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Authority of the National Court to Intervene in the International Arbitration Process from the Perspective of International Commercial Arbitration Law

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ABSTRACT

As a result of the complexity of international commercial disputes, international arbitration has become the preferred and most effective method for resolving disputes. In 1995, UNCITRAL formulated the Model Law on International Commercial Arbitration (Model Law) which may be utilized by UNCITRAL member states as a consistent and transparent legal foundation to facilitate international arbitration in various jurisdictions. Setting aside the independence from national courts and effectiveness of arbitration, in practice the international arbitration process can be delayed or terminated by the intervention of national courts. Based on these facts, this research is aimed towards figuring out the authority of national courts to intervene in the international arbitration process from the perspective of the UNCITRAL Model Law.

This Research utilizes a normative juridical approach and qualitative descriptive data analysis method, namely research on the legal principles within UNCITRAL Model Law in order to give an illustration and explanation on the subject and object of the research. The results of this research are firstly, the UNCITRAL Model Law gives limited authority for national courts in the seat of arbitration to intervene an arbitration process only in specific situations. Secondly, in practice there are two kinds of court intervention which are the ones in compliance with the provisions and limitations within the UNCITRAL Model Law and the ones that are not. The author proposes that there should be a more distinct differentiation between what is called a court intervention and what is merely the court's function to supervise and accompany arbitral proceedings.

Keywords: *court authority, court intervention, international commercial arbitration, UNCITRAL model law*.

I. INTRODUCTION

In the midst of rapid rates of globalization and technological advancement, international commercial activities have become the backbone of global economic growth. These activities include sales of goods and services, transnational investment, technological transfer, and other sorts of business interactions between nations and multinational corporations.[1] This rapid growth has brought significant economic benefits, improved quality of life, and strengthened connections between states.[2] Globalization has opened the doors for companies to expand their market reach to many countries. A developed information technology has facilitated business communication and transaction without physical limitations, which made it possible to operate efficiently in a global level.

Behind its many benefits, international commercial activities can give rise to a variety of disputes and tensions between the parties involved. These kinds of disputes may involve breach of contract, disagreement on the quality of goods or services, payment issues, unfair competition, breach of intellectual property rights, and many other issues which is rooted in legal, cultural, or interpretational differences of a business agreement. It is important to note that these kinds of disputes arise not only

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[1] M. Reza Syariffudin Zaki, *Hukum Perdagangan Internasional* (Jakarta: Kencana, 2021), 6-7.
[2] Putri Dewi Purnama and Ming-Hung Yao, "The Relationship Between International Trade and Economic Growth," *IJABR* 1, No. 2 (2019): 119-20, https://doi.org/10.35313/ijabr.v1i02.72.

between two business parties, but can also involve governments or government bodies that participate in international commercial activities, both as the claimant and the defendant. For example, in cases where a state through its state-owned enterprise enters into a commercial agreement with a foreign company, if a disagreement arose between the parties, then it will be considered as an international dispute.[3]

International commercial disputes can be resolved through litigation or non-litigation means. Non-litigation resolution, often referred to as alternative dispute resolution, is comprised of a number of dispute resolution methods outside of the court. As a result of the complexity of international commercial disputes, international arbitration has become the preferred and most effective method for resolving disputes[4] Arbitration is an alternative dispute resolution method that entails both disputing parties to agree on submitting their dispute to an independent third party which is called an arbitrator or arbitral tribunal (if there are more than one arbitrators).[5] Though it involves a tribunal and a formal hearing, arbitration is inherently different than litigation because it is not settled within a court, rather by a "third-party court" of the disputing parties' own choosing. Regardless of arbitration's efficacy, efficiency, and independence from national courts, in practice there are cases where an arbitral proceeding can be delayed or terminated by the intervention of national courts.

UNCITRAL or the United Nations Commission on International Trade Law plays a vital role in the development of the legal framework for international arbitration. The United Nations Commission on International Trade Law (UNCITRAL) drafted the Model Law on International Commercial Arbitration (Model Law, for short) in 1985 to simplify and standardize international commercial arbitration around the globe.[6] The Model Law was revised in 2006 to become the version currently utilized in a number of nations. Member states of UNCITRAL may adopt the Model Law as a consistent and transparent legal basis to promote international arbitration in diverse jurisdictions.[7]

However, the implementation of the Model Law can vary from one state to another, and a few jurisdictions may provide different interpretations regarding the national court's intervention authority in the proceedings of international arbitration. This can cause challenges and uncertainty for the parties that are involved in international arbitration, especially if the national court intervenes without considering the autonomy of arbitration.[8]

The author found one of the prominent legal issues relating to international arbitration, which is on the authority of national courts to halt international arbitration proceedings based on the UNCITRAL international commercial arbitration law. Within some cases, the national courts in some jurisdictions had decided to halt an ongoing arbitration based on certain deliberations that are considered to be in disagreement with the public interest or in violation of the national law. This is the case, for instance, if an international agreement concerning a strategic or crucial sector for a state's national interest is subject to arbitration. The parties who feel wronged by the arbitration may petition the national court for assistance in terminating the arbitral proceeding or contesting the arbitral award.[9] This can cause a

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[3] See cases such as *Karaha Bodas Co v. Pertamina (2001)* or *Pac Rim Cayman LLC v. El Savador (2016)*.
[4] Xiaorong Lin, "Influence of International Investment Arbitration Under the International Law," *The 6th International Conference on Economic Management and Green Development*, (2023): 247, https://doi.org/10.54254/2754-1169/4/20221066.
[5] Priyatna Abdurrasyid, *Arbitrase & Alternatif Penyelesaian Sengketa: Suatu Pengantar*, (Jakarta: Fikahati Aneska, 2002), 56.
[6] United Nations Commission on International Trade Law, *The UNCITRAL Guide: Basic facts about the United Nations Commission on International Trade Law*, (Vienna: United Nations Office, 2013), 14-15.
[7] Frans Hendra Winarta, *Hukum Penyelesaian Sengketa: Arbitrase Nasional Indonesia dan Internasional*, (Jakarta: Sinar Grafika, 2012), 179.
[8] Omar Hisham Al Hyari and Abdullah Rabee Al Ani, "Post Award Arbitral Tribunal's Mandate Under the UNCITRAL Model Law and National Laws Based Thereon," *Heliyon* 7, No. 7 (2021): 6, https://doi.org/10.1016/j.heliyon.2021.e07556.
[9] See the *HubCo v. WAPDA (2000)* case in Pakistan and *Salini Costruttori S.p.A. v. The Federal Democratic Republic of Ethiopia and AAWSA (2001)* case.

controversy and difference of views due to the potential intervention that can disrupt the efficiency and independence of international arbitration.

Some jurisdictions give strict limitations towards national court's authority to intervene in international arbitral proceedings. They hold tight to the principle of arbitral autonomy, which underlines that national court is not supposed to meddle unless in certain, very limited situations.[10] This kind of perspective quotes the importance of keeping the faith in international arbitration as an efficient and independent alternative dispute resolution method. Meanwhile, some other jurisdictions may take the middle-path approach where they acknowledge the court's authority to take part in certain international arbitration cases, though they still seek to limit such intervention to the utmost minimum to ensure the efficiency and creed of international arbitration are not compromised. These limits must be clarified and supervised with caution to ensure that international arbitration can still function as a fair and just alternative dispute resolution.

Based on such background, the author feels a need to explore the topic of national court intervention in international arbitral proceedings observed through the UNCITRAL international commercial arbitration law. The goal is to analyze various approaches and interpretations taken by different jurisdictions related to the issue. This article will include a few relevant cases to contribute to the analysis of national courts' decision in handling international arbitration disputes. The issues raised by this article are whether national courts are authorized to intervene in the international arbitration process according to the rules within international commercial arbitration law and how is it implemented in practice.

II. RESEARCH METHOD

This article uses the normative juridical approach to analyze literary sources, expert opinions, and legal documents which discuss international commercial arbitration. The data collected for this study would be reviewed using a descriptive-qualitative approach, which is aimed to give an illustration or description of the subject and object of the research.

III. DISCUSSION AND RESULTS

3.1 International Commercial Arbitration as an Alternative Dispute Resolution

Before we discuss how an international commercial arbitral proceeding can be intervened and its limitations according to the UNCITRAL Model Law, let us first discuss about the arbitration itself. Arbitration is defined as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[11] In this case, the arbitrators will function as a private judge or court to determine the dispute resolution procedure based on the applicable law or the peaceful resolution procedure which the disputing parties has agreed to previously in order to reach a final and binding decision.[12]

Consent, non-governmental decision-makers, and a final and enforceable award are the three distinguishing characteristics of commercial arbitration. Consent signifies that the disputing parties have agreed to resolve their dispute through arbitration. This can be achieved through what is called an arbitration agreement, which can be formed as a clause within the commercial contract between the parties or formed after the dispute has risen in the form of a submission agreement. The parties'

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[10] George A. Bermann, "The Role of National Courts at the Threshold of Arbitration," *The American Review of International Arbitration* 28, No. 3 (2017): 293 – 95, https://scholarship.law.columbia.edu/faculty_scholarship/3012.
[11] Bryan A. Garner et al., eds, *Black's Law Dictionary*, 9th Ed., (United States of America: Thomson Business, 2004), s.v. "arbitration".
[12] Priyatna Abdurrasyid, Op. Cit., 56.

agreement serves as the basis for the arbitrator's right to determine the dispute, but it also restricts that authority to issues within the bounds of the parties' agreement.[13]

Non-governmental decision-makers means that the arbitrators that will decide on a dispute are private citizens that has no affiliation with any government or government bodies. They also do not need to be lawyers, as an arbitrator can be chosen due to their specific skills and expertise in relation to the dispute. They are intended to be independent and impartial, and if there is evidence to the contrary, they can be challenged before the arbitral institution or a court.[14]

The third and final characteristic is a final and binding award. The decision made by the chosen arbitrators is considered as final and binding, though there are instances of opportunities to appeal in some jurisdictions.

As mentioned in the characteristic of parties' consent, among the most crucial factors of international commercial arbitration is the arbitration agreement. The arbitration agreement serves as the foundation for any voluntary arbitration, so before an arbitration is deemed to lawfully exist or referenced in a dispute, there must first be a valid arbitration agreement.[15] It is recognized by the international legal instruments related to arbitration such as the UNCITRAL Model Law and New York Convention of Recognition and Enforcement of Arbitral Award 1958 (New York Convention), which state that the recognition and enforcement of a foreign arbitral award can be rejected by a state if the arbitration agreement is deemed as invalid under the law that governs the contract.[16]

One of the grounds for the validity of an arbitration agreement is that it must be in written format, which may be incorporated into the main commercial contract or within a distinct arbitration agreement outside of the main contract.[17] This leads us to the two forms of arbitration agreement, which can be formed before the emergence of a dispute or after the dispute has risen. An arbitration agreement that is made before the dispute is called *Pactum de Compromittendo*. In this form, the agreement can be put in the main agreement as a clause or separate from the main agreement.[18] Meanwhile, an arbitration agreement that is arranged once the dispute has risen is known as a submission agreement. A submission agreement would be a separate document from the main agreement that is being disputed, that serves as evidence of the parties' intent to submit the existing dispute to arbitration for resolution.[19]

Moving on, there are two kinds of arbitration in general, which are *ad hoc* or voluntary arbitration and institutional arbitration. These differ in their forums of arbitration. An *ad hoc* arbitration's forum is incidental, which means that the existence of the arbitration and its forum is solely to resolve a dispute that has been determined. Once an award is given, the arbitration would then cease to exist. *Ad hoc* arbitration is not affiliated to any arbitration institution; it is solely directed by the disputing parties' wishes and abides fully by the laws applicable to the disputed agreement.[20]

Institutional arbitration is an arbitration that is tied to a certain arbitration body or institution. These institutions are permanent in nature and are founded in order to settle disputes that arise due to the execution of agreements. After settling a certain dispute, the arbitral body is not dissolved and they

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[13] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (Cambridge: Cambridge University Press, 2008), 2.
[14] Ibid.
[15] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract*, (London & New York: Routledge, 2010), 8.
[16] Art. V(1)(a) of the New York Convention of Recognition and Enforcement of Arbitral Award (1958) and Art. 36(1)(a)(i) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[17] Art. II(1) New York Convention.
[18] Munir Fuady, *Arbitrase Nasional*, (Bandung: Citra Aditya Bakti, 2000), 118.
[19] Emilia Onyema, Loc. Cit*.,* 8.
[20] Yahya Harahap, *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa*, (Bandung: Citra Aditya Bakti, 2001), 34.

commonly have their own procedures to examine and hear a dispute. The arbitrators will also be determined and appointed by said arbitral institutions themselves.[21] Though each institution has its own arbitration rules, general provisions on the parties' freedom and autonomy are still upheld as they can adjust the arbitral proceeding for their specific dispute.[22] These institutions can be on a national level (e.g., The Indonesian National Board of Arbitration), regional level (e.g., Asia-Africa's Regional Center for Arbitration), and international level (e.g., Court of Arbitration of the International Chamber of Commerce (ICC) or International Center for Settlement of Investment Disputes (ICSID)).

The proceedings of arbitration can generally be separated into these categories:

Firstly, the disputing party that submits and starts the arbitration process (the claimant) will arrange their appeal which includes a summary of the claims from said party. The respondent will then reply to the claims with their counterclaims with the chance for the claimant to reply once more to the counterclaims.

Secondly, the arbitrators will be appointed according to the criteria outlined within the arbitration agreement. After the arbitrators have been appointed, typically they will schedule an appointment with the parties to establish preliminary matters and inspections by the arbitrators. During this stage is when the issues of jurisdiction of arbitrators and validity of the arbitration agreement are usually discussed and decided.[23]

Thirdly, unless the dispute is able to be resolved only through the exchange of documents, then a hearing will be held. In this hearing, each party may disclose their claims and submit evidence which may include witness or expert testimonies.[24]

The fourth and final stage is the arbitrators' decision to issue the arbitral award. Since the award is final and binding, the disputing parties must show their good faith by enacting their obligations as stated by the award, no matter of they win or lose the dispute. If a party fails to oblige to the award, the opposing party could submit an enforcement plea within the country where the former party has not enacted said obligation.[25]

International arbitral award is defined in the New York Convention as arbitral awards that are "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." [26] Aside from the location it's made in, an arbitral award is also considered as international based on the applicable law that is used by the parties to resolve said arbitrated dispute.[27] An international arbitral award may also be refused recognition and enforcement by the state where it's submitted to for, based on the provisions in Article V of the New York Convention. The grounds for this denial range from the incapacity of a party, invalidity of the arbitration agreement, to violation of public policy and differences that cannot be settled through arbitration.[28]

3.2 National Court Intervention According to UNCITRAL Model Law Regulations

In researching the provisions regarding intervention on the international arbitration process within UNCITRAL Model Law as the source of international legal framework for commercial

[21] Gunawan Widjaja and Ahmad Yani, *Hukum Arbitrase*, (Jakarta: Raja Grafindo Persada, 2000), 28.
[22] Gatot Soemartono, *Arbitrase dan Mediasi di Indonesia*, (Jakarta: Gramedia Pustaka Utama, 2006), 16.
[23] Nigel Blackaby et al., *Redfem and Hunter on International Arbitration*, (Oxford: Oxford University Press, 2015), 233-34.
[24] Ibid.
[25] Huala Adolf, *Dasar-Dasar, Prinsip dan Filosofi Arbitrase*, (Bandung: Keni Media, 2015), 27.
[26] Art. 1(1) New York Convention.
[27] Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, (Jakarta: Kencana, 2015), 377.
[28] Art. V New York Convention.

arbitration, the author found that there is a line between court intervention and what's known as the court's role to assist and supervise an arbitral proceeding.[29] Essentially, the Model Law proposes that the role held by national courts is still needed in international commercial arbitration process; however such role is to support the execution of the arbitration process and not to solely intervene.[30]

The Model Law gives authority for national courts, especially the courts of the seat of arbitration or otherwise called as the "competent court" as provided in Article 6 of the Model Law[31], to take part in the arbitral proceedings in regards to the following matters[32]:

1) Appointment of Arbitrators

   The national court's authority to appoint arbitrators for the international commercial arbitration process is stated in Article 11(3) and 11(4) of the Model Law, that if the disputing parties fail to submit their chosen arbitrators, then one of the parties can request the court to assign them. Said parties can also request the court to appoint a substitute arbitrator in case of any hindrance in the appointment of arbitrators in accordance to the arbitration agreement between the parties.[33]

2) Termination of Arbitrators

   The disputing parties may also request the national courts to terminate an arbitrator from the tribunal under two circumstances. The first circumstance is when one of the parties submits a challenge towards one or more of the appointed arbitrators. If the challenge is rejected by the tribunal, then said party may resubmit the challenge to the competent national court within 30 days of receiving the rejection notice from the tribunal.[34] The second circumstance is when an appointed arbitrator becomes *de facto* or *de jure* unable to carry out their duties as an arbitrator, then one of the parties may request the court to decide on said arbitrator's termination, if said arbitrator does not withdraw or both parties are unable to come to a conclusion to terminate them.[35]

3) Determining the Arbitral Panel's jurisdiction

   The disputing parties have a right to submit a plea to determine the jurisdiction of the arbitration tribunal towards the tribunal itself, based on Article 16(1) and 16(2) of the Model Law. If said plea is denied by the tribunal, then Article 16(3) gives an opportunity for the requesting party to resubmit the plea to the competent national court within 30 days of receiving the denial from the tribunal.[36]

4) Assistance in collecting evidence

   In accordance to the role of national courts in assisting the international arbitration process, both the tribunal and one of the parties (with consent from the tribunal) may submit a plea for assistance by the court in collecting the evidence needed for the arbitration proceedings.[37]

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[29] Guilia Carbone, "Interference of the Court of the Seat with International Arbitration," *Journal of Dispute Resolution* 2012, No. 1 (2012): 218, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1128&context=jdr.
[30] Richard Garnett, "National Court Intervention in Arbitration as an Investment Treaty Claim," *The International and Comparative Law Quarterly* 60, No. 2 (2011): 285, http://dx.doi.org/10.1017/S0020589311000030.
[31] Art. 6 UNCITRAL Model Law ("The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by… [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]")
[32] Julian D.M. Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" *American University International Law Review* 24, No. 3 (2009): 495, https://core.ac.uk/download/pdf/235401511.pdf.
[33] Art. 11(3) and 11(4) UNCITRAL Model Law.
[34] Art. 13 UNCITRAL Model Law.
[35] Art. 14 UNCITRAL Model Law.
[36] Art. 16 UNCITRAL Model Law.
[37] Art. 27 UNCITRAL Model Law.

Based on said provisions within the Model Law, it is understood that although the entirety of the Model Law heavily restricts the chance for national courts to intervene in the arbitration process[38], it cannot and does not try to hinder the court from partaking in their certain functions within the arbitration process.[39] As the author sees it, these functions of the court cannot be considered as intervention, and it is notable to differentiate between the two in regards to the related clauses within the Model Law itself. The line between "court assistance and supervision" and "court intervention" especially expressed within Article 5 of the Model Law that stipulates "…no court shall intervene except where so provided in this Law."[40] This provision gives a clear line that what is meant as court intervention is an action taken by the court related to the arbitration process that is not outside of the authority and role of the court that is regulated within the provisions of the Model Law.

Aside from the articles regarding the court's assistance and supervision, Article 8(1) of the Model Law also specifies that if one of the disputing parties involves a court regarding a matter which is the substance of an arbitration agreement, then the court is expected to refer said parties to arbitration.[41] This provision underlines the principle of party autonomy within arbitration, where the jurisdiction of an arbitration tribunal to resolve a dispute is rooted in the agreement between the disputing parties to resolve said dispute through international arbitration, as provided within the relevant arbitration agreement.[42] Based on that principle, it can be said that the existence of an arbitration agreement which clearly indicates the stipulations of arbitration as a method of dispute resolution by the parties gives jurisdiction for the arbitration tribunal to resolve said dispute, which shall be heeded by the national courts by referring the parties to arbitration.

In relation to referring the parties to arbitration, there is one condition where national courts have the authority to not do so. Based on Article 8(1), that authority is given if there are findings that "…indicate the arbitration agreement to be null and void, inoperative, or incapable of being performed."[43] An arbitration agreement may be determined as invalid if it does not fulfill the objective requirements of an agreement based on the law that applies to said agreement. Due to the differing requirements in different countries, the "null and void, inoperative, or incapable of being performed" provision refers to the findings from the competent court. Furthermore, although the court has an authority to intervene in that situation, Article 8(2) of the Model Law also states that the arbitral proceeding may continue as long as the related issue has not been ruled by the court.[44]

Other than the party autonomy principle, the competence-competence principle which is acknowledged by many states also becomes the basis of jurisdiction for the arbitration tribunal in resolving a commercial dispute. The competence-competence principle pertains to the tribunal's authority to decide on its own jurisdiction.[45] This principle is mirrored within Article 16(1) of the Model

[38] This is mirrored within the preparatory works of the Model Law, specifically within the UNCITRAL Analytical Commentary on the Draft Model Law regarding Art. 5 which states, "Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration."

[39] Nebiat Lemenih Lenger, "Judicial Intervention in Commercial Arbitration in Ethiopia: A Comparative Analysis," *The International Journal of Ethiopian Legal Studies* 4, No. 1 (2019): 103-4, https://journal.uog.edu.et/index.php/IJELS/article/view/83.

[40] Art. 5 UNCITRAL Model Law.

[41] Art. 8(1) UNCITRAL Model Law.

[42] Yifang Gao, "A Brief Analysis of Party Autonomy in International Commercial Arbitration," *Advances in Social Science, Education and Humanities Research* 580, (2021): 125, https://doi.org/10.2991/assehr.k.210916.018.

[43] Art. 8(1) UNCITRAL Model Law.

[44] Art. 8(2) UNCITRAL Model Law.

[45] Guilia Carbone, Op. Cit*.,* 221.

Law which states that the arbitration tribunal has the authority to determine its own jurisdiction, including when a disputing party raises an objection regarding the validity or existence of the related arbitration agreement. Meanwhile, the parties are given the authority to submit an objection plea regarding the tribunal's jurisdiction to the related arbitration institution, as stated in Article 16(2). If the tribunal decides within the preliminary question stage that it has the appropriate jurisdiction, then the submitting party is given the chance to resubmit the plea to a competent national court. Nevertheless, similar to the intervention provisions related to the validity of the arbitration agreement within Article 8, Article 16(3) of the Model Law also stipulates that the arbitral proceedings and award making may continue as long as the jurisdiction plea is being processed by the court.[46]

Other than the limitations that have been determined on national court intervention, another thing that needs to be discussed is regarding which national court is actually given the authority to intervene an arbitration process. The issue of "competent court" is discussed within Article 6 of the Model Law, under the assumption that the authority to intervene is given towards the same national court that is given the authority to assist and supervise an arbitration process. Article 6 states that the competent court is determined by each state that adopts the Model Law.[47] Based on that provision, it can be concluded that the national court that is authorized to assist, supervise, and intervene in arbitral proceedings is the court of the state where the seat of arbitration is located.

In conclusion, based on the provisions within the Model Law that has been discussed, be it ones that regulate the court's assistance and ones on the authority of the court to interfere in an arbitration process, the national court of the seat of arbitration has an inherent role to support and assist an ongoing arbitration process. Said court is also given the authority to intervene which is limited to certain situations in relation to determining the tribunal's jurisdiction as well as the validity of the arbitration agreement itself.

3.3 The Practice of National Court Intervention in International Arbitral Proceedings

Now that we have discussed the authority and the roles given to national courts through the UNCITRAL Model Law, let us discuss how they are applied in an actual arbitration. The author chose two cases that can highlight the difference between a court intervention and the court participation in arbitral proceedings.

The first case is the Salini Costruttori S.p.A. v. Republic of Ethiopia (2001) case that involved a construction company under Italian law and a state-owned enterprise of the Republic of Ethiopia called the Addis Ababa Water and Sewage Authority (AAWSA).[48] In this dispute, arbitration was submitted by Salini based on clause 67.3 of the Emergency Dire Dam and Raw Water Transmission Line Project agreement between Salini and AAWSA regarding the construction of an emergency dam and water transmission line in Addis Ababa, Ethiopia. Within clause 67.3, which was the arbitration agreement in this case, Ethiopian law was the applicable law chosen, along with the seat of arbitration being in Addis Ababa, Ethiopia. Based on that agreement, the competent national court that was authorized to be involved and intervene in this dispute was the national court of Ethiopia. However, one of the main issues in this arbitration was regarding the uncertainty of the forum of arbitration that has been decided within the arbitration agreement.

According to Salini, it has submitted the dispute to the correct arbitration forum, which was the International Chamber of Commerce (ICC) pursuant to clause 67.3 of the agreement. Meanwhile,

[46] Art. 16 UNCITRAL Model Law.
[47] Art. 6 UNCITRAL Model Law.
[48] Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS, Award Regarding the Suspension of Proceedings and Jurisdiction, (Dec. 7, 2001), para. 1-2.

AAWSA postulated that based on the addition to the clause which became clause 67.3.4 of the agreement, it mentioned that the dispute shall be resolved through *ad hoc* arbitration pursuant to Article 3325 of the Civil Code of Ethiopia on the submission of arbitration. Though there are differing opinions on the agreed upon forum of arbitration, the two parties agreed that the seat of arbitration was indeed in Addis Ababa and the applicable law is Ethiopian law.

The first objection by AAWSA was on the jurisdiction of the ICC tribunal to rule on the dispute, which it submitted to the ICC Secretariat alongside a plea to stop the arbitration process pursuant to Article 6(2) of the ICC Rules. In response, the ICC decided to resume the arbitration process where the issue of jurisdiction will be further discussed by the tribunal once they have been appointed.[49]

After the parties have chosen the arbitrators, they all met for a preliminary meeting to discuss the Terms of Reference for the arbitration in Paris, France. Among other issues, the parties agreed that the seat of arbitration remained in Addis Ababa notwithstanding the possibility that the tribunal would appoint a more suitable location to hold the hearing or any other meetings. The arbitral award, even if signed somewhere else, would also be considered as being made in Addis Ababa. Following the signing of the Terms of Reference, the tribunal determined that the issue of jurisdiction would not be decided as a preliminary issue, but rather concurrently with the arbitral merits during the hearing which would be held in Paris for the sake of comfort for the parties and their witnesses.[50]

Following said decisions made by the tribunal, there were two different anti-arbitration injunctions that were published by the Ethiopian court. The first one was regarding the plea for the termination of arbitrators by the AAWSA. AAWSA initially submitted its objection to the ICC Secretariat pertaining to the tribunal's decision to convene the hearing in Paris, while the stipulated seat of arbitration was Addis Ababa. Therefore, AAWSA submitted its plea to terminate and replace the arbitrators due to the lack of fairness and impartiality of the tribunal which it considered to have prioritized the comfort of the tribunal and Salini alone. This submission was in accordance to the provisions within Article 13(2) of the Model Law.

In response, the ICC tribunal decided to deny the termination plea, also in accordance to Article 13(2). Then, AAWSA resubmits the termination plea with the same postulations to the Addis Ababa Court of Appeal and subsequently, the Supreme Court of Ethiopia whom decided to publish an injunction to halt the arbitration process while the court processed said plea. The resubmission and injunction are in accordance to Article 13(3) of the Model Law which gives authority for the court to rule on the matter if the plea has been rejected by the tribunal. Following this first injunction, the tribunal decided to continue with the arbitral proceedings, also in accordance to Article 13(3) which specifies that the tribunal may continue the arbitral proceedings as long as the court has not published a decision regarding the plea.

The second injunction happened regarding the jurisdiction of the tribunal to arbitrate in accordance with the parties' arbitration agreement. In this case, the uncertainty regarding the arbitration forum is clear since clause 67.3 and 67.3.4 both exist and is opposing each other. Even two random strangers who are impartial to the case can have differing opinions on which clause is the valid one. AAWSA submitted a plea to the ICC Secretariat to challenge the tribunal's jurisdiction within this dispute, pursuant to Article 16(2) of the Mode Law. Based on Article 16(1), the tribunal has the authority to decide on its own jurisdiction, an in this case, the tribunal concluded that it had jurisdiction and thus denied AAWSA's plea. Then, AAWSA resubmitted the plea to challenge the jurisdiction of the ICC tribunal based on the provisions in the arbitration agreement to the Federal First Instance Court

[49] Ibid., para. 16-18.
[50] Ibid., para. 38 and 53.

of Ethiopia, whom decided to publish the second injunction addressed to Salini to halt the arbitration process until the court reaches a final decision on the jurisdiction matter at hand. Once again, the plea resubmission, publishing of injunction by the court, and also the tribunal's decision to continue the arbitral proceeding despite them are in accordance to Article 16 of the Model Law.

Based on these facts on the Salini case, the author would argue that there are no court interventions present; instead, it was merely the court exercising its authority to assist and supervise the arbitration process in accordance to Article 6 of the Model Law. Despite the court publishing two anti-arbitration injunctions to halt the arbitral proceedings, this action is not specifically prohibited by the provisions of the Model Law. Furthermore, the court has the authority to ignore the anti-arbitration injunctions and, in this case, use said authority to proceed with the arbitration process until both pleas submitted by AAWSA have been decided by the Ethiopian court.

Onto the second case, this is the HubCo v. WAPDA (2000) case that involved a foreign-owned company based in Pakistan and a state-owned enterprise of the country of Pakistan.[51] In this dispute, arbitration was submitted by HubCo based on clause 15 of a Power Purchasing Agreement (PPA) between the two parties regarding the installation and implementation of a power plant in the state of Baluchistan, Pakistan for which the generated electricity would be bought by WAPDA. Based on clause 15 as its arbitration agreement, the applicable law is English law and the chosen forum of arbitration is through arbitration in London under the International Chamber of Commerce rules.[52]

The main agreement was first signed during the term of Nawaz Sharif as the Prime Minister. During the next Prime Minister (PM) Benazir Bhutto's term, modifications were added through the Supplementary Deed, First Amendment, and Second Amendment of the PPA. Over time, these modifications were being suspected by the people of Pakistan as the product of corruption and collusion between PM Bhutto and HubCo to gain profit through the losses of WAPDA. This suspicion was heightened by the fact that Bhutto was impeached from her position as PM and was charged with multiple crimes, a few of them being corruption and nepotism claims. In 1997 and early 1998, Pakistan's financial condition declined due to these controversies with Bhutto, fueled also by the financial crisis that has been surging in Asia at the time. These factors caused WAPDA to have a difficult time to fund its energy projects, including payments that have to be made to HubCo according to the PPA.[53]

To avoid making the payments to HubCo and other energy projects, PM Nawaz Sharif whom had replaced Bhutto after the impeachment claimed that there is "irrefutable evidence" that the investors for the various international energy projects in Pakistan had received bribes. Not long after, 7 energy projects including HubCo received "Notices of Intent to Terminate" or NITs for the related energy agreements. The NIT stated the government's intent to terminate the energy projects on the basis of corruption and violation of Pakistani law, however it did not specify the details to support such claims. Thus, the energy corporations involved denied the accusations and declared that WAPDA and the Pakistani government accused them of corruption merely as a threat to lower the fees that they must pay to said companies.[54]

Based on those issues related to the PPA, HubCo decided to submit an arbitration request to the ICC in London. However, WAPDA has filed a plea to halt the arbitration process to the High Court of Lahore, whom then published an anti-arbitration injunction for HubCo to halt any arbitration attempts

[51] Mark Kantor, "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?" *Fordham International Law Journal* 24, No. 4 (2000): 1123-83, https://ir.lawnet.fordham.edu/ilj/vol24/iss4/5/#:~:text=https%3A//ir.lawnet.fordham.edu/ilj/vol24/iss4/5.
[52] Ibid., 1147-49.
[53] Nudrat B. Majeed, "Commentary on the Hubco Judgement," *Arbitration International* 16, No. 4 (2000): 431-38, https://doi.org/10.1093/arbitration/16.4.431.
[54] Mark Kantor, Op. Cit., 1150.

through the ICC in London.[55] In response, HubCo brought this matter to the Supreme Court of Pakistan, whom decided that the allegations pertaining to the three additions to the PPA (Supplementary Deed, First Amendment, and Second Amendment) has criminal elements based on corruption, fraud and illegality caused the PPA to become null and void as well as becoming an issue of public policy and should be tried in Pakistan's national court, rendering the dispute non-arbitrable.[56]

There are a few things regarding the limitations of national court intervention within the UNCITRAL Model Law within this case. Based on the arbitration agreement, the competent court that was authorized to intervene is supposed to be the English court as the seat of arbitration and the choice of law. In reality, the national court that intervened in this dispute is the Pakistani court. Compliant to Article 8 of the Model Law, the Pakistani court which was neither the applicable law nor the seat of arbitration should not have any authority to partake, let alone intervene in the arbitral proceedings.

Setting aside the issue of competent court, the anti-arbitration injunction that was published by the High Court of Lahore and the Supreme Court of Pakistan is based off the accusation of corruption within the main agreement (the PPA). If done by the competent court, this justification might have been allowed by the provisions of Article 8(1) of the Model Law due to the criminal elements that may render the PPA as invalid and null and void. However, this can also be rebutted using the principle of separability of arbitration which holds that the arbitration agreement is inherently a separate agreement from the PPA, so that despite the PPA being invalid as it was null and void, the arbitration agreement itself is still valid and the arbitral proceedings may continue.[57]

Ultimately, though the Pakistani court should not be the competent court in this dispute, the arbitration tribunal decided to halt the arbitration process and eventually, the disputing parties managed to settle the dispute outside of both arbitration and the national court. If the Pakistani court is indeed the competent court, then its actions are in accordance to Article 8(2) of the Model Law which stipulates that the arbitration process may resume until the national court makes a decision in regards to whether the agreement is null and void. Such is due to the fact that the tribunal's decision to halt the arbitration process happened after the Supreme Court of Pakistan made its final decision that determined the PPA to be null and void and therefore, non-arbitrable.

Therefore, the author opines that the intervention done by the national court of Pakistan in the HubCo case was not in compliance with the limitations provided within the UNCITRAL Model Law due to the court not having valid authority to intervene in the arbitration process in any capacity based on the provisions in Article 6 of the Model Law and in violation of Article 8(2) of the Model Law.

3.4 The Pros and Cons of National Court Intervention

The issue related to court intervention within the international commercial arbitration process is quite a divisive one within the field of international commercial arbitration law. Based on the principles within international arbitration such as separability, competence-competence, and party autonomy, as well as referring to the provisions within the UNCITRAL Model Law, it is fair to conclude that the international legal framework on commercial arbitration puts forward support for the jurisdiction of arbitration by limiting national courts' authority to intervene in arbitral proceedings. Despite that, there are equally appealing and sound arguments from both sides of the pro and anti-court intervention.

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[55] Civil Appeal No. 1399 of 1999 (WAPDA v. HUBCO).
[56] HUB POWER COMPANY LIMITED (HUBCO) VS PAKISTAN WAPDA, 2000 PLD-SUPREME-COURT 841 (2000). Majority Decision.
[57] Seyoum Yohannes Tesfay, *International Commercial Arbitration: Legal and Institutional Infrastructure in Ethiopia*, (Cham: Springer, 2021), 155.

The first argument is regarding the superiority of the competence-competence principle within arbitration. The anti-intervention side argues that competence-competence is the bedrock principle for the execution on international commercial arbitration.[58] This principle is considered as the principle that gives the power for an arbitration tribunal in resolving a dispute because this principle states that a tribunal may rule on its own jurisdiction. The anti-intervention side argues that competence-competence can even be applied when deciding on the existence, validity, and scope of an arbitration agreement, as mirrored within the minority decision of the Pakistan Supreme Court decision of the HubCo v. WAPDA case.[59]

It is also based on the principle of competence-competence that the anti-arbitration side considers that court intervention is not needed in the event of a conflict regarding the scope of an arbitration agreement, because it is considered that if said agreement already exists, then the disputing parties have agreed to resolve their dispute through arbitration. That assumption is deemed to give enough authority for the arbitration tribunal to rule on its own jurisdiction based on the scope of the disputed arbitration agreement.[60]

Meanwhile, the pro-intervention side maintains that despite the fact that the competence-competence concept is acknowledged as the foundation of international commercial arbitration, it is not the supreme principle. There is a misconception that competence-competence hinders the court review within an arbitration process and hinders the court decision on the jurisdiction of the tribunal before the arbitral award is made, but that is not true. There is a view that in applying the provisions of Article 8(1) of the Model Law, the court not only has authority but also an obligation to rule on the issue of the validity of an arbitration agreement.[61]

The pro-intervention side also considers that competence-competence is not suitable to be applied on deciding the validity of an arbitration agreement by the tribunal, because if the tribunal finds that the arbitration agreement is invalid, then in actuality that decision is also invalid. If a valid arbitration agreement does not exist, then the tribunal should not have been established and does not have the authority to rule on the validity of the agreement itself.[62] Therefore, the power of the competence-competence principle within the arbitration process is significantly weakened when there is an issue of uncertainty on the parties' agreement to perform arbitration according to the arbitration agreement.

The second argument is on the need-to-use and alternative to court intervention. The anti-intervention side argues that anti-arbitration injunctions published by the court to postpone or halt an arbitration process are not needed due to the authority given to the court to decide whether or not an arbitral award will be enforced. Meanwhile, the pro-intervention side argues that there are no other alternatives to postpone the arbitration process while waiting for a court decision. The continuance of arbitral procedures simultaneous to the court proceedings is deemed as wasting unnecessary time and money spent, especially if the court ultimately determines that the tribunal does not have jurisdiction for the dispute. In that situation, although the tribunal may have decided on the award, most likely said award will be ruled out by the court in the enforcement stage of arbitration. Based on this pro-intervention argument, it can be said that court intervention in the arbitration process is not aimed to

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[58] Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration", in *Pervasive Problems in International Arbitration*, (Alphen aan den Rijn: Kluwer, 2006), 214.
[59] HUB POWER COMPANY LIMITED (HUBCO) VS PAKISTAN WAPDA, 2000 PLD-SUPREME-COURT 841 (2000), Minority Decision.
[60] Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore," *Singapore Academy of Law Journal* 25, (2013): 256, https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/513/Citation/JournalsOnlinePDF.
[61] Ibid., 251-52.
[62] Law Reform Committee*, Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (Singapore: Singapore Academy of Law, 2011), 25.

bring down arbitration, but actually to help consolidate arbitration as the most efficient alternative dispute resolution method, both in terms of time and money spent.[63]

According to the author, national court intervention actually plays a significant part in the international commercial arbitration process. Despite the need to minimalize court interventions, in necessary issues related to the court's role to assist and supervise the arbitration process, there is a need for court intervention in order to uphold justice for both parties involved. The author also argues that there is a need for a clearer separation between court intervention and court assistance and supervision because those two concepts may determine whether the actions of a court towards an arbitral proceeding stem from the awareness to uphold justice or from bad faith.

For example, based on the author's analysis, the actions that the court had taken in the Salini case are part of the court's assistance and supervision role because it is done in accordance to the related limitations within the UNCITRAL Model Law. Said actions were also taken based on the obvious uncertainty within the boundaries of the arbitration agreement and also on the indication of violation to the seat of arbitration by the tribunal. Therefore, the author opines that said actions by the court were taken with the intent to uphold justice for the parties in regards to the provisions of the arbitration agreement by the parties themselves.

Another thing can be said with the HubCo case, as according to the author's assessment, the actions taken by the Pakistani court should be considered as true court intervention because it is political in nature and not done to uphold justice for both parties. This is due to the lack of issue relating to the arbitration agreement between HubCo and WAPDA, but instead the issue is regarding the validity of the PPA itself, which isn't supposed to be pertinent to the arbitral proceedings according to the principle of separability within international commercial arbitration. Aside from that, the Pakistani court should not have any authority to interfere in the arbitration process that took place in London under the English law, in accordance to the provisions of the arbitration agreement that has also been agreed upon by WAPDA. According to the author, this case provides a clear example of a true court intervention within international commercial arbitral proceedings.

Now that we have discussed the authority and the roles given to national courts through the UNCITRAL Model Law, let us discuss how they are applied in an actual arbitration. The author chose two cases that can highlight the difference between a court intervention and the court participation in arbitral proceedings.

IV. CONCLUSION

Based on the research conducted by the author, two main things can be concluded. *Firstly*, the national court has an authority to intervene in an international commercial arbitration process in line with the provisions within the UNCITRAL Model Law. Even so, that authority is very limited to certain situations, especially related to the court's role in supporting and supervising the arbitral proceedings.

Secondly, in practice, national court intervention in arbitral proceedings can be differentiated into two kinds. The first kind is the intervention that is not in compliance with the provisions within the UNCITRAL Model Law where the related national court does not have any authority in the arbitration process. The second kind is the actions of a competent court based on the seat of arbitration in executing its role in assisting and supervising the arbitral proceedings in accordance with the provisions within the UNCITRAL Model Law.

There are also two main suggestions that the author would like to give related to the issue national court intervention. *Firstly*, within literature and scientific articles regarding the process of international

[63] Nicholas Poon, Op. Cit., 260-61.

commercial arbitration, there should be a much clearer difference between the actions of a national court that can be defined as a "court intervention" versus ones that can be defined as the "court assistance and supervision". This is due to the connotation of the word "intervention" that is forceful and restrictive in nature are unfit to be applied in situations where a competent court takes actions that is provided in the Model Law. From the author's perspective, the use of the word "intervention" is more fitting in situations where the related court does not have any authority as a "foreign court" that is not the seat of arbitration, or if the actions taken by the court are not in compliance to the provisions within the Model Law.

Secondly, there needs to be a reconsideration of the bad stigma towards any action taken by a national court towards an international commercial arbitration process, in relation to the lack of clarity between the differences that was mentioned in the first suggestion. The author argues that a court's actions to assist and supervise that are taken with the intent to uphold the utmost justice for the disputing parties must be supported because it can also ensure an efficient international commercial arbitration process in terms of time and money spent.

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