PUBLIC POLICY AND PRIVATISED JUSTICE: THE SETTING ASIDE OF ARBITRAL AWARDS BY NATIONAL COURTS OF THE ARBITRAL SITUS.

by

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ABSTRACT

The loser in an international commercial arbitration can exercise either of two options if he is not satisfied with the outcome of the proceedings. He can apply to have the resulting award set aside by the appropriate national court of the place of arbitration or he can oppose the recognition and enforcement of the award in all the jurisdictions in which the winner seeks to enforce it. A successful setting aside application vacates and nullifies the award and renders it unenforceable in all jurisdictions. On the other hand, a successful resistance to recognition and enforcement of the award only affects the award in that particular jurisdiction and the award could be enforced in another jurisdiction where the loser has assets. Among other things, the division of these two functions between the national courts of the place of arbitration and that of the place of recognition and enforcement helps in securing one of the fundamental advantages of arbitration which is forum neutrality.

However, comparatively recent national arbitration laws of Belgium, Switzerland and Tunisia on the setting aside of award have shifted the two functions to the national courts of the place of recognition and enforcement of the award. By using the comparative law methodology, this thesis argues that this legislative trend is unsatisfactory both in its reasoning and intended result. The legislations are not only a recipe for arbitrator misconduct and injustice but are also in violation of the obligations of these states under the 1958 New York Convention on the Recognition and Enforcement of Awards, the various regional treaties on the protection of human right as well as the international consensus articulated in the UNCITRAL Model Law.
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CHAPTER 1

CONCEPTUAL FRAMEWORK AND METHODOLOGY.

A. Introduction to the Thesis Topic

There are two basic options available to a party who is dissatisfied with an arbitration award. First, he can oppose recognition and enforcement of the award in any jurisdiction where the winner seeks judicial enforcement of the award. If he succeeds in opposing recognition and enforcement of the award, he defeats the award only in that jurisdiction. The winner may still try to enforce the award in another jurisdiction where the loser has assets.

In the alternative, the losing party can initiate a setting aside application before the appropriate national court of the country where the award is rendered.¹ If the setting aside application is successful, it nullifies, vacates, and overturns the arbitral award and makes it unenforceable anywhere. Setting aside and recognition and enforcement of an award differ in the following respects:

(a) an action to set aside an award and an application for recognition and enforcement of an award take place in different places and at different times;

¹ Each State enacting the Model Law specifies the court, courts or other authority to perform the functions of arbitration assistance and supervision. See Article 6 of the Model Law.

S. 34(2) of the International Commercial Arbitration Act, S.B.C. Chap.14, provides that the appropriate court is the Supreme Court of British Columbia.

Under the Swiss Law, the designated court is the Federal Supreme Court. See Article 191(1) of the Swiss Private International Law Act, 1987.
(b) they are pursued by different parties and for different purposes;
(c) they achieve different results with different legal implications. The effect of a decision refusing recognition and enforcement is territorial while the effect of a setting aside application is extra-territorial. In other words, if an award is set aside or annulled in one jurisdiction, its validity is globally extinguished whereas a successful attempt at resisting recognition and enforcement does not have any adverse effect on the award beyond the boundaries of the state that refused to recognize and enforce the award. These judicial remedies are accordingly guided by entirely different policy considerations and different legal frameworks.

The legal framework for the recognition and enforcement of foreign awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.\(^2\) The New York Convention was a response to the inadequacies of the Geneva Convention of 1927. In order to facilitate the enforcement of awards, the New York Convention provides very narrow grounds for refusing recognition and enforcement of awards. In this way, the Convention also eliminates the various legalistic devices which could, under the Geneva Convention, be resorted to by a loser in the arbitration to frustrate the award. Among the narrow grounds for refusing recognition and enforcement of the award is if the award has been set aside by the appropriate national court of the arbitral situs.\(^3\)

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\(^2\) hereinafter the New York Convention.

\(^3\) See Article V (1) (e) of the New York Convention.
On the other hand, the UNCITRAL model law provides the standards for courts to use in determining applications for setting aside of awards. The model law provides a significant complement to the New York Convention of 1958. Under the model law, the grounds for setting aside the award are substantially the same as the grounds for refusing recognition and enforcement under the New York Convention. This is deliberate. By providing the standards for the review of the award by the national courts of the arbitral situs, the model law strengthens the finality of the award. It also secures for the parties one of the cardinal virtues of international commercial arbitration which is forum neutrality. One advantage of international commercial arbitration is that it enables different parties from different parts of the world and from different legal cultures who do not have confidence in each other’s national courts, to choose a neutral forum in which both should have confidence. It suffices that if a third-country situs has been chosen, the parties should also be entitled to a third-party court of review. A national court without national interests is unlikely to appear biased.

However, because the legal framework for the recognition and enforcement of awards is a convention, there is a unifying trend in the recognition and enforcement of awards. This is unlike the model law which regulates the setting aside function. The adoption of the model law by the states is on a voluntary basis and in adopting the model law, the particular state can make such changes as it deems fit, although it is expected that the

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5 See Article 34 (2) of the Model Law
changes should be in line with the policy considerations underlying the passing of the Model Law.\(^6\)

In the last decade, many states have adopted the Model Law or amended their existing legislation on arbitration.\(^7\) While some of the states maintained the policy considerations that prompted the passing of the Model Law and even improved on them,\(^8\) others deviated from the Model Law in significant respects. One of such deviations concerns the proper role of the national courts of the arbitral situs with respect to the setting aside function. Some of these national laws provide for a total exclusion of the right of the parties to initiate the setting aside proceedings while in others, the parties are given the choice of opting out of the setting aside function. For instance, the amendment to the Belgian Judicial Code introduced a new Article 1717 which prohibits the parties to an arbitration from bringing the setting aside application if either of them is a Belgian citizen or a resident or has business in Belgium. Under the Swiss Private International Law Act, the parties can, prior to the commencement of the arbitration proceedings, waive all or some of the grounds for the setting aside of the award including the breach of natural


\(^7\) For a detailed survey of the states that have adopted the Model Law, see P. Sanders, Ibid.

\(^8\) See for example The International Commercial Arbitration Act of British Columbia which is substantially the same as the Model Law.

justice. Tunisia copied the provisions of the New Swiss Act on the setting aside of awards. In other jurisdictions, an exceedingly fine balance is maintained between arbitral autonomy and a minimum competence for judicial review by national courts.

Proponents of these legislative changes in Belgium, Switzerland and Tunisia have justified them in the context of certain theories. For example, adherents to the contractual theory argue that the removal of the setting aside function either by automatic operation of law as in Belgium or by the express agreement of the parties as in Switzerland and Tunisia is consistent with the parties' expectation that the arbitral process, contractually chosen by them, should put an end to their dispute. It is also said to be in line with the autonomy of the parties and has the advantage of ensuring speed and economy in international commercial arbitration. Besides the justification of these legislative enactments on grounds of speed and economy, most of the states are driven by the desire to present an attractive environment for the conduct of international commercial arbitration. These states have realized that arbitration is an important source of revenue and thus have sought to render their legal environment more attractive for arbitration by enacting new arbitration laws or revising their old arbitration laws. The developments in Belgium, Switzerland and Tunisia have given rise to several questions pertaining to the power of the courts to perform the setting aside function in international commercial arbitration. Some of the

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9 Lord Cullen of Ashborne estimated that a new English arbitration law might attract as much as five hundred million pounds per year of additional revenue in the form of fees for the arbitrators, barristers, solicitors and expert witnesses. See William Laurence Craig, William W. Park, and Jan Paulsson, "International Chamber of Commerce Arbitration" p.1 at p.15
questions include: are these statutes in violation of the Model Law on international commercial arbitration and the New York Convention of 1958? Are these legislations consistent with the obligation assumed by these states under the various conventions on the protection of human rights such as the Universal Declaration of Human Rights, the European Convention on Human and the African Charter on Human and Peoples’ Rights? Can a state enact a law which is contrary to its treaty obligations?

B. Research Hypothesis.

By examining the likely consequences of this emerging legislative trend in international commercial arbitration, my thesis seeks to prove that these states have exceeded the objectively permissible limits. It will further be shown that these promotional efforts have been overzealous and suffer from misrepresentation as well as inadequate research and analysis. This study is apposite as many states in different continents have enacted or are in the process of either enacting new arbitration laws or are amending their existing legislations on arbitration. One of the fundamental objectives articulated by UNCITRAL in the adoption of the Model Law is “the establishment of a defined core of mandatory provisions to ensure fairness and due process.” This objective has been undermined by the developments in Belgium, Switzerland and Tunisia. Although the UNCITRAL Model Law is a legislative model as opposed to a Convention, it represents an international consensus on the proper role of the courts with respect to the setting aside function. There

10 For example, S. 54 (2) of the new Egyptian law on arbitration provides that the parties cannot waive the grounds for the setting aside of the award before the award is rendered.

11 See UN Doc. A/CN. 9/207, paras. 16-17
should therefore be a considerable uniformity in regulating certain fundamental aspects of international commercial arbitration. The need for this considerable uniformity arises because if the emerging legislative trend proves able to attract more arbitration business, other countries will amend their national arbitration laws on similar terms or even improve on them. Furthermore, by a shift in the control function from the country of the arbitration to that of the enforcement of the award, the advantage of forum neutrality in international commercial arbitration is jeopardized. This is because the winner in the arbitration will seek enforcement of it in the jurisdictions in which the loser has assets and there is the possibility that the loser’s assets may be located in his home jurisdiction. In this regard, it will be convincingly demonstrated that such a shift in the control function will render some provisions of the New York Convention of 1958 redundant. For a control system like that established in the New York Convention to work, the limited review functions assigned to the place of arbitration and the place of enforcement of the resulting award should be mandatory.

Secondly, my thesis seeks to prove that this legislative trend is a gross violation of some notable instruments for the international protection of human rights. Due process is part and parcel of every justice system, be it private or public. It encapsulates the mandatory

12 Tunisia for instance copied the setting aside provisions of the New Swiss Act on Private International Law.

13 The primary assignment depicts the control functions of the courts of the arbitral situs while the secondary assignment refers to that of the jurisdiction where recognition and enforcement of the award is sought.
and objective standards fixed by law and which accord with societal expectations. It is an
inalienable obligation which the state owes to all in its territory and which neither litigant
nor an arbitral tribunal can ignore, waive or compromise. Support for this contention will
be drawn from the relevant provisions of some basic instruments on the international
protection of human rights such as the Universal Declaration of Human Rights adopted by
the U.N. General Assembly on Dec. 10, 1948, the European Convention on Human
instance, Article 8 of the Universal Declaration of Human Rights of 1948 provides that
everyone has the right to an effective remedy by the competent national tribunals for acts
violating the fundamental rights granted him by law. It has thus been decided by a
European Court that Article 6 of the European Convention on Human Rights (which is
similar to Article 8 of the Universal Declaration of Human Rights) is applicable to
arbitration proceedings. If the guarantee of procedural fairness is to be secured for the
parties, there must be a remedy in the event of a breach. By ratifying these instruments,
these states (Belgium, Switzerland and Tunisia) have undertaken to provide for the
guarantee of fundamental procedural rights in their national laws as well as remedies for
the breach of same. This obligation applies with equal force to the provisions of national

14 U.N. Doc. A/810 at 71 (1948)

15 Belgium and Switzerland have ratified the European Convention on Human Rights.

16 Tunisia has ratified the African Charter on Human and Peoples Rights.

17 On the applicability of the European Convention on Human Rights to international arbitration, see
generally Jean-Hubert Moitré, "Right to a Fair Trial and the European Convention on Human Rights:
arbitration laws and irrespective of whether the parties to the arbitration have any connection with the arbitral situs or not. Moreover, my thesis will demonstrate that the law in this respect is well settled: a state cannot use its national laws to evade its treaty obligations.18

C. Scope of Investigation/Analysis

Although the thesis deals with the setting aside of foreign arbitral awards in the jurisdiction where it is rendered, constant reference will be made to the recognition and enforcement of international arbitral awards as a facilitative device for enhancing the understanding of the issues under discussion.19 The research will be done against the

18 See the Vienna Convention on the Law of Treaties, 1969, Article 27, referring to justification for failure to perform a treaty.


19 The New York Convention on the Recognition and Enforcement of Foreign Awards accounts substantially for the relative ease with which awards rendered in a foreign jurisdiction can be enforced at the debtor’s domicile or in any jurisdiction where the loser has assets. The Convention, which provides that the courts of each signatory State will enforce arbitration awards from the other countries, ensures the effectiveness of foreign arbitral awards by providing for relatively few and restrictive grounds for the denial of recognition and enforcement of foreign awards. In the spirit of the Convention, many jurisdiction look favourably upon enforcing foreign awards even where the convention does not apply. The national laws of some countries have provided for even more liberal enforcement of foreign awards than envisioned in the New York Convention. On the other hand, however, no international agreements control how national courts supervise arbitrations taking place on their territory. Each State is free to apply
background of the legislative trend in various jurisdictions with respect to the setting aside of foreign arbitral awards by the appropriate national court of the arbitral situs.

Chapter 1 of the thesis is the conceptual framework and methodology. This chapter introduces the research topic. It also provides the parameters of the investigation/analysis, and the definition of the key concepts that will feature prominently in the entire thesis.

Chapter II deals with the theories of arbitration. The scope and limits of the national court's intervention in the arbitral process, particularly with respect to the setting aside function, depends to a great extent on the theory of arbitration accepted in the particular jurisdiction. It will be seen that the legislative changes that have taken place in various jurisdictions within the last decade represent an intense struggle to reconcile the conflicting interests inherent in these theories.

Against the background of chapter II, chapter III will examine the emerging legislative trend in the setting aside of foreign awards to see which of the theories they support. This

whatever measures of judicial control it wishes to international arbitration conducted within its own jurisdiction.


entails a comparative analysis of the provisions of some national laws on the setting aside function. The policy considerations underlying these provisions as well as their perceived advantages to international commercial arbitration will be highlighted. This will then be put in context by juxtaposing it with its disadvantages to international commercial arbitration. In conclusion, it will be argued, inter-alia; that because international commercial arbitration is subject to the laws of two or more states, the role of the national courts of the arbitral situs and the courts where recognition and enforcement is sought should be kept apart.

Chapter IV constitutes a specific inquiry into the extent to which the principles of fair hearing and the remedies for their breach apply to international commercial arbitration. By examining the various international instruments on the protection of human rights which these states have ratified, I will also ascertain whether a state can use its national laws to evade its treaty obligations and whether parties to international arbitration can effectively waive their natural law rights. It will be argued that parties to international arbitration have an integrated guarantee of procedural fairness together with the remedies for its breach under the Model Law, the New York Convention of 1958 and various international instruments on the protection of human rights. Further justifications for the retention of the setting aside function in international commercial arbitration will be provided. In conclusion, it will be argued that legislative changes which restrict that option are not valid since they constitute an attempt to destroy the only basis for guaranteeing procedural
fairness in international commercial arbitration as well as an attempt by the States concerned to evade their treaty obligations.

Chapter V is the conclusion. In this chapter, my arguments and conclusions in the previous chapters will be summarized.

D. Research Methodology.

Comparative Law Approach

My primary research methodology is comparative law. Comparative law has several significant functions, one of which is that it enables one to gain knowledge. By enabling one to gain knowledge, comparative law extends and enriches "the supply of solutions" and offers the scholar of critical capacity the opportunity of finding the better solution for his time and place. Perhaps, the fundamental role of comparative law which bears so much relevance to international commercial arbitration and by logical extension to this thesis, is its function in the transnational unification of law. This function of comparative law is manifest in the efforts of the League of Nations and the United Nations Organization towards the harmonization and unification of the laws of international commercial arbitration. Evidence of their success include but are not limited to the UNCITRAL Model Law on international commercial arbitration, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Arbitration Rules e.t.c. In this regard, I hold the view that any research directed at the assessment and proposals for restructuring the law and rules of international commercial arbitration must of necessity draw from comparative law methodology. Thus, comparative legal study vis-à-vis international commercial arbitration is the logical reaction to global development and
interdependence, to the transnational structure of law, or to the intensified economic and social relationships.\(^{20}\) In international commercial arbitration, conflict of law problems arise from time to time. This conflict of law problem requires a careful consideration of laws of more than one country to determine which one is applicable. In other words, international commercial arbitration involves the interaction of the laws of different countries\(^{21}\). The comparative law approach thus facilitates the choice of the applicable from the laws of different countries.

In using the method of comparative law in my research, I started by studying the national arbitration laws of some countries. In doing this, I didn’t restrict myself only to the laws of the great arbitral countries such as Switzerland, England, France or the United States because in my view, they do not possess a monopoly of legal inventiveness. I didn’t also

\(^{20}\) With the continuing integration of the global economy, international commercial arbitration is playing an important role in the interpretation and application of international trade and investment agreements. In playing this role, international commercial arbitration involves the interaction of the laws of different countries. The trend is towards unification of the laws of international commercial arbitration. The advantage of unified law is that it makes international business easier. Unified law reduces the legal risks of international business, and in effect gives relief to both the businessman who plans the venture and the arbitrator who has to resolve the dispute arising therefrom. In this way, unified law promotes greater legal predictability and security.

\(^{21}\) See generally Max Rheinstein, “Comparative Law: Its Functions, Methods and Usages” (1968) 22 Arkansas Law Review p.415

confine myself to the study of the statutory rules or doctrinal principles applied by the various systems. By utilizing comparative functionalism, I made a critical evaluation of what I have discovered by my comparisons. I tried to relate new knowledge to settled knowledge. Thereafter, I posed some questions in purely functional terms to highlight the flaws and thus bring out my dissatisfaction with some of the existing national arbitration laws.

E. Terminology

(i) International and Domestic Arbitration Distinguished

Generally, the use of the term “international” marks the difference between arbitrations which are purely national or domestic and those that transcend national boundaries, sometimes referred to as “transnational.” Domestic arbitrations take place between the citizens of the same State, as an alternative to formal judicial proceedings before the national courts of that state. The state naturally exercises tighter control over such arbitrations between its citizens than it does in relation to international commercial arbitration which in most cases is conducted in the territory of the state in question because of geographical convenience. A further reason for distinguishing between

international commercial arbitration and domestic arbitration is that in some states, only the state itself or designated entities of the state may validly enter into an arbitration agreement in respect of international transactions.24

(ii) “International”

There is no consensus among the states on the exact meaning of the term “international” in the context of international commercial arbitration. In defining the term, two criteria are used, either alone or in combination.25 One approach is by analyzing the nature of the dispute so that an arbitration is international if it involves the interests of international trade.26 The alternative criteria is to focus attention on the parties; their nationality or

24 Redfern & Hunter, supra note 23 at p.15

25 See Redfern & Hunter, supra note 23

26 This definition, which is based on economic considerations is supported by French law. Article 1492 of the French Arbitration Decree of 1981 defines international arbitration as follows; “Arbitration is international if it implicates international commercial interests.” Elements such as the nationality of the parties, their place of business, the place of the performance of the main contracts, the place of arbitration, the applicable law, or the intervention of an international institution will be taken into consideration, but none of them will be really determining when taken separately. However, in later judicial pronouncements economic considerations were supplemented by factors of a juridical nature. In the Hecht case, the Court of Appeals of Paris upheld the validity of an arbitration clause on the ground that the contract executed in Holland between a commercial company and a Frenchman, is an international contract and that such contract possesses this character because of its execution in Holland, the nationality of the parties ...

See Georges R. Delaume, supra note 23 at p.270
habitual place of residence or, if the party is a corporate entity, the seat of its central control and management. Thus, using this second criteria, an arbitration between a Nigerian and a Canadian or between an American and a Canadian is international.

The Model Law, which is aimed at harmonizing state practice in relation to international commercial arbitration, does not favour the idea of a single formula in determining when an arbitration is international. The draftsmen of the Model Law defined “international” as follows:

“An arbitration is international if:
(a) the parties to an 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


27 Redfern & Hunter, supra note 23 at p.15

28 This approach is predominant. For example, in the European Arbitration Convention of 1961, Article 1.1(a) defines agreements to which the convention applies as: “arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different contracting States” A similar definition is used in the English Arbitration Act of 1975 which gave effect to the New York Convention of 1958.
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

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.”

This definition is a marriage of the two criteria of the nature of the dispute and the identity of the parties, in addition to two other ones: the “situs test” i.e. the situation of the arbitration proceedings outside the place of business of one of the parties and the “opt-in test” i.e. the parties expressly agreeing that the subject matter of the arbitration agreement relates to more than one country. Thus, this definition effectively expands the scope of internationality, although the opt-in provision may create some difficulties. The opt-in clause empowers the parties to internationalize an arbitration with exclusively domestic elements merely by stating that the subject matter of their arbitration agreement relates to more than one country. This provision may be misused in that nationals of the same state seeking to benefit from the liberal treatment of international commercial arbitration may find tenuous grounds for declaring that their agreement relates to more than one country,

29 Article 1(3) of the Model Law
and thereby internationalize their arbitration proceedings. This problem was no doubt envisaged by the drafters of the Model Law:

"It was understood (by those states who participated in drafting the Model Law) that the states will be prepared to allow the "opting-in" if an element of internationality is present. Such elements should have been that not all of the following places are situated in the same state: place of offer of contract containing the arbitration clause or of separate arbitration agreement; place of corresponding acceptance; place of performance of contract or of location of subject matter; place of registration or incorporation or nationality of each party; place of arbitration."

The final draft of the Model Law does not contain the above requirements, with the result that parties to international commercial arbitration could declare that a domestic arbitration is international even when such arbitration does not contain any element that qualifies it as being international. In response to this point, two eminent commentators argue that "domestic arbitration laws tend to provide protections that are not needed by sophisticated parties likely to make use of the opt-in provision." This observation


merely begs the question. The issue is not the sophistication of the parties, but the ability to circumvent mandatory rules that are especially designed to regulate domestic arbitrations-a category into which their arbitration may otherwise belong. Many countries will find it difficult to accept a situation where parties might internationalize an arbitration that has no international element.32

However, under the Model Law, there are possible provisions for dealing with parties who abuse the opt-in provision. For instance, under Article 8, courts may refuse to refer such cases to arbitration, or exercise the power to set aside or refuse enforcement of the award resulting from the arbitration on the grounds that it is contrary to public policy under Articles 34 and 35. In the alternative, national courts could simply read into the opt-in provision a requirement to the effect that the subject matter of the dispute should in fact relate to more than one country, quite apart from the declaration of the parties.

In effect, the two main criteria for ascertaining whether an arbitration is international are the identity of the parties and the nature of the dispute, although the Model Law introduces additional criteria.

For the purposes of this thesis, I adopt the wide definition of “international” under the Model Law while also recognizing the different approaches of various jurisdictions. In other words, if a question arises with respect to the international nature of a particular

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32 See I. Szasz, supra note 30 at p.45
arbitration, such a question will be resolved by reference to the provisions of the relevant national law.\(^{33}\)

(iii) “Commercial”

It is axiomatic to speak of international “commercial” arbitration rather than international arbitration. Why this qualification of “commercial”? In some countries, arbitration is sustained only in respect of commercial contracts.\(^{34}\) For instance, under the Geneva Protocol of 1923, contracting states are obliged to recognize the validity of an arbitration agreement arising from a contract “relating to commercial matters or to any other matter capable of settlement by arbitration.”\(^{35}\) The qualification is also important in distinguishing international commercial arbitrations from international arbitrations between states concerned with boundary disputes and other issues. Moreover, in seeking recognition and enforcement of a foreign arbitral award under the New York Convention, it is important to know whether the legal relationship out of which the arbitration arose was or was not a commercial relationship.

The term “commercial” in arbitral jurisprudence does not lend itself to any universally accepted definition. The general practice of many jurisdictions is to define “commercial” so as to cover all types of trade or business transactions. The Model Law does not define “commercial” but provides in the footnote to its Article 1(1) as follows:

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\(^{33}\) For instance Switzerland and the Netherlands apply the nationality approach only.

\(^{34}\) See Redfern & Hunter, supra note 23

\(^{35}\) See Article 1(3) of the New York Convention which provides for commercial reservation.
"the term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road." 36

For the purposes of my thesis, I adopt the Model Law wide interpretation of the term “commercial” so as to include all aspects of international business. However, the question of whether an agreement is commercial or not can only be answered by reference to the relevant national law. 37

(iv) Judicial Review.

Judicial review is a generic term that describes the extent of the national court’s involvement in the scrutiny of arbitral awards. There are two basic approaches to judicial review in international commercial arbitration. The first is by resisting recognition and enforcement of the award in the jurisdiction where the winner seeks a judicial enforcement

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36 See the footnote to Article 1(1) of the Model Law which states that the Model Law applies to "international commercial arbitration."

See also Redfern & Hunter, supra note 23 at p.21

37 Ibid
of the award. The second and more effective option is the application to set aside the award in the jurisdiction where it is rendered.

(a) Resisting Recognition and Enforcement of the Award.

There is an important distinction between the enforcement of an award in the jurisdiction in which the award is made and the enforcement of a foreign award. A foreign award is the award made outside the territory of the state in which recognition and enforcement is sought. An application to set aside the award is also the function of the place where such an award was rendered. The setting aside of the award, which is my concern in this thesis, is frequently governed by treaty obligations.38

The successful party in the arbitration initiates an application for the recognition and enforcement of the award outside the jurisdiction in which the award is made. The application for recognition and enforcement of the award is made to the courts of the place of enforcement because these courts possess considerable powers of coercion and jurisdiction over assets. Recognition and enforcement of the award is usually directed at the assets of the loser in the arbitration. If his assets are located in more than one country, the party seeking recognition and enforcement of the award can chose any country in which to proceed.

However, the party against whom the award is sought to be enforced can resist it judicially based on any of the grounds set out in the New York Convention of 1958. If he

38 Ibid at p.448
successfully resists the recognition and enforcement of the award, he defeats the award only in that jurisdiction. The winner may still seek enforcement of the award in any other country in which the loser has assets. Under the New York Convention which is the treaty that regulates the recognition and enforcement of awards, there are very few grounds on which the courts of a signatory state may deny enforcement. 39 It is generally accepted in most jurisdictions that a signatory state being called upon to enforce a foreign award should not review the merits of the award as to a mistake in fact or a mistake of law. 40 Article V (1) of the New York Convention provides a short, exhaustive list of permissible grounds for resisting recognition and enforcement of the award. The five grounds are:

(i) The invalidity of the arbitration agreement. The invalidity of the arbitration agreement can result if the parties to the agreement or either of them were under the law applicable to them, under some incapacity or if the arbitration agreement is invalid under the law applicable to it. 41

(ii) The second ground for refusing recognition and enforcement of an award is when the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. 42 This is a due process provision, aimed at ensuring that the parties are given adequate opportunity to present their case.

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39 See A.J. Van den Berg, supra note 19


41 Article V (1)(a) of the Convention.

42 Article V (1)(b) of the Convention.
(iii) Under Article V(1)(c), recognition and enforcement of the award may be refused if the arbitrators exceeded their authority in making the award.

(iv) Another ground for refusing recognition and enforcement of an award is if the composition of the arbitral tribunal or the arbitral procedure is contrary to the agreement of the parties. 43

(v) The fifth and final ground on which enforcement can be avoided is if the opposing party can show that the award is not binding in the jurisdiction in which it was rendered. 44

Article V (2) of the Convention provides an additional and general ground for refusal to enforce a foreign arbitration award. It provides that enforcement can be refused if the arbitration award contravenes the public policy of the place where the award is presented for enforcement. Public policy is a catch-all phrase and as a result, any weakness in the arbitration award may make it vulnerable to attack on grounds of public policy. 45 For example, a failure to give notice of an arbitration to one party is a ground for refusing

43 Article V (1)(d) of the Convention.

44 Article V (1)(c) of the Convention.

45 See for example the case of Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969 (2nd Cir. 1974) 975. In this case, the District Court for the District of New York was urged to refuse recognition and enforcement on the grounds that the diplomatic relations between Egypt (the defendant's state) and the United States had been severed. The court rejected the argument and referred to the general pro-enforcement bias of the New York Convention. It held that the Convention's public policy defence should be construed narrowly and that enforcement of foreign arbitral awards should only be denied "where enforcement would violate the forum state's most basic notions of morality and justice."
enforcement under Article V(1)(c). It may also be against the public policy of the enforcing jurisdiction.

The New York Convention is a significant improvement on the Geneva Convention of 1927. Unlike the Geneva Convention, it provides for a simple and effective method of obtaining recognition and enforcement of foreign awards.\textsuperscript{46}

(b) Application for Setting Aside of Foreign Arbitral Awards.

Rather than resist recognition and enforcement of the award in the jurisdiction where the winner seeks judicial enforcement of the award, the loser in the arbitration can attack the validity of the award by initiating the setting aside\textsuperscript{47} application at the jurisdiction where the award is made. A successful setting aside application nullifies, vacates, overturns, or reverses the arbitral award and renders it unenforceable anywhere. The setting aside application is provided for under Article 34 of the Model Law. The article makes an action

\textsuperscript{46}See A.J. Van den Berg, supra note 19

\textsuperscript{47}Internationally, some practitioners speak of “recourse” against an award. The term is used frequently in civil law countries and is used in the Model Law which contains provisions governing “recourse to a court against an arbitral award. The term “recourse” is not sufficiently wide since in its strict sense, it does not cover, for instance, an appeal on a point of law. According to Craig, “it is difficult to find a single word appropriate for all jurisdictions to describe the process of judicial review at the seat of arbitration. In referring to judicial review in the jurisdiction where the award is rendered, the broadest and most encompassing term is “challenge” of an award. Challenge captures the idea of an offensive effort to overturn an award as distinct from mere resistance to enforcement. It covers recourse to a court for the setting aside or revision of an award...”

William L. Craig, supra note 40 at p.177. See also Redfern & Hunter, supra note 23 at p.430
for setting aside or annuling the award the only type of appeal permitted to courts in the jurisdiction in which the award is rendered. The grounds for setting aside of an award are the same limited grounds established in the New York Convention for refusing recognition and enforcement of the award. 48 These grounds are: parties lack of capacity or invalidity of the arbitration agreement, lack of proper notice to a party preventing the party from presenting his case, the tribunal exceeding its powers, or some irregularity in the procedure or composition of the arbitral tribunal.49

The Model Law thus complements the New York Convention. Both its provisions on recognition and enforcement and the provisions on appeal for annulment use the procedural and substantive grounds for opposing recognition and enforcement of an arbitration award established under the New York Convention.

The Model Law however included two additional provisions that are intended to strengthen the finality of arbitral awards. The first is the provision of a time limit for bringing the setting aside application.50 The second addition is an innovative element


49 See Article 34(2) of the Model Law.

50 See Article 34(3) of the Model Law. The article provides that “any application for setting aside may not be made after three months have elapsed from the date on which the party seeking the application had received the award.”
aimed at preserving awards where the procedural defects in such awards are such that do
not warrant the annulment of the award. Article 34(4) thus provides as follows:

"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 actions as in the arbitral tribunal’s
opinion will eliminate the grounds for setting aside."

By this provision, the Model Law adopts the English ‘remission’\textsuperscript{51} or the American
‘remand’ in which an award or decision is sent back to its source with an order for, and
instructions concerning, further proceedings.\textsuperscript{52} Article 34(4) balances the private nature of
arbitration with the need for justice in an adversarial proceedings. It offers the arbitral
tribunal an alternative when the award the court is asked to review contains defects which
would be easy for the arbitral tribunal to correct and impossible for the courts to overlook.

As will be seen in chapter III of this thesis, the countries that have adopted the Model Law
are not united in their approach to Article 34 with respect to the setting aside
application.\textsuperscript{53} Some jurisdictions made significant changes to the provisions of this article.
Under the arbitration laws of some countries, the parties can waive all or any of the

\textsuperscript{51} In English law, the jurisdiction to remit an award is used “as a safety net to prevent injustice.”

\textsuperscript{52} William L. Craig, supra note 40 at p.205

\textsuperscript{53} See P. Sanders, supra note 6
grounds for setting aside of a foreign arbitral award while in Belgium, no grounds exist for
setting aside the award if the parties to the arbitration have no connection with Belgium.

(v) Foreign Arbitral Award.

When is an arbitral award foreign? This question does not admit of a straightforward
answer. Nevertheless, it is necessary to ascertain whether an award is foreign for the
purposes of its recognition and enforcement. The New York Convention of 1958 which
governs the recognition and enforcement of foreign arbitral adopts a hybrid definition of
foreign arbitral awards. Article 1(1) of the New York Convention provides as follows:

This Convention shall apply to the recognition and enforcement of arbitral awards
made in the territory of a State other than the State where the recognition and
enforcement is 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.\(^{54}\)

The first segment of Article 1(1) contains the territorial criterion. However, the italicized
part of the same Article 1(1) complicates the question of what is a foreign arbitral award.\(^{55}\)

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\(^{54}\) Italicics are mine.

\(^{55}\) At the time of drafting the New York Convention, there was a difference between the common law and
civil law States over the criteria for determining foreign arbitral awards. Common law countries favoured
the application of the Convention to the enforcement of awards made in the territory of other States while
the civil law States urged that the criteria should not be strictly territorial. The civil law States thus
proposed that the Convention should simply apply to the recognition and enforcement of arbitral awards
which were not considered as domestic in the State where recognition and enforcement were sought. In
It envisages the possibility of local awards being regarded as non-domestic and enforceable under the convention where, for instance, the award was governed by foreign procedural law. This latter criterion of non-domestic awards was considered by the US Court of Appeals for the Second Circuit in the case of Bergesen v. Joseph Muller Corporation. Bergesen, a Norwegian ship owner, and Joseph Muller Corporation, a Swiss company, entered into charter parties providing for the transportation of chemicals between Europe and the United States. Each charter party contained an arbitration clause providing for arbitration in New York. After disputes had arisen, arbitration was held in New York and an award was rendered in favour of Bergesen. Bergesen filed a petition in the US District Court in the Southern District of New York to confirm the arbitration award. The Court held that an award made in the State of New York between two foreign parties may be considered as non-domestic award within the meaning of the New York Convention and its US implementing legislation.

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56 See M. Pryles, ibid at p.260.
57 710 F.2d 928 (2nd Cir. 1983)
Van Den Berg has criticized this decision. Based on the legislative history and the text of the New York Convention, he argues that the second criterion of the Convention's scope applies only to an arbitral award made in the territory of the country where recognition and enforcement are sought if the arbitration is governed by the arbitration law of another country. For example, parties may agree to arbitrate in France on the basis of West German arbitration law. If the request for enforcement is based on the Convention, French courts will indeed apply the Convention since they consider the award as non-domestic, although it is made within their own territory. The Convention refers to arbitral awards not only made in another country but under also under the law of another country.

While Van Den Berg's views are highly persuasive, it should be noted the fact that the second sentence of Article 1(1) leaves it to the law of the state of enforcement to determine whether an award is domestic.

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58 supra note 55 at p.200

59 ibid at p.201

60 See M. Pryles, supra note 55 at p.272
CHAPTER II

THEORIES OF ARBITRATION: STRENGTHS AND PITFALLS

Introduction

Various theories have been propounded in order to ascertain the appropriateness of a national courts' intervention in the arbitral process, particularly with respect to the setting aside of arbitral awards. An understanding of these theories is necessary because the scope and limits of the national court's intervention in the arbitral process as well as the scope and limits of the powers of the arbitrators is influenced to a very great extent by the theory of arbitration accepted in a particular jurisdiction. A jurisdiction that accepts the contractual theory would legislate for unrestricted arbitral autonomy. Conversely, proponents of the jurisdictional theory would argue for substantial judicial supervision of the arbitral process. Scholars who favour the mixed or hybrid theory are likely to propose

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62 The national arbitration laws of Belgium, Switzerland and Tunisia have embraced the contractual nature of arbitration and have curtailed, even to a vanishing point, the power of national courts to set aside arbitral awards. According to a Belgian professor, François Rigaux, "It is possible to believe that the institution of arbitration is deformed and even loses its essential nature if the arbitral procedure must be followed by a subsequent procedure before national courts." Quoted in William L. Craig, supra note 40 at p.181

The national arbitration laws of these jurisdictions are discussed in detail in chapter III.
an effective admixture of autonomy and regulation,\textsuperscript{63} whereas advocates of the autonomous theory would focus on what is necessary to ensure that arbitration meets only the needs and objectives of the parties.

The legislative changes that have taken place in various jurisdictions within the last decade represent an intense struggle to reconcile these conflicting perspectives of the role of the courts in the arbitral process. Each theory represents a distinct way of looking at arbitration vis-à-vis the power of the national courts to set aside arbitral awards. I propose to discuss these theories and highlight their strengths and pitfalls with a view to examining critically in chapter III the legislative changes that have taken place in various jurisdictions within the last decade.

\textbf{B. The Contractual Theory.}

The contractual theorists contend that arbitration is a contractually chosen substitute for the national courts and that any recourse to the courts is a deviation from the process agreed to by the parties.\textsuperscript{64} Proponents of the contractual theory thus argue that because

\textsuperscript{63} In jurisdictions that accept the mixed or hybrid theory, a careful and essential balance is struck between arbitral autonomy and the power of the national courts to set aside arbitral awards. Jurisdictions that accept this theory are in the majority. Such jurisdictions include but are not limited to British Columbia, France, England and Nigeria. The national arbitration laws of some of these jurisdictions is discussed in details in chapter III.

\textsuperscript{64} See R. David, "\textit{Arbitration in International Trade}" (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1985) at p.5 where the comparative law scholar defined arbitration as "a device whereby the settlement of a question which is of interest to two or more persons is entrusted to one or more other persons-the arbitrators, who derive their powers from a private agreement, not from the authorities"
arbitration is contractually chosen by the parties, when their dispute is resolved by the arbitrators, there is no dispute to take to the courts. The choice of arbitration by the parties, according to the proponents of this theory, is therefore a contractual ouster of the jurisdiction of the national courts.\textsuperscript{65} The parties manifest their intention and desire to oust the jurisdiction of the courts in their agreement and without their agreement, there can be no valid arbitration.\textsuperscript{66} As Kellor states:

"Arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forego established rights in favour of what they consider to be the greater advantages of arbitration."\textsuperscript{67}

In its classical version, the contractual theory considers the arbitrator to be an agent of the parties. Thus, in rendering an award, the arbitrator acts as the parties' agent and the award

\textit{of a state, and who are to proceed to decide the case on the basis of such an agreement} (Emphasis supplied)


\textsuperscript{67} F. Kellor, "Arbitration in Action" (New York: Harper & Brothers, 1941) at p.8
becomes binding on them as the principals. Professor M. Merlin poses the following questions and offers an explanation:

"An arbitral decision rendered in a foreign country, is it anything other than a contract? Is it not the consequence of the agreement to arbitrate, as a result of which the arbitrators have rendered it? Is it not tied essentially to this arbitration agreement? Does it not form with the arbitration agreement a single entity?...It is the arbitration agreement that gives it its existence; it is from the arbitration agreement that it derives all its substance; it has, then, like the arbitration agreement, the character of a contract...it is, to put it precisely, only an agreement to which the parties have bound themselves by the hands of the latter (arbitrators)." 68

Mr. A. Samuel has criticized the application of the agent/principal relationship to the relationship between the arbitrator and the parties to the arbitration and states that the arbitrator cannot be regarded as an agent of the parties for a number of reasons. 69 First, the authority of an arbitrator, unlike that of an agent can be made irrevocable and the duty of the arbitrator to render an impartial and unbiased award is inconsistent with an agent's obligation to conform with the wishes of the principal. Secondly, since the agent could not

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69 Ibid
do something that the principal is incapable of doing, an arbitrator cannot be acting on behalf of the parties in conducting the arbitration because the parties lack the legal capacity to judge impartially the merits of their dispute.  

In response to the criticisms of the contractual theory, contemporary disciples of the contractual theory repudiate the idea that the arbitrator is an agent of the parties as understood in the law of agency and disown the belief that an award is primarily a contractual document. However, they emphasize the contractual nature of arbitration and stress the fact that the arbitral process is a product of the parties' voluntary consent. In that respect, the parties should be given a free hand in adapting the process to their particular needs. It thus recognizes the competence of the parties to choose the law to govern the arbitral process, free from the interference of the national legal systems.  

The contractual theory is flawed on several grounds. First, it presents a parochial view of the true nature of the arbitral process. While consent is a prerequisite in the arbitral process, arbitration is much more than a contractual process. Arbitration produces a

70 Ibid


See also J. Paulsson, “Arbitration Unbound in Belgium” (1986) 2 Arb. Int’l 68

72 For a detailed discussion of the conflict between the contractual and quasi-judicial character of arbitration, see P. Sanders, “Trends in the Field of International Commercial Arbitration” in Académie de Droit International (1975) Recueil des Cours 207
binding award with legal consequences. From a jurisdictional point of view, arbitration apportions rights between the parties in a judicial manner.\textsuperscript{73} Secondly, the arbitral process receives enormous assistance from the national courts, particularly the national courts of the arbitral situs. Parties to the arbitration often rely on the state powers of compulsion. National courts, particularly the national courts of the arbitral situs, offer to ongoing arbitration proceedings their assistance with respect to such matters as the constitution and composition of the arbitral tribunal (including challenges of the arbitrators, nomination and replacement of arbitrators, and extension of the time limits). Other aspects of arbitration in which the assistance of the national courts is of paramount importance include the taking and preservation of evidence (using the coercive powers of national courts to obtain documentary and testimonial evidence, as well as expertise). The national courts can also provide provisional measures such as injunctions, attachments, and interim measures of protection in order to prevent the frustration of the ultimate award.

The contractual theory does not take into consideration the interests of third parties who may not have signed the arbitration agreement. In international commercial arbitration, the interests at stake may include not only those of the parties, but also the rights of persons who may never have consented to the arbitration at all. Such situations arise in multiparty arbitrations.\textsuperscript{74} Under a system of unrestricted arbitral autonomy in which the parties

\textsuperscript{73} See William L. Craig, supra note 40 at p.180

cannot apply to have the resulting award set aside, persons who never consented to the arbitration would have no opportunity to challenge the arbitrator's decision in the jurisdiction where it was rendered.75

Finally, it should be noted that as a method of dispute resolution, arbitration is a mechanism for the resolution of differences arising between people by an impartial person having the confidence of and authority from these people. Therefore, if the arbitrator errs for example by disregarding the requirement of due process, there should be an opportunity to correct such fundamental error. In international commercial arbitration, the correction of this error is by setting aside of the award by the national courts of the place of arbitration. Arbitration should not be viewed as purely a contract that is sacrosanct. It is submitted that the consensual nature of arbitration must be viewed in the context of the national legal systems that allow the consent of the parties and the award of the arbitrators to be productive of legal consequences.76


C. The Jurisdictional Theory.

The central focus of the jurisdictional theory is the authority of the State to regulate all arbitrations taking place within its territory. This school of thought argues that the validity of the arbitration agreement, the powers of the arbitrators, and the enforcement of the resulting award are all derived from a particular national legal system. The theory therefore insists that an arbitration cannot be carried out without the regulation of a national legal system.

Professor F.A. Mann, reputed to be the leading protagonist of the jurisdictional theory argues that every State has the right to supervise and regulate any activity occurring within its territory. Thus, the country where an arbitration is conducted regulates the arbitral proceedings and the efficacy of the process. The agreement of the parties to the arbitration is binding on them not just because they have mutually consented to such an agreement, but because a national legal system decides to attach legal consequences to

It is therefore not a suprise that each state has its statutory or common law regulating the conduct of arbitration proceedings.

77 See J. Lew, supra note 71 at p. 52


their agreement. In other words, the intention of the parties as manifested in their agreement can only be binding to the extent to which they are sanctioned by the laws of the place where the arbitration is conducted. In Mann’s thesis:

“No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects.”80

Furthermore, he argues that the use of the term “international arbitration” is a misnomer because in the legal sense, no international commercial arbitration exists. “Every system of private international law” according to Mann “is a system of national law and every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”81 Consequently, arbitration as a system of private law necessarily derives its legitimacy from a national legal system. Also, international conventions governing arbitration apply only by virtue of their incorporation into national law.82 In conclusion, Mann has maintained that “it is in the highest interest of the State...to maintain the principle of judicial review of arbitration not only to develop the law, but also to ensure the administration of justice and to avoid the risk of arbitrariness.”83

80 See F.A. Mann, supra note 78 at p.160

81 Ibid

82 Ibid

83 F.A. Mann, “Private Arbitration and Public Policy” (1985) 4 Civil Justice Quarterly 257 at p.267
The jurisdictional theory is useful to the extent it recognizes the importance of national laws in regulating the conduct of international commercial arbitration. Unlike the contractual theory, it highlights the fact that national laws are indispensable in understanding the nature of arbitration. However, the fundamental issue to be addressed is whether the jurisdictional theory is an accurate representation of the true nature of arbitration. In my opinion, it does not accurately present the true nature of arbitration. Like the contractual theory, it overemphasizes a singular, albeit significant consideration in the arbitral process; that is, the role of national legal systems. The theory does not give adequate regard to the role of the parties’ agreement. Granted that national law confers legitimacy and efficacy on international arbitration, it is also necessary to point out the fact that there can be no international arbitration without the valid agreement of the parties.

The various conventions and legal instruments on international commercial arbitration recognize the significance of the parties’ agreement and the need to respect the desire of the parties to settle their dispute through arbitration rather than the national judicial process. The recognition of the will of the parties accounts for the current trend towards limiting judicial interference in the arbitral process. Such a limitation of judicial interference exists under the Model Law and the New York Convention. It is submitted that the jurisdictional theory is unsatisfactory because it ignores the significance of the will of the parties to an international commercial arbitration.

**D. The Autonomous Theory**

The autonomous theory views arbitration from a perspective quite different from both contractual and jurisdictional theories. The autonomous theory examines the arbitration
process itself and focuses on such issues as the role of arbitration, its objectives and its methodology. Thus, the autonomous theory proceeds from the assumption that arbitration must be viewed from a broader context and that rather than emphasizing the nature of the process, emphasis should be placed on its goals and objectives. It is argued that a complete picture of arbitration can only be presented by considering its use and purpose and the manner in which it responds to the need of the business community.\(^8^4\)

Proponents of the autonomous theory suggest that unrestricted party autonomy is essential to the full development of international arbitration.\(^8^5\) The advantage of unhindered party autonomy is that it will fulfill the aspirations of the parties who use arbitration for the resolution of their disputes and also help in the development of arbitration as an autonomous institution.\(^8^6\) One of the great intellectual protagonists of the autonomous theory is Professor Berthold Goldman, who argues that “all investigation of the nature of international arbitration “leads to the ineluctable necessity of a system that is autonomous, not national”\(^8^7\) Another learned scholar, Professor Arthur Von Mehren has proffered what I consider to be a more moderate view. He suggests that arbitrations are


\(^{8^5}\) See A. Samuel, supra note 68 at p.72

\(^{8^6}\) Ibid

subject to national law only to the extent that public authorities intervene in connection with the conduct of arbitration or the enforcement of the award.  

The views espoused by this school of thought are similar to the opinion of the scholars who argue that arbitration should be delocalised or unbound from the laws of the seat of arbitration. The implication is that the intention of the parties should be the sole factor in determining the law to be applied both to the arbitral proceedings and the substance of the dispute.

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F.A. Mann, supra note 78

Hans Smit, supra note 19
Although an understanding of the goal and purpose of arbitration is useful in appreciating the character of arbitration, the autonomous theory is deficient in some respects. The theory is inadequate in underscoring the need for some form of, if only basic, national law regulation of arbitration. Parties to an arbitration do not expect the arbitration process to be frustrated by unrestricted judicial intervention in the arbitration. However, in the absence of minimal regulation of arbitration by national law, how can procedural integrity be guaranteed in international commercial arbitration? How can we secure the arbitrators' respect for the desired intentions of the parties? What will be the remedy for a person who is not a party to the arbitration agreement but whose rights are affected by the decision of the arbitral tribunal or a person who is erroneously joined in the arbitration?

E. The Mixed or Hybrid Theory

The mixed or hybrid theory tries to reconcile the dual nature of arbitration, that is, the contractual and the quasi-judicial nature of arbitration. According to its originator, G. Sauser-Hall, “although deriving its effectiveness from the agreement of the parties as set out in the arbitration agreement, it (arbitration) has a jurisdictional nature involving the application of the rules of procedure.”

He argues that it is not possible for arbitrations to be unbound—that is, to be carried out beyond the control of every national legal system and that arbitration should be submitted to the law of the seat of arbitration.

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90 G. Sauser-Hall, “L'Arbitrage en droit international Privé” (1952) 44-1 Ann. Inst. Dr. Int’l 469 at 471. Quoted in A. Samuel, supra note 68 at p. 60

91 Ibid
application of the law of the seat of arbitration and the use of its courts, according to him, works efficiently and justly in the majority of cases.\textsuperscript{92}

The major distinguishing feature of the mixed or hybrid theory is that it presents a fuller picture of the true nature of arbitration by demonstrating that although an arbitration agreement is a contract and must be held sacred, the arbitration proceedings remain subject to national law.\textsuperscript{93} This feature of the mixed or hybrid theory separates it from the contractual and jurisdictional theories. The contractual and jurisdictional theories are narrow constructs in that they are essentially a one-dimensional evaluation of the nature of arbitration. The contractual theory looks at arbitration from a contractual point of view whereas the jurisdictional theory concentrates entirely on the jurisdictional character of arbitration and does not recognize the importance of the consent of the parties to the arbitration. An acceptable theory of arbitration must acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on the process by national legal systems. The consent of the parties is guaranteed by the national laws which determines the legality and efficacy of the choice made by the parties. There is thus an inter-relationship between international commercial arbitration, national law and international treaties and conventions. Redfern and Hunter summarises the hybrid nature of arbitration as follows:

"International commercial arbitration is a hybrid. It begins as a private agreement

\textsuperscript{92} Ibid

\textsuperscript{93} Ibid
between the parties. It continues by way of private proceedings in which the
wishes of the parties are of great importance. Yet it ends with an award which
has binding legal force and effect and which, on appropriate conditions being
met, the courts of most countries of the world will be prepared to recognize and
enforce. The private process has a public effect, implemented by the support of
the public authorities of each state expressed through its national law..."94

The hybrid or mixed theory supports the judicial review of awards, particularly the setting
aside function. However, the performance of this function by the national courts has to be
restricted or arbitration will become a prelude to formal litigation.95 It is submitted that an

94 Redfern & Hunter, supra note 23 at p.8 Emphasis supplied.

95 See A. Bucher, “Court Intervention in Arbitration” in R.B. Lillich & C.N. Brower eds., “International
Arbitration in the 21ST Century: Towards “Judicialisation” and Uniformity” (Irvington, New York:
Transantional Publishers Inc. 1994) p.29 at 30. He considers the extent to which the parties to an
arbitration should be permitted to challenge the resulting award either through annulment proceedings or
by opposing its enforcement. He concludes that the agreement of the parties to have their dispute decided
by arbitrators and not by the courts necessarily implies that the award shall not be reviewed completely by
the courts. If the case should be litigated extensively again before the courts, the basic purpose of
arbitration would be defeated. Court protection should therefore be admitted only to the extent that the
award infringes basic legal safeguards as provided by the principles of due process and public policy.

Transnational Disputes Through International Arbitration” (Virginia, U.S.A: University of Virginia
exceedingly fine balance must be struck between arbitral autonomy and a minimum competence for national judicial review. Too much autonomy for the arbitrator may create a situation of arbitrator’s misconduct. On the other hand, too much national judicial review will transfer real decision power from the arbitration tribunal, selected by the parties in order to be non-national and neutral, to a national court whose party neutrality may be considerably less. The failure to always maintain this balance would ultimately reduce the attractiveness of arbitration as a private means of dispute resolution. The Model Law maintains this balance by recognizing the autonomy of the parties and also provides restrictively narrow grounds on which the award may be challenged before the national courts at the seat of arbitration.

F. Conclusion.


97 See M. Kerr, “Arbitration and the Courts: The UNCITRAL Model Law” (1985) 34 I.C.L.Q. 1. He justifies judicial review of awards on the following grounds: “...No one having the power to make legally binding decisions in the country should be altogether outside and immune from this system. (meaning the judicial system). This system is our bulwark against corruption, arbitrariness, bias, improper conduct and-where necessary-sheer incompetence in relation to acts and decisions with binding legal effect for others. No one below the highest tribunals should have unreviewable legal powers over others. Speaking from experience, I believe this to be as necessary in relation to arbitrations in England and abroad as in all other contexts.”
The above theories of arbitration reflect the pressures and dilemma of various states in determining the proper role of the national courts in the arbitral process, particularly with respect to the setting aside proceedings. The pressures on the states have intensified in the last decade because of the competition among states to present the best environment for the conduct of international commercial arbitration. The extent of court intervention in the arbitral process depends on the theory of arbitration accepted in that jurisdiction. A state that is attracted to the contractual theory would necessarily provide for unhindered party autonomy and may not permit the courts to set aside arbitral awards. On the other hand, a jurisdictionalist would argue for substantial judicial supervision of arbitration. The proponents of the mixed or hybrid theory would favour a necessary marriage of autonomy and regulation, whereas protagonists of the autonomous theory would focus on what is necessary to ensure that arbitration meets the needs and objectives of the parties.

It is my submission that the law should reflect a blend of these theories in order to ensure that arbitration meets the needs of the parties as well as the larger needs of society. In this respect, the mixed or hybrid theory is the most appealing of the theories because it is a blend of both the contractual and jurisdictional basis of arbitration. Embedded in this theory is the caution that international commercial arbitration cannot entirely be divorced from the legal systems with which they come in contact. This theory is also supported by both the Model Law and the New York Convention, both of which favour limited intervention of national courts in the arbitral process, particularly with respect to the setting aside function. However, the national arbitration laws of some States have
compromised this vital balance between arbitral autonomy and the power of the courts to set aside foreign arbitral awards. In the subsequent chapter, I intend to examine the national arbitration laws of some jurisdictions against the background of these theories and case law. The emphasis will be on the setting aside function.
CHAPTER III

LEGISLATIVE TRENDS IN SETTING ASIDE OF FOREIGN ARBITRAL AWARDS: A COMPARATIVE ANALYSIS.

Introduction

Until comparatively recently, the supervisory powers of the courts in international commercial arbitration, particularly with respect to the setting aside of foreign arbitral awards, was generally considered to be inviolable. In recent times however, there have emerged some unique developments in international commercial arbitration. In Belgium for example, the power of the courts to set aside foreign arbitral awards is ousted by operation of law while in some States, notably Switzerland and Tunisia, the parties to the arbitration are permitted by positive legislation to enter into an agreement to exclude all or some of the grounds for the setting aside of the award in the jurisdiction where the award is rendered. This legislative trend which started in Belgium is a practical manifestation

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98 See M. W. Reisman, supra note 96 at p.109 “...the very notion of the responsible performance by national courts of important control roles assigned to them under the international agreement central to the entire regime is being challenged”

99 See generally, Pieter Sanders, “Unity and Diversity in the Adoption of the Model Law” supra note 6

of some of the theories of arbitration discussed in chapter II. It is the purpose of this chapter to examine this legislative trend and examine the extent to which it is in compliance with the New York Convention and the Model Law as well as its likely practical implications in international commercial arbitration. The justification for these legislative changes will be presented. Consistent with the exposition of the poverty of the arguments for the total or partial removal of the setting aside function, a convincing case will be made for the retention of the setting aside function in international commercial arbitration. One of the fundamental questions to be addressed here is whether there is any need to upset the well-established principle that an arbitral award can be subject to an action for setting aside in the country of origin and that the setting aside in the country of origin constitutes a ground for refusal of enforcement in any jurisdiction in which the award is presented for enforcement. My methodology is to first examine the national law of some jurisdictions which strike a necessary balance between arbitral autonomy and the guarantee of procedural fairness. Such jurisdictions include British Columbia and France. Reference will also be made to the Federal Arbitration Act of the United States. Against this background, the emerging legislative trend will be examined. The examination will focus on the setting aside provisions of the national arbitration laws of Belgium, Switzerland and Tunisia.

B. Maintaining Procedural Integrity:

101 Professor Park has identified three statutory models of judicial review of arbitral awards at the seat of arbitration: (i) appeal on the merits; (ii) review to ensure procedural integrity of the arbitration; and (iii) no right of review at all. See William W. Park, “Illusion and Reality in International Forum Selection” (1995) 30 Texas Int’l Law Journal p.135 at 182. (hereinafter “Illusion and Reality...”)
(i) British Columbia (Canada)

British Columbia, a province in Canada was the first to adopt the Model Law in August, 1986. Shortly thereafter, the other provinces and territories adopted the Model Law. In the province of British Columbia, the *International Commercial Arbitration Act*, based on the Model Law, was enacted in 1986. The ICAA of BC made few changes to the Model Law but the changes do not derogate from the underlying objectives that informed the adoption of the Model Law. With respect to judicial review of arbitral awards by national courts of the arbitral situs, the ICAA of BC adopted the Model Law policy by striking a balance between arbitral autonomy and the power of the courts to set aside foreign arbitral awards. The legislative policy pursued by the ICAA of BC ensures maximum support for the arbitral process and minimal and objectively reasonable control, but never no control. Thus, Section 34 of the ICAA of BC provides for restrictively

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102 hereinafter the ICAA of BC

103 For instance S.2 of the ICAA of BC even strengthens the meaning of an award and defines it as “any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes (a) an interim arbitral award, including an interim award made for the preservation of property, and (b) any award of interest or costs. To further cement the relationship between the Act and the Model Law, S.6 of the Act provides that “In construing the provisions of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law and shall give those documents the weight that is appropriate in the circumstances” (Emphasis supplied)

104 See A. Asouzu, supra note 100
narrow grounds for the setting aside of foreign arbitral awards. Like the Model Law, the grounds for the setting aside of foreign arbitral awards under the ICAA of BC are in all respects the same as the grounds for the refusal of recognition and enforcement of foreign arbitral awards under Article V of the New York Convention. In this way, the

\[105\] S.34(2) of the ICAA of BC provides as follows: An arbitral award may be set aside by the Supreme Court only if (a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of the Province;

(iii) 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;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters not submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing any agreement, was not in accordance with this Act; or

(b) the court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Province; or

(ii) the arbitral award is in conflict with the public policy in the Province.
ICAA of BC not only limits and defines the grounds upon which an arbitral award may be set aside but also ensures consistency with the provisions of the New York Convention. 106

The courts in British Columbia have endorsed the world-wide trend towards restricting judicial intervention in the arbitral process, particularly with respect to the setting aside of foreign arbitral awards. 107 The cause célèbre is the case of Quintette Coal Ltd v. Nippon Steel Corporation. 108 After the arbitrators had rendered the award, the loser in the arbitration (the seller) brought an application to have the award set aside on the ground that the arbitrator decided matters not within the scope of the submission. The court of first instance made reference to the judicial decisions of other common law countries in support of the global trend towards restricting judicial intervention in international arbitration 109 and rightly held that even if the arbitrator had committed an error of law in interpreting the contract, that would not be a ground for setting aside the award. 110

106 See generally Henri C. Alvarez, “Judicial Intervention and Review Under the International Commercial Arbitration Act” in Paterson & Thompson eds., supra note 8 at p.137


108 (1989) 1 W.W.R. 120 (B.C. Supreme Court)


110 In the United States, an error of law or failure of the arbitrators to understand and apply the law is not a ground for setting aside of the arbitral award. Under S.10 of the Federal Arbitration Act of the U.S., an award may be set aside only:
From the provisions of S.34 of the ICAA of BC and judicial authorities cited above, it is evident that the right of recourse against the arbitral awards is still retained, though the grounds for exercising that right are very narrow. In effect, the ICAA of BC strikes a balance between the autonomy of the parties and arbitrators on the one hand, and the guarantee of the integrity of the award and its enforceability on the other hand.\textsuperscript{111}

(a) where the award is procured by corruption, fraud or undue means;
(b) where there was evident partiality or corruption in the arbitrators;
(c) where the arbitrators were guilty of misconduct by refusing to postpone the hearing or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced;
(d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

It should be noted that although the U.S. has not adopted the Model Law as a federal statute, the above provisions of the existing legislation provide adequate procedural safeguards while also maintaining the autonomy of the parties. However, eight states of the U.S. have adopted the Model Law.


\textsuperscript{111} See H. Strohbach, “Composition of the Arbitral Tribunal and Making of the Award” in P.Sanders ed., “UNCITRAL'S Project For a Model Law on International Commercial Arbitration” (Deventer: Kluwer Law and Taxation Publishers, 1984) p.103 at 117 wherein he rightly observes as follows: “I do not regard it as a ‘danger’ that the arbitral award might be annulled; if a true reason for an annulment exists, the annulment of the arbitral award would be justified”
(ii) France.

Prior to 1981, parties in international commercial arbitration in France were left without any possibility of setting aside the award. French courts were then consistent in their position that an award can only be subject to the setting aside procedure if the arbitration was conducted in accordance with French procedural law. In other words, if the parties chose the procedural law of another State, neither of them had the right of recourse against the award that resulted from the arbitration even though the seat of arbitration is France.112 A classic illustration of the attitude of French courts to recourse against foreign arbitral awards is the case of GNMTC v. Götaverken.113 In this case, the Paris court of Appeal dismissed a setting aside application against an award made in Paris between a Swedish and a Libyan party. The court held that the award was not governed by French arbitration law. The decision in this case was greeted with criticisms by academic writers and commentators. In particular, it was argued that the attitude of the French courts is in violation of the New York Convention because they were excluding foreign awards from the ambit of the New York Convention by refusing to consider it as a French award.114 It was also argued that basic fairness required that a loser in a defective arbitration should have the award set aside, once and for all, where rendered.115


114 See A. J. van den Berg, “The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation” supra note 19 at p.34

In 1981, France enacted a revised Code of Civil Procedure applying specifically to arbitration that "implicates international commerce." The new French Code of Civil Procedure provides five main limited grounds on which an award rendered in France could be set aside by French courts. The grounds for setting aside under the new French Code of Civil Procedure are consistent with those articulated in the New York Convention. Article 1502 of the Code provides that an award may be set aside:

1. If the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;
2. If the arbitral tribunal was irregularly composed or the sole arbitrator was irregularly appointed;
3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;
4. Where the adversary principle has not been complied with;
5. If the recognition or enforcement is contrary to international public policy.

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116 See the French Code of Civil Procedure (Decree Law No. 81-500 of May 12, 1981). Reprinted as Appendix 9 in Redfern & Hunter, supra note 23 at p.750-763. Article 1492 provides that "arbitration is international if it implicates international commercial interests."


117 This refers to the principle of fair hearing or due process.
One interesting thing about the French Code is that the above grounds for the setting aside of foreign awards cannot be excluded by the agreement of the parties and action to set aside may be brought even if the parties have waived the right.\textsuperscript{118}

Barely three years after the enactment of the French Code of Civil Procedure, it was tested judicially in the case of \textit{Arab Republic of Egypt v. Southern Pacific Properties Ltd.} (SPP)\textsuperscript{119} In this case, the Paris Court of Appeal set aside an award rendered pursuant to an ICC arbitration clause on the ground that the arbitrator decided on the basis of a void or expired arbitration agreement.\textsuperscript{120} Southern Pacific Properties entered into a contract entitled ‘Heads of Agreement,’ signed by the Egyptian Minister of Tourism and the Egyptian General Organization for Tourism and Hotels (EGOTH).\textsuperscript{121} The contract was a joint venture to develop two resort complexes. The contract permitted SPP to assign its obligations to a subsidiary, SPP (Middle East) which it later did. The Heads of Agreement contained no arbitration clause, but a subsequent agreement between SPP and EGOTH contained an arbitration clause. The Minister of Tourism signed the subsequent


\textsuperscript{119} (1986) 23 I.L.M. 1048.

\textsuperscript{120} See Article 1502 (1) of the French Code which provides that an award may be set aside if the arbitrator decided in the absence of an arbitration agreement or in reliance on a void or expired arbitration agreement.

agreement, but added the words “approved, agreed and ratified.” After an ICC arbitration, the Arab Republic of Egypt moved to have the resulting award set aside on the ground that the Minister of Tourism did not intend to bind the government, but had intervened only in a supervisory capacity with respect to EGOTH. The Court of Appeal of Paris set aside the award on the ground that the Minister had not intended to bind the government of Egypt. The decision was affirmed by the French *Cour de cassation*.

In the light of the new French Code of Civil Procedure and the *SPP* case, the *Götaverken* case and all other cases which held French courts without jurisdiction to hear setting aside applications are no longer good law in France. The legislative policy underlying the new French law on arbitration is the promotion and facilitation of international arbitration on the one hand and the enforceability of foreign arbitral awards on the other hand. A complete hands off attitude by national courts of the seat of arbitration would be detrimental to international commercial arbitration.

The national arbitration laws of Canada and France as well as those of many other jurisdictions demonstrate the indispensability of the national courts in the arbitral process particularly as it relates to the setting aside function. However, recent legislative

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122 Scholars who favour the delocalisation of foreign arbitral awards base their arguments on the *Götaverken* case. See Jan Paulsson, supra note 89. The same case provides a basis for the protagonists of the contractual theory of arbitration.

developments in Belgium, Switzerland and Tunisia constitute a challenge to the power of the national courts of the arbitral situs to set aside foreign arbitral awards. Are these legislative trends justifiable? Will they promote international commercial arbitration or are they likely to impede the efficiency of the arbitral process as a vehicle for the settlement of commercial disputes? Are these legislative enactments not in violation of the arbitral obligations of these States under the New York Convention and the international consensus articulated in the Model Law? Is it necessary to retain the setting aside function for such reasons as ensuring the observance of due process or natural justice?

C. Excluding the Setting Aside Function in Belgium, Switzerland and Tunisia.

(i). Exclusion of the Setting Aside Function by Operation of Law: The Case of Belgium.

The Belgian Judicial Code was amended in 1985 in relation to the setting aside of foreign arbitral awards. The amendment added a new paragraph (4) to Article 1717 of the Judicial Code. Thus, Article 1717(4) of the Belgian Judicial Code provides to the following effect:

"Belgian Courts have jurisdiction to set aside an award only when at least one of the parties to the dispute settled by the arbitral award is either an individual of Belgian nationality or a Belgian resident or legal entity which is incorporated in Belgium or which has a branch or any establishment in Belgium"124

124 See generally E. Gaillard, "Belgium: Statute on the Setting Aside of Arbitral Awards" (Introductory Notes)
Article 1701 of the same Belgian Judicial Code sets out the grounds for setting aside of awards. For clarity of analysis, some of these grounds are set out hereunder:

(i) if it is contrary to *ordre public*;

(ii) if the dispute was not capable of settlement by arbitration;

(iii) if there is no valid arbitration agreement;

(iv) if the arbitral tribunal has exceeded its jurisdiction or its powers;

(v) if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made;

(vi) if the award was made by an arbitral tribunal irregularly constituted;

(vii) if the parties have not been given an opportunity of substantiating their claims and presenting their case, or if there has been disregard of any obligatory rule of the arbitral procedure, insofar as such disregard has had an influence on the arbitral

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Jan Paulsson, “Arbitration Unbound in Belgium” supra note 89


The party who initiates the setting aside application cannot rely on grounds (iii), (iv) and (vi) if he had knowledge of it during the pendency of the arbitral proceedings and failed to raise them at that time. An award may also be set aside in Belgium:

(a) if it was obtained by fraud;

(b) if it is based on evidence that has been declared false by a judicial decision having the force of res judicata or on evidence recognized as false; and

(c) if, after the awards was made, there has been discovered a document or other piece of evidence which would have had a decisive influence on the award and which was withheld through the act of the other party.\(^\text{126}\)

The above grounds for the setting aside of foreign arbitral awards in Belgium cannot be utilized by a party who lacks any of the Belgian connections specified under Article 1717 (4) of the Belgian Judicial Code: nationality, incorporation, establishment or place of business.\(^\text{127}\) In such situations, Belgian courts will decline jurisdiction to rule on the validity of the arbitral award even if there is manifest injustice or corruption on the part of the arbitrators. Indeed, under the Belgium national arbitration law, there is absolutely no

\(^{125}\) This is the requirement of due process or the rule of fair hearing. It is also referred to as the principle of natural justice.

\(^{126}\) See Article 1704 (5)

\(^{127}\) See generally A. Asouzu, supra note 100
window of opportunity to have the award set aside if the parties lack the connections which are conditions precedent for the exercise of that right. In the definitive words of A.J. van den Berg:

"The Belgian amendment is extreme. No annulment whatsoever is possible. It is not even possible for the parties to agree that the Belgian courts will have jurisdiction to annul the award in international arbitration (a so-called "opting in")".


The legal regime governing international commercial arbitration in Switzerland is Chapter XII (Articles 176-194) of the Swiss Private International Law Act of 1987. Article 192

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129 Articles 176-194 of the Swiss Private International Act of 1987, which deals with international commercial arbitration, is reprinted as appendix 19 in Redfern & Hunter, supra note 23 at p.784-790
of the Act, which deals with the right of the parties to challenge the arbitral award provides that:

1. Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent statement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several grounds listed in Article 190, para 2.

2. Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply by analogy.\textsuperscript{130}

The grounds for the setting aside of the awards, which may be partly or wholly excluded by the parties, are set out in Article 190 (2) as follows:

\textsuperscript{130} Emphasis supplied. This section does not address the equally important question of whether an award rendered in Switzerland in an arbitration in which the parties have partially excluded the setting aside proceedings is enforceable in Switzerland under the New York Convention by analogy, even if the arbitrator breached the parties' right to a fair hearing. See A. Asouzu, supra note 100.
(a) where the arbitrator has been incorrectly appointed or where the arbitral tribunal has been incorrectly constituted;

(b) where the arbitral tribunal has wrongly declared itself to have or not to have jurisdiction;

(c) where the award has gone beyond the claims submitted to the arbitral tribunal, or failed to decide one of the claims;

(d) where the principle of equal treatment of the parties or their right to be heard in adversarial procedure has not been observed;131

(e) where the awards is incompatible with public policy.

The Swiss model represents what is called the “opting-in procedure.” The utilization of this procedure by parties arbitrating in Switzerland is subject to two fundamental conditions viz: none of the parties may have their domicile, habitual residence, or business establishment in Switzerland, and the exclusion must result from the agreement of the parties.132

131 All emphasis are mine.

132 See A.J. van den Berg, supra note 128 at p.145.


In 1993, Tunisia copied substantially the provisions of the Swiss Act as it relates to the setting aside of arbitral awards. Article 78 of the Tunisian Arbitration Code (on recourse against an award) provides: “If neither party is domiciled, nor has its habitual residence or place of business in Tunis, the parties may expressly agree to waive their right to challenge the arbitral award, either partially or totally...”

D. Justifications for the Legislative Trends in Setting Aside of Foreign Awards.

The legislative ink in Belgium, Switzerland and Tunisia had hardly dried when some academic writers and commentators began to project these States as very conducive for the conduct of international commercial arbitration because of the perceived quality, flexibility and recent origin of their legislations, particularly as they relate to the setting

A. Asouzu, supra note 100 at p.78. In reference to the provisions of the Swiss arbitration law on the setting aside of awards, he said: “...it is as dangerous as the provision restraining Belgian courts from setting aside awards rendered in Belgium in arbitration involving non-Belgian connections...”


There is an authority for the view that parties arbitrating in Sweden can exclude by agreement the annulment of arbitral awards rendered in international arbitration in Sweden. In Solel Boneh International Limited and Water Resources Development(International) Limited v. The Republic of Uganda and the National Housing and Construction Corporation of Uganda. (1991) 16 Yearbook Comm. Arb. 606, the court stated obiter that if the parties do not have any connection with Sweden, (in this case an Israeli and Ugandan parties were involved) such parties must be considered to be entitled to agree, even before any dispute arises between them, to limit their right to challenge the award in a Swedish court on account of formal deficiencies.
aside of arbitral awards. Apologists of the emerging legislative trends in the setting aside of foreign arbitral awards seek to justify this trend on a number of grounds. Reverence for the principle of party autonomy is the first reason which is advanced in favour of the total or partial exclusion of the grounds for setting aside of foreign awards, be it by automatic operation of law as in Belgium or by the binding agreement of the parties as in Switzerland and Tunisia. The autonomy of the parties, it is argued, vests in the parties the seemingly absolute right to determine the essentials of the arbitral process such as designating the applicable procedural and substantive law, the place of the arbitration, the appointment of the arbitrators e.t.c. If the parties have chosen arbitration rather than the national courts for the resolution of their dispute, it is their will to bring about res judicata effect and enforcement of the resulting award without the remedy of judicial review. The parties, it is further argued, should stick to their choice, and an exorbitant, mistaken or unreasonable award would be treated the same way as a comparable final judgment: finality always has a price to be paid indiscriminately by the defeated litigants in adjudication and arbitration alike.

134 See generally Jan Paulsson, supra note 89

135 See generally P. Lalive, supra note 132

M. Blessing, supra note 132


137 Ibid
Secondly, it is argued that the choice of the place of arbitration is often made solely on the basis of convenience since in international commercial arbitration, neither of the parties wants to end up in the national courts of the other party or holding the arbitration in each other’s jurisdiction. The obvious consequence of this is that although the arbitration takes place in a particular State, that State may not have any connection whatsoever with the parties. The arbitration may not involve a national of the country of arbitration, may not have any financial impact on the country of arbitration and often applies substantive law foreign to the arbitral situs. It might even be the case that the choice of the seat of arbitration is not a conscious choice of the parties, for instance if they have delegated this function to an arbitral institution. Indeed, there may be no national of the State or

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138 For the parties in international commercial arbitration, the guiding principle is: “there is little use in going to law with the devil while the court is held in hell”. See the Diary of Humphrey O’Sullivan, entry of 6 January 1831, reprinted in the article Melosina Lenox-Conyngham, Some Kilkenny Diaries (1995) 47 Old Kilkenny Review. As quoted in William W. Park, “When and Why International Arbitration Matters” Paper presented at the Boston International Conference on 26 September, 1996, p.1 See also William W. Park, “Neutrality, Predictability and Economic Co-operation” (1995 No. 4) 12 J. of Int'l Arb. 99

139 See W. Laurence Craig, supra note 40 at p. 191. He notes that in ICC arbitrations, if the parties have failed to designate the place of arbitration, the ICC will select a neutral site, often based on the domicile of the president of the arbitral tribunal or simply on a location convenient for the parties and arbitrators. It is often said that the result of this exercise is the choice of a situs inconvenient to everyone. It may result in the selection of a situs which neither of the parties had contemplated when they entered into the arbitration agreement.
national interests of the State to be protected. Whatever is left is the most abstract of sovereign interests—a pure concern of the State for what happens on its sovereign territory. The interests of the national courts in such arbitrations are merely interests of national prestige. The State—a neutral one at that, should therefore not involve itself in the private disputes of foreigners in its territory since no national interests are implicated in the dispute. In the light of this, it is suggested that there should be a shift in the control function, away from the court of the country of arbitration to the courts of the country of recognition and enforcement of the award. The shift in the control function, it is contended, enables the country of arbitration to conserve its judicial resources by abstaining from interfering in international arbitrations that have no impact on the State. It will also reduce the workload of the judges by removing from the judicial calendar cases that have no bearing with the arbitral situs.

_140_ Ibid

_141_ Ibid

_142_ See A. Asouzu, supra note 100 at p.84


_144_ Both benefits were advanced in the amendment of the Judicial Code of Belgium which introduced the contentious paragraph 4 of Article 1717. According to Paulsson, the principal proponents of the bill argued that: “The proposal has the result of excluding judicial control of arbitral awards which in no manner concern our country, because this control is often used today for purely dilatory purposes, as the award is to be enforced abroad. It thus appears natural that any objection to the award also be made abroad, on the occasion of request for enforcement” (Emphasis are mine). See Jan Paulsson, “Arbitration Unbound in Belgium”, supra note 89 at p.70
Closely related to the above is the contention that the performance of the setting aside function by national courts of the arbitral situs amounts to double judicial review of the award.\textsuperscript{145} In other words, the award is subject to review at the country of arbitration and also at the country of recognition and enforcement. In order to avoid the hazards of double judicial review, it is suggested that the power of the national courts of the arbitral situs to set aside the award be abolished. Two notable legal commentators have praised the setting aside provisions of the New Swiss Law and argue that "an exclusion agreement under Article 192 of the New Swiss Law is useful to save time, avoid judicial intervention in Switzerland, and obtain quickly and without publicity an enforceable decision."\textsuperscript{146} However, the question is whether the above contentions reflect both sides of the issues so as to warrant the jettisoning of the setting aside function in international commercial arbitration?

E. Arguments For the Retention of the Setting Aside Function.

It is my submission that the above rationalizations of the setting aside provisions of the national arbitration laws of Belgium, Switzerland and Tunisia suffer from gross misrepresentation as well as inadequate research and analysis.\textsuperscript{147} To begin with, although the principle of party autonomy is the cornerstone of the arbitral process, it is not correct to suggest that it is an absolute and unqualified principle of international commercial arbitration.

\textsuperscript{145} See A.J. van den Berg, supra note 128 at p.159

\textsuperscript{146} See A. Bucher & Pierre-Yves Tschanz, "International Arbitration in Switzerland" (Basel: Helbing & Lichtenhahn, 1989) p.147

arbitration. International commercial arbitration relies solely on national laws for its survival and vitality. To that extent, it is limited by the mandatory rules of law and issues bordering on public policy.\textsuperscript{148} These rules apply notwithstanding the agreement of the parties.\textsuperscript{149} The autonomy of the will does not mean that the parties should exclude the rules of natural justice or permit the arbitrators not to apply the rule with regards to equal treatment of the parties. Equal treatment of the parties and the guarantee of procedural fairness are so fundamental to the respect and legitimacy of international arbitration as a dispute resolution system that they are given express recognition both in the New York

\textsuperscript{148} The definition of mandatory rules of law by P. Mayer is very instructive. According to him: “a mandatory rule is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it in another way: mandatory rules of law are a matter of public policy and moreover reflect a public so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws...In matters of contract, the effect of a mandatory rule of law of a given country is to create an obligation to apply such a rule...despite the fact that the parties have expressly or implicitly subjected their contract to the law of another country.”


\textsuperscript{149} See generally J. Lew, “Applicable Law in International Commercial Arbitration” supra note 71


Convention and the Model Law. The requirements of due process or equal treatment of the parties is a mandatory rule of every judicial or quasi-judicial system. It is a transnational minimum standard required of every justice system, be it public or private. The duty of the State hosting the arbitration to protect this right does not admit of any form of discrimination and neither the party nor an arbitral tribunal can sacrifice it on the altar of speed, finality and economy. To clothe the parties with the right to waive or compromise the principle of natural justice (due process) is tantamount to saying that the parties can, of their own free will, set a standard of justice which is contrary to the requirements of public policy. According to a legal commentator, "justice is not always to be controlled by the individual as distinct from the community of which the individual is a part." The automatism of the Belgian provision and the compromise provisions of the New Swiss and Tunisian laws are contrary to a mandatory rule of public policy. It is

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150 Article V.1(b) of the New York Convention provides: "Recognition and enforcement of the award may be refused...if ...the party against whom the award is invoked was...unable to present his case."

151 Article 18 of the Model Law provides: "The parties shall be treated with equality and each party shall be given a full opportunity to present his case."

Redfern & Hunter, supra note 23 at p.293

152 See J. Robert & T. Carbonneau, "The French Law of Arbitration" (New York: Matthew Bender, 1983) "Transnational public policy incorporates principles sufficiently general to be recognised by a number of legal systems representing a bona fide community of civilised nation".

153 See A. Asouzu, supra note 100

interesting to note that Article 182 (3) of the New Swiss Law provides that whatever procedure is chosen by the parties or the arbitral tribunal, the arbitral tribunal shall ensure equal treatment to the parties and the right of the parties to be heard in an adversarial procedure. The article further provides that if the this requirement is not complied with, or if it is violated, an award may be set aside under Article 190 (d) of the law. If this requirement and the remedy of setting aside attached thereto are fundamental to the arbitral process, why then should Article 192 (1) encourage the parties to commit commercial suicide by allowing foreign parties arbitrating in Switzerland to totally or partially exclude their right to be treated equally or to be heard in an adversarial procedure? In agreement with Dr. A. Asouzu, I submit that it is against public policy for parties to enter into an agreement to exclude or compromise a rule of public policy.  

Secondly, those who advance the view that the State, a neutral one at that, should not get involved in the private dispute of foreigners in its territory miss the point. The presence of the parties in the State as well as the conduct of the arbitration in a particular State are connections strong enough for the State not to look the other way if any of the parties in the arbitration happens to be a victim of injustice. The national courts of the arbitral situs offer to ongoing arbitration the much needed assistance which accounts in great measure for the success of the arbitral process. Such assistance include interim measures of

155 See A. Asouzu, supra note 100
protection or conservatory measures,\textsuperscript{156} constitution of the arbitral tribunal,\textsuperscript{157} enforcement of the arbitration agreements or awards,\textsuperscript{158} aid in taking of evidence e.t.c.\textsuperscript{159} The gravamen of my contention is that if the national courts of the arbitral situs should not review the award for such fundamental reasons as the breach of the rules of natural justice or violation of the requirement that the parties be treated equally, then they should accordingly not lend their support to the arbitral process and may well repeal the entire arbitration enactment in relation to foreigners in their territory. The \textit{quid pro quo} for court support of the arbitral process, according to M. Hunter, is the reservation of the right to supervise the proceedings and this includes the power to set aside the award.\textsuperscript{160} The arbitral situs cannot shirk its duty to provide the loser in arbitration with an unwaivable right to challenge the award for an arbitrator's disregard of either his mission or

\begin{footnotesize}
\textsuperscript{156} See generally Brower and Tupman, “Court-Ordered Provisional Measures Under the New York Convention” (1986) 80 Am. J. of Int’l Law 24


\textsuperscript{158} Becker, “Attachments in Aid of International Arbitration: The American Position” (1985) 1 Arb. Int’l 40

\textsuperscript{159} See the \textit{Quintette} case, supra note 108. The parties in Quintette could not reach an agreement on the appointment of the umpire. The Supreme Court of B.C. appointed the umpire in accordance with S. 11 (6) (b) of the ICAA of BC


\textsuperscript{159} The national arbitration laws of Belgium, Switzerland and Tunisia contain provisions on these assisting measures which the national courts provide for the arbitral process.

\textsuperscript{160} M. Hunter, “Judicial Support for Arbitrators” in J.D.M Lew ed., supra note 66 at p.196
\end{footnotesize}
fundamental due process in the arbitral proceedings.\textsuperscript{161} It is indeed a misguided experiment to legislate that an arbitration in Belgium between a Belgian and a Canadian should be subject to the setting aside proceedings while the same arbitration between a Canadian and a Nigerian, should not have the benefit of the setting aside proceedings regardless of what the grounds for invoking such remedial measure are. The current jurisprudence is unsatisfactory, both in its reasoning and the intended result in that it may ultimately result in the withholding of justice to the alien. It is the primary and inalienable international obligation of every State to promote, defend and enforce justice in its territory and the non-performance of this obligation cannot be justified on the grounds that the parties are aliens. According to William Park, “this power to enhance the effectiveness of arbitration within national borders imposes a responsibility of judicial control over the integrity of the arbitral process that receives national support.\textsuperscript{162}

The denial of the setting aside opportunity will also negative one of the fundamental advantages of international commercial arbitration. The choice of a neutral forum by the parties is often motivated by the desire to avoid each other’s home turf. If the parties have made a conscious choice of a neutral forum, they should also have the benefit of setting aside the award at the place of arbitration, once and for all, if strong reasons for that exist. If the entire control process is shifted to the place of enforcement of the award, there is

\textsuperscript{161} See William W. Park, supra note 89

\textsuperscript{162} Ibid at p.237 See also A. Asouzu, “A Threat to Arbitral Integrity” (1995 No. 4) 12 J. of Int’l Arb. 144.

The author discusses what he considers to be some untouchable aspects of commercial arbitration law and practice.
the possibility that the control function will be exercised by the national court of one of the parties. This is because the winner in the arbitration will seek enforcement of the resulting award in all the jurisdictions in which the loser’s assets are located and there is the likelihood that the loser’s assets will be located in his home jurisdiction or even in the home jurisdiction of the winner. It is submitted that if the parties have chosen a neutral situs for the arbitration, they should also be entitled to judicial review by the courts of the place of arbitration. A national court without any interest in the parties’ dispute will be likely unbiased. I am strengthened in my argument by the provisions of both the New York Convention and the Model Law. It is implicit in both the New York Convention and explicitly provided in the Model Law that the setting aside function should be performed by the national courts of the arbitral situs. Article V (1) (e) of the New York Convention

According to Pierre Lalive, a neutral arbitration site has three characteristics: equal treatment of the parties (concrete neutrality); non-allegiance to any relevant political “bloc” (political neutrality); and an appropriate legal environment (judicial neutrality). In summing up, he states as follows: “The first is obvious and reflects a common concern for concrete equality of the parties; settlement of disputes in a third country (whether by litigation or arbitration) offers a fair sharing of inconvenience, whereas arbitration in one party’s country is likely to give substantial advantages of a practical, psychological and perhaps even legal character. There exists therefore, quite understandably, in the international trade community, “a very strong inclination” to chose a neutral country (particularly if the other party happens to be a State enterprise or organisation) -“neutral” of course in relation to both parties...

thus provides that recognition and enforcement of the award may be refused if the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. The New York Convention also enjoins the courts of the country of enforcement of the award to enforce the award as if it is a summary judgment of the courts of that country, meaning that it is not their duty to carry out a substantive review of the award.

There is a plethora of judicial authorities to the effect that the application for the setting aside of the award should be made once and for all, at the place of arbitration. Very recently, the U.S. District Court for the Southern District of New York unequivocally restated this principle in *International Standard Electric Corporation v. Bridas Sociedad*

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164 See Article 36 (1) (v) of the Model Law on the grounds for refusing recognition and enforcement of an award. The second limb of the provision which deals with a situation where the parties agree that the arbitration is governed by the procedural arbitration law of a country other than the place of arbitration is considered to be merely a theoretical possibility by van den Berg. See generally A.J. van den Berg, "Non-Domestic Awards Under the 1958 New York Convention", supra note 55.

165 Article III of the New York Convention provides: "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."
Anonima Petrolera, Industry y Commercial\textsuperscript{166} The case concerned an ICC award rendered in Mexico City, which was the place of arbitration agreed upon by the parties. The applicable substantive law of the contract was the law of the state of New York. After the arbitration, Standard Electric filed a petition in the United States District Court in New York to have the award set aside. Bridas cross-petitioned for dismissal of the Standard Electric's application to set aside the award on the grounds that the District Court lacked subject-matter jurisdiction to grant the application under the New York Convention, and requested enforcement of the award pursuant to the Convention. The argument for Standard Electric was that since the arbitrators in Mexico applied substantive New York law, the U.S. District Court in New York had jurisdiction to set aside the award. The Court held that since the situs, or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction under the convention to vacate the award.\textsuperscript{167} The Court further stated as follows:

"We cannot understand how the Convention, created to assure consistency in the enforcement of foreign arbitral awards, would not be gravely undermined, if judges sitting in each of the many jurisdictions where enforcement may be obtained, were authorized by the Convention to undertake a de novo inquiry into whether the law the arbitrators said they were using was or was not properly


\footnote{167}{Ibid at p. 178. Emphasis added.}
applied by them. The plain answer is that the Convention does not, and could not, contemplate such a chaos.”

The overwhelming implications of the legislative trend in Belgium, Switzerland and Tunisia is that the loser in a defective arbitration will therefore have no effective remedy than to resist recognition and enforcement of the award in all jurisdictions in which he has assets and where the winner may likely seek to enforce the award. Such an award will hang indefinitely over the head of the loser like a sword of damocles. If the losing claimant is the victim of this absolute power granted to the arbitrators, he has to live with the injustice since no remedy, however minor, is available to him.

168 Ibid at p.182. See also Norsolar v. Pabalk (1982) 7 (1982) 7 Yearbook Comm. Arb. 312. In an arbitration between a French and a Turkish party without who have no link with Austria, the Austrian Supreme Court rightly held that by virtue of Article V (1) (e) of the New York Convention to which Austria is a party, once there is “a particular need for legal protection”, an action for the setting aside of an award belongs exclusively to the court of the place in which or under the law of which the award was made notwithstanding the fact that the parties have no connection with Austria.

169 See Y. Derains, supra note 123 at p.115. “...there must exist a central point where an unacceptable award may be attacked...The judge at the place of arbitration is undoubtedly the only authority who can play such a role... If he is to assume this role, it should be only as an instrument for the control of the conformity of the award to transnational-minimum standard such as those embodied in the major international conventions.
The assertion that partial or total exclusion of the grounds for setting aside of awards serves to avoid the hazards of double judicial review fly in the face of the differences between the two remedies and their different legal consequences in international commercial arbitration. If the loser in the arbitration succeeds in opposing recognition and enforcement of the award, he defeats the award only in that jurisdiction. The winner may still try to enforce the award in any other jurisdiction where the loser has assets. On the other hand, a successful setting aside application at the place of arbitration nullifies, vacates, and overturns the arbitral award and makes it unenforceable anywhere. It suffices that setting aside the award at the place of arbitration concerns the validity of the award and is of direct relevance to its finality since an adverse decision uproots the award. At the stage of the recognition and enforcement of the award, the court of the enforcement jurisdiction is hamstrung to the extent that its duty is limited to determining whether the award should be granted or denied recognition. A denial of recognition may affect the effectiveness of the award but has no bearing on its validity. Setting aside and an application to recognize and enforce an award also differ in the following respects:

170 Even some scholars who advocate for a delocalised award conceded the global effect of a successful setting aside application at the place of arbitration. Paulsson acknowledges that after an award has been set aside, he knows of no decided case holding that such an award might nonetheless be enforced abroad. See Jan Paulsson, supra note 89 at p.60

171 See G.R. Delaume, “Reflections on the Effectiveness of International Arbitral Awards” supra note 19 at p.6
(a) an action to set aside an award and an application to recognize and enforce an award take place in different places and at different times;

(b) they are pursued by different parties and for different purposes. The setting aside application is pursued by the loser in the arbitration whereas the recognition and enforcement of the award is initiated by the winner in the arbitration.

(c) they are guided by different legal regimes and different policy considerations. The New York Convention is the legal regime governing the recognition and enforcement of arbitral awards.\textsuperscript{172} The setting aside function is provided for under the Model Law.\textsuperscript{173} Although

\textsuperscript{172} See Article 1 of the New York Convention which delimits the scope of application of the convention. It provides that “this convention shall apply to the recognition and enforcement of arbitral awards...”


\textsuperscript{173} See Article 34 (2) of the Model Law which deals with application for setting aside arbitral awards. It provides restrictively narrow grounds for setting aside arbitral awards. It states that “an award may be set aside by the court...only if (a) the party making the application furnishes proof that: (i) 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; 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 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
this is a Model Law and not a convention, it represents an international consensus on the
proper role of national courts in international commercial arbitration.174 I am opposed to
those who eulogize the New Swiss Law and argue that it will save time, avoid judicial
intervention in Switzerland and obtain quickly and without publicity an enforceable
decision. In response, it is submitted that just as justice delayed is justice denied, hasty or
hurried justice is also a denial of justice.175

174 See the preamble to the Model Law.

See generally G. Hermann, “The UNCITRAL Model Law-Its Background, Salient Features and Purposes”
(1985) 1 Arb. Int’l 6 at p.7 wherein he states that “the current work on the Model Law, again (referring
to the New York Convention) carried out with global representation of different economic and legal
systems, with considerable expertise and in consultation with other organisations, promises to result in
another important United Nations contribution to the cause of international commercial arbitration.”

175 On the duty of the national courts of the place of arbitration in policing the arbitration and the resultant
award, Craig points out that “...courts (meaning national courts of the place of arbitration) may have the
reaction that an award rendered on their territory should not enter the international stream of enforcement
and attain the status of international currency without facing at least the prospects of judicial review. That
F. A Uniform Approach to Setting Aside of Awards?

It is my opinion that the setting aside of awards by national courts of the place of arbitration should be pursued as a uniform legislative policy by all jurisdictions. The developments in Belgium, Switzerland and Tunisia are contrary to the fundamental policy objectives of the New York Convention and even make redundant some provisions of the convention. For instance, one of the grounds for refusing recognition and enforcement of awards articulated under Article V (1) (e) of the New York Convention is automatically extinguished. A maximum realization of the fundamental objectives of the New York Convention will only be possible if the duties of the courts of the place of arbitration and that of the courts of the place of enforcement are made compulsory. The shirking by national courts of the arbitral situs of the control function which is inherent in the New York Convention is a violation of the compact and network of reciprocal expectations and trust that is the ultimate basis of international jurisdiction. If the Belgian, Swiss and Tunisian national arbitration laws prove able to attract international commercial arbitration to these States, the likely result will be that other States will copy and even improve on

is, the national judiciary could feel that it is performing its judicial duty or its government's international duty. Judicial review could stem from a sense of national responsibility in the international arena."

See W. Laurence Craig, "Uses and Abuses of Appeal from Awards" supra note 40 at p.192

See also A. Asouzu, supra note 100

176 See M.W. Reisman, supra note 96 at p.124. "By drastically limiting the supervisory role of domestic courts over international commercial arbitration taking place within their jurisdictions, governments also reduce the efficiency, if not the entire operation of the control scheme of the New York Convention."

177 Ibid.
them. However, a notable commentator on international commercial arbitration has expressed the view that a Contracting State to the New York Convention which has a setting aside remedy in its national law may exclude by legislation or through its courts, an award that is rendered in another Contracting State that lacks in its national law the setting aside remedy from benefiting from the provisions of the New York Convention.\textsuperscript{178} Support for this proposition is drawn from Article XIV of the New York Convention which provides as follows: “A Contracting State \textit{shall not} be entitled to avail itself of the present Convention except to the extent that it is itself bound to apply the Convention.”\textsuperscript{179} It is argued that if the hands off attitude of the national courts of the arbitral situs renders some provisions of the New York Convention inapplicable or redundant, it will act to the prejudice of the party opposing recognition and enforcement and also limit the extent to which it (that is the Contracting State where enforcement of the award is sought) is itself bound to apply the Convention.\textsuperscript{180} In such situations, the first arm of the first reciprocity provision of the New York Convention in Article 1:3, which is permissive, should be read subject to the second reciprocity provision in Article XIV, which is a mandatory provision.\textsuperscript{181} The point was mooted in the case of \textit{M.A. Industries Inc. v. Maritime}

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\item[\textsuperscript{178}] See A. Asouzu, supra note 100 at p.93
\item[\textsuperscript{179}] Emphasis supplied. There is merit in this argument because one who has violated a rule has no right to demand its fulfillment by other parties or subjects and should not be allowed to claim the benefits arising from the violated rule. If a state violates an obligation, the principal approved response is to withdraw that state’s reciprocal right to the benefit accorded by the norm.
\item[\textsuperscript{180}] See A. Asouzu, supra note 100 at p.95.
\item[\textsuperscript{181}] Ibid.
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Battery Limited\textsuperscript{182}. M.A. Industries, Inc. (MAI) and Maritime Battery Ltd. entered into a sales contract whereby Maritime purchased certain equipment from MAI. The contract contained an arbitration clause and provided for the applicability of the law of the State of Georgia to the relationship of the parties. When a dispute arose, it was submitted to arbitration which was held in Washington, DC. In an application to enforce the resulting award as a judgment of the court of New Brunswick, counsel for MAI argued that paragraph 15 of the parties’ agreement which put the award beyond judicial review was invalid. The court stated that: “no attempt having been made to seek such review that argument is inappropriate on an enforcement application.” The question that arises from the pronouncement of this court is whether the court’s treatment of the issue as inappropriate on an enforcement application would have been different if an application for setting aside was made at the place of arbitration, but the court of that place held itself without jurisdiction, either due to operation of law or an express exclusion agreement of the parties to waive all setting aside grounds including breach of due process or the requirement of equal treatment of the parties.

It is submitted that a simple way out of this impending confusion is a uniform adoption by States of Article 34 (2) of the Model Law on the setting aside of awards. As earlier argued, the Model Law is a consensus of the international community on the proper role

of the courts in the arbitral process.\textsuperscript{183} The psychological and intellectual process of negotiating and formulating a model law is not radically different from that of treaty negotiation and formulation, even though the end products are of a wholly different legal nature.\textsuperscript{184} Moreover, the Model Law compliments the New York Convention. The suggestion of the UNCITRAL Working Group which was ultimately accepted by all the countries was that in furtherance of the harmonization and unification of the laws of international commercial arbitration, it would make better sense to substitute for the great variety of national laws, both as to types and procedural forms of attack on awards and as to the grounds on which such attacks could be based, a single type of attack on the award, viz; setting aside procedures and to limit the grounds for the setting aside to those grounds for refusing recognition and enforcement under the New York Convention.\textsuperscript{185}

\textsuperscript{183} According to G. Hermann, one of the pioneers of the Model Law, "...the UNCITRAL Model Law has been devised as a legal regime specifically geared to international commercial arbitration which should be accorded priority (as lex specialis) over other national provisions of law dealing with arbitration." See G. Hermann, "The UNCITRAL Model Law on International Commercial Arbitration: Universal Basis for Harmonisation and Improvement of Laws" (Paper presented at the Conference of the Regional Centre for International Arbitration in Kuala Lumpur, 1989, at p.5); referred to in M. Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989, No. 4) 6 J. of Int'l Arb. 7 at p.10


\textsuperscript{185} Ibid. It should be noted that the Model Law was a response to the request of the Asian-African Legal Consultative Committee for a protocol to the New York Convention with a view to clarifying \textit{inter-alia}: 
In the alternative, if the setting aside of awards by the national courts of the arbitral situs is to be dispensed with, it is my suggestion that regional centers for review of awards should be established. For instance, every continent could have a particular number of review tribunals to determine setting aside applications in respect of all awards rendered within the continent; but on no account should the decisions of arbitrators be immune from judicial review, particularly when there is a breach of due process. The logic of suggesting this new world of international commercial arbitration is that arbitrators, like all human beings, are fallible. P. Lalive has thus cautioned that:

“Arbitrators are not infallible any more than judges—it is hardly necessary to say so— and the existence of State ‘appeals’, whether they aim at annulment or at revision, is virtually inevitable. They even exist in a system as special as that of ICSID, established by the 1965 Washington Convention of the World Bank (Articles 51 and 52)”

that where an award had been rendered under procedures which operate unfairly against either party, recognition and enforcement of the award should be refused. It was later decided by UNCITRAL that the preparation of a protocol to the New York Convention was not the appropriate approach. A better and more important alternative adopted by UNCITRAL was that it will be in the interest of international commercial arbitration to prepare a model law on arbitration which would be the most appropriate way to achieve the desired uniformity.

See P. Lalive, “Enforcing Awards in 60 Years of ICC Arbitration: A Look at the Future” (1984) 318 at 338; referred to in A. Asouzu, supra note 100 at p.88
G. Conclusion.

It is submitted that the setting aside of foreign arbitral awards should be retained in the arbitration laws of all the States. The legislative exclusion of all the grounds for setting aside of awards as in Belgium or by the contract of the parties as in Switzerland and Tunisia are contrary to the intent and purposes of the New York Convention. This legislative trend will also undermine the confidence in and the desirability of the arbitral process as a mechanism for resolving international commercial disputes. The creation of an attractive environment for the conduct of international commercial arbitration can be achieved without necessarily compromising fundamental principles of natural justice and public policy but by striking a realistic and necessary balance between court supervision and court meddling and this accords with the legitimate expectation of the parties. After all, arbitration is not just about attracting arbitral business; it is more about justice.

See also M.W. Reisman, supra note 96 at p.129. "Markets, even those committed to maximum freedom, are regulated precisely when the urgent interests of all members of the market system could be undermined by certain types of uncontrollable private behaviour."
CHAPTER IV

INTERNATIONAL PROTECTION OF HUMAN RIGHTS AND
INTERNATIONAL COMMERCIAL ARBITRATION.

Introduction

In Chapter III, it is argued that the setting aside provisions in the national arbitration laws of Belgium, Switzerland and Tunisia are in contravention of the treaty obligations of these states under the 1958 New York Convention and also in breach of some aspects of the common understanding of the comity of nations articulated in the Model Law. These national laws either completely deprive the parties to the arbitration the right to initiate the setting aside application if dissatisfied with the outcome of the arbitration or they permit the parties to enter into an agreement to waive their right to the setting aside function even if their fundamental right to fair trial or the principle of natural justice is violated.

However, some of these rights, the breach of which can trigger off the setting aside remedy are rights guaranteed by the various legal instruments on the international protection of human rights. One such right which is the focus of this chapter is the right to fair trial or the principle of natural justice. In the context of international commercial arbitration, can the requirement of natural justice and the remedy for its breach be denied the parties by provisions of national law? In other words, do the Conventions on the protection of human rights viz: the Universal Declaration of Human Rights, the European Convention on Human and the African Charter on Human and Peoples’ Rights, directly or
indirectly impose a legal duty upon contracting states to implement in their national laws the rights and freedom enumerated in these Conventions? It will be argued in this chapter that the right of the parties to seek a remedy for the breach of their fundamental right to due process or principle of natural justice cannot be extinguished by national legislation. Moreover, the right of the parties to waive any or all the grounds for the setting aside of the award, it will be submitted, does not include the right to a waiver of the due process requirement because it is not within their power to do so.

B. The Internationalization of Human Rights: An Overview

Prior to the end of the Second World War, the protection of human rights was considered the exclusive responsibility of individual states. The question as to whether an individual’s human right had been violated or not by a state could only be determined solely by reference to the law of that particular state. Thus, because it was the state that could guarantee the human rights of its citizens, the state could also take these rights away, leaving the individual with the only option of appeal to divine law or universal morality which had little or no effect on the state concerned. There was no international legal instrument which prescribed for the states the manner in which they should treat human beings and ipso facto, people had no internationally protected human rights. The absolutist conception of state sovereignty was very instrumental in sustaining this perception of human rights.

After the end of the Second World War, there was a shift in the perception of human rights as rights which are subject to the whims and caprices of individual states. In the international community, there was a growing need to provide a universal normative basis for the protection of human rights. The consideration was that there are some legal values and principles common to all human societies and that a domestic problem is often the manifestation of a wider world problem to be solved only by international cooperation and regulation. This awareness is traceable, among other things, to the studies and writings of a generation of legal scholars on “the general principles of law recognized by civilized nations” These legal principles, they contend, have superior value in all legal constitutions and institutions or as rightly tagged by R.B. Schlesinger, “a common core” of all legal systems.

The legal foundation for the international protection of human rights was laid by the United Nations Organization. In 1945, the U.N. Charter, which is not only an international

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189 One of such notable scholars was Lord McNair, “The General Principles of Law Recognised by Civilised Nations”, (1957) 33 British Yearbook of International Law p.1


treaty but also the constitution of the U.N. was adopted. Article 1(3) of the Charter declares that one of the purposes of the U.N. is to achieve international cooperation “in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Under Articles 55 & 56 of the Charter, member states of the organization obligate themselves and the organization to promote “universal respect for, and observance of human rights and fundamental freedoms without distinction as to race, sex, language, or religion.” This effort at the international protection of human rights received a major boost in 1948 when the U.N. General assembly adopted a resolution on “The Universal Declaration of Human Rights”. In 1966, the text of the treaty became the “International Covenants on Human Rights”. The Universal Declaration of Human Rights and the International Covenants on Human Rights together constitute the International Bill of Human Rights. The Declaration, according to Professor Thomas Buergenthal, has gradually evolved into the “Magna Carta of the international human rights movement”. These international legal instruments are thus the conduit pipe through which the international community transformed mankind’s view of human rights as well as mankind’s expectations about human rights.¹⁹² Thus, these international legal instruments recognize and proclaim that human beings have human rights and they are entitled to enjoy these rights as a matter of international law. In the light of this development, human rights are no longer a set of privileges which the state can confer on the citizens or deny them whenever it wishes. Human rights are rights which belong to human beings wherever they may live; rights which belong to them as members

¹⁹² See T. Buergenthal, supra note 187
of the international community; rights that accrue to them because they are the common heritage of humankind.\textsuperscript{193}

Although the Universal Declaration of Human Rights is the cornerstone of the universal protection of human rights, it does not impose binding obligations on states. The declaration is contained in U.N. General Assembly resolutions which arguably do not have a law-creating effect. During the drafting of the U.N. Charter in San Francisco, the view was put forward by some countries that in order to realize the objective of promoting and encouraging respect for human rights and fundamental freedoms articulated in Article 1(3) of the Charter, it was necessary to append a bill of rights to the charter, a treaty that would impose binding obligations on the signatory states. This suggestion did not receive the blessing of such countries as the U.S., Russia (then U.S.S.R.), France and the United Kingdom. It was the view of these countries that only the weakest statements on human rights would suffice. The end product was the Universal Declaration, which listed in a non-binding U.N. General Assembly resolution, a common understanding of the human rights which was referred to in the Charter. But even as a ‘common standard of achievement’, its moral force and persuasive character made it generally acceptable to the civilized world. In addition, the declaration contained \textit{de lege preferenda} propositions and had a prophetic effect in that it gave rise to a plethora of binding regional treaties on the protection of human rights. Such regional treaties include but are not limited to The European Convention on Human Rights and the African Charter on Human and Peoples’

\textsuperscript{193} Ibid
Rights. As will be seen in the preceding section, on one hand, The European Convention on Human Rights is binding on Belgium and Switzerland and the African Charter on the other hand is binding on Tunisia. These treaties apply with equal force to both public and private international law. In that respect, the national laws of these countries including their national arbitration laws should not contain any provision which is in conflict with the treaty obligations of these countries under the Conventions. A state which uses its domestic law to negative her obligation under international law should be denied the benefit of that treaty by other states. In other words, because these states are in breach of their treaty obligations, they have no right to demand that other states comply

194 The preamble to The European Convention on Human Rights declares inter-alia: “Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared; Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms; Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world...(italics for emphasis)

See also the preamble to the African Charter on Human and Peoples’ Rights. The preamble refers to the pledge African countries made to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights and recognising on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples’ rights should necessarily guarantee human rights...
with the terms of the treaty when it involves its national. This is an accepted method of securing enforcement of treaties.

C. Obligation of States Under International Treaties.

When states conclude and ratify a treaty or treaties, they mutually exchange undertakings to observe the terms of the treaty and this also implies an obligation undertaken towards some other party or parties. This fundamental principle of international treaty law is often expressed in the Latin maxim *pacta sunt servanda* and is aimed among other things at ensuring international order as well as the prevention of arbitrary behaviour and chaos. It places an international legal duty on contracting states to ensure that their domestic legislation is in conformity with their accepted international obligations. This principle is restated in Article 27 of the 1969 Vienna Convention on the Law of Treaties. The Article provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Thus, as succinctly stated by Professor Ian Brownlie, ‘the acts of the legislature and other sources of internal rules and decision-making are not to

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be regarded as acts of some third party for which the state is not responsible, and any other principle which would facilitate evasion of obligations. ¹⁹⁸

The principle that states are bound by their obligation under international law has received the blessing of the Permanent Court of International Justice (PCIJ). In its advisory opinion of 21 February 1925 in the *Exchange of Greek and Turkish Population Case*, the court stated: "...a principle which is self-evident, according to which a state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken." ²⁰⁰ Again, in the *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration*, the PCIJ reaffirmed the principle as follows: "it is a generally accepted principle of international law that in relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." ²⁰⁰


¹⁹⁹ See Advisory Opinion (1925) PCIJ no.10 series B. p.20.

²⁰⁰ PCIJ, Series B. no 17, p.32. See also the *Polish Nationals in Danzig*, (1931) PCIJ Ser. B. no 44 p.24 wherein the court further stated as follows: "It should...be observed that ...a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled
D. The Right to a Fair Trial and International Commercial Arbitration.

The individual’s right to a fair hearing or the requirement of due process is a right protected by the various instruments on the international protection of human rights, particularly the Universal Declaration of Human Rights, the European Convention on Human Rights and the African Charter on Human and People’s Rights. Article 10 of the Universal Declaration of Human Rights provides that ‘everyone is entitled to a full equality to a fair...hearing by an independent and impartial tribunal, in the determination of his rights and obligations...’ The European Convention on Human Rights and the African Charter on Human and People’s Rights contain similar provisions. The Conventions further provide that the enjoyment of this right by the individual shall be without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national and social origin. As earlier stated, the fundamental right to fair hearing or due process is a basic standard of every judicial or quasi-judicial process and applies to both public and private law. This requirement cannot be derogated from except

exclusively on the basis of the rules international law and the treaty provisions in force between Poland and Danzing.”

201 See Article 6 (1) of the European Convention on Human Rights.

202 See Article 7 of the African Charter on Human and Peoples Rights. The African Charter elaborates on this right by providing that it includes among others the right of an appeal by the individual to the competent national authority against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

203 See Article 2 of the Universal Declaration, Article 14 of the European Convention, Article 2 of the African Charter and Article 3 of the The U.N. International Covenant on Civil and Political Rights.
in circumstances permitted by the Conventions or treaties. The application of this principle of law to international commercial arbitration is not a subject of controversy. A comparatively recent case which came before the Paris court (the *tribunal de Grande Instance*—"TGI") provided the impetus for a judicial reaffirmation of the applicability of this principle to international commercial arbitration. The case—*the République de Guinée Case* was a case involving the Republic of Guinea and the Paris Arbitral Chamber (*La Chambre Arbitrale de Paris*) and the former's three contracting parties. In this case, the *Tribunal de Grande Instance* considered Article 6 of the European Convention on Human Rights in canceling the contractual relationships between the Chamber and the parties on the grounds that the Republic of Guinea was entitled to claim that due to circumstances, it could no longer trust the arbitral tribunal set up under the Chamber. Although the Paris Court of Appeal reversed this decision on other grounds, the court stated very clearly that arbitrators are bound by the due process requirement laid down in Article 6 of the European Convention on Human Rights.

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206 For a detailed discussion of this case, see Jean-Hubert Moitry, Ibid.
In the light of the above, the focal question arises: are the provisions of the national arbitration laws of Belgium, Switzerland and Tunisia on the setting aside of foreign arbitral awards in conformity with the due process requirement or a derogation therefrom?

As earlier pointed out, a party to an international commercial arbitration in Belgium cannot under any circumstance, including the breach of his right to fair hearing, apply to set the resulting arbitral award aside unless the person is a Belgian citizen or resident or is carrying on business in Belgium. On the other hand, the national arbitration laws of Switzerland and Tunisia permit the parties to agree to waive any or all of the grounds for the setting aside of the award if the parties do not have any connection with Switzerland and Tunisia. This right of pre-award waiver also include a waiver of grievances arising from the violation of the parties’ right to fair hearing or due process. It is submitted that the above provisions of the national arbitration laws of these countries on the setting aside of foreign arbitral awards are impermissible derogations from the country’s international obligations assumed under the Human Rights Conventions.\(^{207}\) They amount to distinction

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\(^{207}\) Belgium ratified the Convention and its first Protocol on 14 June, 1955, the law authorising the instrument’s full and entire effect having been passed on 13 May, 1955. Switzerland has also ratified the Convention and Tunisia has done the same with respect to the African Charter on Human and Peoples’ Rights. No reservations were made when ratifying these instruments. In view of the fact that these countries have have ratified these conventions, a detailed commentary on the classical doctrinal controversy between the monist and dualist theories is unnecessary. These theories seek to answer the question of whether international law and domestic law are two separate legal systems or part of the same legal system. Proponents of the monist theory such as Kelsen, Scelle and Lauterpacht contend that international and municipal law constitute one and the same legal order and as a result, the obligations
a based on national origin—a distinction which is frowned at by the Conventions under discussion.\(^{208}\) In particular, Article 1 of the European Convention on Human Rights which has been ratified by Belgium and Switzerland provides unambiguously that the contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.\(^{209}\) By the use of the word ‘shall secure’, it is my view that the drafters of the Convention intended to make it clear that the rights and freedoms set

imposed by international agreements such as these conventions have automatic and direct application in the domestic arena. On the opposite side of the ring, the dualist school of thought, notably Triepel and Anzilloti are of the firm view that the international law and municipal law are two completely separate legal systems and that international obligations such as those arising from treaties must be transformed by the competent domestic organs before they can be applicable. For further details, see A.Z. Drezmczewski, supra note 196 at p.35-36. See also G. Sperduti, “Dualism and Monism: A Confrontation to be Overcome.” (1977) 3 Italian Yearbook of International Law p.31


\(^{209}\) Undelining is for emphasis.
out in Section 1 would be directly secured to anyone of whatever nationality within the jurisdiction of the Contracting States. The contempt for the protection of the right to fair hearing shown by the national arbitration laws of the countries under consideration is further highlighted by fact that the Conventions stipulate for the provision of a remedy in the event of a breach of a person's fundamental right. Article 13 of the European Convention for instance provides that 'Everyone whose rights and freedoms as set out in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' In other words, every contracting state party to the Convention is obliged by Article 13 to provide a remedy in domestic law against violations committed by private persons and public authorities. Thus, by the non provision of the effective remedy of setting aside even where the party's right to a fair hearing or due process is breached simply because the party has no connection with Belgium or by encouraging the waiver of this remedy as in Switzerland, the national arbitration laws of these countries are in

210 See the Judgment of the European Court of Human Right of January 18, 1978, Series A. 25, para.239. Referred to in A.Z. Drzemczewski, supra note 196 at p.55

211 Underlining is for emphasis. See also Article 8 of the Universal Declaration of Human Rights: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 7 of the African Charter on Human and Peoples' Rights provides to the same effect.

conflict with their treaty obligations under the European Convention on Human Rights.\textsuperscript{213} The same argument applies to Tunisia in relation to her obligation under Article 7 of the African Charter on Human and Peoples' Rights.\textsuperscript{214} The right to a fair hearing or due process and the remedy for its possible breach are inseparable siamese twins. One cannot be granted without the other. If the law furnishes no remedy for the violation of a vested right, of what benefit is that right to the individual? More than half a century ago, Justice Holmes rightly ridiculed the concept of an unenforceable right in the \textit{Western Maid}\textsuperscript{215} when he observed: “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”\textsuperscript{216}

E. Conclusion.

It has been convincingly urged in this chapter that the right to a fair hearing or the requirement of due process is a fundamental principle of law protected by the various human rights Conventions notably the Universal Declaration of Human Rights, the European Convention on Human Rights and the African Charter on Human and Peoples Rights. State parties to these Conventions, particularly Belgium, Switzerland and Tunisia are bound to implement the provisions of these Conventions in their respective domestic


\textsuperscript{214} See generally P.H. Imbert, supra note 204

\textsuperscript{215} (1922) 257 U.S. 419

In doing this, the states must not only guarantee these rights to everyone but must couple it with an effective remedy if violated. In the context of international commercial arbitration, there should always be the remedy of setting aside an arbitral award rendered in breach of either of the party’s right to a fair hearing or due process. Anything short of this is not only a violation of the state’s obligation under international law but also a recipe for injustice and arbitrators’ misconduct. In order to ensure that these states implement the obligations which they willingly assumed under international law, they or their nationals should not be allowed to claim the benefits arising from the violated rule. A state that has violated a rule of international law cannot demand its fulfillment by other parties or subjects. In effect, if a state violates an obligation, the principal approved response is to withdraw that state’s reciprocal right to the benefit accorded by the norm.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS.

In this thesis, I have discussed the setting aside of foreign arbitral awards. This discourse is provoked by the unique provisions in the national arbitration laws of Belgium, Switzerland and Tunisia with respect to the setting aside of foreign arbitral awards. Having provided a roadmap of the territory ahead in Chapter I, Chapter II examined the various theories of arbitration. These theories of arbitration are the foundation of the national arbitration laws of most countries. They impact on the role assigned to the arbitrators and the extent to which the national courts should intervene in the arbitral process, particularly post-award intervention. The contractual, jurisdictional and autonomous theories are unacceptable because of their proponents' parochial view of arbitration and the role of the national courts in the arbitral process particularly in the setting aside of foreign awards. The hybrid or mixed theory is the most acceptable in that it seeks to strike a fine balance between arbitral autonomy and regulation—a reconciliation of the tension between justice and finality. While recognizing the private nature of arbitration, the theory also supports the judicial review of awards. Indeed, any theory of arbitration must necessarily reflect the consensual basis of arbitration and the legitimacy and support which the arbitral process derives from national legal systems. Although arbitration begins with a private agreement between the parties, it terminates in the award which is enforced, where necessary, by the public authorities of each state through its national courts. However, the endorsement of the mixed or hybrid theory is not without a
caveat: judicial review of awards by national courts, particularly the setting aside function has to be exercised with reasonable degree of restraint, otherwise arbitration will become a prelude to formal litigation.

Chapter III discusses the emerging legislative trends in the setting aside of foreign arbitral awards with emphasis on the national arbitration laws of Belgium, Switzerland and Tunisia. By juxtaposing these national arbitration laws with that of other jurisdictions such as British Columbia and France, it is argued that they infringe on the provisions of the New York Convention as well as the international consensus articulated in the Model Law. This is because under the national arbitration law of Belgium, a party is totally denied the right to have the award set aside unless that party is a Belgian citizen, is living in Belgium or carries on business in Belgium. The national arbitration laws of Switzerland and Tunisia permit the parties to waive all or any of the grounds for the setting aside function if neither of them has any connection with Switzerland or Tunisia. The denial by legislative fiat of the setting aside opportunity at the place of arbitration or its waiver leaves the aggrieved party with the only option of opposing recognition and enforcement in all the jurisdictions in which the winner seeks enforcement of the award. Appeal to divine law or universal morality is as good as no remedy. The justification for exercising the setting aside function at the place of arbitration is the preservation of one of the attractive advantages of arbitration which is forum neutrality. If then the loser in the arbitration cannot exercise the right of setting aside at the place of arbitration and relies only on the remedy of opposing recognition and enforcement of the award where his
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assets are located, it is possible that his assets may be located in his home country. The location of his assets in his home country gives him a home advantage over the winner in the enforcement stage. This reality necessitated the division of functions in the New York Convention and the Model Law between the national courts of the enforcement forum and the place of arbitration. Moreover, by shifting both functions to one jurisdiction, a vital provision of the New York Convention on the setting aside of foreign arbitral awards is rendered inoperative. It is my considered view that if the setting aside function should be removed from the place of arbitration, a viable alternative such as regional centers for review of defective arbitral awards should be provided. For instance, Africa can have two regional arbitration centers for all awards rendered in Africa, four in Europe for all awards rendered in Europe e.g. and this might call for an amendment to the New York Convention. In the alternative, it may make better sense to establish the setting aside provisions of the Model Law as a treaty binding on all state parties to the New York Convention. The need for speed must be balanced with the need for justice and fairness and in the achievement of this commendable objective, no one should be subjected to unnecessary disadvantage because of his nationality, race or colour. To deny the parties the setting aside opportunity implies that arbitrators are infallible and this is no more than an invitation to injustice and arbitrator misconduct.

Assuming but not conceding, that the parties to the arbitration, as a matter of commercial practice, can willingly waive the grounds for the setting aside of the award or be denied same by operation of law, does this include a setting aside application arising from the
breach of due process or the principle of natural justice? This is the linchpin of the arguments in Chapter IV. Since the right to a fair hearing or due process and the accompanying remedy for its breach are rights protected by the various instruments on the international protection of human rights, they cannot be taken away or compromised by any domestic legislation such as the national arbitration laws of Belgium, Switzerland and Tunisia. This right derives from the inherent dignity of the human person and are inalienable. To this extent, the setting aside provisions of these national arbitration laws are not in conformity with the obligation of Belgium, Switzerland and Tunisia under the above mentioned human rights Conventions. The human rights Conventions prevail over these domestic statutes. A landmark decision by the Belgian cour de cassation sheds more light on the primacy of ratified international treaties over domestic laws. In the Fromagerie Franco-Suisse 'Le Ski' case concerning the relationship between the applicable European Community law and conflicting domestic law, the Belgian court held inter-alia: "...The conflict which exists between a rule of law established by an international treaty and a rule of law established by a subsequent statute, is not a conflict between two statutes... When the conflict is one between a rule of domestic law and a rule of international law having effects within the domestic legal order, the rule established by the treaty must prevail; its pre-eminence follows from the very nature of international treaty law. This is all the more so, when the conflict is one, as in the present case, between a rule of domestic law and a rule of community law...It follows from the preceding consideration that the court had the duty to reject the application of the provisions of
domestic law that are contrary to this provision of the treaty." Although this case is based on the European Community law, it is still a good authority for the proposition that the provisions of the European Convention on Human Rights have a greater superiority over the national arbitration laws of Belgium and this logically extends to Switzerland. Under the Swiss law, international agreements are automatically incorporated into Swiss law because there is no need for them to be enacted as statutes. The same applies to Tunisia vis-à-vis the African Charter on Human and Peoples’ Rights. In the case of Tunisia, my view is further fortified by Article 32 of the Tunisian Constitution which states the lofty commitments in international instruments ratified by Tunisia. Article 32 of the Tunisian Constitution puts conventions over and above local and internal laws and such a system in directly incorporating international obligations within the internal legal system guarantees the protection of human rights.

In conclusion, it is submitted that the current jurisprudence in Belgium, Switzerland and Tunisia with respect to the setting aside of foreign arbitral awards is unsatisfactory both in its reasoning and its intended results. The national arbitration laws of Belgium, Switzerland and Tunisia on the setting aside of foreign arbitral awards are not only a recipe for arbitrator misconduct and injustice but are also in violation of the obligations of these states under the 1958 New York Convention on the Recognition and Enforcement

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of Foreign Arbitral Awards. The legislations also violate fundamental provisions of the various regional treaties on the protection of human rights as well as the international consensus articulated in the UNCITRAL Model law
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