, the international approach should be a better solution for the court interpretation of unclear legal issues. The international cases, scholars, and the resolution of the UNCITRAL's Secretariat on the *Model Law* showed support to this approach.[517] However, the court should also consider domestic circumstances when it interprets and applies the *Model Law*.[518] Three issues of the international interpretation also reflect the concept of contextualist interpretation. Furthermore, judges may find the solution to the interpretation to the global consensus, the transnational interpretive rule, and *the travaux preparatoires*.[519] In a nutshell, the sense of being part of the transnational interpretive community will encourage judges to consider the international interpretation.[520]

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517 "[...]Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice." "United Nations General Assembly Resolution A/40/72."

518 Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1083–86; Driedger, "Statutes: The Mischievous Literal Golden Rule," 780–81; Dajajic, "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration," 27–28; Glover, "Statutory Interpretation in French and English Law," 1083–86.

519 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 252.

520 Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 41; Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 252.

Chapter IV: Competence of Arbitral Tribunals to Rule in their Jurisdictions

Article 16 of the *Model Law* determines the competence of the arbitral tribunal to rule in its jurisdiction and the validity of an arbitration agreement.[521] This article is important because without it, the parties may not have a recourse to challenge the arbitral tribunal's jurisdiction and the validity of an arbitration agreement when there are irregularities or absurdities in the proceedings. This article includes two internationally established principles: competence-competence and the separability of arbitration agreements. The *LRED*, however, does not have these two principles. When foreign parties need to resolve a dispute by using the *LRED*, the parties may wonder if the Lao law could provide a legal basis as similar with international standards. They may wonder if the *LRED* includes instances such as the competence of arbitral tribunals to rule in their jurisdictions and the principle of separability of the main contract and its arbitration agreement. The most related Lao provisions on the separability doctrine are Articles 16 and 36 of the *LRED.*[522] Article 16 concerns the subject matter which parties agreed to refer to the resolutions of economic dispute by mediation or arbitration; Article 36 determines on recusal and challenge of arbitrators under the discretion of the CEDR.

Lao law and the *Model Law* share some similarities, but it is important to note some critical differences. First, on the jurisdiction of the arbitral tribunal, a disputing party under the *LRED* has the right to challenge the arbitrator or the arbitral tribunal if the party finds that the arbitrator is a relative of a disputing party, has an interest in the dispute, has a dispute with either party, or is unable to perform his or her duties due to sudden sickness or a necessary engagement.[523] The *Model Law* allows a party to file a plea that the arbitral tribunal does not have jurisdiction. This plea must be filed no later than the submission of the statement of defense. The arbitral tribunal may rule on the plea either as a preliminary question or in an award on the merits, and it is subject to an ultimate court review. After the arbitral tribunal rules that it has jurisdiction, the disputing party can ask the court to decide on the

521 Please see Appendix 3.
522 Please see Article 16, 36 and 27 of *the LRED* in Appendix 2.
523 Lao Law on Resolution of Economic Dispute (2018), Art.27.

matter (the court review) and the court's decision on jurisdictional question is not subject to appeal.[524] Both laws determine that a party can challenge the arbitral tribunal's jurisdiction. The *Model Law* empowers the arbitral tribunal to decide on its jurisdiction; the party can challenge such an arbitral award, whether it is a preliminary or a final award which includes the jurisdictional question. The party can later directly invoke the competent court to decide on the jurisdictional competence. The *LRED*, however, only enables the CEDR to have the powers to examine the matter. The law does not determine the power of the Lao courts at issue in this provision.

Second, about the separability of the arbitration agreement, both laws determine that the parties must have agreed to arbitration to give effect to the arbitration proceedings. Article 16 of the *LRED* determines that the CEDR will consider the dispute if "the disputing parties have agreed to mediation or arbitration or voluntarily agreed to the resolution of the economic dispute." This subsection of Article 16 of the *LRED* has indicated the condition that the parties must have an agreement to arbitration in the contract. However, it does not specifically mention the separability of the main contract and the arbitration agreement. On the other hand, Article 16 of the *Model Law* clearly announces the separability by its *proviso* that "a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." The termination of the main contract will not affect the validity of its associated arbitration clause as its nature is independent. This chapter will examine all issues of the national and international interpretive approaches on Articles 16 and 36 of the *LRED* and Article 16 of the *Model Law*. In this chapter, the author argues that the international approach to the interpretation of Article 16 of the *Model Law* is better for Lao courts.

1. Analysis of Article 16 of the *Model Law* and Articles 16 and 36 of the *LRED*

The competence-competence doctrine enables the arbitral tribunal to rule on its jurisdiction and the validity of arbitration agreements. Otherwise, the parties can stall arbitral proceedings at any

[524] "UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," Art.16.

time with the jurisdictional questions and think about if the court is eligible to decide the case.[525] The CEDR has powers to determine such challenges and recusals. The Lao People's Court has no authority to deal with the problem. The *LRED* does not mention in any provision the existence of competence-competence, though many scholars commonly asserted that this was the overriding principle.[526] Although the *LRED* has not ostensibly mentioned the competence principle of Article 16 of the *Model Law*, it does provide similar grounds for the recusal of arbitrators. For example, when the arbitrator selected by the parties finds herself inappropriate to act in a tribunal, she can withdraw or recuse herself from the tribunal via the procedures provided by Lao law.[527] If the recused arbitrator refuses to withdraw, the CEDR has the powers to decide on the recusal according to Lao law. Accordingly, it is inconsistent with international practice and the *Model Law* that the current provision gives the authority to the CEDR. The *Model Law,* on the other hand, has provided the powers to an arbitral tribunal to rule on the jurisdiction questions because it was drafted with the aim to provide a harmonized legal framework for dispute settlement in international commercial relations.[528] This divergence is due to the fact that the *LRED* was drafted mainly for the resolutions of domestic economic disputes in the country.

International practice suggests the court should embrace the pro-arbitration bias over court litigation, and strengthen the doctrines related, such as party autonomy and limited court intervention.[529] German and French laws have supported these doctrines. In Germany, the domestic legislature adopted the *Model Law* with a minimum degree of adaptation to the peculiarities of the respective legal system. This country views that the drafters refrained from having the *Model Law* regulate subject matters that would interfere with the general procedure or substantive law of the

525 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 479.

526 *Ibid.*

527 Lao Law on Resolution of Economic Dispute (2018), art.36.

528 "United Nations General Assembly Resolution 40/72."

529 Ali, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong," 10.

adopting country.[530] The *Model Law* provides the maximum degree of party autonomy.[531] The French law—despite the fact that France is not a model law jurisdiction—remains favorable for arbitration and the French court shows an extreme pro-arbitration bias for all aspects of arbitration.[532] The court will not interfere in arbitration proceedings, and when the court is authorized to set aside or enforce an arbitral award, it takes a limited scrutiny approach.[533]

Article 16 of the *Model Law* mentioned that the tribunal has the authority to decide on the jurisdictional competence and on the validity of the arbitration clause. Holtzmann and Neuhaus wrote that Article 16 articulates the well-known principle of competence-competence, an arbitral tribunal is competent to rule on its own competence.[534] This power of the arbitral tribunal is widely accepted in modern rules, statutes, and treaties designated to apply to international arbitration such as in Article 21(1) of *the UNCITRAL Arbitration Rules*, *the Rules for the ICC Court of Arbitration* (Article 8(3)), *the European Convention on International Commercial Arbitration* (Article VI(3)) and *the Convention on the Settlement of Investment Dispute between States and National of Other States* (Article 41(1)).[535]

The principle of competence-competence can prevent a party from stalling the arbitration at any time only by raising a jurisdictional objection that could be resolved in the lengthy court proceedings.[536] Furthermore, Article 16 (1) declares that, for the purpose of an arbitral tribunal's jurisdiction (or competence-competence), an arbitration clause must be treated as "independent" from the underlying contract within which it is contained. A decision by an arbitral tribunal that an underlying contract is invalid "shall not entail *ipso juire* the invalidity of the arbitration clause." [537] This what? is the so-called "separability presumption" or "the doctrine of separability of arbitration

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530 Klaus, "The Implementation of the UNCITRAL Model Law in Germany," 2.
531 *Ibid.*
532 *Ibid.*
533 Gaillard Emmanuel, "France Adopts New Law on Arbitration," New York Law Journal, January 24, 2011, https://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-article-France-Adopts-New-Law-On-Arbit__/FileAttachment/IA012411FranceAdopts NewLawOn Arbitrationegaillard.pdf.
534 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 478.
535 Holtzmann and Neuhaus, 478.
536 *Ibid.,* 479.
537 Born, *International Commercial Arbitration*, 2009, 1:361.

agreements" that the invalidity of the underlying contract would not affect the validity of the associated arbitration clause.[538] Even if the underlying contract is null and void, the tribunal can still have the powers to continue the proceedings with the mandate of the arbitration agreement and to continue to examine the related issues such as the applicable law.[539] This treatment is good for international commercial arbitration because the arbitral tribunal will have more power to exercise its jurisdiction and enhance the independence of the arbitral tribunal to decide on the matter.

1.1. National interpretation

Suppose Laos incorporates Article 16 of the *Model law* into the *LRED* (Laos adopts the *Model Law.*) As already mentioned, Article 16 has two subject matters. First, the principle of competence-competence is in the phrase "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." [540] Second, the principle of separability of arbitration agreements lies in these wordings "an arbitration clause…shall be treated as an agreement independent of the other terms of the contract…. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." [541] Likely, if there are ambiguities and arguments on the meaning of those phrases and wordings in Article 16 of the *Model Law*, the judge with a national approach would tend to interpret this article restrictively with reference only to the local laws and court practices. The judge would interpret the *Model Law* exactly as if he or she would normally interpret municipal law regardless of the virtue of Article 2A of the *Model Law*.[542]

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538 *Ibid.*

539 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 480.

540 Michael Polkinghorne et al., "Article 16 Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction," in *UNCITRAL Model Law on International Commercial Arbitration - A Commentary* (Cambridge University Press, 2020), 293.

541 *Ibid.*, 301.

542 "Vienna Convention on Law of Treaties (VCLT)," art.31; Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264; R W M Dias, *Jurisprudence*, vol. 5 (UK: Butterworth Law Publishers Limited, 1985), 171.

If Lao judges apply the national approach to interpret the doctrine of competence-competence and the separability, Article 12 of the Law on People's Court would supervise the interpretation of the judges. Article 12 enables other courts to follow the Supreme Court's judgments as the court precedents. The ordinary People's Courts cannot interpret unresolved issues of the law. The court where the petition is submitted with regard to the unprecedented matters and ambiguous legal provisions can ask the People's Supreme Court for judicial interpretation. The judgment of the Supreme Court will then take effect as a court precedent, which all People's Courts must follow until such matters are regulated by the law. A decision of the cassation court can also become a precedent if the Supreme Court renders instruction on the matter.[543] The courts do not look for the foreign source of precedents, case law and the specific rule of interpretation.

In Laos, the People's Courts make decisions on three levels: at first instance, on appeal, and on cassation.[544] The People's Area Court has jurisdiction to make decisions as the court of first instance. The People's Provincial and Vientiane Capital Court acts as the court of first instance for a case which is beyond the Area Court's jurisdiction or as the appeal court for a case that the lower court decided. The People's Zone Court decides appeals for the provincial, Vientiane Capital, and juvenile court's decisions. Additionally, the court also has jurisdiction to decide as the cassation for the provincial and Vientiane Capital Court's decision which the court renders as an appeal. Finally, the People's Supreme Court has the jurisdiction of cassation as provided by the law.[545]

The interpretation rule as determined in Article 31 and 32 of *the VCLT* is close to the approach applied in common law and civil law jurisdictions.[546] Pursuant to the notion of divergence of law, the Lao court could use local rules, principles, and judicial precedents for court

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543 Lao Law on People's Court (2017), Art.12; Lao Civil Code, Art.374.

544 Lao Law on People's Court (2017), Art.5.

545 *Ibid.*

546 Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 124; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1084; Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 53.

interpretation.[547] Though the *Model Law* does not dictate a national court follow any particular rule of interpretation, it implies some indication for judges to apply the *Model Law* toward uniform application.[548]

The judge who takes the national approach values the notions of divergence of municipal law and state sovereignty. Those following case will illustrate further in detail. Judges may even apply a more onerous rule in an instance involving the model arbitration law, the restricted approach to the judicial interpretation. The judge may interpret the terms exactly as he or she would approach municipal law and define the disputed texts based on the parochial rules of interpretation. The judge may neither apply judicial precedents from other jurisdictions nor the interpretive rules.

In an international case decided by the Mexican court between *LDC, S.A. de C.V. (nationality not indicated/claimant) v. (1) ADT Security Service, S.A. de C.V. (nationality not indicated/defendant 1), and (2) Cámara Nacional de Comercio de law Ciudad de Mexico (Mexico/defendant 2),* the national court applied the restrictive approach of the interpretation of the Mexican Commercial Code.[549]

The claimant and defendant 1 entered into a distributorship contract with an arbitration clause. A dispute arose when defendant 1 terminated the contract. The claimant commenced an action in the Mexican federal court against both defendants. The court granted the defendant's objection, holding that the dispute should be referred to arbitration. On appeal, the federal district court reversed the previous court's decision, holding that there cannot be a referral to arbitration when the validity of the arbitration agreement is in dispute. However, the Sixth Federal Court of Appeal reversed the decision and ruled that the validity of arbitration agreements should be decided by the arbitrators.[550]

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[547] Lao Civil Code, art.374; Lao Law on People's Court (2017), art.12; In its adjudication, Lao judges renders a judgment according to the facts and evidence pursuant to the law and for the issue that the law does not define, the judge will follow judicial principles and precedents.

[548] Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 232.

[549] LDC, S.A. de C.V. (nationality not indicated) v. (1) ADT Security Service, S.A. de C.V. (nationality not indicated), and (2) Cámara Nacional de Comercio de law Ciudad de Mexico (Mexico), ICCA Yearbook 2007 (Federal Supreme Court of Justice, First Chamber 2006).

[550] Albert Jan Van Den Berg, *ICCA Yearbook Commercial Arbitration (2007)*, vol. XXXII (The Netherlands: Kluwer Law International BV, 2007), 411.

The Supreme Court, however, ruled that the state court has the power to decide on the validity of the arbitration agreement. The court noted that an arbitration clause in a contract implies that all disputes under that contract, including disputes in respect to the validity of the clause itself, should be referred to arbitration (the competence-competence). Additionally, many scholars widely recognized that the arbitration clause should be independent of the underlying contract (the principle of separability of arbitration agreement.) Therefore, if the existence or validity of the arbitration clause is the object of a claim, the arbitrators have jurisdiction to decide thereon, subject to subsequent judicial review.[551] However, the court announced that there is an exception to this general rule when the invalidity or non-existence of the arbitration clause is relied upon before the state court in the context of an action for performance under the contract. In that case, the state court should decide whether the arbitration agreement is invalid and the state court should have jurisdiction. The court did not mention *the New York Convention* but referred to Article 1424 of the Mexican Commercial Code, which essentially mirrored the text of Article II (3) of the Convention.[552]

The Supreme Court had restrictively interpreted the Mexican law leading to an absurd decision. Two judges filed a dissenting opinion to the decision that.

> The court shall, if a party so request, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. It must not be interpreted as meaning, absurdly, that state courts have exclusive jurisdiction on a party's action for annulment of the arbitration clause *or compromise arbitral*. Furthermore, the decision would also violate the principle of the autonomy of the will of the parties in such an alarming manner as to trample on the parties' free will as well as the *raison-d'-être* (reason of being) of any alternative proceeding….[553]

The two judges criticized the Supreme Court's decision for the reason that the court had strongly violated the principle of party autonomy which is a fundamental principle of international commercial arbitration.

By employing the restrictive interpretation, the judges failed to look for the recourse to international practice and the well-established principles stipulated in Article 16. Recourse to

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551 *Ibid.*
552 *Ibid.*, XXXII:412.
553 *Ibid.,* 418–21.

international practice might not be their usual practice, or domestic law might have prohibited them from doing so. The judges may not look for the general principles in which the law is based as in Article 2A (2). They interpret and apply the *Model Law* based on the local laws, rules of interpretation, and court practices. In the end, this what? may lead the judges to render absurd decisions to international commercial arbitration.

In another case from the Philippines, *a Model Law* jurisdiction,[554] the Philippine court decided in favor of the state court by holding that if one party denies the existence or the validity of the contract, it would invalidate the arbitration proceedings. The court did not examine the principle of separability of arbitration agreements as it is set forth in Article 16 of the *Model Law.* The approach applied by the court seems to fall under a national interpretation. This case was between *Cargill Philippine, Inc. (nationality not indicated/Petitioner) v. San Fernando Regala Trading Inc. (nationality not indicate/Respondent)*. The respondent purchased an amount of cane molasses from the petitioner by a contract in 1996. The contract contained an arbitration agreement for arbitration in New York at the American Arbitration Association (AAA.)[555]

Subsequently, a dispute arose between the parties when the petitioner allegedly failed to meet its obligations under the contract. The respondent filed a complaint for rescission of contract and damages against petitioner in the Philippine court, alleging breach of contract. The petitioner asked to stay the court proceedings and refer the dispute to arbitration. The regional trial court of Makati city held that an agreement for foreign arbitration violates public policy.[556] In addition to that, the Court of Appeal denied the petitioner's appeal, holding that though agreements for foreign arbitration are admissible, the present dispute could not be referred to arbitration because the very existence of the contract containing the arbitration clause was disputed.[557]

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554 Philippines adopted the old version the Model Law of 1985. "International Arbitration 2020 - Philippines | Global Practice Guides | Chambers and Partners," August 18, 2020, https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/philippines.

555 Cargill Philippine, Inc. (nationality not indicated) v. San Fernando Regala Trading Inc. (nationality not indicate) (ICCA Year 2008), XXXIII CA-G.R.No.Sp.No.50304 (Court of Appeal, Manila, Seventh Division 2006).

556 *Ibid.,* 621.

557 *Ibid.*

The appeal court held that the dispute could not be referred to arbitration because the petitioner alleged that the contract between the parties did not legally exist or was invalid. The court held that in that case at the issue, which involves a question of fact, must be resolved by the court. Arbitration is not proper when one of the parties repudiates the existence or validity of the contract.[558]

The appeal court had relied on the case law of the Supreme Court which was consequently modified. The appeal court reasoned that arbitration was not proper when one of the parties repudiated the existence or validity of the contract. The appeal court followed the Supreme Court's decision in *Gonzales v. Climax Mining Ltd., (G.R.No.161957)*. The Supreme Court held that the question of the validity of the contract containing the arbitration agreement will affect the applicability of the arbitration clause itself. A party cannot rely on the contract and claim rights or obligations under the contract, while at the same time challenge the existence or validity of the arbitration clause. In fact, litigants are enjoined from taking this inconsistent position.[559]

This case directly concerned the separability doctrine. The Court of Appeal erred in finding that this case could not be brought to arbitration. Finally, the Supreme Court reversed the lower courts' decision and ordered the parties to submit themselves to arbitration. As the court held that:

> The validity of the contract containing the arbitration agreement does not affect the applicability of the arbitration clause itself, we when applied the doctrine of separability […] or severability as other writers call it, enunciates that an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as a separate agreement and the arbitration agreement does not automatically terminate when the contract of which it is a part comes to an end.[560]

This case has shown that the court of first instance and the appeal court restrictively interpreted the law favoring the state court and leading to a wrongful decision. This what? is the national approach in which judges seem to ignore the principle of the separability of arbitration agreements embedded in Article 16 of the *Model Law.* The Philippines adopted the *Model Law* into the *Alternative Dispute Resolution Act (ADR Act)* of 2004 (the adoption by reference).[561] The judges

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558 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2008)*, 33:621.

559 Cargill Philippines v. San Fernando Regala Trading, G.R. No. 175404 (Supreme Court 2011).

560 *Ibid.*

561 "Alternative Dispute Resolution Act of the Philippines (2004)," 9285 Republic Act the Philippines § (2004), https://lawphil.net/statutes/repacts/ra2004/ra_9285_2004.html.

of the Court of Appeal rendered its decision in 2006 and only focused on the inexistence of the contract containing the arbitration clause which was disputed.[562]

In conclusion, pursuing the traditional court practice and the restrictive interpretation may be irrelevant for the interpretation of Article 16 of the *Model Law.* According to Gelinas, this interpretation would fall under national interpretations. The expert considered such interpretation as idiosyncratic and counterproductive to international normative context.[563]

1.2. International interpretation

The international approaches ask judges to interpret Article 16 of the *Model Law* expansively and broadly in favor of international commercial arbitration. This dissertation suggests to the Lao court to further examine Article 2A, international interpretation practices, and international comity in its interpretations. The interpretation of the competence-competence and the separability of arbitration agreements concerns the approach applied by the court. As mentioned above, in Paragraph 3 of Article 16, the ruling of the arbitral tribunal on the jurisdictional competence is subject to the ultimate or subsequent court review. Article 16 includes judicial review of a preliminary or final award on the jurisdictional competence. International practice suggests that there are two kinds of court review, a *prima facie* or full review.[564] Gary Born wrote that interlocutory (or preliminary) judicial review is available in some states. This situation is when the arbitrator or the arbitral tribunal has rendered an award on the jurisdictional question. Then the party can challenge the award by asking the court to review it. In Sweden and China, the court will always take the full judicial consideration of the arbitral tribunal award.[565] There is no judicial review of the arbitral award on the jurisdictional competence in France and India.[566] In Canada, all disputes concerning "solely legal" issues are subject

562 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2008)*, 33:621; "International Arbitration 2020 - Philippines | Global Practice Guides | Chambers and Partners."
563 Gelinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 264.
564 Born, *International Commercial Arbitration*, 2009, 2:881.
565 *Ibid.*
566 *Ibid.*

to full judicial review. In the US and England, all challenges which are directed "specifically" at the arbitration agreement or at the formation of the underlying contract are subject to full interlocutory judicial consideration.[567] The following cases show how the courts applied the law concerning two principles as determined in Article 16: the competence-competence and the separability doctrine with the international interpretation.

Germany is a model jurisdiction with the adoption by the direct approach.[568] Under section 1032(2) of *the German Code of Civil Procedure*, "prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible. The court's examination of the jurisdictional question at this stage is on the merits of the jurisdictional question, rather than a mere inquiry into whether there is a *prima facie* basis for jurisdiction." This rule contrasts with the French approach where *the Code of Civil Procedure* permits only *prima facie* review prior to commencement of the arbitration.[569]

In the absence of statutory guidance, US courts have developed a substantial body of case law that addresses various aspects of the competence-competence doctrines. In a domestic dispute case between *First Option of Chicago (plaintiff), Inc. v. Kaplan (defendant),* the case reflected the current approach to this doctrine applicable in both domestic and international case. The US courts have applied the full judicial review to the issue of competence-competence.[570] In this case, a dispute arose between a stock-trade-clearing firm and a husband and wife. This dispute was whether the couple was personally liable to the firm for a debt of an investment company. The investment company was wholly owned by the husband. The plaintiff sought arbitration, by a panel of a stock exchange, of this dispute and some related disputes.[571] The investment company, which had signed a document

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567 *Ibid.,* 972.

568 "List of the Model Law Adopting Jurisdiction— Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission On International Trade Law," accessed June 19, 2019, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

569 *Ibid.*

570 First Options of Chicago Inc. v. Kaplan, 514 U.S. 938 (Supreme Court of the United States 1995); Born, *International Commercial Arbitration*, 2009, 2:911.

571 *Ibid.*

containing an arbitration clause, accepted arbitration, but the couple argued that they had not personally signed that document; they denied that the couple's dispute was arbitrable and filed written objections to that effect to the arbitration panel. However, the arbitrators decided that they had the power to rule on the merits of the parties' dispute and did so in the firm's favor. Under *the Arbitration Act*, the couple requested the district court of Pennsylvania to vacate the arbitration award. The district court however confirmed the arbitral award. On appeal, however, the Court of Appeals ruled in favor of the defendants that the dispute was not arbitrable. On certiorari, the Supreme Court affirmed. The court ruled that the decision of Federal Court of Appeals was correct in finding that the arbitrability of a particular dispute was subject to independent review, and using ordinary standards to review the district court's arbitrability matters.[572]

The court's reasoning has provided two presumptions for determining whether an arbitration agreement to arbitrate jurisdictional disputes exists. First, there must be "clear and unmistakable" evidence to prove the existence of an agreement to arbitrate disputes in the arbitral tribunal's jurisdiction, and the scope of an existent arbitration agreement should be interpreted broadly, in favor of "arbitrability." [573]

In addition, the court also held that if an arbitration agreement granted arbitrators the power to rule on the jurisdictional competence and decide their own jurisdiction, then their resulting jurisdictional award would be subject to the same highly deferential standard of judicial review applicable under *the Federal Arbitration Act (FAA)* to the merits of other arbitral awards. The court wondered if the parties agree to submit the arbitrability question itself to arbitration. If so, then the question is whether the court's standard in reviewing the arbitrator's decision should not differ from the standard courts apply when they review any other matter related to the parties' consent to arbitration.[574]

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572 Summary of the case. First Options of Chicago Inc. v. Kaplan, LexisNexis.
573 Born, *International Commercial Arbitration*, 2009, 2:916.
574 *Ibid.*, 2:917.

This US Supreme Court's decision sets forth the standard the court will review the arbitral tribunal's award on its jurisdictional dispute. Other courts have repeatedly relied on this court's analysis, despite its arguable status as dicta, under the FAA to determine when an arbitral tribunal is authorized to decide jurisdictional issues.[575] Some authorities have suggested that *First Options'* analysis does not apply when US courts consider international arbitration agreements. Commentators have suggested that *the New York Convention* requires a *prima facie* review standard.[576]

With competence-competence, courts with the international approach tend to honor the decision by the arbitration tribunal on the validity of the arbitration agreement. For example, in ne ICC arbitral award decided in Geneva, Switzerland*,* there was a jurisdictional question of the arbitral tribunal.[577] The arbitration tribunal decided that the arbitration agreement was valid for two reasons. First, the tribunal's decision was justified by the Article 6 (2) of *the ICC Rules* which reads that:

> If the respondent does not file an answer, as provided by article 5 [obligation for the respondent to file an answer within 30 days from the receipt of the request from the secretariat] …, the court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that the arbitration agreement under the rules may exist. In such a case, any decision as to the jurisdiction of the arbitral tribunal shall be taken by the arbitral tribunal itself.[578]

Secondly, pursuant to the Swiss case law, the arbitral tribunal found that the arbitration clause in the Framework Agreement was valid in regards to both form and substance. The tribunal found that the respondent's failure to respond within the timeframe would not invalidate the arbitration agreement. The respondent's action would not constitute *prima facie* the nonexistence of the arbitration agreement according to *the ICC rules* and Swiss case law.[579]

Sum Trade Corp. (plaintiff) -v- Agricom International Inc. (defendant) highlights the approach applied by the Canadian Supreme Court to the issue of the competence of the arbitral tribunal

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575 *Ibid.*, 2:918.
576 *Ibid.*, 2:959.
577 Company A (Italy) -v- Respondent 1-5 (Italy) (ICCA Yearbook 2010), 35 Final Arbitral Award in case no. 14046.
578 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2010)*, 35:246.
579 *Ibid.,* 246–48.

to rule on its jurisdiction. This case concerns three sales contracts under which the defendant would deliver to the plaintiff a certain quality of large green lentils of a specific type on a specified schedule. The contract includes the annotation "Trade Rule Info: GAFTA 88, Incoterms 2010." The GAFTA 88 is a sale contract form including the arbitration clause and the pre-defined commercial terms published by the ICC (Incoterms) which was applied by the parties.[580] The dispute arose when the product did not meet the agreed terms and the plaintiff sought a refund. The plaintiff commenced court litigation in Canada ignoring the arbitration in London.[581]

The Supreme Court of British Columbia dealt with competence-competence by first resolving the challenge of the arbitral tribunal's jurisdiction. The long-standing and endorsed case law by the Canadian Supreme Court was that the court would only admit a challenge under a few exceptions. The court would refer the jurisdictional question to be decided by arbitrators if the matter concerned a question of fact, the only issue of the existence of the arbitration agreement. This practice would not apply with the challenge based solely on a question of law, for example, the application of foreign law, the validity and legality of the arbitration agreement. If the question was mixed fact and law, the question of fact will require only the superficial consideration of the documentary evidence on the record by the court or the *prima facie* review.[582] In fact, this approach is similar to the *prima facie* judicial review standard which is applied in France, Switzerland, and in some other civil law jurisdictions.[583] In summary, there were two steps of the approach applied by the Supreme Court of Canada. First, the court would accept a jurisdictional claim only when the subject matter dealt with the question of law or mixed fact and law. The question of fact should be decided by the arbitrators, subject to judicial review by the court. Second, for the question related to the legal issue, the court would only apply the *prima facie* review on the jurisdictional question and not a full review of the arbitral award.

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580 "Incoterms 2010: ICC Official Rules for the Interpretation of Trade Terms," SeaRates, January 26, 2021, https://www.searates.com/reference/incoterms/.

581 Sum Trade Corp. -v- Agricom International Inc., S178573.

582 *Ibid.*

583 Born, *International Commercial Arbitration*, 2009, 2:958.

The British Columbia court dismissed the argument by the plaintiff, holding that the "arguable case" standard fell under the condition for a stay under Section 8 of *the International Commercial Arbitration Act (ICAA.)*[584] The court precedent is that the competence-competence principle should be decided by the arbitrators unless it involves a pure question of law, or the question of mixed fact and law. The issue of whether the contract has incorporated the arbitration clause is a question of fact. In the court examination, it requires "only superficial" consideration of the documentary evidence in the record." [585]

Finally, the court concluded that the defendant did agree to submit the arguable case to arbitration pursuant to *the GAFTA Arbitration Rules*.[586] The court, therefore, ordered a stay of the proceedings.[587] This case indicates the international interpretation where the court applies the law and rely judicial precedent in favor of arbitration. The court underlined the importance of party autonomy and limited court intervention. The court would refer the case to be decided by arbitral tribunals on the jurisdictional questions.

A Singaporean case between *Aloe Vera of America, Inc (US/plaintiff) v. Asianic Food(S) Pte Ltd (Singapore/defendant) and Another* also reveals the international interpretation in the *Model Law* jurisdiction on the competence-competence and the *prima facie* validity of arbitration agreements.[588] A sole arbitrator rendered an arbitral award favoring the plaintiff with the application of Arizona law and the rules of the American Arbitration Association (AAA). The defendant did not ask the court to set aside the arbitral award in the U.S. The Singaporean High Court subsequently granted the enforcement order *ex parte*. The court dismissed the defendant's application to set aside the enforcement order.[589] The defendant continued to appeal to the Supreme Court of Singapore but the

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584 Please section 8 of *the ICAA* in Appendix 5.
585 Sum Trade Corp. -v- Agricom International Inc., S178573.
586 "The Grain and Feed Trade Association's Web Page," accessed March 18, 2020, https://www.gafta.com/about.
587 Sum Trade Corp. -v- Agricom International Inc., S178573.
588 Aloe Vera of America, Inc (US) v. Asianic Food(S) Pte Ltd (Singapore) and Another (ICCA Yearbook 2007), XXXII Suit No. OS 762/2004, RA 327/2005.
589 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2007)*, XXXII:490.

court dismissed the appeal with costs.[590] The Singapore courts had applied the international approach in favor of arbitration leading to the recognition and enforcement of the arbitration agreement and the foreign arbitral award in Singapore.

The Supreme Court of Singapore provided reasoning on competence-competence. First, the arbitrator was acting under the rules of the AAA and the law of Arizona, US. The parties chose Arizona law to be the law governing the relationship between the parties. The arbitrator held that he had jurisdiction to determine the arbitrability of the claim by AVA (the plaintiff) against Mr. Chiew (the defendant). Secondly, Mr. Chiew was a proper party to the arbitration. The court considered accepted that the power of the arbitral tribunal to determine its own jurisdiction is subject to review by the court.[591] The judge further mentioned that as the enforcement court, he could permit the refusal of the enforcement if the defendant was able to establish the grounds in Section 31(2) of the Act. The judge could not look into the merits of the award and allow the defendant to re-litigate issues which he could have brought up either before the arbitrator or the court at the place of arbitration.[592] The court had applied the *prima facie* review and dismissed the appeal to allow the enforcement of the arbitral award. Finally, Singapore is one jurisdiction that applies the international interpretation of the *Model Law.* The courts also applied foreign sources of case law from common law jurisdictions in its decisions including Proctor v. Schellenberg (Canada), Svenska Petroleum Exploration v. Government of the Republic of Lithuania (England), and Heibei Import& Export Corp. v. Polytek Engineering Co. Ltd (Hongkong).[593]

Under the current *LRED*, the arbitration agreement becomes invalid if the main contract is terminated. In order to support the international interpretation, the principle of the separability of an arbitration agreement should be added to Lao law. If Lao judges take the international approach to apply and interpret Article 16 of the *Model Law*, they should have the recourse in Article 2A which

590 *Ibid.,* 506.
591 *Ibid.,* 99.
592 *Ibid.,* 501.
593 *Ibid.,* 489–96.

suggests the court consider the international origin and the need to promote uniformity in its application. The international interpretive practices (as mentioned in Chapter II), the global consensus, and transitional interpretive rules suggest that judges consider *the VCLT* and the legislative history of the *Model Law*, if it is relevant, as a basis for judicial interpretation.[594] Finally, the judge should consider international comity, which is the recognition of foreign arbitral awards. *The New York Convention* strongly inclines the courts to give effect to foreign arbitral awards according to the principle of international comity. This principle enshrined in *the New York Convention.*[595]

The separability doctrine provides that the invalidity of the contract should not affect the validity of the associated arbitration clause.[596] As mentioned above, the international scholar underlined the importance of the *travaux preparatoires of* the *Model Law* for the international interpretation. The commentary by the Secretary-General of the UNCITRAL on the draft text of the *Model Law* mentioned that though the doctrine of separability (or autonomy) of the arbitration clause has not yet been recognized in all national law, it is a widely accepted feature of modern international arbitration. This doctrine complements the power of the arbitral tribunal to determine its own jurisdiction in that it calls for treating such a clause as an agreement independent of the other terms of the contract.[597] A finding by the arbitral tribunal that the contract is null and void, therefore, does not require the conclusion that the arbitration clause is invalid. The arbitral tribunal would thus not lack jurisdiction to decide on the nullity of the contract and on further issues submitted to it unless it finds that the defect which causes the nullity of the contract also affects the arbitration clause itself.[598] The termination of the main contract may affect the validity of arbitration agreements if judges can prove that such defects also affect the arbitration agreement.

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[594] Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–42.
[595] Aloe Vera of America, Inc (US) v. Asianic Food(S) Pte Ltd (Singapore) and Another (ICCA Yearbook 2007), XXXII Suit No. OS 762/2004, RA 327/2005 at 496.
[596] Born, *International Commercial Arbitration*, 2009, 1:361.
[597] "Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration, Report of the Secretary General, 1985, A/CN.9/264," 1985, 38.
[598] *Ibid.*

In an international dispute from Greece, a model law jurisdiction, the Greek courts applied the law with the broad interpretation of public policy and the principle of the separability of arbitration agreements. The court granted the enforcement of three English arbitral awards in favor of arbitration. This case was between *Shipowner (Malta/Appellant) v. Contractor (nationality not indicated/Appellee) decided by the Supreme Court in 2007.* The contractor (appellee), a foreign company with an office in Greece, undertook the reparation of a vessel owned by the shipowner for an agreed fee. Clause 6 of the contract provided for the application of English law and for arbitration of disputes in London.[599] A dispute arose between the parties in respect of the payment. Arbitration proceedings commenced in London as provided for in the contract.[600] The arbitral tribunal rendered three arbitral awards. The contractor (appellee) sought enforcement of the three English awards in Greece. The Athens Court of Appeal granted the enforcement. The Supreme Court affirmed the lower court's decision and dismissed all of the shipowner's (appellant) grounds for appeal. The court then dismissed, *inter alia,* the shipowner's public policy arguments. It first reasoned that it was not proved in the proceedings that the arbitration clause had been terminated as a consequence of the alleged termination of the contract between the parties. On the contrary, the arbitral tribunal held that the clause was valid under the applicable English law.[601] In this respect, the court disagreed with the argument that the parties' choice of English law violated public policy, noting that *the New York Convention* explicitly states that the law applicable to the arbitration agreement is the law chosen by the parties. The court also noted that the termination of the contract would not in any case affect the arbitration clause because of the principle of separability.[602]

Finally, judges applied Article 16 with the desire to promote international uniformity of the application of the *Model Law*. International practices ask judges to apply the *prima facie* test for the jurisdictional question of arbitral tribunals. There are two instances related to the term *prima facie* for

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599 Shipowner (Malta) v. Contractor (nationality not indicated) (ICCA Yearbook 2008), decision no, 1066 of 2007 (Supreme Court 2007).
600 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2008)*, 33:565.
601 *Ibid.,*566.
602 Van Den Berg, 33:566.

judges such as the *prima facie* evidence of the existence of the arbitration agreement, and the *prima facie* review of the jurisdictional questions. This summary should help judges to resolve the jurisdictional questions whether the national court should have jurisdiction over a given case or whether the arbitral tribunal should have jurisdiction to determine its jurisdiction. This solution derives from the principle of competence-competence which enhances the power of the arbitral tribunal. The question of the jurisdiction of the arbitral tribunal should be first decided by the arbitrators themselves. The *prima facie* character suggested that the jurisdiction questions should be decided by the arbitrators, unless it involves a pure question of law, or the question of mixed fact and law.[603] This basis was one of the approaches applied by the Canadian Supreme Court as shown in the *Dell Computer Corporation* case and the *Sum Trade Corp* case.[604] At least one Canadian court reasoned that this distinction applies only in Quebec, Canada.[605] In summary, if the courts receives the claim on the jurisdiction of arbitral tribunals, the court must first apply the *prima facie* test to determine whether there exists the arbitration agreement. If the dispute involves the question of law or mixed fact and law, the court should have jurisdiction. If the dispute involves the question of fact, the court should refer the dispute to be decided by arbitrators. However, in any case, the arbitral tribunal should have the powers to rule on its jurisdiction. This is the competence-competence principle. The international interpretation urges judges to decide on the jurisdictional competence in favor of international arbitration. Secondly, when there is an arbitral award over the jurisdictional questions, whether in a preliminary or final award. Article 16 enables the court to review those arbitral awards. There are two prominent approaches for the court review such as a *prima facie* or full review. The international interpretation suggests judges to apply the *prima facie* review of the competence of arbitral tribunals. Judges require only superficial or *prima facie* consideration of the documentary evidence.[606]

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603 Bermann, "International Arbitration and Private International Law-General Course on Private International Law," 117.

604 Dell Computer Corporation (Canada) -v- (1) Union des consommateurs (Canada); (2) Olivier Dumoulin (Canada) (Supreme Court of Canada July 13, 2007); Sum Trade Corp. -v- Agricom International Inc., S178573.

605 Bermann, "International Arbitration and Private International Law-General Course on Private International Law," 117.

606 Sum Trade Corp. -v- Agricom International Inc., S178573.

A connected matter in Article 16 is whether the arbitration agreement should be treated as independent from the underlying contract. Courts can also apply the international interpretation with the separability doctrine of Article 16. This principle provides that even if the contract is null and void, inoperative, or incapable of being performed, the tribunal can still have the power to continue the proceedings with the mandate of the arbitration agreement. This principle attached the importance of the consent of the parties in the arbitration proceedings. This treatment is good for international commercial arbitration because the arbitral tribunal will have more power to rule on its jurisdiction and enhance the independence of the arbitral tribunal to decide on the matter. In summary, the international approach supports the broad interpretation of this doctrine in favor of international arbitration.

2. Comparison and examination of the two interpretations

The principles of competence-competence and the doctrine of separability of arbitration agreements are interconnected. The principle of competence-competence clarifies whether it is the arbitral tribunal or the state court to first determine jurisdictional competence.[607] This principle gives the power to the arbitral tribunal to decide jurisdictional questions and strengthens the powers of arbitral tribunals.[608] The principle is essential for international arbitration. Without it a party can interrupt the arbitration at any time merely by raising a jurisdictional objection that may bring court intervention.[609] Besides, separability is a commonly accepted principle in national legal systems, especially in international commercial arbitration.[610] Ikko Yoshida wrote that the principle of separability of arbitration agreement deduces because of the separate nature of the main contract and the arbitration agreement. Similarly, the right and obligations relating to arbitration are not

[607] *Ibid.*, 103–26.
[608] *Ibid.*
[609] Ikko Yoshida, "Interpretation of Separability of an Arbitration Agreement and Its Practical Effects on Rules of Conflict of Laws in Arbitration in Russia," *Arbitration International* 19, no. 1 (2003): 108; Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 479.
[610] Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*, 480.

automatically transferred with the assignment of the main contract. This nature creates another agreement.[611] The arbitration agreement is therefore considered as independent from other terms of the main contract. The following explains how the courts interpret these two principles (1) the principle of competence-competence and (2) the separability of arbitration agreements by either the national or international interpretation.

2.1 National interpretation of Article 16

Taking into account the divergence of municipal law and state sovereignty issues, a judge using the national approach may interpret Article 16 restrictively and rely only on the law and principles of its jurisdiction. The judge may be hesitant to apply foreign case law or the general principles of an international convention or treaty. The national approach applies a restrictive interpretation. The courts tend to use case law which is not in favor of arbitration and are inclined to interpret and apply the question of the jurisdiction of the arbitral tribunal and the separability of arbitration agreements with deference to the national court.

First, the national approach advocates interpret the competence-competence as follows. Among the few cases showing the national approach, Mexican courts showed a preference toward court litigation. The courts applied the laws and principles restrictively and put forward a national public policy. In the *LDC, S.A. de C.V.'s* case*,* the Supreme Court interpreted *the Commercial Code* and produced an absurd result. The court provided reasons that there was an exception to this general rule. In this case, the invalidity or non-existence of the arbitration clause was raised before the state court in the context of an action for performance under the contract. Accordingly, it is for the state court to decide whether the arbitration agreement is invalid and, therefore, the state court should have jurisdiction. The Supreme Court explained that this issue concerned a substantive validity of the

611 Yoshida, "Interpretation of Separability of an Arbitration Agreement and Its Practical Effects on Rules of Conflict of Laws in Arbitration in Russia," 112.

arbitration agreement because it was related to the performance of the contract and the state? court should have jurisdiction. After this decision, two judges gave dissenting opinions.[612]

The second issue is the separability doctrine: in a Philippine case, the Court of Appeal ruled in favor of the state court by holding that if one party denies the existence or the validity of the contract, that would also invalidate the arbitration proceedings. The court did not consider the principle of separability of arbitration agreements as it is mentioned in Article 16 of the *Model Law* which was incorporated into *the ADR Act.*[613] Furthermore, the comparison with the Canadian supreme court's approach in which the court referred the question of facts to be decided by the arbitrators. The Filipino court, however, held that "in that case at the issue, which involves a question of facts, must be resolved by the court: arbitration is not proper when one of the parties repudiates the existence or validity of the contract." [614]

2.2. International interpretation of Article 16

The international interpretation, on the other hand, is supported by practitioners and academics.[615] The inclusion of Article 2A of the *Model Law* recommended the judges to adhere to the uniform application of the *Model Law*. Judges should recognize and follow the international interpretation practice and the international comity. The circumstances may be better if there is a global consensus on competence-competence and the separability. Otherwise, judges may have to find a solution from judicial precedents and international practices. *The Vienna Convention* can be a very useful aid to resolve the textual problem. In addition, as an ideal international judge, he or she must be responsible for the duty to address the problem of the transnational interpretive community.

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612 LDC, S.A. de C.V. (nationality not indicated) v. (1) ADT Security Service, S.A. de C.V. (nationality not indicated), and (2) Cámara Nacional de Comercio de law Ciudad de Mexico (Mexico), ICCA Yearbook 2007 (Federal Supreme Court of Justice, First Chamber 2006).

613 Cargill Philippine, Inc. (nationality not indicated) v. San Fernando Regala Trading Inc. (nationality not indicate) (ICCA Year 2008), XXXIII CA-G.R.No.Sp.No.50304.

614 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2008)*, 33:621.

615 Bachand, "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A," 239–50; Gélinas, "From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives," 263–64.

For the issue of competence-competence, in the *First Option's* case, the court held that there must be "clear and unmistakable" evidence to prove the existence of an arbitration agreement, and the scope of the existence of the arbitration agreement should be interpreted broadly, in favor of "arbitrability." The US court prefers the full judicial consideration for the jurisdictional objection and the ultimate court review.[616] In *Sum Trade Corp's* case, the court interpreted and applied the law broadly by following the court precedents that the question of the jurisdiction of the arbitral tribunal: competence-competence principle should be decided by the arbitrators unless it involves the pure question of law or the question of mixed fact and law. In the court examination, judges require "only superficial" (*prima facie*) consideration of the documentary evidence in the record." [617] The issue of whether the contract has incorporated the arbitration clause is a question of fact and should be decided by the arbitral tribunal. Furthermore, the Singaporean courts also applied the international interpretation. The Supreme Court of Singapore had applied the *prima facie* presumption holding that the arbitrator was acting under the rules of the AAA. The arbitrator reached his decision based on the law governing the relationship between the parties. The arbitrator held that he had jurisdiction to determine the arbitrability of the claim, and the court dismissed the appeal to allow the enforcement of the arbitral award.[618]

The international interpretation advocates interpret the separability doctrine as follows. In an international dispute from Greece, the courts applied the law with the broad interpretation of public policy and the principle of separability of arbitration agreements. The court granted the enforcement of the three English arbitral awards with preference to international arbitration.[619] The court also noted that the termination of the contract would not in any case affect the arbitration clause because of the principle of separability. [620]

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616 Born, *International Commercial Arbitration*, 2009, 2:916.
617 Sum Trade Corp. -v- Agricom International Inc., S178573.
618 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2007)*, XXXII:498–99.
619 Van Den Berg, *ICCA Yearbook Commercial Arbitration (2008)*, 33:565.
620 *Ibid.,* 566.

In conclusion, legal jurisprudence and international practice suggest that competence-competence, the principle that the arbitral tribunal should have the authority to determine its own jurisdiction, should be recognized in all national laws and this principle should be applied with the international interpretation.[621] The court can apply the international interpretation to the separability of arbitration agreements. These two issues are related to jurisdictional disputes. There have been two approaches in considering the jurisdictional competence in non-*Model Law* and *Model Law* jurisdictions.[622] Full judicial consideration has been applied in Germany (the *sui generis* approach), the US and England, while courts apply *prima facie* review in France, Canada (for the question of facts) and Switzerland (for awards seated in Switzerland), depending on the circumstances of each jurisdiction. The *prima facie* approach, of course, shows more deference toward international arbitration, and it is more relevant for the international interpretation. In conclusion, the issues of the jurisdiction and separability in Article 16 should be interpreted extensively in support of international arbitration. In practice, this dissertation recommends for Lao judges to look for the current circumstance and three issues of Article 2A, international interpretation practice and the principle of comity, in particular, for the interpretation of Article 16 of the *Model Law*.

[621] "Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration, Report of the Secretary General, 1985, A/CN.9/264," 37.
[622] Born, *International Commercial Arbitration*, 2009, 2:885–87.

Chapter V: Conclusions

Despite the latest amendments in 2018, there are still some problems in the *LRED.* Since the law was drafted exclusively for domestic settlements with the intent of defining the rules and regulations for the domestic resolution of economic disputes arising out of the violations of a contract related to economic or business operations,[623] the law may not be competent to provide a recourse for international commercial arbitration with international standards. Besides, some essential and widely accepted principles of international arbitration do not exist in the current *LRED,* such as the principle of competence-competence, the separability of arbitration agreements, international public policy. Incorporating these rules will enable the *LRED* to resolve disputes for both domestic and international parties, and increase its efficiency and productivity in Laotian law.

The beginning of this dissertation mentioned legal and political background; economic perspectives and demands from the disputants for international commercial arbitration; and the willingness to retain the existing arbitration law as factors for the denial of the adoption of the *Model Law*. Though actively taking part in the drafting process of the *Model Law*, the socialist countries have been reluctant to adopt this uniform law.[624] Some legal origin countries will not enact the law based on the *Model Law.* Furthermore, some countries may wonder if the enactment of the *Model Law* will raise the efficacy and productivity of the arbitration law. Moreover, the adoption by one country might result in disparities and fail to ensure the increase of international arbitration cases. Some resisters may view that the adoption may not be consistent and coherent in jurisdictions where international arbitration has not been widely used and recognized.

Besides the hostility toward the adoption of the *Model Law* by the resisters, there are optimistic grounds for the adoption of the *Model law* for Laos. First, since the current *LRED* was not

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623 Lao Law on Resolution of Economic Dispute (2018), Art.1,2 and 6.

624 See Summary records for meeting on the UNCITRAL Model Law on International Commercial Arbitration (meeting 305th-333th). "Travaux Préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985) | United Nations Commission On International Trade Law," https://uncitral.un.org/, 1985, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux.

drafted for the resolution of international commercial disputes, some well-established and fundamental principles of international arbitration have not yet been incorporated in Lao law. The adoption may help modernize the *LRED* for international arbitration purposes. The adoption of the *Model Law* may further integrate the Lao judicial system with judicial internationalism by introducing the worldwide approach for the interpretation. Second, countries with a good reputation in international arbitration forums have developed a regime of arbitration law for domestic and international commercial disputes.[625] This development encourages and promotes the alternative dispute resolution mechanism in these countries. Furthermore, adopting the *Model Law* is in line with the development policy of the Lao government. The parties can expect a higher standard of international arbitration procedures as similar to other ASEAN model law jurisdictions. Lastly, potential investors have observed that arbitration is more reliable than litigation in developing countries; the arbitral awards are generally more enforceable than foreign court judgments.[626] Therefore, the adoption of the *Model Law* will subsequently promote international business, trade, and investment in Laos. Additionally, the direct approach of the adoption may be more persuasive because the country may optimize to make changes to the legal provision of the *Model Law* and adjust the law to national circumstances and social needs. This type of adoption may be more appropriate for the Laotian context.

After the adoption, the performance of parties, legal counsel, arbitrators, and judges are subject to changes including the changes to the new legal provisions and to their interpretation, especially in the competent courts. This research has identified such changes which will, in turn, become a basis for the reform of the method applied by the Lao People's Supreme Court and the competent courts. The UNCITRAL Secretary-General implicitly called upon judges to always consider the international origin and the need to promote uniformity in its application of the *Model Law.* The focus of this research is a change in the judicial interpretation by Lao judges. Recognizing the importance of this uniform law, judges should adopt a more expansive approach which is the international approach, in favor of international arbitration.

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625 Hong Kong Arbitration Ordinance (2014); Singapore International Arbitration Act.

626 "Arbitration Procedures and Practice in Japan."

Judges' attitude may change from the prior perspective after the adoption, such as the negative attitude toward the *Model Law*, the questions on influences from foreign law, and the suspicion of the impacts on state sovereignty. However, judges still have obligations and duties to interpret and apply the *Model Law* in accordance with the law of their jurisdictions. Furthermore, this dissertation recommends for Lao judges to consider three issues of the international interpretation, which also reflect to some extent, the contents of Article 31 and 32 of *the VCLT.*

Article 34 of the *Model Law* is a vital provision of the *Model Law*.[627] The arbitral award should proceed toward the enforcement after its rendition by the arbitral tribunal. For instance, damages should be paid and the performance of the contract should resume. Nevertheless, this provision has enabled parties to challenge arbitral award at the seat of arbitration.

Article 16 of the *Model Law* determines the rules concerning the competence of arbitral tribunals to rule in their jurisdictions and the validity of the arbitration agreement. Also, the separability doctrine determines that the termination of an underlying contract should not entail the invalidity of an associated arbitration clause. This article is essential in the *Model Law* as it contains the well-known principles of modern international arbitration, the competence-competence (*kompetenz-kompetenz,*) and the separability of arbitration agreements.

The Lao courts which seize jurisdiction over the dispute should be able to choose from the two interpretive approaches: the national or the international approach. This dissertation views the national approach as a restrictive approach with preference to court litigation. This type of interpretation seems to contradict the objective and purpose of the *Model Law* and international tendencies. This peculiar approach is also indicated when the court applies the local law and court practices with the *Model Law*. This approach is deemed irrelevant to the interpretation of Article 34 and Article 16 of the *Model Law*. There are two issues from the national approach such as the divergence of municipal law and the state sovereignty. Judges should understand the divergence of law which may affect and restrict the result of the interpretation. Divergence of municipal law is legal

[627] Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 13.

constraints stem from local theories, laws, principles, and court practices. The state sovereignty will affect the court decision in some extent. Judges would have to examine this particular issue, when confronts with the foreign uniform law. The national approach may mislead judges to read and apply the *Model Law* resulting in absurd and counterproductive decisions. Judges may have the negative attitude toward the uniformity of the interpretation of the *Model Law.* They do not feel bound to the pro-arbitration bias and cannot ignore their legal rules which operate in a very particular social and political setting. With the national approach, courts would base their judicial discretions on the grounds of local jurisprudence, laws, and judicial precedents ignoring the international character of the *Model Law.* Judges may not apply the global consensus, international conventions, the general principles of law, or the legislative history of the *Model Law*. The courts may deal with the law exactly as they would interpret the municipal law regardless of the inclusion of Article 2A.

This dissertation recommends the Lao court to interpret Article 34 and Article 16 with the international approach. The judge should apply the interpretation which is expansive, broad (for example, with the scope of arbitration agreements), narrow (for example, with public policy) in favor of international arbitration. The courts should further examine three notions on the international approach such as Article 2A, the international interpretation practice, and the principle of comity. In fact, judges can apply the international interpretation with all provisions of the *Model Law.*

This is a summary of how the court would deal with Articles 34 and Article16 with the international approach. Judges would commence with the determination of the disputed texts and principles which are ambiguous and unclear. The party, legal counsel, arbitrator and judge may probably raise these issues for the court interpretation, such as the incapacity of parties, the scope of arbitration agreements, the public policy, the competence-competence, and the separability of arbitration agreements.

First, Article 2A would be among the important subjects judges will examine. Although the *Model Law* does not exclude the judge to follow one particular paradigm of interpretation, Article 2A determines that judges should examine the international origin and the need to promote uniformity in its application. This rule has meant that the judge should interpret the *Model Law* with the scrutiny to

the international origin. The *Model Law* status is neither an international convention nor merely a national law; however, Article 2A suggests that judges should interpret this uniform law with international practices and the desirability to promote the uniform arbitration procedure and the uniform practice of international commercial arbitration.

The next issue is the international interpretive practices. This issue asks judges to also consider foreign judicial precedents. The case law can be a factual basis or a legal basis for the court interpretation. Foreign court decisions may provide a guideline and directive on how to interpret the uniform law, albeit that it may not be a binding ground depending on the law of the jurisdiction. Additionally, the court may look for the global consensus on that question. If there is no such consensus, judges may resort to the international interpretive rule.[628] Judges ought to resolve the interpretive problem independently by themselves.[629] The solution might include the recourse to *the Vienna Convention*; for example, Article 31 of the convention mentions that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose." The courts should first interpret the legal text with good faith and look for the ordinary meaning, the context of terms, and the objective and purpose of the treaty. These wordings of *the VCLT* reflects the mixture of a teleological approach adopted by civil law and the common law rules of interpretation.[630] Furthermore, judges may examine the *travaux préparatoires of* the *Model Law*, for instance, the analytical commentary on the draft text of the *Model Law.*[631]

Lastly, the principle of international comity means the deference to foreign law and foreign courts. This principle also refers to the reciprocity of international obligations to international conventions and treaties. This approach is also called judicial internationalism or transjudicialism.

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628 Bachand Frédéric, *The UNCITRAL Model Law after Twenty-Five Years—Global Perspectives on International Commercial Arbitration*, 239–50.

629 *Ibid.,* 240.

630 Bhala and Witmer, "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law," 124; Barnes, "Contextualism: The Modern Approach to Statutory Interpretation," 1084; Dean, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*, 53.

631 Alternative Dispute Resolution Act of the Philippines (2004), sec. 20.

Some practitioners suggest that it is judges' duties and obligations to scrutinize the use foreign law in their judicial interpretations. Besides, judicial internationalism calls on judges to scrutinize foreign court decisions, in particular in comparable legislation and comparable jurisdictions. However, this approach might not be the case for the jurisdiction with a different legal system. Finally, the principle of comity is reciprocity in the enforcement of foreign judgments and arbitral awards. The principle of international comity in *the New York Convention* strongly urges the judges to give effect to foreign arbitral awards.[632] This principle encourages judges to give deference to *the New York Convention*.[633]

The research recommends the international approach as a preferred strategy for Lao judicial interpretation, an expansive approach in favor of international arbitration. The international approach is not a holistic approach but it is similar to the blended approach of the contextual and teleological approaches as determined in Articles 31 and 32 of *the VCLT.* This interpretation includes the consideration of the objectives, purposes, and intentions of the drafters of the *Model Law*. Furthermore, Lao judges should examine the three issues of Article 2A, the international interpretation practice, and the principle of international comity as the basses for the interpretation of the *LRED* after the adoption of the *Model Law*. The competent authority may have to render specific instructions or directives on how the Lao courts would interpret and apply the *Model Law*. This action follows the UNCITRAL's objectives for the uniform application of the *Model Law.* If Lao PDR adopts *the UNCITRAL Model Law on International Commercial Arbitration of 2006*, Laos may consider incorporating Article 34, the application for setting aside as exclusive recourse against arbitral award, and Article 16 on the competence of arbitral tribunal to rule on its jurisdiction into *the Law on Resolution of Economic Disputes*. In conclusion, this dissertation has not yet clearly stated what to do when the powers of the CEDR are shifted to the judiciary. This question refers to, for example, the powers to appoint arbitrators. Currently, the *LRED* enables the parties to select their arbitrators. If the parties are unbale to select the arbitrators from the list provided, the CEDR, which is equivalent to a department under

[632] Aloe Vera of America, Inc (US) v. Asianic Food(S) Pte Ltd (Singapore) and Another (ICCA Yearbook 2007), XXXII Suit No. OS 762/2004, RA 327/2005 at 496.
[633] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614.

the supervision of the Ministry of Justice, will appoint arbitrator for the parties. Under the *Model Law* rules, if the party or the selected two arbitrators are unable to make an appointment, the court or other authority specified in the *Model Law* will appoint the arbitrator. The appointment of arbitrators is in other articles of the *Model Law* which is beyond the scope of the current research. It is not easy to achieve the institutional reform. It requires the additional research for further discussions and analyses on these matters.

Appendix 1: The statistic showing the number of court decisions on arbitration / *the New York Convention*/ the *Model Law* from the ICCA yearbooks

Subject matter related to Article 34	**1985-2005**	**2006-2010**	**Total**
Incapacity of parties and invalid arbitration agreements	152	160	312
Irregularities in arbitration proceedings	62	80	142
The scope of arbitration agreements	132	54	186
Composition of the tribunal	14	1	15
Arbitrability	67	16	83
Public policy	156	96	252
Setting aside claims	68	27	95

Subject matter related to Article 16	**Year 1985-2005**	**Year 2006-2010**	**Total**
Competence-competence	33	15	48
Separability of arbitration agreements	33	18	51

Appendix 2: Articles from the Lao Law on Resolution of Economic Disputes of 2018 (the LRED)

Article 2: Economic dispute resolution

An economic dispute is a conflict of interest between legal entities, or between a legal entity and an individual, or between individuals whether domestic or foreign that may arise from the breach of a contract or [from a dispute related] to production or business operations.

Economic dispute resolution is the resolution of a dispute related to interests by mediation and arbitration which operates by economic dispute resolution organizations.

Article 16: Condition for the resolution of an economic dispute

An economic dispute considered by the Centre or Offices for Economic Dispute Resolution shall be a dispute derived from the breach of economic contracts or business operation that must have one of these following conditions as follows:

1. The disputing parties have agreed [to mediation or arbitration] in a contract or voluntarily agreed to [the Resolution of Economic Dispute];
2. The dispute has not been referred to the People's Court for Consideration or the court has rendered a final decision.

The dispute is not related to the violation of laws and regulations concerning the stability of the state, social security and public order and the environment.

Article 20: Considerations of the petition

Within five days from the date of receipt of the claim, the Centre or Offices for Economic Dispute Resolution shall have examined the claim and summoned the disputing parties to appear to discuss and agree on the type of resolution. If a party does not respond to this invitation without a valid reason, the claim will be declared null and void. The claim will be returned to the claimant.

In the event that the claim does not in conformity with the conditions in Article 16 of this Law, the Centre or Offices for Economic Dispute Resolution shall inform the claimant of reasons within five business days from the date of receipt of the claim.

If the parties of the contracts have agreed on the selection of the resolution of economic dispute by arbitration as provided in Article 34 of this law, however, one party did not appear [at the CEDR] according to the invitation without reasons, the arbitration proceedings may continue as determined by this law.

Article 27: Recusal and challenge of a mediator or a mediation panel

A mediator or a mediation panel have the right to recuse himself or herself from mediation if he or she is a relative [of a disputing party], has an interest in the dispute, has a dispute with either party or is otherwise unable to perform his or her duties due to sudden sickness or a necessary engagement.

In case of recusal, the mediator or the mediation panel must inform its intention in writing to the Center or Office of Economic Dispute Resolution for consideration.

A disputing party has the right to challenge the mediator or the mediation panel if it is found that the terms of the first paragraph of this article applies to such mediator and panel.

In case of challenge, the party invoking such challenge must inform its intention in writing the reasons to the CEDR or OEDR for consideration.

Upon receipt of the recusal or challenge, CEDR or OEDR shall examine within fifteen days, if it is found that such action is reasonable, [the CEDR or OEDR] must render the resolution on the recusal and challenge and proceed to the selection and appointment of mediator or mediator panel with respect to article 26 of this law.

Article 36: Recusal and challenge of arbitrators

Recusal and challenge of arbitrators shall be performed in the same manner as the recusal and challenge of a mediator as determined in article 27 of this law.

Article 47: Challenge of an arbitral award

A disputing party has the right to submit a request to challenge an arbitral award to the People's Court within 30 days from the date of receipt of the arbitral award in any of the following circumstances:

1. The disputing parties did not agree to arbitrate the dispute, or the agreement was cancelled;

2. The composition of the arbitration panel was not in accordance with the agreement of the disputing parties and the law and regulation;
3. An arbitration process was not in accordance with the law and regulation on resolution of economic dispute and was not applied the law and regulation that the disputing parties had agreed in the contract;
4. Information and evidence submitted to the arbitration panel and on which the arbitral award was based, was falsified or the arbitration panel has taken brides, properties or other inducements to distort the course of justice;
5. The dispute is not covered by the scope of Article 16 of this law;
6. The arbitral award exceeded or was less than the claim of the disputing parties.

Appendix 3: Articles from the Model Law on International Commercial Arbitration of 2006 (the Model Law)

Article 1: Scope of application

[...] (3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(iii) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Article 2: Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution.

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

(c) "Court" means a body or organ of the judicial system of a State.

(d) Where a provision of this Law, except Article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

(e) Where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

Where a provision of this Law, other than in Articles 25(a) and 32(2)(a), refers to a claim, if also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to such counterclaim.

Article 2A: International origin and general principles

(1) In the interpretation of this law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this law which are not expressly settled in it are to be settled in conformity with the general principles on which this law is based.

Article 16: Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a latter plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a primary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 34: Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if:[1]

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 7 was 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 this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this state; or

(ii) the award conflicts with the public policy of this state.

(3) Application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral

tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Appendix 4: Articles from the Convention on the International Sale of Goods (CISG) of 1980 and the Vienna Convention on Law of Treaties of 1970

Article 7 of *the CISG*

(1) In the interpretation of this convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 31: General rule of interpretation (*VCLT*)

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relation between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation (*VCLT*)

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 32, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which in manifestly absurd or unreasonable.

Article 33: Interpretation of treaties authenticated in two or more languages (VCLT)

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.

Appendix 5: Articles from foreign laws related to this dissertation

Section 1031: Form of arbitration agreement of *the German arbitration law (2013)*, *Code of Civil Procedure*

(1) The arbitration agreement must be set out either in a document signed by the parties, or in letters, telefax copies, telegrams, or other forms of transmitting messages as exchanged by the parties, and that ensure proof of the agreement by supporting documents.
(2) The requirement as to form stipulated by subsection (1) shall be deemed to have been met also in those cases in which the arbitration agreement is contained in a document transmitted by one party to another party, or by a third party to both parties, the content of which document is regarded, in the event an opposition is lodged late and in accordance with customary standards, to be the content of an agreement.
(3) Where an agreement that is in compliance with the requirements as to form set out in subsection (1) or (2) makes reference to a document containing an arbitration clause, this establishes an arbitration agreement wherever the reference is made such that this clause is included as a component part of the agreement.
(4) (repealed)
(5) Arbitration agreements in which a consumer is involved must be contained in a record or document signed by the parties in their own hands. The written form as set out in the first sentence may be replaced by the electronic form pursuant to section 126a of the Civil Code. The record or document, or the electronic documents may not contain agreements other than those making reference to the arbitration proceedings; this shall not apply if the agreement is recorded by a notary.
(6) Any failure to comply with formal requirements shall be remedied by an appearance being made, in the hearing before the arbitral tribunal, on the merits of the case.

Article 808 of *the Italian Code of Civil Procedure (CCP)*

The parties may establish, in their contract or in a separate document, that disputes arising out of the contract be decided by arbitrators, provided such disputes may be made subject to an arbitration agreement. The arbitration clause must be contained in a document meeting the form required for a submission agreement by Article 807.

The validity of the arbitration clause must be evaluated independently of the underlying contract: nevertheless, the authority to enter into the contract includes the authority to agree to the arbitration clause.

Section 8: Stay of proceedings (*International Commercial Arbitration Act (1996)*, British Columbia, Canada)

(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.
(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed.
(3) Even if an application has been brought under subsection (1) and even if the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

Bibliography

Asean Secretariat News. "AEC 2015 Remains on Track and Top Priority," September 12, 2012. http://www.asean.org/news/asean-secretariat-news/item/aec-2015-remains-on-track-and-top-priority.

Ali, Shahla. "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong." In *the UNCITRAL Model Law and Asian Arbitration Laws—Implementation and Comparisons*. Great Britain: Cambridge University Press, 2018.

Aloe Vera of America, Inc (US) v. Asianic Food(S) Pte Ltd (Singapore) and Another (ICCA Yearbook 2007), XXXII Suit No. OS 762/2004, RA 327/2005 (Supreme Court of Singapore, High Court 2006).

Alternative Dispute Resolution Act of the Philippines (2004), 9285 Republic Act the Philippines § (2004). https://lawphil.net/statutes/repacts/ra2004/ra_9285_2004.html.

An interview with the judge from Vientiane Capital People's Court of Laos, March 2019.

"Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration, Report of the Secretary General, 1985, A/CN.9/264," 1985.

"Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration," March 19, 1985. https://undocs.org/pdf?symbol=en/a/cn.9/263.

Ancel, Marc. "Case Law in France." *Journal of Comparative Legislation and International Law* 16, no. 1 (1934). https://www.jstor.org/stable/753975.

Animal Science Products inc., v. Hebei Welcome Pharmaceutical co. ltd., 138 S. Ct.1865, 138 S. Ct.1865 (Supreme Court of the United States 2018).

Practical Law. "Arbitration Procedures and Practice in Japan: Overview." Accessed May 28, 2020. http://uk.practicallaw.thomsonreuters.com/6-602-0046?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

Arnold, Chris. "Comparison of Civil Law and Common Law." *Common Law Review* 8 (2007): 5–9. https://heinonline.org/HOL/P?h=hein.journals/comnlrevi8&i=7.

Bachand, Frédéric. "Judicial Internationalism and Interpretation of the Model Law: Reflections on Some Aspects of Article 2A." In *the UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration*. United States: JurisNet, LLC, 2013.

Bachand Frédéric. *The UNCITRAL Model Law after Twenty-Five Years—Global Perspectives on International Commercial Arbitration*. JurisNet, LLC, 2013.

Barnes, Jeffrey. "Contextualism: The Modern Approach to Statutory Interpretation" 41 (2018): 31.

Bedard, Julie, Timothy G. Nelson, Jennifer Permesly, Shepard Goldfein, and Shaud G. Tavakoli. "US Supreme Court to Consider Degree of Deference Courts Should Give Foreign Countries' Interpretation of Their Laws | Insights | Skadden, Arps, Slate, Meagher & Flom LLP." Sakadden,

January 25, 2018. https://www.skadden.com/insights/publications/2018/01/us-supreme-court-to-consider-degree-of-deference.

Bell, Gary F. "Singapore's Implementation of the Model Law: If at First You Don't Succeed…." In *the UNCITRAL Model Law and Asian Arbitration Laws—Implementation and Comparisons*, 240. Great Britain: Cambridge University Press, 2018.

Berger, Klaus Peter. "Zivilprozessordnung - German Code of Civil Procedure." Accessed January 12, 2021. https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/.

Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. "The Transplant Effect." *The American Journal of Comparative Law*, 1, 51 (2003).

Bermann, George A. "International Arbitration and Private International Law-General Course on Private International Law," n.d.

Bhala, Raj, and Eric Witmer. "Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law." *Connecticut Journal of International Law* 35, no. 2 (2020): 62–132. https://heinonline.org/HOL/P?h=hein.journals/conjil35&i=97.

"Bimco." Bimco Contracts, July 24, 2020. https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-1994#.

Biukovic, Ljiljana. "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration." *Canadian Business Law Journal* 30, no. 3 (1998): 376–414. https://heinonline.org/HOL/P?h=hein.journals/canadbus30&i=394.

Born, Gary. *International Arbitration— Cases and Materials*. Aspen Publishers, 2011.

Born, Gary B. *International Commercial Arbitration*. Vol. 1. The Netherlands: Kluwer Law International, 2009.

———. *International Commercial Arbitration*. Vol. 2. The Netherlands: Kluwer Law International, 2009.

Born, Gary, Jonathan W. Lim, and Dharshini Prasad. "Sanum V Laos (Part I): The Singapore Court of Appeal Affirms Tribunal Jurisdiction under the PRC-Laos BIT," November 10, 2016. http://arbitrationblog.kluwer arbitration.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/.

Broches, Aron. *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*. The Netherlands: Kluwer Law and Taxation Publishers, 1990.

Buyer (claimant) (nationality not indicated) v. Seller (defendant) (nationality not indicated), 26 Sch H03/09 (Oberlandesgericht [Court of Appeal], Frankfurt 2009).

Buyer (nationality not indicated) v. Seller (nationality not indicated) (ICCA Yearbook 2009), 36 No.E.2007/380 K. 2007/514 (Yargitay [Supreme Court], 19th Civil Chamber 2007).

Cargill Philippine, Inc. (nationality not indicated) v. San Fernando Regala Trading Inc. (nationality not indicate) (ICCA Year 2008), XXXIII CA-G.R.No.Sp.No.50304 (Court of Appeal, Manila, Seventh Division 2006).

Cargill Philippines v. San Fernando Regala Trading, G.R. No. 175404 (Supreme Court 2011).

Chan, Phil C.W. *State Sovereignty and International Legal Order*. Vol. 2. Koninklijke Brill NV, Leiden, 2015.

Church of the Holy Trinity v. United States, 143 U.S. 457 (Supreme Court of the United States 1892).

Civil and Economic Law Group, the Project on Human Resource Development in Justice Sector of the Lao PDR. *Manual on Economic Dispute Resolution*. Vientiane Thepphanya Publisher, 2017.

Company A (Italy) -v- Respondent 1-5 (Italy) (ICCA Yearbook 2010), 35 Final arbitral awards in case no. 14046 (n.d.).

Company X (claimant) v. Company Y (respondent 1), Bank Z (respondent 2), Company S (third party) (Court Judgement for the first instance of Commercial Court Chamber of Vientiane Capital People's Court, Lao PDR November 21, 2017).

Company X v. Company Y and Shareholder A in company Y, 3379/Civil/2014 (Qatari Court of First Instance, Civil and Commercial Matters, Ninth Circuit 2015).

Dainow, Joseph. "The Civil Law and the Common Law: Some Points of Comparison." *American Journal of Comparative Law* 15, no. 3 (1967 1966): 419–35. https://heinonline.org/HOL/P?h=hein.journals/amcomp15&i=435.

Dajajic, Sanja V. "Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration." *Zbornik Radova* 49, no. 2 (2015): 577–96. https://heinonline.org/HOL/P?h=hein.journals/zborrado49&i=599.

Dean, Lewis. *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration—Focusing on Australia, Hong Kong and Singapore*. The Netherlands: Kluwer Law International B.V, 2016.

Dell Computer Corporation (Canada) -v- (1) Union des consommateurs (Canada); (2) Olivier Dumoulin (Canada) (Supreme Court of Canada July 13, 2007).

Desuatels, L- Martin, and D. Greenlee William Jr. "Lao People's Democratic Republic." In *Asia Arbitration Handbook*. The United States: Oxford University Press, 2011.

Detlev, Kuhner. "Annulment and Enforcement of Arbitral Awards in France." Wolters Kluwer, 2018. https://bmhavocats.com/assets/uploads/2018/10/CEPANI-Detlev-K%C3%BChner-Brussels-2018.pdf.

Dias, R W M. *Jurisprudence*. Vol. 5. UK: Butterworth Law Publishers Limited, 1985.

Djajic, Sanja. “Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration Special Issue of International Investment Treaties.” *International Review of Law* 2016, no. 3 (2016): 1–28.

“Doing Business 2020 of Lao PDR.” Accessed July 10, 2019. https://www.doingbusiness.org/content/dam/doingBusiness/country/l/lao-pdr/LAO.pdf.

“Doing Business 2020 of Thailand.” Accessed October 25, 2019. https://www.doingbusiness.org/content/dam/doingBusiness/country/t/thailand/THA.pdf.

“Doing Business 2020 of Vietnam.” Accessed October 25, 2019. https://www.doingbusiness.org/content/dam/doingBusiness/country/v/vietnam/VNM.pdf.

“Doing Business Website.” Accessed March 10, 2020. https://www.doingbusiness.org/en/about-us.

Donaldson, Mike. “Will Clear Rules Fix Statutory Interpretation: Canadian Experience with Judge Kavanaugh’s Proposed Rules of the Road.” *International Journal of Legislative Drafting and Law Reform* 6 (2017): [i]-39. https://heinonline.org/HOL/P?h=hein.journals/intjadr6&i=70.

Driedger, E. A. “Statutes: The Mischievous Literal Golden Rule.” *Canadian Bar Review* 59, no. 4 (1981): 780–86. https://heinonline.org/HOL/P?h=hein.journals/canbarev59&i=788.

“Edict of the Presidium of the USSR Supreme Soviet,” June 21, 1988. Vedomosti SSSR (1988), no. 26, item 427.

Esplugues, Carlos, José Luis Iglesias, and Guillermo Palao. *Application of Foreign Law*. Munich, Germany: european law publishers, 2011.

Farber, Daniel A. “Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective Book Review.” *Cornell Law Review* 81, no. 2 (1996 1995): 513–29. https://heinonline.org/HOL/P?h=hein.journals/clqv81&i=540.

First Options of Chicago Inc. v. Kaplan, 514 U.S. 938 (Supreme Court of the United States 1995).

Frank, Jerome. “Say It with Music.” *Harvard Law Review* 61 (1948).

French Code of Civil Procedure (Book IV: Arbitration) (amended) (2011).

Gaillard, Emmanuel. “France Adopts New Law on Arbitration.” New York Law Journal, January 24, 2011. https://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-article-France-Adopts-New-Law-On-Arbit__/FileAttachment/IA012411FranceAdoptsNewLawOnArbitrationegaillard.pdf.

———. “Gaillard’s Chaos Theory Is Harmony in International Arbitration Overrated? The International Journal of Commercial and Treaty Arbitration” 13, no. 5 (2018). https://globalarbitrationreview.com/.

Gaillard, Emmanuel, and John Savage. *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Netherlands: Kluwer Law International, 1999.

Garner, Bryan A. In *Black’s Law Dictionary*. United States of America: Thomson Reuters, 2014.

Garnett, Richard, and Kien Cuong Nguyen. “Enforcement of Arbitration Award in Vietnam.” *Asian International Arbitration* 2, no. 2 (2006): 137–50.

Gélinas, Fabien. “From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives.” In *the UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*. United States: JurisNet LLC, 2013.

World Trade Organization. “General Council Accepts Laos’ Membership, Only Ratification Left.” Accessed October 27, 2012. http://www.wto.org/english/news_e/news12_e/acc_lao_26oct12 _e.htm.

Germain, Claire M. “Approaches to Statutory Interpretation and Legislative History in France.” *Duke Journal of Comparative & International Law* 13, no. 3 (2003): 195–206. https://heinonline.org/HOL/P?h=hein.journals/djcil13&i=679.

Ghodoosi, Farshad. *International Dispute Resolution and the Public Policy Exception*. New York, United States: Routledge, 2017.

Global arbitration review. “Global Arbitration Review: Sweden,” October 19, 2015. https:// global arbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2016/1036960/sweden.

Global arbitration review. “Global Arbitration Review: United Kingdom,” October 19, 2015. https://globalarbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2016/1036964/united-kingdom.

Glover, Rupert Granville. “Statutory Interpretation in French and English Law.” *Canterbury Law Review* 1, no. 3 (1982 1980): 385–92. https://heinonline.org/HOL/P?h=hein.journals/cblrt1 &i=389.

Gunther, Teubner. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences.” *The Modern Law Review* 61, no. 1 (1998): 11–32. https://www.jstor.org /stable/ 1097334.

Harvard College v. Canada (Commissioner of Patents), [2002] 4 SCR 45 (the Supreme Court of Canada 2002).

Heraeus Kulzer GmbH (Germany) v. Dellatorre Vera SpA (Italy), 33 ICCA Yearbook 2008 (Corte di Cassazione [Supreme Court] 2007).

Hilton v. Guyot, 159 U.S. 113 (Supreme Court of the United States 1895).

Holtzmann, Howard M., and Joseph E. Neuhaus. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration—Legislative History and Commentary*. The Netherlands: Kluwer and Taxas Publishers, 1989.

Hong Kong Arbitration Ordinance (2014) (2014). https://www.elegislation.gov.hk/hk/cap609.

Hop, Dang Xuan. “The Vietnamese Law on Commercial Arbitration 2010 Compared to the UNCITRAL Model Law on International Commercial Arbitration 2006.” In *The UNCITRAL Model Law and*

Asian Arbitration Laws— Implementation and Comparisons. Great Britain: Cambridge University Press, 2018.

Hornby, A S. *Oxford Advanced Learner's Dictionary of Current English*. 9th ed. Britain: Oxford University Press, 2015.

"ICC Arbitration in South-East Asia." Vientiane, Laos, 2016.

ICC Digital Library. "ICC Digital Library," November 6, 2020. https://library.iccwbo.org/dr-awards.htm.

"ICSID Convention." Accessed June 5, 2019. https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.

SeaRates. "Incoterms 2010: ICC Official Rules for the Interpretation of Trade Terms," January 26, 2021. https://www.searates.com/reference/incoterms/.

"Instruction of the President of People's Supreme Court on Consideration of Results of Economic Dispute Resolution by People's Courts," July 2, 2019. http://laoofficialgazette.gov.la/.

"Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards. Committee on International Commercial Arbitration of International Law Association." London Conference, 2000. http://www.ila-hq.org/en/committees/index.cfm/cid/19.

"International Arbitration 2020 - Philippines | Global Practice Guides | Chambers and Partners," August 18, 2020. https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/philippines.

Jan, Paulsson. "The New York Convention in International Practice—Problems of Assimilation in the New York Convention of 1958." *ASA Special Series*, 9, 1996.

Jingshou, Tao. "Arbitration in China." In *International Commercial Arbitration in Asia*. United States: JurisNet, LLC, 2006.

John, Fellas. "Who, as Between Courts and Arbitrators, Should Decide Objections to Arbitrability?" *New York Law Journal* 261, no. 58 (March 27, 2019): 3. https://advance.lexis.com/document/?pdmfid=1000516&crid=1e5004a6-8e49-49a2-b88b-2c02c13a92fa&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5VRK-BP41-DY35-F50H-0000000&pdcontentcomponentid=8205&pdteaserkey=sr5&pditab=allpods&ecomp=kxdsk&earg=sr5&prid=cad4bb95-2dbe-4509-a0fe-1ab9959338f9.

Jordan, Tan. "Singapore Court of Appeal: Sanum Investments Limited v The Government of the Lao People's Democratic Republic." *Kluwer Arbitration Blog* (blog), April 25, 2016. http://kluwerarbitrationblog.com/2016/04/25/singapore-court-of-appeal-sanum-investments-limited-v-the-government-of-the-lao-peoples-democratic-republic/.

Julien, Bonnecase. "The Problem of Legal Interpretation in France." *Journal of Comparative Legislation and International Law* 12, no. 1 (1930): 79–93. https://www.jstor.org/stable/753 944.

Jun, Zhang. “China’s Price Liberalization and Market Reform: A Historical Perspective.” In *China’s 40 Years of Reform and Development*, edited by Ross Garnaut, Ligang Song, and Cai Fang, 215–34. 1978–2018. ANU Press, 2018. https://www.jstor.org/stable/j.ctv5cgbnk.20.

Kavanaugh, Brett M. “Fixing Statutory Interpretation.” *Harvard Law Review* 129 (2016): 46.

Kerameus, K.D. “Waiver of Setting-Aside Procedures in International Arbitration.” *The American Journal of Comparative Law* 41, no. 1 (1993). https://www.jstor.org/stable/840507.

Kerr, Michael. “Concord and Conflict in International Arbitration.” *Arbitration International* 13, no. 2 (1997): 121–43.

Kim, Joongi. *Research Project on How Lao PDR Can Modernize Its Arbitration Related Legislation: Based Upon Korea’s Experience of Amending Its Arbitration Law*. Republic of Korea: Yonsei University, 2016.

Klaus, Peter Berge. “The Implementation of the UNCITRAL Model Law in Germany.” *Mealey’s(R) International Arbitration Report* 13, no. 1 (January 28, 1998). https://advance.lexis.com/.

Kotuby, Charles T., and Luke A. Sobota. *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*. CILE Studies, volume 6. New York, NY: Oxford University Press, 2017.

Kroll, Stefan. “The Public Policy Defense in the Model Law Jurisprudence: The ILA Report Revisited.” In *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*. United States: JurisNet LLC, 2013.

La Porta, Rafael, Florencio Lopez-de-Silanes, and Andrei Shleifer. “The Economic Consequences of Legal Origins.” *Journal of Economic Literature* 46, no. 2 (2008): 285–332. https://www.jstor.org/stable/27646991.

Lao Civil Code, 55/NA § (2018). https://laoofficialgazette.gov.la.

Lao Civil Procedure Law, no. 13/NA (2012). https://laoofficialgazette.gov.la.

Lao Law on Contract and Tort, no. 01/NA (2008). https://laoofficialgazette.gov.la.

Lao Law on Drafting of Juristic Acts, no. 19/NA (2012). https://laoofficialgazette.gov.la.

Lao Law on People’s Court (2017), 09/NA § (2017). http://na.gov.la/?fbclid=IwAR2lrh2V7zf7oJJxN5CkzMsObMRdqWOn4Z0Pd_DkbGfyXUGCa-QlTYKaQnA.

Lao Law on Resolution of Economic Dispute (2010), 06/NA § (2010). https://laoofficialgazette.gov.la.

Lao Law on Resolution of Economic Dispute (2018), 51/NA § (2018). https://laoofficialgazette.gov.la.

“Laos Becomes Party to Two More UN Treaties.” *Vientiane Times*, October 1, 2019.

“Laos Prevails in Hongsa Power Plant Court Case.” *The Nations*, September 19, 2017.

LDC, S.A. de C.V. (nationality not indicated) v. (1) ADT Security Service, S.A. de C.V. (nationality not indicated), and (2) Cámara Nacional de Comercio de law Ciudad de Mexico (Mexico) (ICCA Yearbook 2007), Appeal no.3836/2004 (Federal Supreme Court of Justice, First Chamerber 2006).

Leebouapao, Leeber, Phonesavanh Sitthideth, Keokhuanchay Douangpaseuth, and Yuanita Suhud. “E-Commerce Development in the Lao PDR: Some Policy Concerns.” In *E-Commerce Connectivity in ASEAN*, 235–51. Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia, 2020.

Lemay Timothy and Montineri Corinne. “Review of the Model Law’s Implementation after Twenty-Five Years.” In *the UNCITRAL Model Law after 25 Years: Global Perspectives on International Commercial Arbitration*. USA: JurisNet, LLC, 2013.

Lexis Advance. “Lexis Advance,” November 6, 2020. https://advance.lexis.com/firsttime?crid =76c43b5e-593a-4a97-b050-041461276f5a.

www.newyorkconvention.org. “List of Contacting States of New York Convention,” February 6, 2020. http://www.newyorkconvention.org/countries.

“List of the Model Law Adopting Jurisdiction— Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission on International Trade Law.” Accessed June 19, 2019. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

Loo, Wee Ling. “Full Contractual Capacity: Use of Age for Conferment of Capacity.” *Singapore Journal of Legal Studies*, 2010, 328–51. https://www.jstor.org/stable/24870501.

Lorbacher, Michael. “The Model Law After Twenty-Five Years: A German Judicial Perspective on International Interpretation.” In *the UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*. United States: JurisNet LLC, 2013.

Lorenz, Werner. “General Principles of Law: Their Elaboration in the Court of Justice of the European Communities.” *The American Journal of Comparative Law* 13, no. 1 (1964): 1–29. https://doi.org/10.2307/838341.

Louis Dreyfus Commodities (nationality not indicated) v. Cereal Mangimi s.r.l. (Italy) (ICCA Yearbook 2009), 36 11529 (Corte di Cassazione [Supreme Court] 2009).

Loukas, Mistelis. “Delocalization and Its Relevance in Post-Award Review.” In *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*. United States: JurisNet, LCC, 2013.

Ma, Arthur, Benjamin Miao, and Helen Shi. “People’s Republic of China.” In *Asia Arbitration Handbook*. United States: Oxford University Press, 2011.

Matti S., Kurkela, and Snellmann Hannes. *Due Process in International Commercial Arbitration*. United States: Oceana Publications, Inc., 2005.

United Nations. “Member States | United Nations,” March 7, 2021. https://www.un.org/en/member-states/index.html.

United Nations Treaty Collection. “Member States of the Vienna Convention on the Law of Treaties of 1969.” Accessed September 7, 2019. https://treaties.un.org/Pages/ViewDetails III.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

Mills, Karen. “Enforcement of Arbitral Awards in Indonesia and Other Issues of Judicial Involvement in Arbitration.” Jakarta, Indonesia: KarimSyah Law Firm, 2005. http://www.arbitralwomen.org/files/publication/4310102632224.pdf.

Mistelis, Loukas A., and Domenico Di Pietro. “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).” In *Concise International Arbitration*. United Kingdom: Kluwer Law International, 2010.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (Supreme Court of the United States 1985).

Mortenson, Julian Davis. “The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?” *The American Journal of International Law* 107, no. 4 (2013): 780–822. https://doi.org/10.5305/amerjintelaw.107.4.0780.

Moses, Margaret L. *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press, 2008.

Nguyen Manh, Dzung, and Trang Nguyen Thi Thu. “Countries Report on the Public Policy Exception in New York Convention, Vietnam.” Dzungsrt & Associates LLC, March 15, 2016.

Nuannavong, Vongsavan. “The Condition for Recognition and Enforcement of Foreign Arbitral Award: Public Policy.” Master’s Thesis, Nagoya University, 2012.

Oak Crest Manor Nursing Home, LLC v. Barba, 2016 Tex. App. LEXIS 12710, 2016 Tex. App. LEXIS 12710 (Court of Appeals of Texas, Third District, Austin 2016).

OJSC Ukrnafta (Ukraine) v. Carpatsky Petroleum Corp. (United States) et al. (ICCA Yearbook 2018), 43 Civil Action H-09-891 (United States District Court, Southern District of Texas, Houston division 2017).

Ortolani, Pietro. “Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award.” In *UNCITRAL Model Law on International Commercial Arbitration - A Commentary*. Cambridge University Press, 2020.

“Overview of the Status of UNCITRAL Convention and Model Laws,” May 18, 2020. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table.pdf.

World Bank. “Overview: The World Bank in China.” Text/HTML. Accessed May 26, 2020. https://www.worldbank.org/en/country/china/overview.

Pargendler, Mariana. “The Rise and Decline of Legal Families.” *The American Journal of Comparative Law* 60, no. 4 (2012): 1043–74. https://doi.org/10.2307/41721695.

Paul, Joel R. “The Transformation of International Comity.” *Law and Contemporary Problems*, Transdisciplinary Conflict of Laws, 71, no. 3 (2008): 19–38.

Paulsson, Jan. “Arbitration in Three Dimensions.” *The International and Comparative Law Quarterly* 60, no. 2 (2011): 291–323.

Peter, Binder. *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*. 3rd ed. Great Britain: Thomson Reuters (Legal) Limited, 2010.

———. *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions—An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration (2000)*. London: Sweet & Maxwell, 2000.

Peter, M. Binder. *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction: An International Comparison of the UNCTRAL Model Law on International Commercial Arbitration*. 1st ed. London: Sweet & Maxwell Limited, 2000.

Polkinghorne, Michael, Alvaro Peralta, Hazel Levent, and Gwen Wackwitz. “Article 16 Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction.” In *UNCITRAL Model Law on International Commercial Arbitration - A Commentary*. Cambridge University Press, 2020.

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, CA 127/2005 21 (Singapore Court of Appeal 2006).

Quang Chuc Tran. “Recognition and Enforcement of Foreign Awards in Vietnam-Shortcomings and Suggested Remedies.” *Journal of International Arbitration* 22, no. 6 (2005): 487–503.

Quigley, John. “Socialist Law and the Civil Tradition.” *The American Journal of Comparative Law* 37, no. 4 (1989): 781–808. https://www.jstor.org/stable/840224.

Randy, Ai. “CanLII Connects.” *CanLII Connects*, May 4, 2015. http://canliiconnects.org.

“Report of the Secretary General, A/CN.9/263,” 1985.

“Report of the UNICITRAL Commission on the Work of Its Eighteenth Session (Vienna, 3-21 June 1985) Commenting on Public Policy as Understood in the New York Convention and Model Law.” Vienna, 1985.

“Resolution Adopted by the General Assembly 40/72,” November 12, 1985.https://digital library.un.org/record/196028?ln=en.

Reverso context. “Ad Substantiam - Translation into English - Examples Italian | Reverso Context,” January 19, 2021. https://context.reverso.net/translation/italian-english/ad+substantiam.

Salini Constructtori S.P.A v. Kingdom of Morocco, Civil Action H-09-891 (United States District Court, District of Columbia 2017).

Sanum Investments Limited and the Government of Lao PDR (Arbitral tribunal December 13, 2013).

Sanum Investments Limited-v- the Government of the Lao PDR, Civil Appeal No. 139 and 167 of 2015 (the Court of Appeal of the Republic of Singapore 2016).

Scherk v. Alberto-Culver Co., 417 U.S. 506, 417 U.S. 506 (Supreme Court of the United States 1974).

Shiels, Nicola M. “Canadian Appeals Court Permits Harvard Mouse Patent: Is the Intellectual Property Provision in the North American Free Trade Agreement Superfluous.” *Law and Business Review of America* 7, no. 3 (2001): 37.

Shipowner (Malta) v. Contractor (nationality not indicated) (ICCA Yearbook 2008), decision no, 1066 of 2007 (Supreme Court 2007).

Singapore International Arbitration Act (2009). http://www.siac.org.sg/images/stories/articles/rules/IAA/IAA%20Aug2016.pdf.

Sinko, Derek. “The Use of ‘Use’: Legislative Intent, Plain Meaning, & Corpus Linguistics.” SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, February 4, 2015. https://papers.ssrn.com/abstract=2560305.

Société d’ etudes et représentations navales et industrieslles–Soerni (France) et al. v. Air Sea Broker Limited– ASB (Switzerland), 956 (Cour de Cassation [Supreme Court] 2009).

United Nations. “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission On International Trade Law,” March 7, 2021. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

Sum Trade Corp. -v- Agricom International Inc., S178573 (Supreme Court of British Columbia, Canada 2017).

Supreme Court Judgments. “Supreme Court Judgments of Singapore,” November 6, 2020. https://www.supremecourt.gov.sg/news/supreme-court-judgments.

Swiss Singapore Overseas Enterprises Pvt. Ltd v. M/V African Trader (High Court, Gujarat February 7, 2005).

Tawfik, Myra J. “No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law.” *Queen’s Law Journal* 32, no. 2 (2007 2006): 573–601. https://heinonline.org/HOL/P?h=hein.journals/queen32&i=583.

Telenor Mobile Communications AS (Norway)-v- Storm LLC (Ukraine), 548 Federal Reporter, Third Series (2nd Circuit), 396 et seq.: 2009 U.S. App. Lexis 22156 Yearbook XXXV 2010 (United State Court of Appeal 2009).

Thai-Lao Lignite (Thailand) co., Ltd. & Hongsa Lignite (Lao PDR) Co., Ltd., -v- Government of Lao PDR., 2011 U.S. Dist. LEXIS 87844 (United States District Court for the Southern District of New York 2011 2011).

“The Case Law on UNCITRAL Texts (CLOUT).” Accessed December 5, 2018. http://www.uncitral.org/uncitral/en/case_law.html.

The constitution of the Lao PDR of 2015, 63/NA § (2015).

"The Convention on International Sale of Goods (CISG)," April 11, 1980. https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

The Decree on Resolution of Economic Dispute (1994), 106/PM § (1994).

"The Grain and Feed Trade Association's Web Page." Accessed March 18, 2020. https://www.gafta.com/about.

"The London Court of International Arbitration (LCIA)." Accessed May 26, 2020. https:// www.lcia.org/.

The Notice of the Prime Minister Office of Lao PDR concerning the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 2454/PMO § (1998).

the UNCITRAL Model Law on International Commercial Arbitration (2006).

The United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) (1958).

https://uncitral.un.org/. "Travaux Préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985) | United Nations Commission On International Trade Law," 1985. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux.

Tyco Services Singapore Pty Ltd v. Leighton Contractors (VN) Ltd, 02/PTDS (Appellate Court in Hochiminh 2003).

"UNCITRAL Model Law on International Commercial Arbitration 1985 (with Amendments as Adopted in 2006)," 1985. https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

"United Nations General Assembly Resolution 40/72," n.d. 40 GAOR supp. No. 53. A/40/53, 308.

"United Nations General Assembly Resolution A/40/72," December 11, 1985.

Van Den Berg, Albert Jan. *ICCA Yearbook Commercial Arbitration (2007)*. Vol. XXXII. The Netherlands: Kluwer Law International BV, 2007.

———. *ICCA Yearbook Commercial Arbitration (2008)*. Vol. 33. The Netherlands: Kluwer Law International BV, 2008.

———, ed. *ICCA Yearbook Commercial Arbitration (2009)*. Vol. 36. The Netherlands: Kluwer Law International BV, 2009.

———, ed. *ICCA Yearbook Commercial Arbitration (2010)*. Vol. 35. 2010. The Netherlands: Kluwer Law International BV, 2010.

"Vienna Convention on Law of Treaties (VCLT)," 1970.https://treaties.un.org/pages/ ViewDetails III.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3& clang=_en.

Wei Lee, Lim, and Yeo Alvin. "Singapore." In *Asia Arbitration Handbook*. Great Britain: Oxford University Press, 2011.

Welser, Irene, and Susanne Molitoris. "Wording and Interpretation of Arbitration Clauses." In *Austrian Yearbook on International Arbitration*, 17:14, 2012.

Yadykin, Alexey, Martin C. Mekat, and Noah Rubins. “The Russian Arbitration Reform.” *Arbitration International* 32, no. 4 (December 2016): 641–50. https://doi.org/10.1093/arbint/aiw028.

Yanagisawa, Koki, and Takiko Kadono. “Setting Aside Arbitral Awards before Japanese Court: Consolidating Japan’s Position as an Arbitration-Friendly Jurisdiction?” *Kluwer Arbitration* (blog), 2018. http://arbitrationblog. kluwerarbitration.com/2018/01/22/post-2/.

Yang, Lih Shyng, and Leslie Chew. “Arbitration in Singapore.” In *International Commercial Arbitration in Asia*. United States: JurisNet, LLC, 2006.

Yoshida, Ikko. “History of International Commercial Arbitration and Its Related System in Russia.” *Arbitration International* 25, no. 3 (September 1, 2009): 365–402. https://doi.org/10.1093/arbitration/25.3.365.

———. “Interpretation of Separability of an Arbitration Agreement and Its Practical Effects on Rules of Conflict of Laws in Arbitration in Russia.” *Arbitration International* 19, no. 1 (2003).

Yu, Guo. “Comparison between UN Model Law and Chinese Arbitration Law.” In *The UNCITRAL Model Law and Asian Arbitration Laws— Implementation and Comparisons*. Great Britain: Cambridge University Press, 2018.

Yuri Privalov (nationality not indicated) and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others (ICCA Yearbook 2007), Case no. 20062353 A3 QBCMF (Court of Appeal (Civil Division) 2007).