REVIEW OF AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION: TIME FOR AN INTERNATIONAL COMMERCIAL ARBITRAL COURT OF APPEAL

by

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ABSTRACT

This thesis seeks to identify the main shortcoming of the current system of review within international commercial arbitration and provides suggestions for its reform. Two major international arbitration instruments, the New York Convention and UNCITRAL Model Law limit the scope of review in international commercial arbitration to protect the finality of arbitral awards and reduce the national courts' involvement in the arbitration process. Review on the merits is almost absent in international commercial arbitration. The recourse available to the parties is usually limited to challenges on procedural irregularities and jurisdictional errors. The scope and the type of review are determined by the law of the seat of arbitration.

International commercial disputes have become more complex with higher stakes as a result of the globalisation of trade and an erroneous award may have considerable consequences. The lack of a substantive review mechanism would undermine the principle of fairness and may damage the credibility of international commercial arbitration. One of the reasons parties choose arbitration over litigation is its independence from the judiciary. However, the current system of review normally forces parties to challenge their arbitrational awards in the national court of the seat of arbitration.

This thesis proposes to expand the scope of review in international commercial arbitration without frustrating its main features such as finality and autonomy. Based on the delocalisation of the arbitral process theory, it argues that the best forum to review an international commercial arbitral award is a proposed International Commercial Arbitral Court of Appeal (ICACA). Such an institution would provide the opportunity for those parties with concern over fairness to have access to a truly independent dispute settlement mechanism.

The thesis goes beyond the current literature and provides a detailed analysis on the establishment of the proposed court by means of a new international convention. The function of the court is examined and suggestions for its structure, location, finance and time frame are provided.

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HKIAC Administered Arbitration Rules 2018

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International Chamber of Commerce (ICC) Rules

JAMS Comprehensive Arbitration Rules & Procedures 2021

JAMS Optional Arbitration Appeal Procedures 2003

LCIA Arbitration Rules 2020

LCIA Scheduel of Costs 2020

SCC Arbitration Rules 2017

SCIA Arbitration Rules 2019

SCIA Guidelines for the Optional Appellate Arbitration Procedure 2019

Statutes of the Bodies Working for the Settlement of Sports-Related Disputes 2020

LIST OF ABBREVIATIONS

AAA	American Arbitration Association
CAS	Court of Arbitration for Sport
CDI	China Development Institute
CEA	European Court of Arbitration
CICC	China International Commercial Court
CIETAC	China International Economic and Trade Arbitration Commission
CPR	Civile Procedure Rule / International Institute for Conflict Prevention & Resolution
ECOSOC	United Nation Economic and Social Council
GB-DRS	Governing Body for Dispute Resolution Services
GFCI	Global Financial Centres Index
GGFI	Global Green Finance Index
GPCI	Global Power City Index
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICACA	International Commercial Arbitral Court of Appeal
ICC	International Chamber of Commerce
ICCP	International Commercial Courts of Paris
ICSID	International Centre for Settlement of Investment Disputes
ITLOS	International Tribunal for the Law of the Sea
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitrators Association
NCC	The Netherlands Commercial Court

SCC	Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SICC	Singapore International Commercial Court
SPC	Supreme People's Court of China
UNCITRAL	United Nations Commissions on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea

CHAPTER 1. INTRODUCTION

This thesis makes a case for recognising the right to appeal in international commercial arbitration in order to satisfy procedural and substantive justice. The establishment of a new and unified arbitral appeal court is proposed as a solution to the problem of very limited substantive review (appeal) in international commercial arbitration, without frustrating its main features such as finality and autonomy.

1.1 Background

Arbitration is a private dispute settlement mechanism which has been used by traders as early as 427 AD.[1] It enables parties to settle their dispute outside national courts.[2] Arbitration is a consensual process commenced by parties' agreement through which an arbitrator or an arbitral

[1] Georgios I Zekos, 'Precedent and Stare Decisis by Arbitrations and Courts in Globalization' (2009) 10 JWIT 475, 478.

[2] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law Intl 2003) 4.

panel determines a dispute.[3] The parties' agreement is the cornerstone of any arbitration process without which arbitration would not exist.[4]

Arbitration is commonly used to settle international commercial disputes where foreign parties seek to avoid national jurisdictions.[5] Several features of arbitration contribute to its popularity[6] for resolving cross border disputes such as parties' autonomy, flexibility, finality, enforceability of arbitration awards and confidentially.[7] Arbitration provides an opportunity for parties to tailor the arbitral procedure, structure and applicable law according to their needs.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") adopted in 1958 is the cornerstone of international commercial arbitration that promotes and facilitates recognition and enforcement of international commercial arbitral awards. However, the New York Convention is not in force

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[3] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 10.

[4] Sunday A Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6 J Sustainable Dev L & Pol'y 222, 222.

[5] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 07 December 2020; Leonard V Quigley, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1961) 70 Yale LJ 1051, 1051.

[6] International Bar Association, 'The Current State and Future of International Arbitration: Regional Perspectives IBA Arb 40 Subcommittee' (2015) 9; Michal Kaczmarczyk and Joanna Lam, 'Sociology of Commercial Arbitration: Tools for the New Times' (2019) 36 J Intl Arb 693, 693.

[7] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

in every state. Moreover, variations in national arbitration laws resulted in different treatment of international commercial arbitration in member states. The attempts to develop a model law that is acceptable to jurisdictions with different social, legal and economic systems resulted in the adaptation of the UNCITRAL Model Law[8] on International Commercial Arbitration (the Model Law) by the UN General Assembly resolution 40/72 in 1985. It provides a framework for states to modernise and reform their arbitration law. It includes provisions for all stages of the arbitration process in order to facilitate international commercial arbitration.

One of the main features of arbitration is its finality. Finality means that the arbitral award ends a dispute. When an arbitral tribunal renders a decision, it is the final step in an international arbitration procedure and as soon as an award has been made the original mandate of the tribunal comes to an end, and it will have a res judicata effect.[9] The award will be ready to be enforced and the tribunal responsibilities and powers become restricted.[10] Any delay in international commerce may increase costs to the parties, which makes finality an attractive feature for international commercial arbitration. It is regarded as one of the reasons for some practitioners to choose arbitration over litigation.[11]

[8] The United Nations Commission on International Trade Law (UNCITRAL) is established in 1966 by the United Nations General Assembly's resolution 2205 (XXI).

[9] Eduardo Zuleta Jaramillo, 'The Relationship Between Interim and Final Awards-Res Judicata Concerns', in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times, ICCA Congress Series No. 15*, (Kluwer Law Intl 2011) 234.

[10] Margaret L Moses, *The principles and practice of international commercial arbitration* (2nd edn, CUP 2012) 392.

[11] Samuel A Haubold, 'Opting Out of the US Legal System-The Case for International Arbitration' (1997) 10 Intl L Practium 43, 44.

Any challenge to an arbitral award would undermine its finality. Hence, the extent of review is limited and a higher priority is given to finality. The New York Convention and the Model Law only recognise the possibility of review of an award on procedural irregularities and jurisdictional errors and do not recognise a substantive review on the merits (appeal) of an arbitral award. Article V of the New York Convention and article 34 of the Model Law set out these grounds. These grounds are limited to a violation of due process, an arbitral award covers matters beyond the scope of an arbitration agreement, a dispute that is not capable of settlement by arbitration, and a violation of public policy.[12] Such a review mechanism does not provide the possibility to appeal an award on a question of law or fact.

Although the New York Convention and the Model Law set out grounds for review of arbitral awards, the power to review the validity of an arbitral award is generally vested in the national court of the country 'in which or under the law of which that award was made'[13] and the grounds for such review are usually determined in national arbitration statutes. These tend to adopt the same grounds set out in the international instruments and the scope of review is generally limited to procedural irregularities and jurisdictional challenges.[14] However, some jurisdictions provide the possibility of a limited review on the merits.[15]

The limited grounds to review an arbitral award may undermine fairness which is one of the main principles of any dispute settlement mechanism that satisfies the requirement of justice.

[12] New York Convention 1958, art V; UNCITRAL Model Law 1985, art 34 (a).

[13] New York Convention 1958, art V(1)(e).

[14] For types of review see Chapter 2.

[15] For example, s 69 of the English Arbitration Act 1996 allows an appeal on a question of law in exceptional cases.

Normally, parties to an arbitration agreement seek a fair and just arbitration[16] in both the procedures and substance of the award.[17] Procedural fairness covers the issues regarding the arbitration process such as equality in opportunities to present a case, equal treatment of parties, and impartiality of arbitrators. Substantive fairness is concerned with the accuracy and correctness of an award. A requirement to satisfy fairness implies the possibility to correct either procedural or substantive errors which require a comprehensive review of an arbitral award.

There is always a clash between finality and fairness. In international commercial arbitration, these two principles have not been treated equally, and it seems more weight is given to finality. This is reflected in international instruments that recognise and facilitate international commercial arbitration.

Although the ultimate goal of arbitration is to end a dispute with a final and binding award, parties will choose arbitration if they believe it is a fair mechanism. Cross-border trade is growing rapidly, which results in an increased number of high-value transactions that are increasingly complex in nature.[18] Stakes in international commercial arbitration are generally

[16] Murray S Levin, 'The Role of Substantive Law in Business Arbitration and the Importance of Volition' (1997) 35 Am Bus LJ 105, 113.

[17] Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeals process?' (2018) 84(2) J Intl Arb Med Disp Mang 104, 106.

[18] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 8 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

high,[19] and even small mistakes can bring serious consequences. The correctness of an award is an important concern for parties to high-stake agreements where the cost imposed due to an erroneous award can outweigh the benefit of a fast and expedited process.[20] A question that may arise is whether a possibility of review on merit should be introduced in international commercial arbitration.

Although an option for a final and binding arbitration is readily available for parties, the possibility of correcting an error of fact or law is limited to certain jurisdictions in exceptional cases. If an adequate possibility to correct an award is not available for parties, international commercial arbitration may lose its popularity and parties would choose other mechanisms that offer an appellate review of the award. [21] Park states that 'If arbitration loses its moorings as a truth-seeking process, nostalgia for a cheerful golden age of quick results will yield to calls for the reinvention of an adjudicatory process aimed at actually getting the facts and the law'.[22] Therefore, it would be beneficial to find a solution for a more extensive review of arbitral awards for those parties who have such concerns.

The concern over the lack of adequate appeal mechanism in international commercial arbitration is already felt and some arbitral institutions have provided an appellate review in

[19] Michael Goldhaber, 'Arbitration Scorecard 2013: Contract Disputes' (2013) Am Lawy <http://www.americanlawyer.com/id=1202607030865/Arbitration-Scorecard-2013-Contract-Disputes?slreturn=20160103181849> accessed 08 November 2020.

[20] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 534; Stephen A Hochman, 'Judicial Review to Correct Arbitral Error--An Option to Consider' [1997] 13 Ohio St J Disp Resol 103, 104.

[21] William W Park, 'Arbitrators and Accuracy' (2010) 1 JIDS 25, 27; Stephen Hayford and Ralph Peeples, 'Commercial Arbitration in Evolution: An Assessment and Call for Dialogue' [1994] 10 Ohio St J Disp Resol 343, 405.

[22] William W Park, 'Arbitrators and Accuracy' (2010) JIDS 1 25, 27.

their arbitration processes for parties who want to have this type of review. For example, the International Institute for Conflict Prevention & Resolution (CPR),[23] the Judicial Arbitration and Mediation Services (JAMS)[24] and the American Arbitration Association (AAA)[25] are amongst institutions which provide an 'opt-in' appeal procedure that allows a second tribunal to review the award rendered by the first tribunal. Parties should agree on this type of appeal in their arbitration agreement.[26] The possibility of appeal is also recognised by the European Court of Arbitration (CEA) which provides an 'opt-out' appeal procedure.[27] Hence, it is important to examine whether the availability of an appeal mechanism through these institutions satisfies the requirement of fairness in international commercial arbitration or if a different forum would serve better to review an arbitral award.

In this research, the necessity to establish an appeal mechanism within international commercial arbitration is examined. It is important to safeguard the unique characteristic of arbitration such as finality, parties' autonomy and independence from national jurisdictions if any type of appeal mechanism is to introduce in international commercial arbitration. The extent of review, parties' autonomy in selecting the type of review and the appropriate forum to conduct the review should be identified in a way that international commercial arbitration characteristics would be preserved and promoted.

[23] CPR Appellate Arbitration Procedure 2015.

[24] JAMS Optional Arbitration Appeal Procedures 2003.

[25] AAA Optional Appellate Arbitration Rules 2013.

[26] JAMS Optional Arbitration Appeal Procedures 2003, r b(i); AAA Optional Appellate Arbitration Rules 2013, r A(10).

[27] Arbitration Rules of the European Court of Arbitration 2015, art 28(1).

1.2 The aim of the thesis and research questions

The overall aim of this research is to answer the question whether it is required to expand the scope of review in international commercial arbitration by introducing an appellate mechanism. The thesis examines the current review practice, recognising its value, but identifying its shortcomings, and explores whether further development is necessary. The extent of a review of arbitral awards is discussed as well as the role of national courts in the review of arbitral awards and the appropriate forum to conduct such a review. The research agrees with earlier suggestions to establish a new forum to review arbitral awards. However, it goes beyond the existing proposals and provides detailed suggestions on the establishment and functioning of such a forum. Several questions need to be answered to address the aim of this thesis.

The first set of questions to be answered is about review in international commercial arbitration. What is the nature of review in the context of international commercial arbitration? What are the review mechanisms currently available in international commercial arbitration? Is the court of the seat the most appropriate body to review an arbitral award? Should the role of the seat in reviewing arbitration awards be reconsidered?

The second set of questions concern the expansion of the possibility of appeal in international commercial arbitration. Is the benefit of fairness outweighed by the desire for finality in international commercial arbitration? What are the pros and cons of an extensive review? Can the existing review mechanisms be modified to include an appellate review? Should an international body be introduced to conduct a review of international commercial arbitral awards? Is there a persuasive case for establishing such an appellate court?

The third set of questions deal with the practical requirements for establishing an international commercial arbitral court of appeal. The thesis investigates how an international court may be established. What would be the function of the new court? What would be its structure? Who would finance the court? Where is the appropriate location for such a court?

1.3 Methodology

A doctrinal legal research methodology is mainly used in this thesis to establish the extent of review of an arbitral award and the best forum to conduct the review in international commercial arbitration. Although there are some competing definitions of legal doctrinal research,[28] it is usually defined as the method that entails determining the law followed by its interpretation and synthesis.[29] A more detailed definition by Jain is that doctrinal legal research 'involves analysis of case law, arranging, ordering and systematising legal propositions, and study of legal institutions, but it does more - it creates law and its major tool (but not the only tool) to do so is through legal reasoning or rational deduction'.[30] Doctrinal research is further explained as an internal research method[31] which is studying the law from an insider's

[28] Mark Van Hoecke, 'Legal Doctrine: Which Kind of Method for What Kind of Discipline?' *in Mark Van Hoecke (ed) Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 3.

[29] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh UP 2017) 21; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 110; Graham Virgo, 'Doctrinal legal research' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2009); Emerson H Tiller and Frank B Cross, 'What Is Legal Doctrine' (2006) 100 Nw UL Rev 517, 518.

[30] S N Jain, 'Doctrinal and non-Doctrinal legal research' (1975) 17 JILI 516, 516.

[31] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal

perspective.[32] In legal doctrinal research, a solution to a specific legal problem is sought in the law.[33]

In addition to the doctrinal research methodology, non-doctrinal methods have been incorporated into legal research.[34] Some have argued that 'Anything that is not 'doctrinal' can be encompassed in the 'other' category of non-doctrinal research'.[35] For example, empirical or evidence-based methods are regarded as non-doctrinal research.[36] Non-doctrinal research methods are external methods that examine law from the outside and the perspective of external disciplines such as economics, sociology and politics.[37]

In recent decades, interdisciplinary research has found support in legal studies as an alternative to doctrinal research.[38] However, Posner argues that the quality of research may be undermined

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Legal Research' (2012) 17 Deakin L Rev 83, 114; Brian R Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58 Cambridge LJ 19, 20; Richard L Schwartz, 'Internal and External Method in the Study of Law' (1992) 11L& Phil 179, 180.

[32] Richard L Schwartz, 'Internal and External Method in the Study of Law' (1992) 11L& Phil 179, 180; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 114.

[33] Graham Virgo, 'Doctrinal legal research' in Peter Cane and Joanne Conaghan(ed), *The New Oxford Companion to Law* (OUP 2009).

[34] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 86; Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh UP 2017) 19.

[35] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 114.

[36] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 114.

[37] Richard A Posner, 'Legal Scholarship Today' (2002) 115 Harv L Rev 1314,1317.

[38] Richard A Posner, 'Legal Scholarship Today' (2002) 115 Harv L Rev 1314,1317.

in interdisciplinary legal scholarship due to the 'peculiar and inadequate structure of its institution'.[39] It has also been argued that many interdisciplinary studies have little to do with actual law practice and have no immediate application to legal practice.[40] While doctrinal scholarship may be considered 'dull and limited', it is valuable and guarantees the minimum standards of quality.[41] Some commentators have even suggested that doctrinal research is the dominant scholarship in legal research[42] and is described as 'the currency of the law'.[43]

In this thesis, the doctrinal research methodology is used to answer whether the scope of review in international commercial arbitration should be expanded by introducing an appeals mechanism. The thesis achieves its objectives by using an internal method via interpreting and analysing of relevant legal texts. It enables examining law, regulations and legal processes to assess their suitability, identify any problematic area and the possibility of reform consistent with the main principle of international commercial arbitration.

Hutchinson argues that good quality doctrinal research is not only involved in the identification and analysing the current law but also 'goes well beyond description, analysis, and critique, and invariably suggests ways the law could be amended or the philosophy, processes or administration of the law could be improved'.[44] In this thesis, the research goes beyond

[39] Richard A Posner, 'Legal Scholarship Today' (2002) 115 Harv L Rev 1314, 1317.

[40] Brian R Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58 Cambridge LJ 197, 200.

[41] Richard A Posner, 'Legal Scholarship Today' (2002) 115 Harv L Rev 1314, 1324.

[42] Ernest M Jones, 'Some Current trends in Legal Rsearch' (1962) 15 JLE 121, 129.

[43] Emerson H Tiller and Frank B Cross, 'What Is Legal Doctrine' (2006) 100 Nw U L Rev 517, 517.

[44] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus L Rev 130,132.

description, analysis and critique; a new international court to review arbitral awards is suggested to reform the current practice.

The thesis systematically and critically analyses the primary sources (mainly English legislation and cases, examples from other jurisdictions such as France, the US, Switzerland, Belgium, international conventions and the rules of arbitral institutions). The research also examines secondary sources (books, academic papers and reports) in order to answer the research questions.

Brandey argues that the 'Doctrinal method has never had the purity its partisans ascribed to it'.[45] He contends that the approach toward the pure doctrinal analysis which explains the law through internal evidence such as judgments and statutes has shifted.[46] The doctrinal research may also use non-doctrinal materials in doctrinal analysis by combining methods and approaches from humanities and social sciences.[47] In this thesis, the research is conducted open-mindedly and borrows from other methods occasionally to enrich its analysis. Although the research has not conducted an empirical study, the results of published studies are used in different sections to support the arguments and provide an understanding of the approach taken by practitioners and other stakeholders.

The nature of this research, that is on international commercial arbitration, necessitates examining legal rules and practices in different jurisdictions as well as arbitral institutions within a legal doctrinal research framework. The legal rules and the practice of reviewing an international commercial arbitral award in some important jurisdictions are compared as part

[45] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 JLS 71.72.

[46] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 JLS 71,73.

[47] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 JLS 71, 72, 78.

of this research. For example, the scope of review in Belgium, England, France and the US are compared. This may be considered at the intersection of doctrinal and comparative legal research, but it has no claim of being a fully comparative study by way of examining the underlying doctrines of review in different jurisdictions.[48] Rather it shares an objective with a comparative study in achieving a harmonised international legal framework in reviewing arbitral awards.[49]

The second part of Chapter 6 goes beyond a legal research framework and provides suggestions for practical aspects of establishing a new international court. This is done via a qualitative comparison of similar institutions and a quantitative examination of a few measures, for example, indices provided to assess different features of cities are used to propose a location for the court.

1.4 Contribution of the Research

The thesis provides a detailed analysis of the review of an arbitral award. The principal contributions of the thesis are listed here.

[48] Mark van Hoecke and Mark Warrington 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' in Maksymilian Del Mar and others (eds) *Legal Theory and the Legal Academy* (1st edn, Routledge 2010) 530.

[49] Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process and Potentiality' (2015) 57 JILI 147,147; John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 157.

1. The research identifies a gap in the existing review mechanism where a comprehensive review is not widely available. It argues, in Chapter 4, that the scope of review in international commercial arbitration should be expanded.
2. After considering various alternatives, the research reaches the conclusion that the best way to extend the scope of review in international commercial arbitration is through a proposed international appellate court.
3. The research then provides details on how the international court could be established and how it could function. Although the idea of an international court has been suggested in the literature, no detailed proposal has been provided or addressed in any study to the knowledge of the author. International instruments and their development procedure are analysed to set out the appropriate means to establish the new court. In Chapter 6, detailed suggestions are offered on the structure, financing, functioning, and possible location of the proposed court.

1.5 Thesis outline

The thesis is divided into seven chapters. Chapter 1 is an introduction to the thesis.

Chapter 2 first provides an explanation of the nature of judicial review and appeal in the context of litigation, before analysing different types of review in the context of international commercial arbitration. This leads to an explanation of the scope and types of review considered in this thesis.

Chapter 3 addresses the question whether the court of the seat is the appropriate court to conduct a review of arbitral awards. The delocalisation theory is also examined in this chapter as an alternative to the seat theory and the current practices where the theory is applied are discussed.

The chapter identifies a gap in the review of international commercial arbitration and suggests that the delocalisation theory favours the establishment of an international forum outside national jurisdiction to review arbitral awards.

Chapter 4 answers the question whether the scope of review in international commercial arbitration should be expanded to cover the gap. The chapter justifies the establishment of an appeal mechanism in international commercial arbitration. Principles of fairness and finality are analysed, and the right balance between the two is considered. The pros and cons of the introduction of an appellate mechanism are examined.

Chapter 5 addresses the question how the scope of review should be expanded without undermining the central features of international commercial arbitration. The chapter establishes the best forum to conduct the review of an international commercial arbitral award. Internal appellate mechanisms of different institutions are reviewed to determine whether the review should be conducted by arbitral institutions. Following the discussions in chapter 3, the possibility of establishing appellate review through national courts is also considered. It is concluded that neither internal appeal through arbitral institutions, nor expanding the scope of review through national courts are adequate solutions. The existing proposals for an international court are reviewed and the pros and cons of establishing an international court are revised. The potential arguments against the establishment of such a court are addressed. This chapter concludes that a new international arbitral court should be established to review arbitral awards.

Chapter 6 proposes the details for the establishment of an international commercial arbitral court of appeal. It is suggested to implement the court by introducing a new international

convention. The function of the court is examined and details for its structure, time frame, location and finance are suggested.

Chapter 7 summarises the findings of the research.

CHAPTER 2. THE NATURE OF REVIEW IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1 Introduction

This chapter examines the concepts of judicial review and appeal in the context of international commercial arbitration. There are different forms of review, such as judicial review and appeal, and there is some ambiguity and confusion as to the meaning of these reviews in the context of international commercial arbitration. Despite the fact that neither the UNCITRAL Model Law[1] nor the New York Convention[2] has used judicial review to describe challenges brought before national courts to review arbitral awards, in the literature 'judicial review' is frequently used by commentators in this context.[3] A question may arise why the review of arbitral awards by national courts is referred as judicial review rather than appeal. What are the characteristics of

[1] UNCITRAL Model Law 1985, art 34.

[2] New York Convention 1958, art V(1)(e).

[3] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 592; William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 601; Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 J Intl Arb 553.

each mechanism? Furthermore, 'judicial review on the merits',[4] 'review on the merits',[5] and 'appeal'[6] are used interchangeably in arbitration literature.

This chapter seeks to examine the main ideas of review and appeal in the context of international commercial arbitration before explaining the concept of review and appeal that will be adopted for the purposes of this thesis. To do this, the chapter seeks to answer a number of questions. What is the nature of judicial review and appeal in the context of litigation, especially judicial review in the field of public law? Which review mechanism is adopted in international commercial arbitration? What is the reason behind this adoption? What are the grounds on which a review of an arbitral award can be sought? Can a review be sought on the merits of an arbitral award? What is the meaning of judicial review and appeal adopted by this thesis?

Before examining the scope of judicial review in petitions for annulment of awards and in appeals against the decisions of arbitral tribunals it is beneficial to examine the nature of appeal and judicial review in litigation outside the context of arbitration. Judicial review is looked at in Section 2.2 and appeal is considered in Section 2.3.

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[4] Adam Samuel, 'The 1979 Arbitration Act-Judicial review of Arbitration Awards on the Merits in England' (1985) 2 J Intl Arb 53; Jonathan DeBoos, 'Arbitration Awards: Is Review on the Merits Desirable' (2008) 3 Const L Int'l 31.

[5] William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 605; Clive Schmitthoff, 'Finality of Arbitral Awards and Judicial Review' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 235; He argued that 'We turn now to the second type of judicial review, the review on the merits. Such review is, whatever euphemistic phraseology is used, in reality an appeal from the decision of the arbitrator or arbitration tribunal'.

[6] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531.

Judicial review of arbitral awards in the context of international commercial arbitration is explored in Section 2.4. The possible outcome of a judicial review of an arbitral award is considered in Section 2.5. The degree of judicial review and common grounds that are adopted by international instruments and most national laws for challenging an arbitral award are discussed in Section 2.6.1. Appeal, which is less common in international commercial arbitration, is looked at in Section 2.7. The meaning of review in this research is considered in Section 2.8.

2.2 Judicial review in Public law

Arbitration awards may be subject to judicial review by national courts. A judicial review is a form of review that is usually used in public law and it is examined here to identify its scope and limitations. In English law, judicial review is a mechanism that provides an opportunity for parties to challenge the lawfulness of a decision, an act, or a failure to act[7] of a person or body of persons called the 'decision maker'.[8] In judicial review, a court which has a supervisory role can control and check a decision maker to ensure they act lawfully and fairly in exercising their statutory functions.[9] The scope and the meaning of judicial review may differ from one jurisdiction to another. For example, in England, rule 54 of Civil Procedure Rules provides that 'a "claim for judicial review" means a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function'.[10] It is normally

[7] Harry Woolf and others, *De Smith's Principles of Judicial Review* (2nd edn, Sweet & Maxwell 2020) 1-001.

[8] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 408.

[9] Stephen Breyer, 'Judicial Review of Questions of Law and Policy' (1986) 38 Admin L Rev 363, 363.

[10] CPR 54.1

used in administrative law to control public bodies in order to prevent any potential abuse of power in exercising their duties.[11] In *R. v Secretary of State for the Home Department ex p Brind,*[12] judicial review is described as 'a remedy invented by the judges to restrain the excess or abuse of power'.[13]

English courts inherently have a judicial review jurisdiction,[14] which is derived from common law rather than statutes. According to Lord Brown, 'Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not: in a word to uphold the rule of law'.[15] However, this right is recognised by statutes.[16] Judicial review protects the rule of law and ensures that the decision makers act according to the law.[17] Lord Bingham described the rule of law by asserting 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.[18]

In judicial review, courts do not examine the facts and the merits of a decision. Review focuses on the lawfulness and fairness of the process and the way in which a decision has been made.[19]

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[11] Judicial review in England and Wales is sought from the Administrative Court which is part of the Queen's Bench Division of the High Court; David S Law, 'A Theory of Judicial Power and Judicial Review' [2009] 97 Geo LJ 723, 727.

[12] [1991] 1 AC 696 (HL).

[13] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL) 727.

[14] Jonathan Auburn and others, *Judicial Review: Principles and Procedure* (OUP 2013) 1.06.

[15] *R v HM the Queen in Council, ex p Vijayatunga* [1988] QB 322 (QB) 346.

[16] Harry Woolf and others, *De Smith's Principles of Judicial Review* (2nd edn, Sweet & Maxwell 2020) 2-025.

[17] *R v HM the Queen in Council, ex parte Vijayatunga* [1988] QB 322 (QB) 343.

[18] Lord Bingham, 'The Rule of Law' (2007) 66 Cam LJ 67, 69.

[19] *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193 [20].

The grounds for judicial review reflect the purpose of the remedy which is not concerned with the merits of the decision. These grounds are examined in the next subsection.

2.2.1 Grounds of judicial review

Judicial review is available where there is illegality, procedural impropriety or unreasonableness (irrationality) in decisions of public bodies or tribunals.[20] Decision makers should follow and understand the law correctly and should not exceed their powers.[21] If they fail to meet these considerations, the matter may be subject to judicial review on the ground of illegality. For example, if they unlawfully sub-delegate their power to an executive committee or exceed their statutory power.[22]

A public body's irrational act is also a ground for seeking judicial review of a decision or judgment. It means that the public body should act reasonably and make a decision that normally any reasonable decision maker could have made.[23] Lord Diplock asserted that irrationality 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[24]

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[20] *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL) 410.

[21] Jonathan Jones, 'The judge over your shoulder — a guide to good decision making' (5th edn, republished 2018, Government Legal Department 2016) 10.

[22] *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA).

[23] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) 230; Ian Turner, 'Judicial Review, Irrationality and the Review of Merits' (2006) 15 Nottingham LJ 37, 37.

[24] *Council of Civil Service Unions v Minister for the Civil* Service [1985] AC 374 (HL) 410.

A judgment or decision would be subject to review if a procedural impropriety occurs.[25] In all decision making processes, the rule of natural justice should be followed. This means procedures should be fair and just,[26] that is, parties should have a fair hearing and have a fair opportunity to present their case, a decision maker must act impartially, the judgment or decision should not be tainted by bias, and decision makers must avoid any biased acts in the proceedings. Tribunals must follow the mandatory statutory rules which are necessary to be followed in the decision making process. [27]

In judicial review, the court will not review the correctness of decisions or awards and will not decide about 'rights and wrongs of the conclusion reached'.[28] The court considers whether a decision is unlawful. If so, the court quashes it, but may not substitute its own decision for that of the decision maker.[29] Parties who seek to challenge the correctness of decisions should bring an appeal application to the court.

2.3 Appeal

The right to appeal is an important universal right which is recognised in most legal systems.[30] An appeal provides opportunities for challenging a judgment that is considered incorrect and unfair by parties involved in a proceeding. It is a mechanism to protect a losing party against

[25] David Feldman, 'Judicial Review: A Way of Controlling Government?' (1988) 66 Pub Adm 21, 26.

[26] Jonathan Auburn and others, *Judicial Review: Principles and Procedure* (OUP 2013) 5.04.

[27] *Jackson Stansfield & Sons v Butterworth* [1948] 2 All ER 558 (CA).

[28] Courts and Tribunals Judiciary, 'Judicial review', < https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> accessed 19 November 2020.

[29] *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193 [22].

[30] Harlon Leigh Dalton, 'Taking the Right to Appeal (More or Less) Seriously' (1985) 95 Yale LJ 62, 62; Steven Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24 JLS 379, 379.

an ‘arbitrary, capricious, or mistaken decision’ of a trial judge.[31] Drahozal argues that ‘Trial courts make mistakes, and appellate courts, because of their greater expertise, lesser time pressures, collegial decision-making, or some other reason, correct those mistakes’.[32] Parties may seek an appeal to revise a judgment of a first instance court, either in whole or in part, to correct any mistake of law or fact. It is designed to protect parties against possible errors, bias, and human faults.[33] The right to appeal ensures accountability of the judicial system by providing opportunities for litigants to revise incorrect decisions.

In *General Medical Council v Michalak,*[34] Lord Kerr distinguished an appeal from a judicial review by asserting that:

> [A]n “appeal” (if it is not qualified by any words of restriction) is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own. Judicial review, by contrast, is, *par excellence*, a proceeding in which the legality of or the procedure by which a decision was reached is challenged.[35]

[31] Martin Shapiro, ‘Appeal’ (1980) 14 L & Soc'y Rev 629, 629; Christopher R Drahozal, ‘Judicial Incentives and the Appeals Process’ (1997) 51 SMU L Rev 469, 469.

[32] Christopher R Drahozal, ‘Judicial Incentives and the Appeals Process’ (1997) 51 SMU L Rev 469, 469, 470.

[33] Harlon Leigh Dalton, ‘Taking the Right to Appeal (More or Less) Seriously’ (1985) 95 Yale LJ 62, 66.

[34] [2017] UKSC 71, [2017] 1 WLR 4193.

[35] *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193 [20].

The appeal has a public function.[36] The possibility to correct mistakes promotes public confidence in the judiciary. An appeal court judge normally plays a crucial role in shaping and reforming the law in different legal systems, particularly in common law.[37]

Appeals are heard by courts or judges which are typically high in rank with a higher level of authority and expertise.[38] Their judgments are fully reasoned and have a precedential value which contributes to the development of law and have a binding and persuasive effect for other courts in rendering judgments with similar legal issues and facts.[39] Functions of appeal are not the same around the world.[40] In civil law countries, the function of an appeal is more focused on error correction.[41] In common law countries, the appeal mechanism in litigation has two important functions. The first is error correction.[42] An appellate court may review the award both on procedural grounds and substantive grounds.[43] The second function of appellate courts

[36] Chad M Oldfather, 'Universal de Novo Review' (2008) 77 Geo Wash L Rev 308, 316.

[37] Martin Shapiro, 'Appeal' (1979) 14 Law & Soc'y Rev. 629, 629; Robert S Thompson and John B Oakley, 'From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way through the Forum' (1986) Ariz St LJ 1, 8,7.

[38] Martin Partington, *Introduction to the English Legal System: 2012-2013* (7th ed, OUP 2012) 225.

[39] Caslav Pejovic, 'Civil law and common law: Two different paths leading to the same goal' (2001) 32 VUWLR 817, 837; John Hodgson, 'A Guide to Appeals within the English Legal System' (2010) 19 Br J Nurs 48, 48.

[40] Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Intl Arb 185, 190.

[41] Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Int Arb 185, 190.

[42] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1997) 51 SMU L Rev 469, 469, 470.

[43] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1997) 51 SMU L Rev 469, 469, 470.

in common law countries is to develop and harmonise law.[44] An award that undergoes an appeal process is more precise. The appeal court focuses on the legal issues as facts are examined in the first instance court.[45] This allows the appellate court to render a more accurate decision which contributes to the development of the law. For example, in English law, appellate court judgments bind lower courts. It means that the decisions of the Court of Appeal must be followed by lower courts.[46]

A right to appeal is a statutory right and should be recognised by legislation, otherwise, parties cannot file an application to a higher court to challenge the decision of a trial court. In England, permission to appeal in most civil cases is necessary. The court will grant permission to appeal if it is satisfied that 'the appeal would have a real prospect of success', or 'there is some other compelling reason for the appeal to be heard'.[47] Where the lower court refuses to grant leave to appeal, parties may seek permission directly from the Court of Appeal.[48] However, this practice of seeking permission is not universal. For example in France, there is no need to seek court permission in civil and commercial cases in order to appeal.

An appeal can be sought on a question of fact, a question of law, or both.[49] Appeals examine whether the first instance judges applied the law and facts correctly in their judgments. An error

[44] *London Street Tramways Co Ltd v London County Council* [1898] AC 375 (HL) 376-378; Robert S Thompson and John B Oakley, 'From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way through the Forum' (1986) Ariz St LJ 1, 8, 7.

[45] Gershon Ellenbogen, 'English Arbitration Practice' (1952) 17 L Contemp & Probs 656, 678.

[46] Uwe Kischel and Andrew Hammel, *Comparative Law* (OUP 2019) 242.

[47] CPR 52.6.

[48] CPR 52.3(3).

[49] Martha S Davis, 'A Basic Guide to Standards of Judicial Review' (1988) 33 SD L Rev 469, 470; Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Int Arb 185, 191.

of fact occurs when a judge makes a mistake in the determination of what has happened. Usually, the first instance court determines the facts of a case by receiving evidence and hearing witnesses. An error of law is a misinterpretation of legal principles that applied to the case. An appeal may also be against an unjust award as a consequence of serious procedural or other irregularities in the proceedings.[50]

An appeal court may affirm or set aside a judgment or substitute its own decision.[51] It may also, in some legal systems, order a retrial at the appeal court or refer any claim for reassessment to the lower court depending on the jurisdiction. This is examined in the next subsection.

2.3.1 The practice of appellate review

National jurisdictions adopt different ways in the application of appellate review. The role of an appellate court in some judicial systems is limited compared to others which provide a more comprehensive appellate review.

In England, appellate courts usually hear an appeal to correct errors where a trial court has gone wrong in the application of law.[52] An appellate court normally decides an appeal by considering the materials and evidence on which the original award was based. Appellate courts are reluctant to receive any new evidence which has not been brought to the lower court but may have the power to receive new evidence if it finds it necessary for the determination of the

[50] Steve Wilson, *English Legal System* (OUP 2020) 676.

[51] For example, CPR 52.20(2)(a).

[52] CT Emery, 'Appellate jurisdiction to correct errors of law' (1987) 103 LQR 264, 265.

case.[53] It would also be reluctant to examine fact findings of the trial judge.[54] In *Fage UK Ltd v Chobani UK Ltd*, the Appeal Court said that:

> Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them.[55]

The judgment also provided reasons why appellate courts should avoid interfering with fact-findings of trial judges. It is argued that the trial judge in making her decisions has regard to the whole evidence that is presented to her. Furthermore, a court transcript can never fully represent the atmosphere of the courtroom. It is also argued that a trial judge is in a better position to see and hear the witnesses.[56] The trial judge is more advantageous in examining the facts of the case via assessing the credibility of witnesses and is able to examine the evidence put forward in greater details.[57] As a result, the Appeal Court is more likely to be involved in an inferential finding of facts.[58]

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[53] CPR 52.21(2).

[54] Richard Ward, Amanda Wragg and Ronald Jack Walker, *Walker & Walker's English Legal System* (11th edn, OUP 2011) 558.

[55] *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26 [114].

[56] *Datec Electronics Holdings Limited and others v United Parcels Service Limited* [2007] UKHL 23, [2007] 1 WLR 1325, 1330.

[57] *Manning v Stylianou* [2006] EWCA Civ 1655 [19]; *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36.

[58] Richard Ward, Amanda Wragg and Ronald Jack Walker, *Walker & Walker's English Legal System* (11th edn, OUP 2011) 558.

While it is rare,[59] sometimes an appellate court overturns a trial judge's fact-finding on primary facts if they conclude that the trial judge was 'plainly wrong'.[60] In such cases, the court may hold a rehearing if it is satisfied that it would be in the interests of justice.[61]

Some jurisdictions show little deference to the judgment of the trial court and review the award on both questions of fact and law. Such an appeal is known as appeal de novo. In *Thompkins v South Australian Health Commission,*[62] Martin J stated that in an appeal de novo:

> The appeal court hears the matter afresh. Regardless of which party appeals, the appeal is conducted as an original cause and all the evidence is given afresh unless the parties agree to the material used before the original body being used on the appeal. The judge who hears such an appeal will determine the question upon the material presented before the judge and will not be limited in any way by the decision that has been made by the body appealed from.[63]

For example, in France and Italy, the Court of Appeal conducts a de novo appeal.[64] The case before the appellate court will be considered anew. The appellate court can review the evidence and all records which were brought before the trial courts. The court needs to be involved in an evidentiary inquiry, and the court allows the submission of new evidence which was not

[59] *Thomson (AP) v Kvaerner Govan Ltd* [2003] UKHL 45, 2006 SC (HL) 1 [17].

[60] *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 37.

[61] CPR 52.21(1)(b).

[62] [2001] SASC 147.

[63] *Thompkins v South Australian Health Commission* [2001] SASC 147 at [30].

[64] Nina Nichols Pugh, 'The Structure and Role of Courts of Appeal in Civil Law Systems' (1975) 35 La L Rev 1163, 1165; Martin Shapiro, 'Appeal' (1980) 14 L & Soc'y Rev 629, 647; Simona Grossi, 'A Comparative Analysis between Italian Civil Proceedings and American Civil Proceedings before Federal Courts' (2010) 20 Ind Intl & Comp L Rev 213, 222.

submitted by the parties in the trial court hearing.[65] The appellate court substitutes its own decision, and it will decide whether the trial court acted correctly in the application of the law to the facts.

In an appeal, the judge considers the outcome of the case in order to determine whether the decision is correct. Although an appeal may be sought on a question of law or fact, the extent of appeal may be limited in some instances. There is no universal standard on the procedure and the extent of an appellate review. In a judicial review, the way in which a decision is made will be challenged. The judge would not review the outcome of a case but determine whether the right procedure is followed, and the decision is lawful. Thus the grounds for judicial review are limited to procedural errors, illegality or irrationality in decisions.

2.4 Judicial Review of arbitral awards

The concept of judicial review in the context of international commercial arbitration is examined in this section. This is to understand which review mechanism is adopted in international commercial arbitration, and the reasons for its adoption. The meanings defined above are used as the basis for the discussion here.

Once an arbitral tribunal renders a final award, it is *functus officio*.[66] This means that its function regarding a particular dispute has been completed and the tribunal has no further authority to decide on the dispute. Although arbitration awards are commonly branded final, the losing

[65] Thomas E Carbonneau, 'Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity' (1980) 55 Tul L Rev 1, 11.

[66] Saloni Kantaria, 'The Challenges of Enforcing an Arbitral Award Against a Foreign State in the United States' (2010) 27 J Intl Arb 75, 75.

parties may seek a judicial review either at the court of the seat or the enforcement court. Judicial review of arbitration awards is recognised widely around the world. Schmitthoff asserts that 'the courts of all countries exercise a judicial review over arbitrations on questions of natural justice and legality'.[67] Usually, parties can seek judicial review without the necessity to seek permission either from a national court or an arbitral tribunal.[68]

In most cases, arbitral awards are voluntarily complied with by the parties.[69] According to the 2008 Queen Mary University survey,[70] '84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%'. Unsatisfied parties may have recourse to judicial review in order to overturn an arbitral award or resist its enforcement. Yet, parties to an arbitration agreement have fewer options to challenge awards compared to those who choose litigation. Taking recourse against an arbitration award, in the current practice, is possible on limited grounds. It should be noted that, in some jurisdictions,[71] there is a possibility to review the substantive merits of awards[72] which is discussed in Section 2.7. It is also possible to resist the enforcement of an arbitral award by

[67] Clive M Schmitthoff, 'Finality of arbitral awards and judicial review' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 232.

[68] UNCITRAL Model Law 1985, art 34; Arbitration Act 1996, s 67, 68.

[69] Albert Jan Van Den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arb Intl 2; Richard W Naimark and Stephanie E Keer, 'Post-Award Experience in International Commercial Arbitration' (2005) 60 Disp Res J 94, 96.

[70] Queen Mary, University of London and PWC, 'International Arbitration: Corporate attitudes and practices' (2008) 2 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf> accessed 19 November 2020.

[71] For example, Arbitration Act 1996, s 69.

[72] International Trade Centre, *Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes* (United Nations 2001) 104.

challenging it at the enforcement court under national law, including the grounds set out in article V of the New York Convention.

2.4.1 The need for judicial review

One objective of this thesis is to examine whether the scope of review in international commercial arbitration is adequate and whether it meets current needs. Before examining any reform of the current judicial review process in international commercial arbitration, it is important to understand the reasons for the adoption of this process.

In arbitration, the parties delegate power to arbitrators in order to settle a dispute according to their agreement. Such delegation of power requires a control mechanism.[73] Control is defined as 'checks on the powers of an organisation that ensure that the organisation acts within its assigned mandate'.[74] The control mechanism may be internal, which would be implemented by the arbitral institution itself and are 'methods of self-control',[75] or external, which are those applied by external bodies.[76] Finality and autonomy are two important features in international arbitration, [77] and any control mechanism should provide the necessary freedom and independence in order to allow arbitration to fulfil its tasks and responsibilities while

[73] W Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' [1989] Duke LJ 739, 741.

[74] Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Va J Intl L 411, 413.

[75] Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Va J Intl L 411, 418.

[76] Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Va J Intl L 411, 418.

[77] Jessica L Gelander, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations' (1997) 80 Marq L Rev 625, 626.

maintaining its legitimacy.[78] Judicial review is the external control mechanism in international commercial arbitration which is designed to ensure its integrity and to minimise judicial intervention with arbitral awards.[79] Asouzu states that 'The tendency should be towards maximum support and minimal but objectively reasonable control (but never no control) in the light of the fact that arbitration is a private adjudicative process'.[80]

A review mechanism is required to ensure that an arbitral award is correct and justice is served.[81] The judicial review of arbitration awards is designed to protect fairness and impartiality in arbitration proceedings.[82] It is described as the 'bulwark against corruption, arbitrariness, bias, improper conduct and - where necessary - sheer incompetence in relation to acts and decisions with binding legal effect for others'.[83] A lack of a review system may make arbitration vulnerable to abuse as arbitrators will find it easier to undermine parties' agreements and exceed their powers.[84]

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[78] Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Va J Intl L 411, 414.

[79] William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tul L Rev 647, 685, 686.

[80] Amazu Asouzu, 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure' (1995) 7 Afr J Intl & Comp L 68, 70.

[81] Jessica L Gelander, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations' (1997) 80 Marq L Rev 625, 626.

[82] Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration, an Asia-Pacific Perspective* (CUP 2010) 415.

[83] Michael Kerr, 'Arbitration and the Courts: the UNCITRAL Model Law' (1985) 34 Intl & Comp. LQ 1, 15.

[84] William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tul L Rev 647, 653.

It is also argued that a review mechanism would prevent excessive autonomy of arbitrators, without which it may become a situation of 'moral hazard'.[85] It makes arbitrators more cautious in rendering a correct decision and more likely to follow the requirement of due process as they know there is a mechanism to scrutinise their decisions and actions.

Countries have varied views about the need for judicial review of an arbitral award which is reflected in their national jurisdictions. For example, sections 67 and 68 of the English Arbitration Act 1996, which are provisions for challenging an arbitral award, are mandatory, and parties cannot waive their right to invoke judicial review of arbitration awards by agreement. However, in some jurisdictions such as Belgium,[86] Sweden[87] and Switzerland[88] parties can exclude the possibility of judicial review from arbitral awards. For example, under article 1718 of the Belgian Judicial Code, parties can exclude their rights to challenge arbitral awards if none of the parties is a Belgian national. In Switzerland, according to article 192(1) of the Swiss Federal Act on Private International Law (PILA) 1987, parties can waive their right to challenge arbitral awards by their agreement if parties to a dispute have no 'domicile, habitual residence or seat in Switzerland'.[89] France reformed its arbitration law in 2011 and provided a provision

[85] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Rev Foreign Invest LJ 339.

[86] Code Judiciaire (BE), art 1718.

[87] skiljeförfarande (SFS 1999:116) (SE), s 51.

[88] Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff, art 192(1) (CH).

[89] Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff, art 192(1) (CH).

to a similar effect.[90] Article 1522 of the Code of Civil Procedure provides that '[b]y way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside'.[91]

The review is introduced in international commercial arbitration to secure a system of control. This is to ensure that the arbitration process is fair and due process is followed. It is also to ensure that arbitrators act within their powers and are cautious to render a correct award. In order to assess fully the need for reform in the review of international commercial awards, it is imperative to examine the legal implications of the current review practice. This is discussed in the next section.

2.5 The outcome of judicial review of arbitral awards

A judicial review of an arbitration award can be brought to the court of the seat of arbitration or to the enforcement court. Although both of them are conducted on similar grounds, as discussed in Section 2.6.1 below, the outcome of the review under each is different. An application to the court of the seat may lead to the annulment of an arbitral award, while an application to the enforcement court may result in refusing the recognition and enforcement of the award. These two cases are considered here.

[90] Maxi Scherer and Linda Silberman, 'Limits to Party Autonomy at the Post-Award Stage' in Franco Ferrari (ed), *Limits to Party Autonomy in International Commercial Arbitration* (Juris 2016) 444, citing nouv C pr civ, art 1522 (FR).

[91] Maxi Scherer and Linda Silberman, 'Limits to Party Autonomy at the Post-Award Stage' in Franco Ferrari (ed), *Limits to Party Autonomy in International Commercial Arbitration* (Juris 2016) 441.

2.5.1 Annulment of an arbitral award

Courts review arbitration awards upon request of parties and may 'annul', ' vacate' or 'set aside' arbitral awards.[92] An annulment action involves a petition to the courts of the seat of arbitration to annul an arbitral award.[93] The annulment is a remedy which is recognised by most national laws.[94] When a court declares that an award is annulled or set aside, the award 'ceases to have legal effect or existence'[95] and the award would be 'null and void'.[96] If an arbitral award is annulled, the dispute should be settled by commencing a new arbitration proceeding unless the court has the power to refer the matter to the original tribunal.[97]

Principally, the annulment has a global implication, and the annulled award would not be recognised and enforced in the member states of the New York Convention.[98] In other words, 'This effectively means the clock goes back to before the arbitration began'.[99] However, the enforcement court may disregard the annulment and recognise and enforce an award that was

[92] Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International 2010) 328.

[93] Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002) 15.

[94] Catherine Bratic, 'The Parties Hereby Waive All Recourse ... But Not That One: Why Parties Adopt Exclusion Agreements and Why Courts Hesitate to Enforce Them' (2018) 12 Disp Resol Intl 105, 108.

[95] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3390.

[96] Arbitration Act 1996, ss 67 and 68.

[97] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 571.

[98] New York Convention 1958, art I(1).

[99] Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International 2010) 328.

annulled in the court of the seat in exceptional cases.[100] For example, English courts will generally honour decisions of foreign jurisdictions regarding the annulment of an arbitral award. However, the court could enforce annulled arbitral awards if satisfied that the annulment is 'against basic principles of honesty, natural justice and domestic concepts of public policy'.[101]

An application to set aside an arbitral award is normally sought from national courts of the seat of arbitration. It is argued that 'legal policy, justice, convenience and maximum economy suggest that there should be an imperative opportunity to set aside an award at the place where it was made'.[102] The New York Convention does not deal with the issue of annulment procedure as it is the Convention for the recognition and enforcement of arbitral awards. However, the Convention indirectly addresses jurisdictions in which annulment of arbitration awards may be sought. Article V(1)(e) of the New York Convention provides that the recognition and enforcement of arbitral awards 'may' be refused if it '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'. Therefore, the Convention indicates that the court of the seat of arbitration is the competent court to hear a challenge on the validity of an arbitration award.

Similar provisions are provided in UNCITRAL Model Law article 36(1)(a)(v). It provides that the recognition and enforcement of arbitral awards may be refused if that 'award has not yet become binding on the parties or has been set aside or suspended by a court of the country in

[100] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3390.
[101] Jack Beatson, 'International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts' (2017) 33 Arb Intl 175, 189, citing *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep 435 [20].
[102] Amazu Asouzu, 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure' (1995) 7 Afr J Intl & Comp L 68, 85.

which, under the law of which, that award was made'. This practice is also recognised by most national jurisdictions. For example, article 190 of the Swiss Federal Act on Private International Law (PILA) 1987 provides the grounds for the annulment of an arbitral award and attributes the authority to set aside an arbitral award to the Swiss Federal Supreme Court in the following articles.[103] The appropriate court to review an arbitration award is discussed in Chapter 3 of this thesis.

2.5.2 Judicial review by enforcement courts (refusing the enforcement)

The legal consequence of a review at the enforcement court differs from such a review at the court of the seat. The outcome of judicial review at the enforcement court is examined here. A losing party may resist the enforcement of an arbitral award by challenging the award at the enforcement court. The enforcement court generally reviews arbitral awards and decide whether to grant recognition and enforcement. The New York Convention is a pro-enforcement convention[104] and restricts the grounds on which parties can challenge the recognition and enforcement of an arbitration award. Article III of the New York Convention obliged member states to pave the way for recognition and enforcement of arbitral awards within their boundaries. It provides that 'Each Contracting State shall recognise arbitral awards as binding and enforce them'.[105] There is also no provision in the Convention to permit substantive review on the merit of arbitral awards.

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[103] Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff (CH), arts 191, 192(1).

[104] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 616.

[105] New York Convention 1958, art II.

The trend in most jurisdictions, especially those who ratified the Convention, is in favour of recognition and enforcement of arbitral awards 'as being similar in authority to court judgments'.[106] It is important to note that member states' courts 'have also consistently found that the Convention does not allow refusal to recognise and enforce based on procedural grounds other than those listed in Article V'.[107] Therefore, normally national courts, when receiving applications to challenge the enforcement of an arbitral award, construe these grounds narrowly in order to enforce arbitration awards.[108] Van den Berg state that 'the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award'.[109] However, their existence safeguards the fundamental right of the losing parties.[110] Abedian argues that it is self-evident that judicial scrutiny is essential in order to grant enforcement since a judge must ensure basic fairness of the proceedings and to protect the public policy of the place of enforcement.[111]

The Secretary-General in his note regarding the comment on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, in United Nations Conference

[106] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 885.

[107] UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Emmanuel Gaillard and George A Bermann eds, Brill Nijhoff 2017) 135.

[108] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) 231.

[109] Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 265.

[110] *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [102].

[111] Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 J Intl Arb 553, 554.

on International Commercial Arbitration, addressed the issue of 'judicial control over the enforceability of arbitral awards' by asserting that:

> One of the central problems of the proposed Convention is to define the conditions under which the competent authorities of the country where the recognition and enforcement of an arbitral award is sought may refuse to grant such a request. It seems generally agreed that, on the one hand, courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible with the public policy of the country of enforcement. On the other hand, if the enforcing authorities were to proceed in each case with a full re-examination of such awards … the purpose of the Convention might be defeated. … The extent of judicial control over the recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it.[112]

The drafter of the Convention struggled to provide the right balance between protecting the parties' rights and pro-enforcement policies which protect the enforceability of arbitration awards. Therefore, the Convention was drafted in a way that it limited the scope of judicial review at the enforcement stage while allowing national courts of the place of enforcement to refuse the recognition and enforcement if they find that the fundamental principle of due process or their public policies will be violated by enforcing flawed arbitral awards.

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[112] 'Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (6 March 1958) UN Doc E/CONF.26/2, para 9.

The decision of an enforcement court has 'a territorial effect'.[113] This means that refusing recognition and enforcement of arbitral awards in one jurisdiction will not make the award null and void in other jurisdictions.[114] Such a decision by an enforcement court only makes arbitration awards unenforceable in that particular state which reviewed the arbitration award. The arbitral award is still binding, and parties can enforce the arbitral award in other relevant jurisdictions.[115] This review process is different from the one which is sought from national courts of the seat of arbitration for annulling an arbitration award where an award may become null and void in all jurisdictions as discussed above.

Annulment of an arbitral award or refusing its enforcement are two distinct processes which are sought through different courts. Although the grounds for judicial review of an arbitral award are similar, the outcome of the review is different. The enforcement court has no jurisdiction to annul an arbitral award and can only refuse the enforcement while the court of the seat may revoke an arbitral award as a result of a judicial review. The purpose of both procedures is to ensure justice and fairness in arbitration proceedings.

2.6 The degree of judicial review

An important question that this research tries to answer is whether the scope of the review of an international commercial arbitral award should be expanded. In order to answer this question, it is important to identify the scope of judicial review in the current practice.

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[113] Albert Jan van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27 J Intl Arb 179, 182.

[114] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3390.

[115] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3390.

Concerns over the efficiency of international commercial arbitration and the tendency to avoid excessive judicial intervention in international commercial arbitration have led to a restriction of the scope of judicial review. It is stated that 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'.[116]

The judicial review of an arbitral award, although in a restricted form, is a mechanism designed to protect the minimum standards of justice in international commercial arbitration. States take different approaches toward an application of judicial review in their boundaries. For example, pro-arbitration states[117] provide a restricted form of judicial review.[118] Redfern and Hunter support the limited judicial review in international commercial arbitration by arguing that:

> There are nevertheless serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral awards. First, the decisions of national judges may be substituted for the decisions of an arbitral tribunal specifically selected by, or on behalf of, the parties. Secondly, a party that agreed to arbitration as a private method of resolving disputes may find itself brought unwillingly before national courts that hold their hearings in public. Thirdly, the appeal process may be used simply to

[116] Emmanuel Gaillard ed, *The Review of International Arbitral Awards* (Juris 2010) 399, citing Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3079, para 35.

[117] For example, English Arbitration Act 1996, ss 67, 68; Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff (CH), art 190(2).

[118] Doug Jones, *Commercial Arbitration in Australia* (2nd edn, Thomson Reuters 2013)109.

> postpone the day on which payment is due, so that one of the main purposes of international arbitration—the speedy resolution of disputes—is defeated.[119]

The European Court of Justice in *Eco Swiss China Time Ltd v Benetton International NV*,[120] rendered an important decision which emphasises a limited judicial intervention in the review of an arbitral award. It held that 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'.[121]

Although there are distinctions in national laws of different countries, a level of harmonisation in grounds for judicial review of an arbitral award is achieved as a result of the recognition of the New York Convention and adoption and growing momentum of the UNCITRAL Model Law.[122] Additionally, the grounds for refusing enforcement of arbitral awards according to article V of the New York Convention inspired countries in adopting similar grounds for the annulment of an arbitral award.[123]

During the drafting of the Model Law, a question arose whether the grounds for setting aside arbitral awards should be identical to those grounds set out in article V of the New York

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[119] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 591.

[120] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3079.

[121] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3079, para 35.

[122] Emmanuel Gaillard, 'The Enforcement of Awards Set aside in the Country of Origin' (1999) 14 ICSID Rev 16, 16.

[123] Michael Ostrove, James Carter and Ben Sanderson, 'Awards: Challenges' in J William Rowley, Emmanuel Gaillard and Gordon E Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Awards* (David Samuels 2019) 23.

Convention for refusing recognition and enforcement of arbitral awards. It is argued that 'the Secretariat urged from the very beginning that the New York Convention grounds be incorporated into the Model Law's setting–aside provision'.[124] Adopting similar grounds would 'help to prevent that an international award falls victim to local particularities of law although the case at hand bears no substantive connexion with that respective State'.[125] The UNCITRAL working group argued that adopting those grounds set out in article V of the New York Convention would 'facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonised system of limited recourse against awards and their enforcement'.[126] Born states that:

> [T]he Convention imposes implied limits on the substantive grounds that may be relied upon to annul awards in the arbitral seat; although these grounds leave substantial autonomy to national courts and legislatures in the arbitral seat, they nonetheless impose international limits on the annulment of international awards'.[127]

The same practice to set similar grounds for the annulment of an arbitral award and refusing enforcement of foreign arbitral awards is adapted in some jurisdictions. For example, in France, article 1520 of the French Code of Civil Procedure sets out the grounds for annulment of international arbitral awards:

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[124] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration:Legislative History and Commentary* (Kluwer Law International 1989) 911.

[125] Report of the Secretary-General, 'Possible features of a model law on international commercial arbitration' (1981) UN Doc A/CN.9/207, 92.

[126] UNCITRAL 'Report of the Working Group on International Contract Practices on the work of its fifth session' (New York 22 February-4 March 1983) UN Doc A/CN.9/233, para 187.

[127] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3168.

> An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.

Article 1522 of the French Code of Civil Procedure refers to the same set of grounds for refusing the enforcement of an arbitral award by providing that 'By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside. Where such right has been waived, the parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520'.

Article 34 of the Model Law sets out exclusive grounds for challenging arbitration awards.[128] These grounds protect the minimum standards of due process in international commercial

[128] Article 34 of the Model Law provides that '(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the

arbitration. Grounds for annulling an arbitral award can be classified as, the incapacity of parties, the invalidity of the arbitration agreement, the lack of proper notice, the lack of opportunity for parties to present the case, the failure in conducting arbitration according to the parties agreement, the failure in constituting the arbitral tribunal pursuant to parties agreement, non-arbitrability of the dispute and a violation of public policy.[129] Although the adoption of the Model Law is not compulsory, these grounds are adopted by most national jurisdictions[130] on their own initiative, sometimes with additional grounds.[131] For example, article 1717 of the Belgian Judicial Code provides more grounds compared to the grounds set out in the Model Law.[132] These additional grounds are the lack of a reasoned award,[133] and where an award is obtained by fraud.[134]

Some jurisdictions such as England and France are influenced by UNCITRAL Model Law and adopted similar grounds set out in article 34 of the Model Law for annulling arbitral award with some exemptions. For example, article 1520 (4) of the French Code of Civil Procedure provides that an arbitral award may be set aside where 'due process was violated' where the similar ground in article 34 (1) (ii) is limited to lack of proper notice and lack of opportunity to present

court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

[129] UNCITRAL Model Law 1985, art 34.

[130] UNCITRAL Model Law 1985, art 34 (a).

[131] Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 J Intl Arb 553, 559.

[132] Hakim Boularbah, Olivier van der Haegen and Jasmine Rayée, 'Belgium' in J William Rowley, Emmanuel Gaillard and Gordon E Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Awards* (David Samuels 2019) 189.

[133] Code Judiciaire, art 1717(3)(a)(iv) (BE).

[134] Code Judiciaire, art 1717(3)(b)(iii) (BE).

the case.[135] The English Arbitration Act 1996 sets out possible ways of challenging arbitration awards. It provides that parties can challenge an arbitral tribunal's substantive jurisdiction under section 67 of the Act. They can also bring challenges for procedural irregularities under section 68 of the Arbitration Act 1996. These two sections are mandatory, and parties cannot exclude them by agreement.[136]

In the United States, a reviewing court may vacate the award according to the grounds set out in section 10 of the Federal Arbitration Act, where for example, procurement of an award by 'corruption, fraud, or undue means' and evidence of 'partiality or corruption in the arbitrators or either of them' are stated as grounds for annulment of an arbitration award.

Almost similar grounds are adopted for the review of an arbitration award at the enforcement stage. Article V of the New York Convention sets out an exclusive list of grounds for refusing recognition and enforcement of arbitral awards.[137] These grounds are mainly procedural

[135] See footnote 128.

[136] English Arbitration Act 1996, s 4(1).

[137] Article V of the New York Convention 1958 provides that:

'1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference 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 submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral

irregularities and jurisdictional challenges. The court may refuse recognition and enforcement if it is satisfied that the parties to the agreement are under some incapacity, an arbitration agreement is not valid, the parties did not receive proper notice and did not have a proper opportunity to present their case, the tribunal exceeded its authority, the arbitration was not conducted in accordance with the parties arbitration agreement, the award has not yet become binding or has been set aside or suspended by a competent court, violation of public policy and the dispute was not capable of settling by arbitration. The grounds 'are restricted to causes which may be considered as serious defects in the arbitration and award'.[138] Paulsson argues that the Convention sets forth seven grounds based on which parties can bring a challenge to the court and resist the enforcement.[139] The first five grounds set out in article V(1), such as grounds relating to procedural irregularities, must be invoked by the parties. While grounds set out in article V(2) of the New York Convention may be invoked by the enforcement court itself.[140] This would not prevent parties from invoking them. He argues that 'Article V(1)'s

authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or 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.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

[138] Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 265.

[139] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 157.

[140] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 157.

rationale is broadly the protection of the defendant's right to due process. Article V(2) protects Contracting States' notions of sovereignty'.[141]

Article 36 of the UNCITRAL Model Law also specifies similar grounds for non-recognition and non-enforcement of arbitral awards. Similar grounds are adopted by most states signatory to the New York Convention. For example, section 103 of the Arbitration Act 1996 mirrors all provisions of article V of the Convention.

2.6.1 Grounds for annulment or refusal of enforcement

Grounds for challenging an arbitral award in order to set it aside or to resist the enforcement are almost identical although 'They achieve different results, with different legal implications'.[142] Some of the grounds invoked by parties for seeking the annulment of an arbitral award or for resisting the recognition and enforcement of arbitral awards are examined here in order to demonstrate the narrow scope of review of an arbitral award in practice.

2.6.1.1 Incapacity of parties and invalidity of an arbitration agreement

Incapacity of parties and lack of a valid arbitral agreement are amongst grounds which are set out for seeking annulment of arbitral awards or refusing their enforcement. These grounds are set out in article 34 (2)(a)(i) of the UNICTRAL Model Law which provides that an arbitral award may be set aside by a court only if 'a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which

[141] Marike Paulsson, The 1958 New York Convention in Action (Kluwer Law International 2016) 157.

[142] Amazu Asouzu, 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure' (1995) 7 Afr J Intl & Comp L 68, 90; Ilias Bantekas, *An Introduction to International Arbitration* (CUP 2015) 219.

the parties have subjected it or, failing any indication thereon, under the law of this State'. Article V (1)(a) of the New York Convention also provides that the recognition and enforcement of arbitral awards may be refused if '(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

The reason for the inclusion of these grounds is that parties should have the capacity to enter into a legal relationship that allows them to settle their dispute by arbitration.[143] A party to an arbitration agreement must have the capacity to enter into legally binding relations under the law applicable to them.[144] For example, parties should satisfy specific requirements such as fulfilling the age threshold or mental capacity in order to enter into binding agreements.[145] Parties to an arbitration agreement should have legal capacity to contract. The lack of capacity will make the arbitration agreement invalid.

The UNCITRAL Model Law failed in determining the law governing the issue of capacity. [146] However, article V(1)(a) the New York Convention briefly addresses the issue by providing that the enforcement of arbitral awards may be refused if the parties to the agreement are under some incapacity 'under the law applicable to them'. The New York Convention failed to address how the applicable law would be determined. The lack of clarity concerning the law

[143] Ilias Bantekas and others, *The UNCITRAL Model Law on International Arbitration: A Commentary* (CUP 2020) 866.

[144] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 81.

[145] *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd* [1998] 1 HKC 676.

[146] Ilias Bantekas and others, *The UNCITRAL Model Law on International Arbitration: A Commentary* (CUP 2020) 868.

governing the issue of capacity may cause countries to take different approaches in determining the law governing parties' capacity. This may increase inconsistency in practice. For example, a court in determining the capacity of parties as a ground to challenge an arbitration award may refer to the conflict of laws rules of the seat of arbitration, which may reach a different conclusion with the tribunal as the tribunal may decide the capacity issue on a different basis.[147] The law of the seat of arbitration, the law governing the arbitral agreement, or any other applicable law may be used for this purpose. It is argued that 'the most likely approach for national courts is to identify the law governing the parties' capacity on the basis of the conflict of laws rules of the seat. This approach should normally lead to the application of the parties' personal law, rather than the law regulating the agreement or the law of the seat'.[148] The personal law[149] is the 'place of residence or nationality' for individuals and is the law of the place of business for legal persons.[150]

In *Dalmine v. Sheet Metal Forming Machinery*,[151] Dalmine challenged the arbitral award on the ground that a person who signed the arbitration agreement had no authority to sign the arbitration agreement with the Sheet Metal Forming Machinery because he was not empowered to conduct extraordinary administration. The Supreme Court of Italy granted enforcement and

[147] Ilias Bantekas and others, *The UNCITRAL Model Law on International Arbitration: A Commentary* (CUP 2020) 868.

[148] Ilias Bantekas and others, *The UNCITRAL Model Law on International Arbitration: A Commentary* (CUP 2020) 868.

[149] Saad Badah, 'Incapacity of Parties and Invalidity of Arbitration Agreement as Grounds for Refusing Recognition and Enforcement in Kuwait' [2014] AGORA Intl J Jurid Sci 44, 47.

[150] Teresa Giovannini, 'The making and enforcement of the arbitral award: What are the grounds on which awards are most often set aside?' (2001) Bus L Int'l 117, 119.

[151] *Dalmine SpA v M & M Sheet Metal Forming Machinery AG*, Cass 23 Aprile 1997 n 152, (1999) XXIVa YB Comm Arb 709.

held that the lack of power to sign the contract was a matter of capacity which should be considered under Italian law as the law applicable to them rather than the law of the seat of arbitration which was Swiss law.[152]

The invalidity of an arbitration agreement is also amongst the grounds for annulling an arbitral award according to article 34(2)(i) or refusing enforcement pursuant to article V(a) of the New York Convention. The validity of the arbitration agreement will be assessed by the law to which the parties have subjected it or, in the absence of any indication, the law of the seat, where the setting-aside proceedings are taking place. A valid arbitration agreement should satisfy some formalities such as the necessity for a written arbitral agreement.[153]

In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*,[154] Dallah, a company providing services for the holy places in Saudi Arabia, entered into an agreement with a Pakistani trust to construct lodgings for pilgrims in Saudi Arabia. According to their contract, disputes should be referred to arbitration. The contract was signed by the trust established by the Pakistani Government and the government did not sign it. The trust was later terminated as a result of changes in the government. A dispute arose and was submitted to arbitration for consideration. Arbitration was conducted under the rules of the International Chamber of Commerce (ICC) in France and the award was rendered in favour of Dallah and against the Government of Pakistan. Dallah sought enforcement from the English court. However, the Government of Pakistan resisted enforcement and claimed that it was not bound by the arbitration agreement. They argued that the award was unenforceable

[152] *Dalmine SpA v M & M Sheet Metal Forming Machinery AG*, Cass 23 Aprile 1997 n 152, (1999) XXIVa YB Comm Arb 709.

[153] UNCITRAL Model Law 1985, art 7; New York Convention 198, art II.

[154] [2008] EWHC 1901 (Comm), [2009] 1 All ER Comm 505.

under section 103(2)(b) of the Arbitration Act 1996 and article V(1)(a) of the New York Convention as the Government of Pakistan was not a party to the agreement. The court refused enforcement under section 103(2)(a) of the English Arbitration Act 1996 on the ground that there was no valid arbitration agreement between the parties. The case demonstrates that the fundamental right of a person who is not a party to an arbitration agreement is safeguarded and an enforcement court may reject enforcement when there is no valid arbitration agreement without deciding about the validity of the arbitral award. This would not prevent parties from seeking enforcement in another jurisdiction.

Arbitration requires an agreement in order to be valid. A valid agreement and the capacity to enter an agreement are two fundamental requirements and the lack of them would make the agreement void and unenforceable. Therefore, these grounds are introduced to ensure the validity of an arbitration award and to protect justice.

2.6.1.2 Lack of notice and inability to present

Parties may bring challenges on the grounds of procedural irregularities such as lack of proper notice and inability to present the case. These are the grounds which are designed to protect the principles of due process and natural justice and the right to a fair trial.[155]

The UNCITRAL Model Law in article 18 clearly addresses the importance and necessity of due process by providing that parties in arbitration proceedings 'shall be treated with equality and each party shall be given a full opportunity to present its case'. Both the UNCITRAL Model Law and the New York Convention also expressly address these grounds as the basis of annulling arbitral awards or refusing enforcement in article 34 (2)(ii) and article V(1)(b)

[155] Ilias Bantekas, *An Introduction to International Arbitration* (CUP 2015) 201.

respectively. Parties should be treated fairly. They have to be informed about proceedings and also have a chance to present and defend their case.

National arbitration laws also provide provisions that secure the right to be heard and receive fair and equal treatment in arbitration proceedings.[156] For example, section 33 of the Arbitration Act 1996 provides that the arbitral tribunal should 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. The tribunal should also 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[157] For example, in *ABB Ltd v. Bam Nuttall Ltd,*[158] the English High Court emphasised the importance of the principle of natural justice in arbitration proceedings by asserting that:

> Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the court can have no confidence in the fairness of the decision making process.[159]

In *International Relief and Development Inc v Ladu*,[160] the Federal Court of Australia rejected the challenge brought by Ladu to resist enforcement on the basis that he had not received proper

[156] For example, s 1042 1 ZPO (DE); Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff (CH), art 182 .

[157] Arbitration Act 1996, s 33(b).

[158] [2013] EWHC 1983 (TCC), [2013] Build LR 529.

[159] *ABB Ltd v. Bam Nuttall Ltd* [2013] EWHC 1983 (TCC), [2013] Build LR 529, [5].

[160] [2014] FCA 887.

notice of the appointment of an arbitrator or the arbitration proceedings, therefore, he was unable to present his case in the proceedings according to section 8(5) of the International Arbitration Act 1974 (Cth). The Federal Court held that Ladu failed to show that proper notice was not given. The Court will only reject the enforcement of an arbitral award 'on the basis of a lack of proper notice presented with compelling evidence of a lack of notice'. This case indicated that although there is a possibility to challenge arbitral awards where parties believe there are serious irregularities in the arbitration process, firm evidence is required in order to challenge an arbitration award successfully.

2.6.1.3 Grounds for jurisdictional challenges

An arbitrator's authority to settle a dispute originates from the parties' arbitration agreement. In drafting arbitration agreements, parties usually determine arbitrators' powers and limits. Arbitrators should decide cases within the scope of their authority, and they cannot render arbitral awards contrary to the parties' agreement. For example, arbitrators can only bind parties to the agreement while they cannot bind third parties. Tribunal '*ultra petita*' behaviour may annul the award if the tribunal exceeded its mandate by rendering the award beyond or different from something requested by parties.[161] The party who challenges an arbitration award based on jurisdictional grounds should furnish the court with proof that arbitrators have violated their contractual authority.[162]

Article 34(2)(a)(iii) of the Model Law also provides that an arbitral award may be annulled if:

[161] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 323.

[162] UNCITRAL Model Law, art 34(2)(a).

> [T]he award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

Parties can also raise this challenge at the enforcement stage and resist enforcement. Article V (1)(c) of the New York Convention provides that the recognition and enforcement of arbitral awards may be refused if:

> [T]he award deals with a difference 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 submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

The excess of authority deals with the situations where an arbitration agreement exists and is valid, but the arbitrators exceed their authority.[163] In *Aspic Engineering & Construction Co v ECC Centcom Constructors LLC,*[164] Aspic was a subcontractor for two ECC projects. The subcontract included a Federal Acquisition Regulation (FAR) clause which allowed termination for convenience. During the construction, ECC terminated contracts for convenience. When the parties could not settle their dispute, Aspic initiated arbitration which ruled in its favour and held that it was not required to comply with FAR provisions since it was a private organisation

[163] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 323.

[164] 913 F.3d 1162, (9th Cir 2019).

while FAR is set for the federal organisation. The Ninth Circuit annulled the award and held that the arbitrator had exceeded its authority by going beyond the arbitration agreement and applying his or her rationality to decide the case.

Another ground for challenging an arbitration award is a failure in the composition of the tribunal according to the parties' agreement or according to the law of the country where the arbitration takes place. Sometimes the parties determine the constitution of the tribunal. Therefore, the tribunal should be constituted according to their agreement; otherwise, the award rendered by this tribunal would be annulled, or its enforcement would be refused. Article 34(2)(iv) of Model Law provides that if 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties' the award may be annulled by the court. Similarly, article V(1)(d) of the New York Convention provides that the recognition and enforcement of an arbitral award may be refused if 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

2.6.1.4 Public policy

A violation of public policy may lead to the annulment of the award or may hinder its enforcement.[165] Public policy reflects 'the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community'.[166]

[165] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21 Law & Pol'y Intl Bus 389, 391.

[166] Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978) 532.

Public policy 'refers to matters which the laws of a state or state courts have determined to be of such fundamental importance that contracting parties are not free to avoid or circumvent them'.[167] The New York Convention and UNCITRAL Model Law do not define the concept of public policy, which results in varied definitions from one jurisdiction to another.[168]

Public policy considerations are addressed in article V(2)(b) of the New York Convention which provides that the recognition and enforcement of an arbitral award may be refused if 'The recognition or enforcement of the award would be contrary to the public policy of that country'. It is also reflected in article 36 (b)(ii) of the Model Law which provides that recognition or enforcement of an arbitral award may be refused if the 'recognition or enforcement of the award would be contrary to the public policy of this State'. Article 34(b)(ii) of the Model Law provides a similar provision for the annulment of an arbitration award by providing that an arbitral award may be set aside if the court finds that 'the award is in conflict with the public policy of this State'.

Annulling arbitral awards or refusing enforcement of arbitral awards on the ground of public policy is difficult to achieve as it is 'limited to blatant and severe violations of the fundamental procedural or substantive conceptions of a state's legal order'.[169] The current trend in

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[167] Joseph R Nuss, 'Public Policy Invoked as a Ground For Contesting the Enforcement of an Arbitral Award, or for Seeking Its Annulment' (2013) 7 Disp Resol Intl 119, 119.

[168] IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, 'Report on the Public Policy Exception in the New York Convention' (2015) 2 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E> accessed 1 October 2020; Sameer Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach' (2011) 8 Transitional Disp M Journal 2, 4 <www.transnational-dispute-management.com/article.asp?key=1759> accessed 01 0ctober 2020.

[169] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82 J Intl Arb Med Disp Mang 2, 7.

international commercial arbitration is in favour of enforcing arbitral awards. Therefore, national courts tend to construe the public policy consideration narrowly and apply a 'universally accepted concept of public policy'.[170] This is to reduce the risk of annulment and resisting enforcement. Sattar argues that 'public policy has been interpreted narrowly by the national courts. This is because the courts of developed jurisdictions generally bear a pro-enforcement attitude towards arbitral awards which they consider to be a stand-alone element of public policy itself'.[171]

In *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du papier (RAKTA),*[172] parties to the proceedings agreed to construct a paperboard mill in Egypt. They decided that any disputes between them should be settled by arbitration under the rule of the International Chamber of Commerce (ICC). Disputes arose as a result of the disruption in the construction process because of Six-Day War between Israel and Arab states in 1967. This war caused hostility between the United States and Egypt, as the United States were a close ally to Israel. The majority of the Overseas staff left Egypt. The diplomatic tie between the two countries broke and Americans were expelled from Egypt except those who applied and obtained the special visa. RAKTA claimed that Parsons & Whittemore Overseas failed to complete the project and commenced arbitration and claimed damages for breach of the contract. Parsons & Whittemore Overseas argued that the work was postponed within the meaning of a

[170] Sameer Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach' (2011) 8 Transitional Disp M Journal 2, 4 <www.transnational-dispute-management.com/article.asp?key=1759> accessed 01 0ctober 2020.

[171] Sameer Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach' (2011) 8 Transitional Disp M Journal 2, 5 <www.transnational-dispute-management.com/article.asp?key=1759> accessed 01 0ctober 2020.

[172] 508 F.2d 969 (2nd Cir 1974), 1974 US App LEXIS 5501.

force majeure clause in the contract. An arbitration award was rendered in favour of RAKTA and enforcement of the arbitral award sought in the United States. Overseas resisted the enforcement by bringing challenges under public policy to the United States Court of Appeals for the Second Circuit. The Court dismissed the challenge in favour of the enforcement. The court held that 'the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice'.[173] It is clear that, in the United States, it would be difficult to overturn arbitral awards on the public policy ground.[174]

In practice, national jurisdictions may apply national, international or transnational interpretations of the public policy exception.[175] However, pro-arbitration states are reluctant to apply national public policy exceptions to international commercial arbitration disputes. Pro-arbitration courts have interpreted public policy as international public policy. For example, the French Code of Civil Procedure in article 1520 permits awards to be set aside if the award violates international public policy, which is interpreted as mandatory French rules and values

[173] *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du papier (RAKTA),* 508 F.2d 969, 975 (2nd Cir 1974), 1974 US App LEXIS 5501, 5510.

[174] *International Navigation Ltd. v Waterside Ocean Navigation Co Inc,* 737 F.2d 150 (2nd Cir 1984).

[175] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 422.

applicable even to international matters.[176] The scope of application of international public policy is usually narrower than domestic public policy.[177]

2.6.1.5 Arbitrability

Parties can also bring a challenge on grounds of non-arbitrability of the disputes in order to annul an arbitral award or resist its enforcement. National courts should determine whether a particular type of dispute can be settled by arbitration. Non-arbitrability 'encompasses disputes involving matters of public policy which are deemed inappropriate for resolution by arbitration'[178] Other factors such as economic, political, public interest, social, cultural and necessity of judicial protection[179] may play a role in determining the arbitrability of disputes in particular states. The settlement of certain types of disputes should be reserved to the exclusive authority of national courts [180] such as family disputes, criminal disputes and tax disputes. For example, article 2059 of the French Civil Code provides that 'All persons may make arbitration agreements relating to rights of which they have the free disposal'.[181] However, it provides exceptions to this general rule in article 2060 by providing that:

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[176] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy', (2004) 20 Arb Intl 333, 340.

[177] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy', (2004) 20 Arb Intl 333, 340.

[178] Gary B Born, *International Commercial Arbitration: Commentary and Materials* (2nd ed, Kluwer Law International 2001) 160.

[179] Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 Arb Intl 275, 277.

[180] Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 Arb Intl 275, 277.

[181] Roland Ziadé and Patricia Peterson, '2016 Research Project: Comparative Study of 'Arbitrability' under the New York Convention, Report on France' (IBA 2016) 8.

> One may not enter into arbitration agreements in matters of status and capacity of persons, in those relating to divorce or to judicial separation or disputes relating to public bodies and institutions, and, more generally, in all matters in which public policy is concerned. However, categories of public institutions of an industrial or commercial character may be authorised by decree to enter into arbitration agreements.[182]

The non-arbitrability of disputes may make the arbitration agreement null and void, inoperative or incapable of being performed.[183] Article 34(b)(i) of the UNCITRAL Model Law provides that an arbitral award may be set aside if 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State'. The New York Convention in article V addresses the issue by providing that recognition and enforcement of an arbitral award may also be refused if 'the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country'.

The pro-enforcement approach of the national courts makes it difficult to challenge an award based on arbitrability. *Honeywell International Middle East Ltd v Meydan Group LLC* [184] is the case which indicates the pro-enforcement approach of the English court despite the allegation of bribery. Honeywell and Meydan agreed to carry out renovations at a Dubai racecourse. According to their agreement, any disputes between parties should be settled by arbitration under the rules of the Dubai International Arbitration Centre ("DIAC"). Meydan failed to meet its payment obligations, and a dispute arose between the parties. The tribunal

[182] Roland Ziadé and Patricia Peterson, '2016 Research Project: Comparative Study of 'Arbitrability' under the New York Convention, Report on France' (IBA 2016) 9.

[183] New York Convention 1958, article II(1).

[184] [2014] EWHC 1344 (TCC), [2014] 2 Lloyd's Rep 133.

commenced its proceedings and rendered an award against Meydan to pay the amount of 12.6 million pounds. Honeywell sought leave to enforce the arbitral award in England while Meydan resisted the enforcement by invoking several grounds set out in section 103 of the Arbitration Act 1996. One of the grounds for challenging the arbitral award was an allegation of bribery in respect of the original contracts. Meydan claimed the subject matter was not able to be settled by arbitration due to the allegation of bribery. It was contrary to English public policy to enforce such awards according to section 103(3) of the Act 1996 which provides that '[r]ecognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award'. The Court dismissed Meydan application by asserting that:

> It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable. It follows that I do not consider that Meydan has real prospects of successfully contending that recognition or enforcement of the Award should be refused on the basis that it would be contrary to public policy, if contrary to my previous conclusion, the Contract had been procured by a bribe.[185]

It is clear that although bribery is considered contrary to English public policy, contracts that are procured by bribes are enforceable and the matter is deemed to be arbitrable. This demonstrates how narrowly grounds to challenge an arbitration award are treated in the English courts.

[185] *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC), [2014] 2 Lloyd's Rep 133 [185].

Discussions here demonstrate the pro-arbitration stance of courts in reviewing arbitral awards. The grounds for seeking review are restricted in international commercial arbitration by national laws. Furthermore, courts may interpret these grounds narrowly. The parties are left with a small opportunity to correct an error in the arbitration award.

2.7 Appeal in international commercial arbitration

Another type of review of arbitration awards is a review on the merits of disputes. This is also known as an appellate review through which a court examines the fact-finding and legal reasoning of an award. This provides a higher level of scrutiny than a judicial review in which the arbitrator's fact-findings and the legal reasons are generally free from any scrutiny, and there is often no mechanism to correct tribunal mistakes of fact or law. Sammartano argues that:

> while in court proceedings the right of the loser to have the case entirely reheard is well established. Contrary to this, the arbitration circles have defended hotly the 'Sanctity of the Award' and used their best efforts to try that it is treated as a 'taboo'. No review of the merits is allowed by many legal systems and by international conventions on commercial arbitration. No error in substantive law (such as the choice of a wrong law, or a wrong application of the law) may be cured. Only major errors as to the rules of procedure may be remedied.[186]

Neither the UNCITRAL Model Law nor the New York Convention recognises appellate review of arbitral awards, and there are no provisions allowing for such a possibility in either

[186] Mauro Rubino Sammartano, 'Arbitration Is Useful Only if It Is Better than Court Proceedings' in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010) 1049.

instrument. Similarly, national arbitration laws do not usually provide such a review. For example, in Austria according to article 611(2) of the Austrian Code of Civil Procedure (ZPO), arbitral awards validity can only be challenged by filing an application for annulment and there is no possibility to appeal on merits. In Germany, an appeal on the merits is not offered in arbitration law. The only available recourse against arbitral awards is commencing annulment proceedings according to article 1059 the German Code of Civil Procedure (ZPO). In Malaysia, section 36 of the Malaysian Arbitration Act 2005 makes clear that an arbitral award is final and binding on the parties. Consistently, there is no possibility of an appeal on the merits against international arbitral awards under Malaysian law. Section 37(1) provides limited grounds for challenging an arbitral award by filing an application for annulment.

In Portugal, according to article 46 of the Portuguese Voluntary Arbitration Law awards cannot be appealed on the merits and challenges on arbitral awards only are allowed by commencing set aside proceedings. However, according to article 39(4) parties can expressly agree to have recourse to appeal in their proceedings and provide provisions governing their appeal process. In Switzerland under the Swiss Private International Law, an arbitral award cannot be appealed on merits. According to the Swiss Federal Act on Private International Law awards may only be set aside according to the grounds set out in article 190(2) of the law before the Swiss Federal Supreme Court (article 191).

In the United States, parties have no right to appeal from an arbitral award. Section 10 of the Federal Arbitration Act provides that a court may vacate an arbitral award based only on the limited grounds set out in the section. In France, there is no possibility of appeal either on a question of law or a question of fact under the Code of Civil Procedure in international arbitration. In Argentina, according to article 99 of the International Commercial Arbitration

Act of Argentina, the only recourse against an arbitral award is bringing a challenge to set aside an arbitral award to the commercial court of appeals of the seat of arbitration. Grounds to set aside an arbitration award are similar to the grounds set forth by the UNCITRAL Model Law.

However, a few jurisdictions permit review on the merits of the legal findings of arbitral tribunals. They provide an appellate review to 'maximise legal certainty concerning the merits of the dispute'.[187] They restrict the scope of appeal considerably and limit it to the utmost.[188] For example, English law permits appeals on a question of law. Section 69(1) of the Arbitration Act 1996 provides that 'Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings'. However, the Act restricts the application of section 69 by providing that 'An appeal shall not be brought under this section except— (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court'.[189] Appeal on a question of fact is not permitted under the English Arbitration Act 1996.[190]

Similarly, the Hong Kong Arbitration Ordinance (Cap. 609) allows parties to appeal on a question of law. Schedule 2, section 5(1) of the Ordinance provides that '…a party to arbitral proceedings may appeal to the Court on a question of law arising out of an award made in the

[187] William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tul L Rev 647, 685, 686.

[188] Howard M Holtzmann and others, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) 924.

[189] English Arbitration Act 1996, s 69(2).

[190] *Guangzhou Dockyards Co Ltd v ENE Aegiali 1* [2010] EWHC 2826 (Comm), [2011] 2 All ER Comm 595.

arbitral proceedings'. However, this appeal is optional and requires the agreement of all parties or with the leave of the Court.[191]

New Zealand is another country that allows an appeal on a question of law. Clause 5(1), schedule 2 of the New Zealand Arbitration Act 1996 provides that 'any party may appeal to the High Court on any question of law arising out of an award'. This requires the agreement of all parties and also the leave of the High Court.

Another example is the Ontario Arbitration Act. Section 45 of the Act allows parties to appeal an arbitral award on a question of law. The court will grant permission to appeal if it is satisfied that 'the importance to the parties of the matters at stake in the arbitration justifies an appeal' or 'determination of the question of law at issue will significantly affect the rights of the parties'.[192] Leave to appeal may be granted for a question of fact if parties to an arbitration agreement expressly include such a right in their agreement.[193]

Some arbitral institutions also provide an appellate review option for parties who want to have this type of recourse in their arbitration processes. For example, the International Institute for Conflict Prevention & Resolution (CPR),[194] Judicial Arbitration and Mediation Services (JAMS)[195] and American Arbitration Association (AAA)[196] provide an 'opt in' appeal procedure which allows a second tribunal to review the award rendered by the first tribunal on

[191] [1 June 2011] LN 38 of 2011 (Hong Kong Arbitration Ordinance), Cap 609, sch 2, s 6(5)(1).

[192] *Arbitration Act*, SO 1991, c 17, s 45(1).

[193] According to section 45(3) of the Ontario Arbitration Act, 'if the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law'.

[194] Conflict Prevention & Resolution, Appellate Arbitration Procedure 2015.

[195] JAMS Optional Arbitration Appeal Procedures 2003.

[196] American Arbitration Association, Optional Appellate Arbitration Rules 2013.

a question of law or fact. Parties should agree on this type of appeal in their arbitration agreement.[197] The possibility of appeal is also recognised by the European Court of Arbitration which provides an 'opt-out' appeal procedure.[198]

The International Institute for Conflict Prevention & Resolution (CPR), American Arbitration Association Arbitration (AAA) and the European Court of Arbitration (CEA) are among institutions which provide the possibility to appeal on a question of fact. The appellate mechanism that is offered by these institutions is discussed in Chapter 5 of this thesis.

An appeal on a question of law or fact is more inclusive and can ensure fairness in the arbitration process. This type of review is not recognised widely in international commercial arbitration. However, it is beneficial to provide such a review on a voluntary basis in order to satisfy the will of those parties that seek a higher level of fairness in international commercial arbitration. This is discussed in detail in Chapter 5.

2.8 The meaning of review in this research

Although the meaning and the practice of review is not universal, a review of an award may be divided into two types. One is a judicial review in which the way an award is made may be challenged. The other type is a review on the merits which is known as an appeal where the award may be scrutinised on a question of law or fact or both. It is evident that appeal is a more inclusive review where the merits of the award would be challenged.

[197] JAMS ADR Rules & Clauses, JAMS Optional Arbitration Appeal Procedures 2003, r 34; American Arbitration Association, Optional Appellate Arbitration Rules 2013, r A(10).

[198] Arbitration Rules of The European Court of Arbitration 2015, art 28(1).

In international commercial arbitration, the New York Convention and the Model Law have limited the scope of the review to procedural and jurisdictional challenges in order to protect the finality of the award. Such review according to the above classification would be a judicial review. Although national jurisdictions generally have adopted a pro-arbitration stand and limited the scope of review of an arbitral award, there are exceptions where a review on the merits is allowed.[199]

Although the term 'judicial review on the merits'[200] is used by some commentators to refer to an extended review similar to appeal, the term 'judicial review' is reserved in this thesis strictly to the meaning that is understood from discussions in Section 2.2. That is the court does not consider the merits of a decision but examines the lawfulness and fairness of the procedure. Hereafter, the word "appeal" is used to describe a review on the merits.

With the concepts of judicial review and appeal having been analysed and explained in this chapter, the next chapter goes on to examine and assess the current state of judicial review of arbitral awards in the context of international commercial arbitration. The next chapter also addresses the question whether the current practice of judicial review and appeal is adequate or whether there is room for reform. In that chapter, the underpinning theory that justifies the role of national courts in reviewing an arbitral award and the competing theories are critically analysed in order to determine whether national courts are the best forum for review of arbitral

[199] For example, the Arbitration Act 1996 s 69; also look at s 2.7 of this report.

[200] Adam Samuel, 'The 1979 Arbitration Act-Judicial Review of Arbitration Awards on the Merits in England' (1985) 2 J Intl Arb 53; Margaret Moses, 'Party Agreements to Expand Judicial Review of Arbitral Awards' (2003) 20 J Intl Arb 315; Clive Schmitthoff, 'Finality of Arbitral Awards and Judicial Review' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 235.

awards. This is important because the conclusion in Chapter 3, that the current state of judicial review of international arbitral awards is inadequate, forms the basis of the discussion in Chapter 4 on the question whether the scope of judicial review in the context of international commercial arbitration should be expanded.

CHAPTER 3. THE CURRENT STATE OF REVIEW OF ARBITRAL AWARDS BY NATIONAL COURTS

3.1 Introduction

An arbitral tribunal's mandate will be terminated after rendering final awards and arbitrators will become '*functus officio*'[1] and they usually have no power to hear challenges in the post-award stage. Losing parties may have recourse to national courts to review an international commercial arbitration award when they find the award unsatisfactory. A court that the parties may have recourse to is the national court of the seat of arbitration which has primary jurisdiction[2] over a challenge to the validity of an arbitral award.[3] As discussed in the previous chapter, the review by the court of the seat of arbitration may annul the arbitration award or set it aside. In such a case, the law of the seat determines the extent to which an arbitral award can be challenged and has a significant impact on the enforceability of the final award. The other option is to resist enforcement by an application to the enforcement court. However, the losing

[1] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 1347.

[2] Catherine A Giambastiani, 'Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in US Courts' (2005) 20 Am U Intl L Rev 1101, 1101.

[3] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir 2004).

party can only ask the enforcement court to review the enforceability of the award.[4] The immediate legal consequence of this review may be to refuse the enforcement pursuant to the grounds provided in article V of the New York Convention.[5]

It is important to examine the role of national courts in reviewing arbitral awards to find out if they are the best forum to review an arbitral award. This chapter examines the question whether a review should be carried out by the court of the seat, the enforcement court, both or neither of them. The chapter also considers the question whether the current review system should be reformed due to shortcomings in the current practice? Should the sole court that review an arbitral award be the enforcement court?

This chapter commences by examining the role of the seat of arbitration in the review process in order to identify the main features of the current practice. The traditional view that supports the role of the seat in reviewing an arbitration award is the *seat theory*[6] or the *territorialism theory*[7] which is also described as *monolocal*[8] representation. The seat theory is examined in

[4] Manu Thadikkaran, 'Judicial Intervention in International Commercial Arbitration: Implications and Recent Developments from the Indian Perspective' (2012) 29 J Intl Arb 681, 688.

[5] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 570.

[6] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 170.

[7] Giulia Carbone, 'Interference of the Court of the Seat with International Arbitration, The Symposium' [2012] J Disp Resol 217, 220; Sandra Synkova, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order* (Springer 2013) 50.

[8] Emmanuel Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years,* (ICCA Cong Series No 16, Kluwer Law International 2012) 67. According to Gillard all arbitrations must have a forum and the awards rendered must have a

the next section in detail to determine if the seat is the best forum to review an arbitration award. The advantages and disadvantages of the theory are discussed.

Opponents of the seat theory criticise the review of an arbitration award by the court of the seat and claim that international commercial arbitration should be detached from the court of the seat of arbitration.[9] A proposal put forward by opponents of the seat theory is *delocalisation theory.*[10] The delocalised theory is examined in detail in Section 3.5 of this chapter. Arguments in favour of the theory are elaborated and the problems in its adoption are highlighted.

The role of the enforcement court in the review process is only considered here in the context of delocalised theory and is not discussed in detail in this thesis. It is beyond the scope of this research to examine the role of the enforcement court, as this thesis does not revisit the position of the enforcement court in the review of arbitral awards. National courts involvement and their scrutiny are necessary for enforcing an arbitral award. They hold executive power which necessitates some degree of review at the enforcement stage.

3.2 The court of the seat

Before examining the appropriateness of the court of the seat as the review forum for international arbitration, it is important to look briefly at the definition and the role of the seat

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nationality. He asserted that the seat of arbitration 'provides the exclusive basis for the binding nature of the arbitration'. This implies that the court of the seat would be the appropriate authority to review the arbitration award.

[9] Theodore C Theofrastous, 'International Commercial Arbitration in Europe: Subsidiary and Supremacy in Light of the De-Localization Debate' (1999) 31 Case W Res J Intl L 455, 457.

[10] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358, 363.

in international arbitration. This is to answer the question of what is the legal basis of the seat theory?

The legal location of arbitration is known as the seat of arbitration.[11] Section 3 of the English Arbitration Act 1996 defines the seat as 'the juridical seat of arbitration'[12] which is usually determined by the parties' agreement. The seat of arbitration is the jurisdiction that assists and supports the arbitration process. It has control, to some degree, over the arbitration. The seat of arbitration determines the 'legal framework'[13] of international arbitration proceedings. The law applicable to the arbitration process which is known as curial law or *lex arbitri*[14] will be the law of the seat or '*lex loci arbitri*'.[15] For example, if London is selected by the parties as the seat of arbitration, the applicable law will be the Arbitration Act 1996. The extent of matters that may be dealt by lex arbitri would vary in different jurisdictions and the followings are examples of

[11] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1530; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Nomos 2016) 147.

[12] Arbitration Act 1996, s 3; *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514.

[13] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 ICLQ 517, 517; Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886, 890.

[14] Richard H Kreindler, Thomas Kopp, 'Commercial Arbitration, International', *Max Planck Encyclopedias of International Law* (2013) para 18 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1508> accessed 24 January 2021; Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886, 887.

[15] Stavros Brekoulakis, 'Arbitrability and conflict of jurisdictions: The (diminishing) relevance of lex fori and lex loci arbitri' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Sellier 2011) 117; Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886, 890.

those matters: arbitrability of disputes; interim measures of protection; the conduct of arbitration; the powers of the arbitrators, and grounds for challenging an arbitration award.[16]

In international arbitration, a hearing may take place physically in a different place from the seat of arbitration.[17] The physical location or venue[18] that is selected for holding an arbitration hearing does not have the same legal significance as the seat of arbitration. For example, national courts of the seat of arbitration have jurisdiction to hear a challenge over the validity of an arbitral award, while the court of the place of hearings would not have such jurisdiction as it is not the 'legal location of the arbitration'.[19]

The concept of the seat as the jurisdiction of arbitration has been adopted traditionally. For example, article 2 of the Geneva Protocol on Arbitration Clauses of 1923 provided that 'the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'. Article 20 of the UNCITRAL Model Law provides that '(1) [t]he parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties'. It is recommended that the parties to an arbitration agreement specify the seat of the arbitration in their agreement. If parties do not expressly choose the governing law of the

[16] *C v D* [2007] EWCA Civ 1282, [2007] EWCA Civ 1282 [9]; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 169.

[17] Gonzalo Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' (2017) 50 Intl Law 329, 332.

[18] *Shashoua v. Sharma* [2009] EWHC 957 (Comm); *BGS SGS Soma JV v NHPC Ltd*, (2020) XLV YB Comm Arb (SC India) at [20].

[19]; Gonzalo Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' (2017) 50 Intl Law 329, 331. Also,

arbitration, the procedural law of the seat or *lex loci arbitri* generally will govern the arbitration.[20]

One of the main legal impacts of selecting the seat of arbitration is that parties implicitly accept the 'annulment procedure'[21] of the chosen seat. In *C v D*,[22] Longmore LJ stated that 'a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award'.[23] The court of the seat is the 'only judicial authority'[24] competent to hear challenges for setting aside an arbitral award[25] according to the New York Convention[26] and UNCITRAL Model Law[27]. Thus, the determination of the seat has a profound effect on the scope of the review of an arbitration award.[28] If an award is annulled by the court of the seat, it has no effect and may not be enforced in most jurisdictions according to article V of the New York Convention.

[20] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 21, he described the lex loci arbitri as 'local curial norms'.

[21] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31 J Intl Arb 575, 594.

[22] [2007] EWCA Civ 1282, [2007] EWCA Civ 1282.

[23] [2007] EWCA Civ 1282, [2007] EWCA Civ 1282 [17].

[24] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 ICLQ 517, 517.

[25] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 309.

[26] New York Convention, art V(1)(e).

[27] UNCITRAL Model Law, art 1(2).

[28] Michael Dunmore, 'What to Expect from the Review of Arbitral Awards by Courts at the Seat' (2015) 33 ASA Bull 578, 594.

3.2.1 The seat theory

Perhaps, one of the most controversial issues in arbitration is why the national courts of the seat of arbitration are the only competent authority to hear a challenge to the arbitration award and decide about its validity. The most traditional view on international arbitration which justifies the importance of the seat of arbitration is known as the seat theory, *Monolocal*[29] representation or territorialist thesis.[30] According to this theory, the seat is the source of legitimacy and validity of arbitration.[31] The binding nature of an arbitration award is drawn from the state and its legal system.[32] 'The state allows within its territory privately administered justice systems (delegated justice or parallel justice) by way of assignment or tolerance'.[33] In other words, states delegate their exclusive powers and authority to arbitration which empowers arbitrators to decide about disputes: 'The sole source of the arbitrator's power is the legal order of the seat of the arbitration'.[34]

Paulsson asserts that 'any arbitration is perforce national and lives or dies according to the law of the place of arbitration'.[35] The seat of arbitration would have an imperative influence in the

[29] Emmanuel Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years,* (ICCA Cong Series No 16, Kluwer Law International 2012) 67.

[30] Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291, 291.

[31] Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291, 291.

[32] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358, 360; Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 259.

[33] Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 75.

[34] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271, 277.

[35] Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291, 292.

arbitration process and reviewing the arbitration award. In other words, arbitration has a strong tie to the legal jurisdiction of the chosen seat.[36] In *A v B*[37] Longmore LJ asserted that:

> An agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.[38]

The seat theory stresses the importance of the supervisory power of the seat of arbitration. It does not reject the idea that the arbitration originated from the parties' agreement, but the arbitration process and the arbitration award owe their existence, validity, or effectiveness to the national law of the place of arbitration. [39] The seat theory implies that the court of the seat is the 'only judicial authority'[40] competent to hear challenges for setting aside an arbitral award. [41] The rules governing arbitration and the grounds for the annulment would be determined by the law of the seat. An annulment of an arbitral award by the court of the seat

[36] Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration' in Albert Jan van den Berg (eds) *International Arbitration: The Coming of a New Age?* (Kluwer Law International 2013) 372.

[37] [2006] EWHC 2006 (Comm), [2007] 1 All ER Comm 591.

[38] *A v B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, 617.

[39] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 184, para 3.84.

[40] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 ICLQ 517, 518.

[41] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 1115.

may prevent its enforcement in other jurisdictions where the enforcement may be sought under the New York Convention.[42]

3.2.2 The seat's role at the pre-award stage

For a smooth and efficient arbitration process, the support of national courts at certain stages of the arbitration is essential. The court of the seat may be required to support the arbitration before its commencement or during the arbitration process. For example, when a party commences court proceedings despite their agreement to settle their dispute via arbitration, the other party may apply to the court to stay the proceedings regarding the matters covered by the arbitration agreement. In the UK, section 9(1) of the Arbitration Act 1996 provides that:

> A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

Parties may also seek the support of national courts regarding the appointment of the arbitrator or arbitrators. Normally the parties decide about the appointment of the tribunal. However, if the parties fail to appoint the arbitrators the court can appoint them.[43]

[42] New York Convention, art V(1)(e).

[43] UNCITRAL Model Law 1985, art 6.

Parties can also challenge an arbitrator or arbitrators before national courts if there are justifiable doubts about arbitrators' independence, qualifications or impartiality.[44]

It has been argued that most arbitrations are conducted without the involvement of a national court, but when necessary, national courts provide crucial support during the arbitration process.[45] For example, arbitral tribunals can seek national courts' assistance in taking evidence since national courts have coercive authority to compel the presence of witnesses or force the disclosure of evidence.[46] Article 27 of the UNCITRAL Model Law provides that 'The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence'.

National courts can also support arbitration by granting interim measures to maintain the status quo, preserve evidence and asset relevant to the disputes while awaiting a final decision by the arbitral tribunal on the case. For example, in the UK section 44 of the Arbitration Act 1996 provides that:

> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are—

[44] UNCITRAL Model Law 1985, art 11(2).

[45] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 420.

[46] Ilias Bantekas and others, *The UNCITRAL Model Law on International Arbitration: A Commentary* (CUP 2020) 718.

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceeding.

It can therefore be seen that national courts play an important role in supporting the arbitration processes since their coercive powers are sometimes required to ensure compliance. As it will be discussed in the delocalisation of arbitration processes in Section 3.5.2 below, this thesis contends that currently there are no viable alternatives to replace national courts in the pre-award stage.

3.3 Review of an arbitral award according to the seat theory

In this section, the application of the seat theory to the review process of arbitral awards in practice is examined. The influence of the seat theory on the New York Convention and the UNICITRAL Model Law is explored. The approach taken by them is a matter of importance as these international instruments are widely adopted by many jurisdictions. The position of English law towards the seat theory is also examined here. The discussion demonstrates the extent to which the review mechanism in international commercial arbitration is influenced by the seat theory.

3.3.1 The New York Convention

As provided in article V(1)(a) of the New York Convention, an arbitration award may be refused by enforcement courts if the agreement is not valid ‘under the law of the country where

the award was made'. It may also be refused according to article V(1)(e) of the New York Convention 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'. By using the 'country where the arbitration took place' and the 'country in which the award was made', the Convention emphasises the role of the seat of arbitration.[47]

The article also states that an award may be set aside or suspended 'under the law of which' that award was rendered. The Convention does not provide an explanation for the phrase 'under the law of which', however, it is understandable from courts' practice that the phrase means the procedural law and not the law governing the merits.[48]

Normally parties choose the law of the seat of arbitration as the law governing the dispute. However, they may select the law of a different country as procedural law.[49] Parties should determine the seat of arbitration clearly as it will define the legal framework of their arbitral proceeding. Lack of clarification in the parties' agreement regarding the seat of arbitration may cause problems and uncertainties in the selection of the right court in which to bring an annulment challenge.

In *Steel Corporation of the Philippines v International Steel Service Inc,*[50] the parties entered into a construction contract and a sale contract. International steel service (ISSI) agreed to

[47] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 172.

[48] Unicitral Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Emmanuel Gaillard and George A Bermann eds, Brill Nijhoff 2017) 202.

[49] *India (Union of) v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48, (1994) XIX YB Comm Arb 235 [7].

[50] *Steel Corporation of the Philippines v International Steel Services Inc*, 2008 US Dist LEXIS 13057 (3rd Cir).

construct an acid regeneration plant for Steel Corporation of the Philippines (SCP). Another contract was the Iron Oxide Sales Agreement (IOSA) which was for purchasing the iron oxide which was a by-product of SCP. They agreed to refer their disputes arising out of or in connection with both contracts to arbitration. Singapore was designated as a forum for arbitration. However, according to the provision of their agreement 'the validity, performance, and enforcement of this contract shall be governed by Philippine Laws'.

A dispute arose regarding the purchases of iron oxide from SCP's plant sale contract and SCP claimed that ISSI breached the agreement. The dispute was submitted to the International Chamber of Commerce International Court of Arbitration in Singapore which resulted in an award in favour of SCP. The tribunal held that the Singapore International Arbitration Law was the applicable law of the arbitration proceedings. ISSI sought to vacate the arbitral award and filed a petition to the Philippines Regional Trial Court to vacate the award on the basis that Philippine law was applied to the merits of the disputes. The court ruled in favour of ISSI. SCP sought to confirm the Singapore award under the New York Convention by filing a petition in the Court of Common Pleas of York County, Pennsylvania. ISSI filed a motion for judgment on the pleading to the Western District of Pennsylvania. ISSI claimed that the Singapore award could not be confirmed as it has been set aside by the Philippine Regional Trial court. The District Court denied the motion according to article V(1)(e) of the New York Convention which states that applications for setting aside or suspending an arbitral award may be made only 'to a competent authority of the country in which, or under the law of which, that award was made'. The phrase 'under the law of which, that award is made' refers to procedural law and not substantive law. Therefore, Singapore as the seat of arbitration had primary jurisdiction and could vacate the award rather than the Philippine court. The case demonstrates that it is important to clarify the seat of arbitration in the contract. If parties fail to determine the seat of

arbitration, the governing law of arbitration would be used to identify the seat rather than the law of the underlying contract.

In *International Standard Electric v Bridas Sociedad Anonima*,[51] the award was made under the ICC in Mexico. According to the parties' agreement, the contract was to 'be governed by and construed under and in accordance with the laws of the state of New York'. The claimant filed a petition to annul the award in the United States District Court in New York. The defendant argued that the District Court did not have jurisdiction to vacate the award under the New York Convention and sought enforcement. The claimant alleged that according to the New York Convention annulment of the award is one of the grounds to reject the enforcement. The claimant argued that application for the setting aside or suspension of the award can be brought only to the courts or the 'competent authority of the country in which, or under the law of which, that award was made'.[52] The claimant also argued that 'the competent authority of the country ... under the law of which [the] award was made', refers to the country whose substantive law was applied by the arbitrators and not the country whose procedural law was adopted. Since the New York law was applied as a substantive law of the contract by arbitrators in Mexico, the decision on the annulment of the award can be made in the US District Court in New York. The District Court rejected the annulment application and stated that:

> [T]he contested language in Article V(1)(e) of the Convention, 'the competent authority of the country under the law of which, [the] award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of

[51] 745 F Supp 172 (2nd Cir 1990).

[52] New York Convention, art V(1)(e).

> arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case.[53]

Arbitration was conducted under the procedural law of Mexico. This was due to the fact that Mexico was selected as the place of arbitration and its procedural law governed the arbitral proceedings. The Court of Mexico was the competent authority for hearing challenges against the arbitral award under the Convention. Although the Convention text is brief and does not directly state that the review should be conducted by the court of the seat, it can be understood from the context that the appropriate authority for the review of an arbitral award is the court of the seat.

Article V(1)(e) of the Convention implicitly restricts parties from submitting the annulment action to other forums.[54] Once the award is set aside by the court of the seat of arbitration the 'game is clearly over'[55] and the award is not normally enforceable in other jurisdictions. Moreover, the article does not provide the grounds for the annulment, which gives excessive discretion to countries to vacate the award pursuant to any ground they found pertinent.[56]

3.3.2 The UNCITRAL Model Law

The seat theory has been supported by the UNCITRAL Model Law. Article 1(2) of the UNCITRAL Model Law provides that the provisions of the Act including the review and

[53] 745 F Supp 172, 178 (2nd Cir 1990).

[54] Hans Smit, 'Annulment and Enforcement of International Arbitral Awards: A Practical Perspective' (2007) 18 Am Rev Intl Arb 297, 298.

[55] Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9 ICC Intl Ct Arb Bull 15, 15.

[56] Hans Smit, 'Annulment and Enforcement of International Arbitral Awards: A Practical Perspective' (2007) 18 Am Rev Intl Arb 297, 300.

annulment of the arbitration award apply 'only if the place of arbitration is in the territory of this State'. According to article 36(1)(v) of the Model Law, 'recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made'.[57]

Article 34 of the UNCITRAL Model Law sets out provisions for an annulment challenge to be heard in a competent court that would be identified in article 6 of the Model Law. The latter provides that 'The function referred to in articles … 34 (2) shall be performed by ... [each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]' [58] Under the Model Law, the courts of other jurisdictions have no power to annul the arbitral awards rendered in other jurisdictions.[59] This is to prevent practical difficulties where a certain award can be subject to contradictory reviews in different jurisdictions. Currently, eighty-five states have adopted the UNCITRAL Model Law and some other jurisdictions are influenced by it. As a result, the seat theory is recognised widely by different jurisdictions and the court of the seat is the competent authority to annul an international arbitral award. For example, although the French legislature has not adopted the Model Law, the French legislature adopted the seat theory. Article 1519 of the French Code of Civil Procedure provides that 'the action to set aside shall be brought before the court of appeal with jurisdiction over where the award was rendered'.

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[57] For example, Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) (CA), sch 1, art 34; s 1059 ZPO (DE); Arbitration (Scotland) Act 2010 (asp 1), art 34(3)(d).

[58] UNCITRAL Model Law 1985, art 6.

[59] Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002) 13-15.

3.3.3 The position of English Law

Traditionally, the seat theory is advocated by the United Kingdom. Pursuant to section 2(1) of the Arbitration Act 1996, 'The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland'. The grounds of challenge to an arbitration award is set out in sections 67-69 of the Arbitration Act 1996. Thus, the court reviews an arbitration award if the seat of arbitration is England or the law chosen by the parties is English Law.

The seat of arbitration is defined as 'the juridical seat of the arbitration' in section 3 of the 1996 Act. England is the 'judicial seat' if arbitration takes place in England or the Arbitration Act governs the arbitration process. In *Bank Mellat v Helliniki Techniki SA*,[60] Kerr LJ argued that:

> The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections … Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.[61]

In *Paul Smith Ltd v H&S International Holding Inc*,[62] Steyn J emphasised the important role of the lex arbitri to support the arbitration. He described the lex arbitri as:

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[60] [1984] QB 291.

[61] *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, 301.

[62] [1991] 2 Lloyd's Rep 127.

> The curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case, it is common ground that both the contract and the arbitration agreement are governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime is the comprehensive and sophisticated ICC rules which apply by virtue of the parties' agreement.[63]

In *Minmetals Germany GmbH v Ferco steel Ltd,*[64] according to the parties' contract, a dispute arising out of a contract should be submitted to arbitration in China. Two arbitral awards were rendered in favour of the claimant under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC). The defendant asked the Chinese Court to revoke the arbitration award on the ground that the tribunal did not give the opportunity to the defendant to present its case and the arbitrators breached the principle of due process. The Chinese Court first remitted the case to the arbitrators for a resumed arbitration. During the resumed arbitration, the respondent failed again to present its case. The arbitrators made the first award which was in favour of the claimant. The defendant asked the Chinese Court to revoke the arbitral award which was refused by the Chinese Court. The claimant obtained permission from the English Court to enforce the arbitral award. The defendant asked the English Court to annul the permission under section 103(2)(C) of the Arbitration Act 1996 on

[63] *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 129, (1994) XIX YB Comm Arb 725, 727.

[64] [1999] 1 All ER (Comm) 315.

the ground that 'he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. The English Court refused to set aside the leave to enforce the award.

The question was whether the party who claimed that the arbitration process was unfair should apply to the seat of arbitration in order to annul the arbitral award. Mr Justice Colman argued that 'In international commerce, a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration'.[65]

There is no mandatory provision in the Arbitration Act 1996 that forces the parties to select the seat of arbitration. In *Dubai Islamic Bank V. Paymentech Mechanisms*[66], Aiken J asserted that 'Under English law, an arbitration must always have a "seat"'.[67] This position is also evidenced in the Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill, 'English law does not at present recognise the concept of an arbitration which has no seat and we do not recommend that it should do so'.[68] Aiken J continued by stating, 'This means that arbitration must have a seat when the arbitration starts'.[69]

[65] [1999] 1 All ER (Comm) 315, 330.

[66] [2001] 1 All ER (Comm) 514.

[67] *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514 [49].

[68] *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514 [49].

[69] *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514 [49].

3.4 Pros and cons of review by the court of the seat

The pros and cons of the review by the seat are examined here to answer the question whether the current review system needs to be reformed. There are three main arguments in favour of the review of an arbitral award by the court of the seat. First, the review by the court of the seat would maintain states' sovereignty.[70] The validity of an arbitration award is determined by the law of the seat of arbitration, and no other can claim such rights.[71] Every sovereign state has a right to handle the activities which take place in its territories.[72] The state of the seat would reserve the right to override any arrangement agreed by parties unless the right is granted by the state themselves.[73]

States delegate their power to arbitrators which enables them to render and issue binding awards, therefore, states need to ensure the integrity of the process.[74] The review by the court of the seat would enable states to have oversight of arbitral proceedings happening in their sovereign territory.

Mann, who is a main proponent of the seat theory, states that:

> [E]very arbitration is a national arbitration, that is to say, subject to a system of national law … No one has ever or anywhere been able to point to any provision or legal principle

[70] Masood Ahmed, 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes towards International Commercial Arbitration' (2011) 77 J Intl Arb Med Disp Mang 406, 413.
[71] FA Mann, 'The UNCITRAL Model Law – Lex Facit Arbitrum' (1986) 2 Arb Intl 241, 244.
[72] Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145 at 150.
[73] FA Mann, 'The UNCITRAL Model Law – Lex Facit Arbitrum' (1986) 2 Arb Intl 241, 246.
[74] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 262.

> which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law.[75]

Yu argues that arbitrators are similar to national judges' as both, the power and the authority are derived from rules of national law.[76] Thus, the awards rendered by arbitrators have a similar effect and can be easily recognised and enforced like national court judgments.[77] Similarly, the review of an award rendered by an arbitrator is within the power of national jurisdictions.

Although the legitimacy and recognition of arbitration are derived from the national order of the seat of arbitration, the power of the national jurisdictions can be delegated. While the power of the national judges is delegated to the arbitrators to settle international commercial disputes, the same can be applied to the review of an arbitral award without damaging the sovereignty of states. Such practice already exists for international investment arbitration where the International Centre for Settlement of Investment Disputes (ICSID) reviews international

[75] FA Mann, 'The UNCITRAL Model Law – Lex Facit Arbitrum' (1986) 2 Arb Intl 241, 244 245.

[76] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 261.

[77] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 262.

investment arbitral awards.[78] The review of the foreign investment arbitration award by national courts is precluded by the Convention and national courts are replaced by an ad hoc committee of three members.[79]

The second argument in favour of review by the seat relies on the risk of an unfair arbitral award in case of a complete separation of arbitration from judicial scrutiny.[80] Lacking the power to control the arbitral process by the court of the seat may motivate arbitrators to act unfairly and frustrate the requirements of a fair and just arbitral process.[81] Farrow argues that:

> Without public scrutiny – through open court processes, the publication of precedents and the application of case law to the facts to be adjudicated – there is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness.[82]

In the absence of judicial scrutiny, if a party finds the award unfair it would not be possible to have recourse to the court to prevent the negative consequences of an unfair award.

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[78] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) (adopted 18 March1965) 575 UNTS 159 (the ICSID Convention) arts 52, 53.

[79] Chrispas Nyombi, 'The Practicalities of Delocalisation in International Commercial Arbitration' (2017) 5 IBLJ 461, 474.

[80] HL Yu, 'Defective Awards Must Be Challenged in the Courts of the Seat of the Arbitration-A Step Further than Localisation' (1999) 65 J Intl Arb Med Disp Mang 195, 196.

[81] HL Yu, 'Defective Awards Must Be Challenged in the Courts of the Seat of the Arbitration-A Step Further than Localisation' (1999) 65 J Intl Arb Med Disp Mang 195, 196.

[82] Trevor C W Farrow, 'Privatizing our Public Civil Justice System' (2006) 9 News & Views on Civ Just Ref 16, 16.

Although the fairness of any dispute settlement mechanism must be observed, it is not a necessity to conduct the review by the court of the seat. Such a review can also be conducted by an international body as discussed in the next section.

The third argument in favour of the seat theory concerns the stability and the efficiency of arbitration. Preserving the annulment of the arbitral award to the national court of the seat of arbitration may increase the predictability, stability and avoid unnecessary delays as a result of the involvement of different jurisdictions. It would avoid a conflict between different jurisdictions over the annulment of an award and prevent inconsistent decisions.[83]

Although the New York Convention and Model Law have provided some level of predictability and stability in the review of an arbitral award, the courts of different jurisdictions take various approaches towards the review of an award.[84] This would hinder the predictability of the review where similar awards might be treated differently in different jurisdictions. The review by the court of the seat would prevent involvement of other jurisdictions but a single authority would serve the purpose better.

There are four arguments against the review by the court of the seat. The first argument is that the seat of arbitration is chosen by parties because of neutrality, being geographically accessible or being an important arbitral venue and the parties have no intention to deal with the national

[83] Loukas A Mistelis, 'Delocalization and its Relevance in Post-Award Review' in Frédéric Bachand and Fabien Gélinas (eds), *The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration*, forthcoming; Queen Mary School of Law Legal Studies Research Paper No. 144/2013, 165, 178 <https://ssrn.com/abstract=2262257> accessed 4 December 2017.

[84] William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 601.

court of the seat of arbitration.[85] Paulson argues that the seat of arbitration would 'have no particular mission to rule on challenges to awards only because they are rendered within their territory'. [86] Usually, the seat of arbitration has no connection to the dispute[87] which raises the question of why the review of an arbitral award should take place in the seat of arbitration. It would be an extra effort by national courts to involve themselves in disputes which are not 'implicating' their 'national interest'.[88]

Detaching arbitration from the control of its seat provides the arbitrators freedom to render a judgment that can serve better the interests of the parties. There would be no requirement to follow the rules of the place of arbitration which are not connected to their disputes.

The second argument against the review by the court of the seat is that the national procedural laws cannot address the necessities of international commercial arbitration for reviewing arbitration awards. Lew argue that:

> The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration

[85] Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28 J Intl Arb 445, 455; Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 Fordham Intl LJ 745, 751.

[86] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358, 360.

[87] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14 ICSID Rev Foreign Invest LJ 16, 18.

[88] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 24.

> agreements and awards should be recognised and given effect, with little or no complication or review, by national courts.[89]

National arbitration laws are tailored to domestic arbitration and may not provide a satisfactory review process for the practitioners of international commercial arbitration and may cause uncertainty and inconsistency in the international arbitration process. Arbitration needs to modernise its laws by understanding that arbitration practice is becoming increasingly international in response to the globalisation of trade. Binding the review process to the national law and the court of the seat may prevent arbitration to adjust itself to a dynamic and evolving practice.

The third argument against the review by the court of the seat emphasises the importance of the parties' autonomy[90] in international arbitration. The seat theory assigns excessive power to the seat courts to intervene in the arbitration process. It has been criticised as an attempt to limit the scope of the parties' autonomy which is the foundation of international arbitration.[91] Kellor asserted that:

> [A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an

[89] Julian David Mathew Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arb Intl 455, 455, 456.

[90] Fagbemi SA, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6 J Sustainable Dev L & Pol'y 222, 245; Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358, 360.

[91] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 ICLQ 517, 518.

> arbitration agreement is made part of the principal contract, the parties voluntarily forgo established legal rights in favor of what they deem to be the greater advantages of arbitration.[92]

It is argued that parties willingly oust the court's jurisdiction to settle their disputes by choosing arbitration.[93] Thus, it would make no sense if they are bound by the court and the national law which they voluntarily excluded. Arbitration is a 'self-contained process'.[94] The parties can determine the law and rules of their arbitration process and to some extent the standards of the judicial review according to the necessities of their disputes and process. Hence, there is no necessity for recourse to a national legal system in order to honour the award.

Party autonomy is one of the fundamental pillars of any arbitration process. A review process should be designed in a way to impose the least level of restriction on parties' autonomy. The current system of review, based on the seat theory, force parties to have recourse to national courts and usually prevents them from determining the scope of the review.[95] Also, parties cannot normally exclude the role of national courts in reviewing their award.[96]

The fourth criticism of the seat theory is the lack of harmonisation in the review of arbitration awards in different jurisdictions. Differences in national law and their approach towards

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[92] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 266, citing Frances Kellor, *Arbitration in Action,* (Harper & Brothers 1941) 7,8.

[93] Jay E Grenig, 'After the Arbitration Award: Not Always Final and Binding' (2014) 25 Marq Sports L Rev 65, 68.

[94] W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 Tex Intl LJ 699, 706.

[95] *Hall Street Associates, LLC v Mattel, Inc,* 552 US 576 (2008).

[96] For example, Arbitration Act 1996, ss 67, 68.

international commercial arbitration causes a variation of law and practice of courts in reviewing arbitral awards. Although the New York Convention and the UNCITRAL Model Law both seek to harmonise arbitration laws in order to achieve unification in practice,[97] the extent of judicial review and the degree to which an arbitral award may be challenged is different from one jurisdiction to another.

Any international commercial arbitration should be subject to a specific system of law. The adoption of the New York Convention and the Model law by most countries resulted in recognition of the seat of arbitration as the proper forum to review the arbitration awards. In my opinion, the seat theory must be implemented with extra care to prevent unnecessary interventions of the court of the seat. The review by the court of the seat may undermine parties' autonomy and may provide excessive power to the national courts. The substantial amount of freedom offered by countries to parties and arbitrators to conduct the arbitration according to their needs and requirements is another key factor that shows that the seat of arbitration is now less important. Although the adoption of the seat theory at the review process makes it possible to scrutinise arbitral awards to some extent, the differences in national legal systems result in varied standards for review of arbitral awards. The current system of review should be reformed in order to achieve a truly international arbitration system that is also fair. The theories advocating a review by a different court than the court of the seat are examined in the next section.

[97] Okezie Chukwumerjie, *Choice of Law in International Commercial Arbitration* (Quorum Books 1994) 17, 18.

3.5 The delocalisation theory

An opposing theory to the seat theory which tries to limit the intervention of the national court of the seat in international commercial arbitration is the delocalisation theory. A delocalised arbitration is defined as a type of international arbitration that is not derived or founded on an internal law of a sovereign state.[98] The concept of delocalisation of international commercial arbitration is based on the autonomy of the parties.[99] It is argued that arbitration originated from the agreement of the parties therefore its procedure and awards are autonomous and should not be connected to any national legal system.[100] The Supreme Court of Canada in its judgment in *Dell Computer Corp v Union des consommateurs*[101] argued that 'Arbitration is an institution without a forum and without a geographic basis. Arbitration is part of no state's judicial system. The arbitrator has no allegiance or connection to any single country. Arbitration is a creature that owes its existence to the will of the parties alone'.[102]

[98] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358, 362; Olakunle O Olatawura, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution?' (2003) 30 Syracuse J Intl L & Com 49, 51.

[99] Alexander J. Belohlávek, 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013) 31 ASA Bull 262, 269.

[100] Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 19 Arb Intl 19, 21; Zaherah Saghir and Chrispas Nyombi, 'Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application' [2016] ICCLR 269, 270.

[101] (2007) SCC 34.

[102] *Dell Computer Corp. v. Union des consommateurs* (2007) SCC 34 at para 51 (citations omitted).

The delocalisation has been described as a 'rebellion against the historical intervention of national courts' in international arbitration.[103] The delocalisation theory argues that international commercial arbitration should detach itself from the legal impact of the place of arbitration[104] or any specific national law.[105] This idea, which is also known as the internationalisation or transnationalism theory, is said to be derived from the parties' desire to expand their freedom in their arbitration process, to protect arbitration from the requirements and control of the court of the seat and to free arbitration from the constraints imposed by the *lex arbitri*.[106] The theory implies that parties to an arbitration agreement should have the discretion to manage their arbitration process and the extent of national court influence in their arbitration according to the necessities of their dispute.[107] Mustill stated that:

> 'Transnationalism' is a theoretical ideal which posits that international arbitration, at least as regards certain types of contractual disputes conducted under the auspices of an arbitral institution arbitration, is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them. If the ideal is

[103] Jie Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration Practice'(2011) 22 ICCLR 383, 383.

[104] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358, 358; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 3.76.

[105] Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 Am Rev Intl Arb 177, 178; Dejan Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 Facta Universitas – L & Pol 63, 64.

[106] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358, 362.

[107] Masood Ahmed, 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes towards International Commercial Arbitration' (2011) 77 J Intl Arb Med Disp Mang 406, 409.

> fully realised national courts will not feature in the law and practice of international arbitration at all and differences between national laws will become irrelevant.[108]

Delocalisation is also described as 'a security blanket'[109] which allows the arbitral process to operate independently and separately from the national law of the place of arbitration. Paulsson argues that a delocalised arbitral award would 'enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered'.[110] It is claimed that by applying the delocalisation theory in international arbitration, the parties can be rescued from 'unforeseen and undesired local procedural law'[111] and failure to comply with the procedural law of the place of arbitration would not make the arbitration award unenforceable and inexecutable in different jurisdictions.[112]

3.5.1 The practice of the delocalisation theory

The extent of applicability of the delocalised theory in practice is analysed by looking at different judgments from France, the UK and Belgium. This puts a number of relevant cases forward from different jurisdictions which show that delocalised arbitration has some judicial

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[108] *Coppée Lavalin NV Appellants v Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation In Kenya)* [1995] 1 AC 38, 52.

[109] Zaherah Saghir and Chrispas Nyombi, Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application' [2016] ICCLR 269, 270.

[110] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358, 358.

[111] Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 Am Rev Intl Arb 177, 178.

[112] Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 Am Rev Intl Arb 177.

recognition. The past decades have seen a shift in the doctrine of the absolute seat jurisdiction towards the delocalisation of arbitration.[113] This shift is evident in the enforcement of arbitral awards which have been annulled in the seat at some jurisdictions, for example, France.[114]

3.5.1.1 France

The delocalised theory influenced French law and practice. In France, the reform in international arbitration started by the passing Decree No 81-500 of 12 May 1981.[115] The reform was reflected in articles 1492 to 1507 of the Decree and intended to make Paris one of the most attractive seats in the world by providing more freedom for the parties and imposing significant restrictions on the review of arbitral awards. The French arbitration law has undergone further reform in 2011 to promote transparency and efficiency in the arbitration process. This reform also helps to enhance the attractiveness of Paris as one of the important arbitration hubs.

French courts may enforce an arbitral award even if it was annulled at the country of origin.[116] This practice is opposite to the provisions of article V(1)(e) of the New York Convention which precludes the enforcement of an arbitral award annulled in the country of origin. Article V(1)(e) provides that the recognition and enforcement of an arbitral award may be refused if an arbitral award was annulled by the court of the seat. However, article 1525 of the French Civile

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[113] Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 Fordham Intl LJ 745, 751.

[114] Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 Am Rev Intl Arb 177, 177.

[115] Décret nº 81-500 du 12 mai 1981.

[116] Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145 at 146; Reyadh Seyadi, 'Enforcement of Arbitral Awards Annulled by the Court of the Seat' (2018) 84 J Intl Arb Med Disp Mang 128, 131.

Procedure Code sets the grounds for refusing the enforcement of an arbitral award the same as those in articles 1520 of the French Civile Procedure Code which are limited to '(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy'. Therefore it is clear that French law has moved forward from traditional seat theory and might recognise and enforce an arbitral award that has been annulled by a court of the seat.[117]

In *PT Putrabali Adyamulia v Rena Holding and Mnogitia Est Epices*,[118] a contract was made between parties to supply goods by PT Putrabali Adyamulia (PT). The goods were to be transported by ship. During transportation, the cargo was lost. Accordingly, Rena Holding refused to pay outstanding fees. Since arbitration was selected as a mechanism to settle the disputes, the dispute was submitted to International General Produce Association in London.

The tribunal rendered the award in favour of Rena Holding. PT Putrabali Adyamulia brought an action to the English Court to set aside the arbitration award according to section 69 of the Arbitration Act 1996. The court annulled the arbitral award and remitted the award to the arbitral tribunal for reconsideration. The second award was rendered by the tribunal and the outcome was different from the first award and was in favour of PT Putrabali Adyamulia.

However, Rena Holding sought enforcement of the first award from the French court. The French court recognised and enforced the first award despite the fact that the award was set

[117] Reyadh Seyadi, 'Enforcement of Arbitral Awards Annulled by the Court of the Seat' (2018) 84 J Intl Arb Med Disp Mang 128, 131.

[118] Cass, Civ 1ère, 29 Juin 2007, 05-18.053, (2007) XXXII YB Comm Arb 299, 301.

aside by the English High Court. The Cour de Cassation held that 'An international award, which is not anchored in any legal order, is a decision of international justice, whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought'.[119]

The judgment clearly supported the delocalisation theory and treated the arbitration award as an international award. Thus, it can be recognised in France even if it has been set aside by the court of the seat of arbitration.

3.5.1.2 Belgium

The delocalisation theory was implemented by Belgium in 1985. Article 1717 of the Belgian Judicial Code was amended on 27 March 1985 in order to prevent a party from challenging an arbitral award in the Belgian court where the award was rendered in Belgium but no Belgian party was involved. In international commercial disputes that were arbitrated by tribunals in Belgium under Belgian law and neither of the parties was Belgian, the award would effectively have been a delocalised award as the Belgian court would have refused to hear a challenge to such an arbitral award.

This trend was not favourable as many businesses were avoiding Belgium as the seat of arbitration[120] and Belgium lost its reputation as a centre to settle disputes. Redfern and Hunter pointed out that 'it appears that this legal provision discouraged parties from choosing Belgium

[119] *PT Putrabali Adyamulia v Rena Holding and Mnogitia Est Epices,* Cass, Civ 1ère, 29 Juin 2007, 05-18.053, (2007) XXXII YB Comm Arb 299, 301.

[120] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) 65.

as the seat of arbitration'.[121] It is clear that the support and assistance of national courts are important to arbitration stakeholders. As a result, Belgium amended its rules and avoided the delocalisation theory in a radical form. Article 1717(2) of the Belgian Judicial Code 1998 provided that:

> The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there.[122]

The Belgian experience shows that delocalisation theory is not favourable as parties in the arbitration process seek the support of the national court in order to secure their interest and ensure a smooth process.[123] Thus, arbitration without a possibility of court intervention could undermine the arbitration as an efficient and fair dispute resolution mechanism.

3.5.1.3 England

How far the English Arbitration Act 1996 is influenced by the delocalisation theory is examined here. The English courts' hostility toward the concept of delocalisation is well known.[124] Prior

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[121] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 182.

[122] 'Free Translation of the Law of 19 May 1998 Amending the Belgian Legislation Relating to Arbitration'(1999) 15 Arb Intl 101, 102.

[123]Alexander J. Bělohlávek, 'Seat of Arbitration and Supporting and Supervising Function of Courts' in Alena Banyaiova and Naděžda Rozehnalová (eds), *Czech and Central European YB of Arbitration - Interaction of Arbitration and Courts* (Juris 2015) 29.

[124] Hong-Lin Yu, 'Defective Awards must be Challenged in the Courts of the Seat of the Arbitration: A Step Further than Localisation?' (1999) 65 J Intl Arb Med Disp Mang 195, 196.

to the enactment of the Arbitration Act 1996, the courts were willing to interfere in the arbitral process. Therefore, the view in England was that delocalised arbitration could not be 'agreed, proceed and enforced'[125] under English arbitration law. In *SA Coppée-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*,[126] Lord Mustill asserted that:

> I think it [is] unnecessary to enter into the controversy over transnationalism which has been a feature of the past two decades, and would indeed not have mentioned the term if it had not been pressed in argument. I doubt whether in its purest sense the doctrine now commands widespread support … At all events it cannot be the law of England'.[127]

However, by the enactment of the English Arbitration Act 1996, national courts intervention in the arbitral process was restricted considerably. Nowadays to a great extent, the parties' autonomy is recognised by the Arbitration Act 1996 which can be regarded as the effect of delocalisation on the Act. For example, in section 69 of the Arbitration Act 1996 parties can agree to opt out of an appeal on a point of law. However, this does not mean that delocalised arbitration is adopted by English Law. Section 2(4) of the Arbitration Act 1996 addresses the delocalised theory by providing that the court can still support the arbitration even where no seat has been designated or determined by the parties if there is a connection between England and the arbitration and also if the court is satisfied that it is appropriate to support the arbitration. Moreover, section 2(2) provides that 'the following sections apply even if the seat of the

[125] Olakunle O Olatawura, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution' (2003) 30 Syracuse J Intl L & Com 49, 53.

[126] [1995] 1 AC 38.

[127] *SA Coppée-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52.

arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined'.

It is contended that 'English law sticks to procedural conservatism'[128] and does not address the requisites of modern arbitration, for example where parties may be willing to exclude any review by the court of the seat. The English system can be modified to adapt to the requirements of modern arbitration where parties have greater freedom to choose the details of their arbitration agreement and the possibility and the extent of review.

France, as a pro-delocalisation jurisdiction, has tried to restrict the influence of the national court of the seat of arbitration in the review process as much as possible. Although the review of an arbitration award according to article 1519 of the French Code of Civil Procedure is normally conducted at the place where the arbitration takes place, this is restricted to the cases where there is a connection between the seat of arbitration and the dispute. Belgium which completely abolished the role of the seat of arbitration in the review process, lost its attraction as an important venue for arbitration. Historically, due to the hostility of English courts towards the concept of delocalisation, upholding this theory in the current system of review in England is very difficult.

The delocalisation of arbitration awards should be happening in an orderly way. It should be in such a way that parties could get support from national courts of the seat of arbitration where it is necessary. Embracing the delocalisation theory in international commercial arbitration has a significant implication for the arbitration process and also the review of arbitration awards. An extreme interpretation of the delocalisation theory would remove any connection between the

[128] Olakunle O Olatawura, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution' (2003) 30 Syracuse J Intl L & Com 49 at 57.

arbitration and the seat. It is known as the delocalisation of the arbitration process.[129] Such practice is not supported by this thesis and is briefly discussed here to introduce the concept, its consequences and also to clarify the role of the seat in the arbitration process as is meant by this research. A second approach to delocalisation is the delocalisation of arbitral awards.[130] This is discussed in detail here as an alternative to the current practice of review.

3.5.2 The delocalisation of the arbitration process

The delocalisation of the arbitration process means that arbitration should be free from the mandatory rules and laws of the place of arbitration.[131] It rejects any link between the arbitration process and the law of the seat of arbitration.[132] The freedom of the parties entitles them to determine their arbitration process according to their needs. The proponents of this type of delocalisation argue that as arbitration is a private means of settling disputes, the arbitration procedure is subject to the parties' control and the principle *pacta sunt servanda* has to be respected.[133]

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[129] Mario Gomez, 'International Arbitration: A Case for Delocalisation' (1991) 3 Sri Lanka J Intl L 61, 62; Matthew Secomb, 'Shades of Delocalisation; Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) J Intl Arb 123, 127.

[130] Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28 J Intl Arb 445, 459.

[131] W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 Tex Intl LJ 699, 715; Jan Paulsson, 'The extent of independence of international arbitration from the law of the situs' in Julian DM Lew (ed.) *Contemporary Problems in International Arbitration* (Springer 1987) 140.

[132] Masood Ahmed, 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes towards International Commercial Arbitration' (2011) 77 J Intl Arb Med Disp Mang 406, 408.

[133] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp Asia Arb J 255, 265, 266.

As the non-intervention principle is widely accepted, national courts are usually reluctant to interfere in the arbitration process.[134] Excessive judicial intervention in the arbitration process is considered a deterrent factor for practitioners.[135] Delocalisation of the arbitration process eliminates judicial supervision of arbitral proceedings and judges and national courts have no role to play in the proceedings.

The exclusion of national courts' supervisory and assistory role over the arbitration process is criticised and is considered as the main disadvantage of the delocalisation of the arbitration process.[136] It is argued that 'the wide recognition enjoyed by arbitration is not a consequence of the existence of a non-national system created by and governing the international business community, but rather the result of the encouragement, or toleration, of arbitration by national legal systems'.[137] Shindler reasons that there are differences between supervisory and assistory roles and 'the assistory role of the court is maintained throughout the proceedings but once the award is rendered its jurisdiction lapses'.[138] Sometimes there is a need for recourse to national courts before commencing an arbitration process or during an arbitration process.[139] For

[134] Andrew Tweeddale, Keren Tweeddale and Natasha Nguyen, 'Section 69 of the English Arbitration Act 1996—When Fact and Law Collide' (2014) 80 J Intl Arb Med Disp Mang 136, 138.

[135] Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28 J Intl Arb 445, 459.

[136] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 31; Andrew Shindler, 'Arbitration Still Bound' (1986) 102 LQR 500, 505.

[137] Maria-Pia Midenbäck Hope, 'International Commercial Arbitration - Party Autonomy and Mandatory Rules by Giuditta Cordero Moss' (2000) 16 Arb Intl 371, 372, citing Giuditta Cordero-Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999).

[138] Andrew Shindler, 'Arbitration Still Bound' (1986) 102 LQR 500, 505.

[139] Chrispas Nyombi, 'The Practicalities of Delocalisation in International Commercial Arbitration' (2017) 2017 IBLJ 461, 462.

example, national courts are enabled to enforce an arbitration agreement, oblige parties to honour their contractual obligations, order the establishment of the tribunal, grant emergency relief, secure the attendance of witnesses, and so on. These are supports which arbitration may need and currently, there is no alternative forum to provide such supports. Only national courts are eligible to use executive power[140] to 'compel performance and execute against a party's assets'.[141] It is argued that 'the national judge should be armed with the powers which he alone can possess, to carry out the necessary measures for the proper operation of the arbitral process'.[142]

In my opinion, recourse to national laws and courts should be preserved in order to keep the assistory and supportive role of the national laws and national courts in intranational commercial arbitration. This practice would enhance the efficiency of intranational commercial arbitration. The support of the national courts promotes arbitration as a reliable method of settlement of international commercial disputes.

Therefore, in the current practice of international commercial arbitration, the delocalisation of the arbitration process is not realistic and arbitration would not survive without the support of national courts. As mentioned by Lord Mustill 'there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of

[140] Sameer Sattar, 'National Courts and International Arbitration: A Double-Edged Sword?' (2010) 27 Journal of International Arbitration .

[141] W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 Tex Intl LJ 699, 707.

[142] Martin H Hunter, 'Judicial assistance for the arbitrator' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 195, citing Goldman, 'The Complementary Roles of Judges and Arbitrators' in, *60 Years of ICC Arbitration* (ICC 1984) 257, 282.

foundering, and that the only court which possesses these powers is the municipal court of an individual state'.[143]

3.5.3 The delocalisation of an arbitration award

Delocalisation of an arbitration award means that an arbitral award is detached from the law of the place where it is rendered. The result of adopting the delocalisation of an arbitral award would be 'a-national arbitral awards' and 'floating' awards.[144] The legal effect of such awards is not linked to any national legal system and an award would be enforceable in different jurisdictions even if it was annulled in the place of arbitration.[145] As a result, an award rendered in delocalised arbitration cannot be subject to review by the court of the seat. The exception to this rule is when the arbitration award or process violates the substantial international or national public policy of the seat of arbitration.[146]

Two alternative courts are suggested to review an international arbitral award, the enforcement court or an international forum. These two alternatives are examined in the next subsections.

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[143] *Coppee Lavalin SA NV v Ken-Ren Chemicals & Fertilisers Ltd (In Liquidation in Kenya)* [1995] 1 AC 38, 53.

[144] Hans Smit, 'A-National Arbitration' (1988) 63 Tul L Rev 629.

[145] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 24; Emmanuel Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years*, (ICCA Cong Series No 16, Kluwer Law International 2012) 67.

[146] Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886, 902.

3.5.3.1 Review by the enforcement court

It is argued that the review of arbitration should be conducted by the enforcement court at the enforcement stage.[147] The view is advanced that instead of having a 'dual system of control,'[148] first by the place of arbitration and then by the national court of the place of enforcement, in order to improve certainty and efficiency in the review process, the arbitral award should be reviewed only at the place of enforcement.[149] Proponents of this theory argue that arbitration awards may be subject to the law of the jurisdiction where the enforcement of the arbitral award is sought rather than the seat of arbitration.[150] Jan Paulsson who is the main proponent of the delocalised theory asserts that 'delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent of the legal order of its country of origin'.[151]

[147] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358; William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21; Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291, 298.

[148] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 180; Chrispas Nyombi, 'The Practicalities of Delocalisation in International Commercial Arbitration' (2017) 5 IBLJ 461, 462.

[149] LM Mangan, 'With the Globalisation of Arbitral Disputes, Is It Time for a New Convention' (2008) 11 Intl ALR 133, 134.

[150] Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 ICLQ 53, 57.

[151] Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 ICLQ 53, 57.

International commercial arbitration is regulated by its own rules and should only be subject of control at the stage of recognition and enforcement of the arbitral award.[152]

There are two arguments against the review by the court of enforcement. First, it cannot reflect the reality of international arbitration as there would be different judgments for the review of a specific award rendered by different enforcement courts. It is considered by some scholars as a 'dangerous heresy'[153].

A historical case, which lasted for decades until settled, highlights the problems associated with the review of arbitral awards by enforcement courts. In *Societe Europeenne d'Etudes et d'Enterprises (SEEE) v Federal Republic of Yugoslav*,[154] the parties made a contract to construct a railway. According to their contract, disputes should be settled by arbitration. Disputes arose regarding payment. SEEE requested additional money as a result of the devaluation of the French Franc and a dispute arose between the parties in this respect. SEEE submitted the dispute to arbitration in Switzerland. The Republic of Yugoslavia refused the arbitration process in the Canton Vaud in Switzerland. Subsequently, the award was rendered by two arbitrators in favour of SEEE in Geneva. The Republic of Yugoslav brought an action to set aside the award in the Cantonal Court of Vaud on the ground that the award was contrary

[152] Alexander J. Bělohlávek, 'Seat of Arbitration and Supporting and Supervising Function of Courts' in Alena Banyaiova and Naděžda Rozehnalová (eds), *Czech and Central European YB of Arbitration - Interaction of Arbitration and Courts* (Juris 2015) 21; Emmanuel Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years*, (ICCA Cong Series No 16, Kluwer Law International 2012) 68.

[153] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 25.

[154] Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 492.

to article 516 of the Code of Civil Procedure of the Canton Vaud which provides that the number of the arbitrators must be an uneven number. The application to set aside the award was dismissed by the court due to the lack of jurisdiction to hear the case. The court held that the arbitration award rendered by the arbitral tribunal in Lausanne was not considered Swiss arbitration as the award was rendered by two arbitrators and the award 'does not constitute an arbitral award within the meaning of article 516 of Code of Civil Procedure of the Canton Vaud and that it must be returned to the deponent'.[155] The award was not capable to register in Cantonal authorities. The judgment was also confirmed by the Swiss Supreme Court which held that the award was not a Swiss award because it did not satisfy the requirements of the arbitration law of the Canton Vaud. The Supreme Court concluded that it did not have jurisdiction to decide about the validity of the award.

SEEE tried to enforce the arbitral award in different jurisdictions. SEEE brought an action in the Court of First Instance of Paris for leave to enforce the award. The court granted leave initially but retracted it later based on the ground that 'the arbitral award was contrary to the agreement made between France and Yugoslavia of 18 November 1950'.[156] The decision was approved by Court of Appeal of Paris.

SEEE sought to enforce the arbitral award in the Netherlands. SEEE asked the Court of Appeal in the Netherlands to enforce the arbitral award. The court refused enforcement on the ground that although article V(1)(e) of the New York Convention recognised the parties' freedom to organise their arbitration process, the provision of the article V(1)(e) only apply to arbitrations

[155] *Société Européenne d'Etudes et d'Entreprises (SEEE) v Socialist Federal Republic of Yugoslavia*, Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 491.
[156] *Société Européenne d'Etudes et d'Entreprises (SEEE) v Socialist Federal Republic of Yugoslavia*, Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 492.

which are governed by national laws. The court held that 'the award was not an award within the meaning of the Convention since it was not governed by a law on arbitration'.[157] The New York Convention does not recognise the concept of the delocalised award and cannot be applied to a floating arbitration award. The case was brought before the Dutch Supreme Court twice. The Supreme Court held that the Yugoslavia government could not claim immunity from the obligation of its contract because 'it had entered, on an equal footing, into a contract of private law with SEEE'.[158] It also asserted that when enforceability of the award was sought, the court did not have the right to consider whether there is any connection between the award and the place where the award was rendered. Since the Swiss court did not recognise the arbitration award as a Swiss award there was no connection between the award and the place of arbitration. The court held that the award must be enforced even in the lack of such a connection. Following this decision, SEEE sought the enforcement of the award from the Hague Court of Appeal. The court refused the enforcement again on the ground that enforcement would violate Dutch public policy because the arbitral award was contrary to the Yugoslav-French agreement of 18 November 1950. The appeal from this decision for the second time was sought from the Dutch Supreme Court. The court rejected the Court of Appeal's decision on the basis that the enforcement court cannot review the merits of the arbitral award. It also held that the New York Convention article V(1)(d) is not applicable as the contract was predated the Convention.

In 1977, the French Supreme Court rejected the decision of the Paris Court of Appeal and returned it to the Court of Appeal of Orleans. The Court of Appeal rejected the enforcement

[157] *Société Européenne d'Etudes et d'Entreprises (SEEE) v Socialist Federal Republic of Yugoslavia*, Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 491.
[158] *Société Européenne d'Etudes et d'Entreprises (SEEE) v Socialist Federal Republic of Yugoslavia*, Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 492.

due to the violation of French public policy arguing the award contained a manifest error. The French Supreme Court reversed the decision again holding that the 'enforcement of a foreign arbitral award in France can be refused only if it violates international public policy, as conceived in France, which does not include an error of the arbitrators even if such error is manifest'.[159] The case was referred to the Court of Appeal of Rouen which granted the enforcement.

The arbitral award was rendered in Switzerland but the award was not valid under the Civil Procedure of the Canton Vaud and it was not considered a Swiss arbitration award. This meant that the award had no nationality. According to many jurisdictions, a delocalised arbitral award is not valid and cannot be enforced. However, the delocalised arbitration award in this case is enforced by the French Court by relying on the New York Convention while it has been rejected by the Dutch supreme court relying on the same Convention. This demonstrates the problem with the current practice of delocalised arbitration. It also indicates that relying on the enforcement court as the forum to review the validity of arbitration allows seeking review in different states where the losing party has assets. Delegating the power to the enforcement court at the enforcement stage to review the arbitration award and decide about the validity of the arbitration award can result in disharmony in reviewing arbitration awards. Different judgments may be rendered by different enforcement courts.

The second argument highlights the risk associated with a fair arbitral process. The opponents of the delocalised theory argue that the lack of proper control by the seat of arbitration may make it easier for arbitrators to frustrate the principle of due process without any accountability

[159] *Société Européenne d'Etudes et d'Entreprises (SEEE) v Socialist Federal Republic of Yugoslavia*, Cour d'appel, 1e civ et 2e civ, Rouen, 13 novembre 1984, N° 8 / E2, (1986) XI YB Comm Arb 491.

in the seat of arbitration. Furthermore, a delocalised practice would not satisfy the principle of fairness, as the enforcement court where the losing party has assets is normally the losing party's home state.[160] There is a possibility that such a national court would be biased and would not offer a fair and efficient review.

In my opinion, the delocalisation theory is an attractive concept in international arbitration. However, reviewing an arbitration award by the court of enforcement has many drawbacks. Similarly to a review by the court of the seat, parties cannot interfere in the scope of review as it is bounded by the national law of the state in which enforcement is sought. Furthermore, a losing claimant would have no recourse to a review process. It cannot bring harmonisation and consistency in the review process and would undermine the arbitration process in practice. The review of an arbitral award at the enforcement stage is outside the scope of this thesis and the opposition here merely refers to a delocalised review by the enforcement court.

3.5.3.2 Review by an international forum

A second group believes that the review of an international arbitral award should be detached from the involvement of any national law and national courts. The creation of an international forum to conduct reviews in international arbitration is suggested. This is known as Transnational Representation.[161] It argues that the legal nature of arbitration is developed neither from the legal order of the seat of arbitration, nor from the legal order of the enforcement states, but developed from a transnational legal order which can be called the 'arbitral legal

[160] LM Mangan, 'With the Globalisation of Arbitral Disputes, Is It Time for a New Convention' (2008) 11 Intl ALR 133, 133.

[161] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271, 279.

order'.[162] The arbitration award is a decision of 'international justice'[163] and 'is neither national nor stateless'.[164] It implies that a new international arbitration court should be established in order to conduct the review of arbitration awards.[165] The new court would replace national courts to hear challenges from arbitration awards[166] and would facilitate the review process.

This is considered by some scholars as an 'impossible dream'[167] as states are unwilling to lose their sovereignty. The creation of a new international body would exclude the parties from recourse to the national court of the seat of arbitration for reviewing and challenging the arbitral award.

I am an advocate of the delocalisation theory of arbitration award and the establishment of an international forum for conducting the review. I believe the theory will gain significant support as it would replace the current national review of arbitration awards with a uniform and international legal framework. Such an international forum and its pros and cons are the topics of discussion in Chapter 5.

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[162] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271, 279.

[163] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271, 279.

[164] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271, 279.

[165] Chrispas Nyombi, 'The Practicalities of Delocalisation in International Commercial Arbitration' (2017) 5 IBLJ 461, 483; Pierre Mayer, 'The Trend Towards Delocalisation in the Last 100 Years' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 37,38.

[166] Stephen M Schwebel, *Justice in International Law: Further Selected Writings* (CUP 2011) 249.

[167] Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109.

3.6 Conclusions

In this chapter, the question of which court should review an arbitral award has been critically examined. First, the review by the court of the seat of arbitration was studied by emphasising the seat theory. The seat of arbitration is defined as the legal location of arbitration. In current practice, an arbitration award is reviewed by the court of the seat. This is due to the adoption of the seat theory by international instruments and most jurisdictions. According to the seat theory, arbitration is governed by the law of the place where arbitration has its legal domicile. Consequently, parties implicitly accept the annulment procedure of the seat of arbitration.

A criticism of the review by the court of the seat is that the seat is normally chosen because of the convenience of the place and it would be unreasonable to bind the parties to the court and the national law of the place which they voluntarily excluded. Furthermore, the review by different jurisdictions would vary and there is no international harmonised review of arbitral awards by the seat. The review by the seat of arbitration would also undermine party autonomy by binding them to a specific review whose extent is set by the national law of the seat. Finally, the review of international commercial arbitration awards by the court of the seat is not truly international and cannot address the demands of growing global trade. The current system of review should be reformed to provide an independent review mechanism that can be tailored according to the parties need.

The chapter also looked at the delocalised theory which has been advanced by some commentators in order to address the shortcomings of the seat theory. The proponents of the delocalised theory detach the arbitration from the national legal systems of the place of arbitration. They emphasise the principle of the parties' autonomy as a foundation of the arbitration process. An extreme interpretation of the theory which is known as delocalisation of

the arbitration process detaches the arbitration completely from national legal systems. In different stages of the arbitration, the assistance of national courts is inevitable and there is no alternative to the coercive powers of the court of the seat. It is argued here that delocalisation of the arbitration process would undermine international arbitration as the support and assistance of the court is necessary to conduct international arbitration, for example, enforcing arbitration agreements or granting interim measures. The assistory role of the seat in different stages of arbitration is very important but the role of the court must be confined to avoid unnecessary intervention by the court.

Another form of the delocalisation theory is the delocalisation of an arbitral award which delegates the power to review an arbitral award to either the enforcement court or an international forum. In this type of delocalisation, the seat of arbitration would no longer involve in review of arbitral awards. It is argued in this chapter that the delegation of the review power to the enforcement court would cause inconsistency and results in contradictory awards issued by different enforcement courts. Furthermore, the enforcement court is usually at the home state of the losing party where it has assets and may be biased in its favour.

National legal systems will govern the review process if the award is reviewed either by the court of the seat or the enforcement court. This would undermine party autonomy and hinders the independence of arbitration from the judiciary. Furthermore, it is impossible to form a harmonised international regime in reviewing arbitration awards through national courts. This research goes on to examine the possibility that an international arbitration review court can be the solution to the above-mentioned problems. Such a court may provide a harmonised regime for the review of arbitral awards while ensuring the finality and the fairness of arbitration. This

is explored in detail in Chapter 5 after a discussion, in Chapter 4, about the need for reforms in the scope of review of awards in international commercial arbitration.

CHAPTER 4. SHOULD THE SCOPE OF REVIEW OF AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION BE EXPANDED?

4.1 Introduction

One of the fundamental objectives of international commercial arbitration is the finality of an arbitral award.[1] This means that an arbitration award is final and binding without any possibility of review on the merits. Although international instruments[2] and national laws[3] offer a judicial review of an arbitral award on limited grounds, as discussed in chapter 2, most jurisdictions refuse any appellate mechanisms[4] in order to safeguard and promote the finality of arbitration awards.[5] However, this feature is not praised by all practitioners and commentators.[6] The

[1] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 53.

[2] For example, UNCITRAL Model Law, art 1(2); New York Convention, art V(1)(e).

[3] For example, the German Code of Civil Procedure as promulgated on 5 December 2005, s 1059; the Canadian Commercial Arbitration Act 1985, art 34.

[4] For example, Austria, Germany, Malysia, Portugal, France, US and Switzerland; see also discussion in s 2.7 of this thesis; Harisankar K Sathyapalan, 'Annulment versus Enforcement of International Arbitral Awards: Does the New York Convention Permit Issue Estoppel?' (2015) Intl ALR 47, 48.

[5] Daniel M Kolkey, 'Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations' (1988) 22 Intl L 693, 694.

[6] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531; Noam Zamir and Peretz Segal, 'Appeal in

limited availability of appellate review in international commercial arbitration has undermined fairness and some commercial users find arbitration too risky as a method of dispute resolution.[7]

The main question that should be answered is whether the current practice for challenging an international commercial arbitration award needs reform by expanding the scope of review. Two fundamental principles that are used to justify the current system of review in international commercial arbitration are finality and fairness. An important secondary question is what the right balance between these two principles is. Is the principle of finality still an important factor to the parties? To what extent do parties want to sacrifice or jeopardize fairness for finality? These questions will be examined first before answering whether the scope of review in international commercial arbitration should be expanded.

In Section 4.2, principles of finality and fairness are examined in order to find out whether parties still prefer finality over fairness in international commercial arbitration. The need to expand the scope of review in international commercial arbitration is examined in Section 4.3. The arguments in favour of and against expanding the scope of the review are considered to advance the discussion in this section. The chapter finishes with conclusions.

International Arbitration—an efficient and affordable arbitral appeal mechanism' (2019) 35 Arb Intl 79.

[7] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1130; Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality' (2013) 30 J Intl Arb 531, 534.

4.2 Finality and fairness

A pertinent question is what the appropriate balance between finality and fairness is according to current trends. By answering this question, the basis for expanding review by introducing an appeal mechanism will be justified.

4.2.1 Fairness

The principle of fairness is an indispensable feature of international commercial arbitration. Justice is a fundamental objective of every dispute settlement mechanism. When parties draft an arbitration agreement, they normally believe that arbitration provides a fair and efficient system for settling their disputes.[8] Tavender asserted that 'Fairness seeks to approximate justice between the parties, based on the pursuit of truth and a correct result. Ultimately it is this fairness that imbues the judicial system with its moral force and acceptability in civilized society'.[9]

There is no measure to assess fairness. It is argued that fairness is used 'freely to convey a wide variety of meanings and to characterize heterogeneous events or states of the world'.[10] Parties' satisfaction with an arbitral award would form their perception of fairness.[11] For example, a

[8] Benjamin A Griffith, 'Contractual Expansion of Judicial Review of Arbitration Awards in Missouri after Hall Street and Cable Connection' (2013) 58 Louis ULJ 265, 265.

[9] EDD Tavender, 'Considerations of Fairness in the Context of International Commercial Arbitrations' (1995) 34 Alta L Rev 509, 510.

[10] Anthony de Jasay, 'When Fair Is Not Just and Just Is Not Fair' (2006) 11 Ind Rev 165, 165.

[11] Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Soc'y Rev 103, 103.

losing party may find the whole process unfair contrary to a winning party who finds it fair even if there were serious flaws in the arbitral award.[12]

Fairness is classified as procedural and substantive fairness.[13] Procedural fairness or procedural due process[14] is sometimes considered the same as the efficiency of the process, settling a dispute in a fair way, the impartiality of the arbitrators or tribunal and equality of opportunity for presenting a case.[15] It is argued that satisfying the requirement of procedural fairness is sufficient to consider the whole process fair according to the current practice.[16]

Substantive fairness is related to the accuracy, correctness, quality of the award and the possibility to correct errors in arbitral awards.[17] Substantive fairness is considered as the extent to which an award 'reflects an accurate application of relevant law to the facts of the case'.[18] The proponents of expanding the review of an arbitral award argue that 'more emphasis should be placed on the correctness of awards'.[19]

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[12] Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Soc'y Rev 103, 109.

[13] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen J Intl L 110, 111.

[14] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen J Intl L 110, 124.

[15] English Arbitration Act 1996, s 68.

[16] Nana Japaridze, 'Fair Enough-Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 Hofstra L Rev 1415, 1430.

[17] Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Soc'y Rev 103, 103.

[18] Robert G Bone, 'Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness' (2003) 83 BU L Rev 485, 510.

[19] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 532; Irene M Ten Cate, 'International

The necessity of procedural fairness in international commercial arbitration is emphasised by the Model Law. For example, article 18 of the UNCITRAL Model Law provides that 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. Arbitral tribunals and arbitrators must argue the case with both parties and have to treat the parties equally by providing the same opportunities to present their case. Otherwise, it would frustrate the requirement of due process and damage the principle of fairness.

Due to the lack of appeal in international commercial arbitration in most jurisdictions, parties are restricted to the limited judicial review by a court. A losing party to an arbitral award would be disappointed facing the difficulties of appealing 'what they regard as unfair verdicts'.[20] The limited review grounds may sacrifice the correctness of an arbitration award in order to ensure finality.[21] Although the enforcement court has the power to review an arbitral award, the scope of review at the enforcement stage is also limited as discussed in Section 2.6. Enforcement of an unfair award could prove seriously damaging for arbitration's reputation and may impose economic costs on the losing party which could never be reversed especially when the stakes are high. Therefore, the need for fairness favours the introduction of a substantive review mechanism in international commercial arbitration.

Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1113; Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33(2) J Intl Arb 185; Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeals process?' (2018) 84 J Intl Arb Med Disp Mang 104, 109.

[20] Christopher R Drahozal and Quentin R Wittrock, 'Is There a Flight from Arbitration' (2008) 37 Hofstra L Rev 71, 72.

[21] Stephen L Hayford, 'Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards' (1995) 30 Ga L Rev 731, 740.

4.2.2 Finality

Finality is also an important aspect of arbitration and a 'natural consequence of the long-recognized principles of *pacta sunt servanda* and *res judicata*'.[22] This principle has a close connection with the validity of an arbitral award as the valid award has res judicata and finality effects.[23] The International Court of Justice described the concept of *res judicata*:

> That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose.[24]

An arbitrator may not revise its decision. The award remains unchanged in the event of a later conflict, thus making it legally binding on the parties.[25]

A dispute settlement, by any form, demands a level of certainty and finality 'since justice too long delayed becomes justice denied'.[26] Finality is interpreted as the lack of any 'substantive

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[22] Mateus Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Int Arb 185, 185.

[23] Kevin M Clermont, 'Res Judicata as Requisite for Justice' (2015) 68 Rutgers UL Rev 1067, 1074.

[24] Stefan Talmon, 'The South China Sea Arbitration and the Finality of 'Final' Awards' (2017) 8 JIDS 388, 390, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 115.

[25] Pierre Lalive, 'Absolute Finality of Arbitral Awards' [2008] Revista Internacional de Arbitragem e Conciliaçao 9 <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawlalive_absolute_finality.pdf> accessed 24 February 2021

[26] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen J Intl L 110, 116.

review of the merits of an arbitral award'.[27] It means that an arbitration award is final and there is no recourse against an erroneous award because 'the process remains a private risk-management tool'.[28] Parties should accept the outcome of the arbitration process 'if the tribunal has jurisdiction, the correct procedures are followed, and the correct formalities are observed'.[29] The arbitral award is final and binding on the parties whether good or bad.[30] Lalive argues that finality provides opportunities to parties to save time and enables them to proceed despite disagreements and differences so that they can continue their trade.[31]

Finality is also construed as 'an extension of the principle of party autonomy'.[32] Parties by choosing arbitration prefer finality and decide to choose a dispute settlement mechanism that puts emphasis on it.

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[27] Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeals process?' (2018) 84 J Intl Arb Med Disp Mang 104, 104.

[28] Jennifer Samsel, 'Evolving Judicial Review of Arbitration Awards: In Massachusetts Lagging behind in a Manifest Disregard of Arbitrators' Substantive Errors of Law' (2006) 40 Suffolk UL Rev 931, 931.

[29] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 10.64.

[30] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 10.64.

[31] Pierre Lalive, 'Absolute Finality of Arbitral Awards' (2008) Revista Internacional de Arbitragem e Conciliaçao 6 <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawlalive_absolute_finality.pdf> accessed 24 February 2021.

[32] Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeals process?' (2018) 84 J Intl Arb Med Disp Mang 104, 108.

This principle plays a substantial role in arbitration and has been counted as an advantage of arbitration as an efficient dispute resolution method by scholars.[33] For example, Samuel Haubold believes that 'most parties who elect to arbitrate rather than litigate do so because they want finality'.[34] Furthermore, it is argued that 'the risk of error is outweighed by the desire for speed and finality'[35] in arbitration. According to Redfern and Hunter, 'by choosing arbitration, the parties choose, in principle, finality'.[36] In *Mitchell v Cable*,[37] Lord Jeffrey emphasised the finality of an arbitration award and the lack of judicial review on the merits by asserting that an arbitrator 'may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to subject themselves to his despotic power'.[38]

The UNCITRAL Model Law and the New York Convention provide for the finality of arbitral awards by limiting the scope of review in international commercial arbitration. Article 34(2) of UNCITRAL Arbitration Rules provides that 'all awards shall be made in writing and shall be final and binding on the parties'. This is also reflected in the limited grounds that are listed for

[33] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 10.01.

[34] Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Intl Arb 185, 216, citing Samuel A Haubold, 'Opting Out of the US Legal System-The Case for International Arbitration' (1997) 10 Intl L Practium 43, 44.

[35] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 531.

[36] Nigel Blackaby and others, Redfern and Hunter on International Arbitration (6th edn, OUP 2015) 10.01.

[37] (1848) 10 D. 1297.

[38] *Mitchell v cable* (1848) 10 D 1297, 1309.

review[39] which indicates the importance of the finality for the drafters of the Convention and the Model Law.[40]

Arbitration awards are considered to be final and binding under most arbitration laws. For example, according to article 9 of the Arbitration Law of the People's Republic of China, 'the arbitration award is final. After the award is given, the arbitration commission or the people's court shall not accept the reapplication of the suit concerning the same dispute by any of the parties concerned'. Some jurisdictions put more emphasise on finality by providing an opportunity for parties to waive the right of review. For example, according to article 190(1) of the Swiss Federal Act on Private International Law 1987, the arbitral award is final from its notification, but Swiss law allows limited judicial review. It also provides an opportunity for parties to waive the right to challenge arbitral awards. According to article 192 of the Swiss Federal Act on Private International Law 1987, the parties may, by an express statement in the arbitration agreement or an agreement subsequent to the arbitration agreement, waive their right to contest the award, if neither party has their domicile, habitual residence, or business establishment in Switzerland.

Similarly, article 1522 of the French Code of Civil Procedures 2011 provides that parties can enter into a binding agreement to exclude review from their arbitration proceedings. However, contrary to Swiss law these agreements are valid for parties that are domiciled in France, as well as those that are not.

The English Arbitration Act 1996 prevents parties from excluding the right to challenge arbitration awards under section 67 and 68 by contract. Section 4(1) of the Act 1996 provides

[39] UNCITRAL Model Law, art 34; New York Convention, art V.

[40] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 168.

that ‘The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary’. Section 67 and 68 of the Act 1996 are part of Schedule I. However, an appeal on a question of law under section 69 can be excluded by the parties’ agreement. Section 4(2) of the Act 1996 provides that ‘The other provisions of this Part (the ‘non-mandatory provisions’) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement’. Section 69 is not part of Schedule I of the Arbitration Act 1996.

The rules of most international arbitration institutions recognise the principle of finality. For example, according to article 46 of the Institute of the Stockholm Chamber of Commerce Arbitration Rules, ‘An award shall be final and binding on the parties when rendered’. A number of international arbitration institutions give more weight to the arbitration's finality by excluding any type of recourse from arbitral awards.[41] Article 29.2 of the London Court of International Arbitration (LCIA) Arbitration Rules provides that ‘To the extent permitted by any applicable law, the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA Court to any state court or other legal authority’. According to article 35(6) of the International Chamber of Commerce (ICC) Rules ‘Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made’.

The importance of finality is emphasised in international commercial arbitration. It is widely accepted that parties choose arbitration to reach a final and binding award. However, a balance

[41] LCIA Arbitration Rules, art 26.8.

must be made between finality and fairness in order to sustain arbitration as a successful dispute settlement mechanism.

4.2.3 Striking the right balance between fairness and finality

A question that needs to be answered here is whether there is a tension between these two important considerations in international commercial arbitration. Are principles of fairness and finality rival principles or are they complements that work together to pursue justice?

It appears that there is tension[42] between these two principles. The principle of finality demands a restricted right to review arbitration awards while fairness seeks more scrutiny over awards. Park states that:

> Efficient arbitration implicates tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality while enhancing fairness calls for some measure of court supervision. An arbitration's winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions.[43]

This tension is treated by preferring one principle over the other. Some commentators have argued that parties in international commercial arbitration prioritise finality over fairness and correctness.[44] Hochman claimed that a reason for the popularity of arbitration over litigation is

[42] EDD Tavender, 'Considerations of Fairness in the Context of International Commercial Arbitrations' (1995) 34 Alta L Rev 509, 512.

[43] William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, OUP 2012) 596.

[44] Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeals process?' (2018) 84 J Intl Arb Med Disp Mang 104, 105.

the finality of an arbitral award.[45] The chance of a legally correct decision by a trial court is higher and in case of an error, there is an appellate procedure to correct it. However, some parties may find the delay and expenses of a court trial too high.[46]

Parties to an arbitration agreement accept that the award may be rendered in error but their right to challenge an erroneous award is usually limited to procedural and jurisdictional errors.[47] Milotic argued that parties are 'fully aware of forthcoming legal consequences, gave their consent to whatever an arbiter might render. This means that they assumed the risk on the result of the arbitration they had previously voluntarily arranged'.[48]

In *AKN v ALC,*[49] although the Singapore Court of Appeal set aside the arbitral award on several grounds, the court applied limited grounds for scrutinising the arbitral award. The court stated that:

> Parties to arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is

[45] Stephen A Hochman, 'Judicial Review to Correct Arbitral Error--An Option to Consider' [1997] 13 Ohio St. J. on Disp Resol. 103 at 106.

[46] Stephen A Hochman, 'Judicial Review to Correct Arbitral Error--An Option to Consider' [1997] 13 Ohio St. J. on Disp Resol. 103 at 106.

[47] William W Park, 'Arbitration in Autumn' (2011) 2 JIDS 287, 292; Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen J Intl L 110, 124.

[48] Ivan Milotić, 'Exclusion of Appeals against Arbitration in Roman Law' (2013) 20 Croatian Arb YB 241, 244.

[49] [2015] SGCA 18.

> within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.[50]

However, it is argued that 'too much finality may undermine the legitimacy of arbitration'.[51] Although finality is praised for enhancing the 'stability and predictability' of international commercial arbitration, 'arbitral users are left with a gap in their ability to pursue justice when they believe that the award is wrong'.[52] Kiltgaard argues that 'Speed and finality are virtues, but only if you win. They are not virtues if a fundamental mistake has been made'.[53]

Japaridze asserts that the nature of international commercial arbitration is changing, and the traditional characteristics are becoming less important.[54] It is argued that 'as the stakes of cross-border disputes become ever higher, arbitral errors become more costly and the value of finality may become less significant when compared to the value of getting the right result'.[55] Tavender states several reasons for the importance of fairness in international commercial arbitration:

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[50] *AKN v ALC* [2015] SGCA 18, [38].

[51] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arb Intl 79, 84.

[52] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arb Intl 79, 92.

[53] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 532, citing Thomas J Klitgaard, 'The Transnational Arbitration of High-Tech Disputes,' (7th Annual Transnational Commercial Arbitration Workshop, Texas, 20 June 1996).

[54] Nana Japaridze, 'Fair Enough-Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 Hofstra L Rev 1415, 1416.

[55] Cameron David Hassall, Matthew Brown and Tiger Lin, 'Appellate Review in International Commercial Arbitration' in Neil Kaplan, Michael Pryles and Chiann Bao (eds), *International Arbitration: When East Meets West. Liber Amicorum Michael Moser* (Kluwer Law International 2020) 96.

> When disputes become difficult and complex, when credibility factors and disagreements over important evidentiary or opinion matters expand, when most of the relevant facts are in the possession and control of only one party, when the issues become complicated, when multiple parties and jurisdictions are involved, when the principles are important or the amount involved significant, concerns about fundamental fairness in international arbitrations deserve careful consideration.[56]

The current balance between the two principles may be considered appropriate, as it satisfied the parties desire to have a fast and efficient dispute resolution mechanism which also preserves the limited right to challenge an arbitral award on procedural grounds.[57]

In order to understand the current trend and preference of international commercial arbitration users, it would be better to look at available empirical evidence. However published data is rare and difficult to access. Here, two surveys that questioned the importance of finality are examined. A survey was conducted in 2000 by Naimark, the Senior Vice President of the American Arbitration Association (AAA) and Keer.[58] The participants were attorneys and parties to international commercial arbitration cases conducted by the American Arbitration Association from the 1st of January 2000 to the 30th of November 2000.[59] One of the questions

[56] EDD Tavender, 'Considerations of Fairness in the Context of International Commercial Arbitrations' (1996) 34 Alta L Rev 509, 532.

[57] Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 J Intl Arb 553, 589.

[58] Richard W Nalmark and Stephanie E Keer, 'International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People-A Forced-Rank Analysis' (2002) 30 Intl Bus Law 203.

[59] Richard W Nalmark and Stephanie E Keer, 'International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People-A Forced-Rank Analysis' (2002) 30 Intl Bus Law 203, 209.

of the survey was which key characteristics of arbitration is the most important to them. These included speed, privacy, receipt of a monetary award, fair and just outcome, cost, efficiency, the finality of the decision, arbitrator expertise and continuing relationship. According to the survey, a fair and just award is the most favourable factor which was chosen by 81% of the participants. In comparison, finality ranked fourth and was only important for 32% of the participants.[60]

A survey conducted by the Queen Mary University of London in 2018[61] also provides data about the extent of the popularity of finality in international commercial arbitration. Participants in this survey included private practitioners, arbitrators, in-house counsel and also 'representatives of arbitral institutions, academics, experts and third-party funders'.[62]

The survey sought to identify[63] the most valuable characteristics of international arbitration. Enforceability of awards (64%), avoiding specific legal systems/national courts (60%) and

[60] Richard W Nalmark and Stephanie E Keer, 'International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People-A Forced-Rank Analysis' (2002) 30 Intl Bus Law 203, 204.

[61] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[62] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 1 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[63] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 1 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020; 'Views were

flexibility (40%) were identified as the most favoured characteristics of international arbitration. Notably, only 16% of the vote went to finality compared to 18% in the survey that was conducted in 2015 by the same institute.[64]

Having access to a fast and expedited service in both surveys was not considered as a favourable factor compared with other factors in the surveys. For example, in the survey conducted by the Queen Mary University of London 2018[65], only 12% of the participants found speed as a favourable factor of international arbitration. Finality also appears to become less important for parties from 2000 to 2018. The trend may be linked to the increased stakes of commercial disputes which makes a correct award more important for parties.

Another survey which was conducted by Queen Mary University of London and PWC in 2013 is 'Corporate Choices in International Arbitration: Industry Perspectives'. Senior corporate counsels, arbitration practitioners and arbitrators took part in this survey. Several frequent users of arbitration are interviewed for the survey. They asserted that 'regardless of whether they are

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sought from a diverse pool of participants in the international arbitration sphere, including in-house counsel, arbitrators, private practitioners, representatives of arbitral institutions, academics, experts and third-party funders'. 'The findings of the survey draw from an unprecedented 922 questionnaire responses and 142 in-person or telephone interviews. These sheer numbers, as well as the wide geographical spread of contributing users, make this survey by far the most comprehensive empirical study the School has ever conducted'.

[64] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 07 December 2020.

[65] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

a claimant or respondent, 'fairness' – above all other considerations – is what companies look for in a dispute resolution mechanism'.[66]

It is important to conduct surveys and obtain the view of practitioners in order to determine the extent of users' satisfaction with the current system of review and the importance of different features of arbitration to them. However, the reliability of the surveys depends on different factors such as methods and questions of the survey, impartiality of the persons or organisation who conducted the surveys and the people who are questioned in the surveys. A criticism of surveys in international commercial arbitration is the risk that parties may act differently from what they claimed in response to the survey questions.[67]

Michael McIlwrath pointed out some problems with the Queen Mary survey's methodology. For example, he argued that the results of the survey which was conducted by PriceWaterhouseCoopers LLP and the Queen Mary University of London in 2008 should be treated with care.[68] The sample population is disputed to be a true representative of practitioners. He also argued that it would be more accurate to raise a query on the preference of respondents of different dispute resolution options rather than their satisfaction with a particular form of dispute resolution.[69] It is also argued that the survey participants may be biased towards

[66] Queen Mary, University of London and PWC, 'Corporate choices in International Arbitration Industry perspectives' (2013) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf> accessed 07 December 2020.

[67] Christopher Drahozal, 'Disenchanted? Business Satisfaction with International Arbitration' (2008) 2(5) WAMR 2, 12.

[68] Michael McIlwrath, 'Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices' (2008) 74 J Intl Arb Med Disp Mang 424, 426.

[69] Michael McIlwrath, 'Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices' (2008) 74 J Intl Arb Med Disp Mang 424, 428.

arbitration as they are its users and have chosen arbitration over litigation.[70] Thus, making conclusions based on empirical evidence alone should be avoided.

By ratifying the New Convention and adopting the Model Law, national jurisdictions have emphasised the importance of finality. This is reflected in the limited judicial review offered by most jurisdictions. Judicial review would value finality over fairness by restricting the scope of review to procedural and jurisdictional challenges.[71] On the other hand, an appeal would emphasise fairness by scrutinising both substantive and procedural correctness at the expense of finality. Schreuer argued that:

> In international arbitration, the principle of finality is often seen to take precedence over the principle of correctness. The desire to see a dispute settled is regarded as more important than the substantive correctness of the decision. Annulment is the preferred solution to balance these two objectives. It is designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects.[72]

The current practice clearly shows that finality and fairness are not treated equally and finality is overemphasised in international commercial arbitration. Such a preference undermines the autonomy of arbitration by binding parties to a limited review that is determined by national laws. Parties who have a concern over the fairness of the settlement mechanism may avoid

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[70] Christopher R Drahozal, 'Empirical Findings on International Arbitration: An overview' in Thomas Schultz and Federico Ortino (eds) *The Oxford Handbook of International Arbitration* (OUP 2020) 645.

[71] Jason Clapham, 'Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?' (2009) 26 J Intl Arb 437, 439.

[72] Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2009) 903.

arbitration. Imposing restrictions on parties' right to bring a challenge on erroneous arbitral awards by prioritising finality would frustrate the reliability of arbitration.

The emphasis on the importance of one of these principles is not realistic. As discussed above, fairness is an important feature for parties in their dispute settlement mechanisms. These principles are not rivals but complementary which can work together in order to bring efficiency and certainty in arbitral processes. It is proposed here that fairness should receive its due consideration and the current emphasis on finality should be changed to strike the right balance between the two. Establishing an appeal mechanism in international commercial arbitration would promote fairness. Enforcing an erroneous arbitral award would damage the concept of fairness in international commercial arbitration and parties may find arbitration a mechanism that would not provide fair dispute settlement service.

Introducing an appeal mechanism through a unified forum would facilitate the development of a body of case law which is currently absent.[73] This would promote harmonisation and consistency in the law and practice of international commercial arbitration. Such harmonisation would nurture fairness since it would increase consistency, certainty and stability in international commercial arbitration by establishing norms and principles which would be applied equally to all parties. Arbitrators would have access to the case law which would enable them to render similar awards in comparable cases. In international commercial arbitration, disputes are international and it is important that parties receive the same treatment in similar disputes around the world. This would give parties greater assurance that the process is fair and would boost confidence in the system.

[73] See discussion in Section 6.3.3.

A question would arise whether finality as a key characteristic of international commercial arbitration would be undermined by expanding the scope of review in international commercial arbitration. There may be a concern that any form of appeal would prolong the arbitration process and the current balance would be altered to the detriment of finality. However, it is submitted that the damage to finality would be minimal since, by the proposal of this thesis detailed in Chapter 6,[74] parties decide about the extent of review in their arbitration and they can choose the same level of scrutiny. Those parties who prefer a final and binding award can limit the review to what is available in the current practice. Ones with a concern for fairness may agree to a substantive review in their arbitration proceedings. This would also enhance party autonomy which is another feature of arbitration.

4.3 The case for appellate review

In this section, I argue in favour of expanding review in international commercial arbitration. In the course of advancing my arguments, I also address objections against an appellate review in international commercial arbitration.

There are four arguments in favour of establishing an appeal mechanism in international commercial arbitration. First, it is difficult to justify how the requirement of justice would be met where there is an inability to appeal against an award on the facts or a point of law. Zamir and Segal argued that 'the right to appeal is an essential element of access to justice'.[75] Restriction of the review to procedural grounds will not provide a safeguard against erroneous

[74] See Section 6.3.1

[75] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arb Intl 79, 92.

decisions.[76] In litigation, there is an assumption that a judge can make mistakes.[77] Almost every national legal system provides an appeal mechanism in which a dissatisfied litigant can challenge the decision 'on appeal'.[78] An appellate court's correction of an error protects litigants[79] and ensures the integrity of adjudication.[80] This should also apply to arbitration and there is no good reason to justify that arbitrators would not make mistakes.[81]

Second, correctness in decision making is an important consideration for the parties.[82] However, due to the lack of appeal in international commercial arbitration or restrictions on bringing an appeal,[83] some practitioners and large companies with high stakes disputes are discouraged to consider arbitration for settling their disputes.[84] There is a limited opportunity to redress

[76] Stephen Hayford and Ralph Peeples, 'Commercial Arbitration in Evolution: An Assessment and Call for Dialogue' [1994] 10 Ohio St J Disp Resol 343, 362.

[77] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arb Intl 79, 83.

[78] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1997) 51 SMU L Rev 469, 469.

[79] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1111.

[80] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1111.

[81] Stephen P Younger, 'Agreements to Expand the Scope of Judicial Review of Arbitration Awards' (1999) 63 Alb L Rev 241, 241; William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 535.

[82] Mauro Rubino-Sammartano and Shahla Ali, 'Will the Winds of Change on Internal Appellate Proceedings in Arbitration Reach Asia?–Part 2' (2015) 17 Asian Dis Rev 142, 147.

[83] English Arbitration Act 1996, s 69.

[84] Erin E. Gleason, 'International Arbitral Appeals: What Are We So Afraid Of? (2000) 7 Pepp Disp Resol LJ 269, 271-272; William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 541; Rowan Platt,

erroneous decisions in arbitration which may result in losses of capital, interest and business reputation. According to a study published in 2006 by Eisenberg and Miller, 'sophisticated actors prefer litigation to arbitration'[85] as they know that if the arbitration process ends with a wrongful decision due to 'misapplication of the law to the facts'[86] there is no room to appeal against the wrongful decision.

The consequences of living with a wrongful decision can be considerable. It is asserted in an international arbitration survey which was conducted by Bryan Cave Leighton Paisner (BCLP)[87] that '51% of respondents felt that in some cases the consequences of an incorrect decision are so serious as to make the lack of an appeal mechanism unacceptable'. Also, 50% of respondents had direct experience regarding a wrong tribunal decision relating to the

'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality' (2013) 30 J Intl Arb 531, 549.

[85] Theodore Eisenberg and Geoffrey P Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56 DePaul L Rev 335, 336.

[86] Eric Sparks, 'Arbitration and "Appellate" Review: Competing Legal Principles' (2017) 25 Constr Lit 11, 11.

[87] Carol Mulcahy, 'A Right of Appeal in International Arbitration: Second Bite of the Cherry: Sweet or Sour? BCLP international arbitration survey 2020' (Kluwer Arbitration Blog, 19 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/19/a-right-of-appeal-in-international-arbitration-second-bite-of-the-cherry-sweet-or-sour-bclp-international-arbitration-survey-2020/> accessed 23 March 2021; Participants in the survey include arbitrators, internal counsel, external lawyers, arbitral institution employees, faculty, experts, and litigation funders. The 123 respondents were from the following geographical regions, 'Central and South Asia (28%).Central and South Asia (28%), North Africa (14%), Australasia (12%), East and South-East Asia (61%), the Middle East (33%), North America (20%), Latin America and the Caribbean (16%), Russia (24%), East Africa (11%), Western Europe (54%), Eastern Europe (including the CIS but excluding Russia) (24%) and West Africa (16%). 2% of respondents had other regional experience not included in the above'.

substance of their dispute. [88] Thus, arbitration may put parties in a disadvantaged position compared to litigation as it does not provide the right to a full review of arbitral awards.[89] It can damage the credibility of the whole system and practitioners would lose their faith in the system.

Third, the introduction of appeal would help to keep the position of international arbitration as the most preferred and efficient method for resolving international commercial disputes. A survey was conducted in 2011 by Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution (CPR) where general corporate counsel in Fortune 1000 companies[90] were asked about arbitration amongst other dispute resolution mechanisms.[91] In this survey, almost 52% of the participant asserted that they did not refer to arbitration for settling their commercial disputes because it is difficult to appeal against arbitral awards.[92]

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[88] Bryan Cave Leighton Paisner (BCLP), 'Annual arbitration survey 2020: A right of appeal in international arbitration-A second bite of the cherry: Sweet or Sour?' (2020) <https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf> accessed 23 March 2021.

[89] Mauro Rubino-Sammartano and Shahla Ali, 'Will the Winds of Change on Internal Appellate Proceedings in Arbitration Reach Asia?–Part 1' (2015) 17 Asian Dis Rev 72, 72.

[90] The 1000 largest US companies ranked by their revenues and published by the Magazine Fortune.

[91] Thomas J Stipanowich and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations' (2014) 19 Harv Negot L Rev 1, 5.

[92] Thomas J Stipanowich and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations' (2014) 19 Harv Negot L Rev 1, 51.

Recently, a growing number of jurisdictions have created international commercial courts to attract more international commercial disputes into their boundaries.[93] For example, the Netherlands Commercial Court (NCC) was introduced in 2019,[94] The International Commercial Courts of Paris (ICCP) was introduced in 2018,[95] the China International Commercial Court (CICC) of the Supreme People's Court of China (SPC) was introduced in 2018,[96] and the Singapore International Commercial Court (SICC) was introduced in 2015.[97] The services offered by these courts could be more attractive to practitioners as these courts adopt the most popular and appealing features of international arbitration and avoid their drawbacks.[98] For example, they provide an appeal on the merits[99] which is usually absent in international commercial arbitration.[100] The introduction of appeal in international commercial arbitration would help it to retain its position as the leading dispute resolution mechanism despite the growing competition.

Fourth, establishing an appeal mechanism in international commercial arbitration will contribute to the development of the law in addition to correcting errors. Lord Thomas argued

[93] Gary F Bell, 'The New International Commercial Courts-Competing with Arbitration-The Example of the Singapore International Commercial Court' (2018) 11 Contemp Asia Arb J 193, 194.

[94] NCC Rules of Procedure 2018, art 1(1).

[95] Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris (2018).

[96] Provisions of the Supreme People's Court (CN).

[97] Supreme Court of Judicature Act (Cap 332, 2007 Rev Ed Sing) Division 3 (SG).

[98] Gary F Bell, 'The New International Commercial Courts-Competing with Arbitration-The Example of the Singapore International Commercial Court' (2018) 11 Contemp Asia Arb J 193, 208.

[99] For example, Supreme Court of Judicature Act (Cap 332, 2007 Rev Ed Sing) sch 6, s 1(f); Chinese Provisions of the Supreme People's Court, art 16.

[100] Gary F Bell, 'The New International Commercial Courts-Competing with Arbitration-The Example of the Singapore International Commercial Court' (2018) 11 Contemp Asia Arb J 193, 208.

that permission to appeal in international commercial arbitration 'would enable the courts more readily to develop the law whilst leaving arbitration as an important means of dispute resolution'.[101] It is important to note that developing the law would be in the interest of the arbitration community ultimately, although it may not be in the interest of parties participating in arbitration. A harmonised and developed system would prevent inconsistencies in international commercial arbitration and would make arbitration more efficient and effective.

There are four arguments against an appellate review in international commercial arbitration. First, proposing an appeal mechanism could cause 'unnecessary inefficiency'[102] and may be used by losing parties as a delaying tactic to prevent enforcement. Many practitioners praise finality which allows immediate enforcement of arbitral awards under the New York Convention. According to the Queen Mary University survey,[103] the enforceability of awards was the most important factor in choosing arbitration over other alternative dispute resolutions. 64% of participants choose enforceability of arbitration as the most favourable feature of arbitration.

The limited grounds for challenging an arbitral award would secure the enforceability of the award and reduce the possibility to delay enforcement by initiating an appeal process by the losing party. However, upon appeal, an award would be considered for the second time and the

[101] Lord Thomas CJ, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', (The Bailii Lecture 2016, 9 March 2016) 13.

[102] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1164.

[103] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

court of appeal award would be more credible as the chance of mistake would be lower. Thus, the enforcement courts would enforce arbitral awards with greater confidence. This also would prevent the possibility of vexatious and strategic challenges at the enforcement court which could be pursued to resist enforcement of an arbitral award.

Secondly, it is stated that 'stakes in arbitration are small enough that errors are tolerable, and the risk of error is outweighed by the desire for speed and finality'.[104] This statement can be true for some disputes for which the losing party can 'absorb the disappointments'[105] as the consequences of losing the case would not cause serious damage. However, globalisation has resulted in trade disputes that are now more complex[106] and the stakes are normally high. Drahozal asserted that 'the amount at stake in international arbitrations is much larger on average than the amount at stake in state court contract cases (and likely federal court contract cases as well)'.[107] Parties cannot take such risks easily for such high stake disputes. Where there is a possibility to introduce appellate review in international commercial arbitration and correct an erroneous award, it would be unreasonable to advise parties that you need to take the risk if you want to rely on arbitration.

[104] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 531.

[105] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 291.

[106] David J McLean, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) 30 U Pa J Intl L 1087, 1087.

[107] Christopher Drahozal, 'Empirical Findings on International Arbitration: An Overview' in Thomas Schultz, Federico Ortino and Jason Mitchenson (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 651.

The third argument against an appeal mechanism in international commercial arbitration is that the introduction of appellate review would make the arbitration process similar to a trial with sophisticated procedures [108] which parties try to avoid by submitting their dispute to arbitration.[109] This trend may make arbitration less attractive as a dispute resolution mechanism. Horvath argues that 'if this continues to occur, the risk is that a highly effective and successful dispute resolution mechanism will be lost to the international business community'.[110] However, it is not necessary to base an appeal mechanism in international commercial arbitration on litigation. The appeal can be conducted by a forum separate from national courts following its own procedure. Arbitration is a different mechanism to litigation and the appeal mechanism should meet its requirements and be flexible to accommodate the needs of the parties. Japaridze argues that arbitration and litigation are different 'in their elementary structure as dirt is to water. Mixing the two only produces mud-not the sort of stuff we willingly tread in'.[111]

Fourth, Japaridze argues that 'the compromises in judicial precision made in the interests of commercial expedience are both necessary results of decades of practical application and are

[108] Rémy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration' (2014) 25 Am Rev Intl Arb 224, 227.

[109] Clive M Schmitthoff, 'Finality of arbitral awards and judicial review' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 230.

[110] Günther J. Horvath, 'The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?' in Stefan Michael Kroll , Loukas A. Mistelis , et al. (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 271.

[111] Nana Japaridze, 'Fair Enough - Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 Hofstra L Rev 1415, 1445, citing *Natl Union Fire Ins Co v Nationwide Ins Co*, 82 Cal Rptr 2d 16, 18 (Ct App 1999).

also safeguarded by the multitude of duties and requirements placed upon arbitrators'.[112] It is also argued that the possibility of a mistake by arbitrators is lower compared to judges in litigation.[113] Arbitrators are chosen by parties based on their expertise. Thus, they normally have enough knowledge about the subject of the dispute which makes them less prone to mistakes. They have incentives to render a proper award. They have to compete with other arbitrators and their reputation is very important to them. Making an error in international commercial arbitration has financial consequences for arbitrators and they can lose their jobs.[114] However, they are human beings and like distinguished judges, are prone to mistakes.[115] Paulsson believes that 'to give a sole arbitrator, or a single tribunal, the power to make a final and unreviewable decision may be a frightening thing'.[116] Thus, there should be a chance in arbitration to correct the mistakes in a similar way to the litigation.

It is not reasonable to take a conservative view and insist that any reform in the current practice of review might undermine the efficiency of arbitration as a fast and final dispute settlement mechanism. Park argues that 'arbitration is constantly reinventing itself to adapt to each particular case and legal culture'.[117] It is helpful to draw attention to the evolution of international arbitration. Initially, the common law courts were 'jealous of their exclusive

[112] Christopher R Drahozal and Stephen J Ware, 'Why Do Businesses Use (or Not Use) Arbitration Clauses' (2010) 25 Ohio St J Disp Resol 433, 451.

[113] Nana Japaridze, 'Fair Enough - Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 Hofstra L Rev 1415.

[114] Steven Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24 JLS 379, 424.

[115] Mauro Rubino-Sammartano, 'The Fall of a Taboo' (2003) 20 J Intel Arb 387, 390.

[116] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 291.

[117] William W Park, 'The 2002 Freshfields Lecture — Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19 Arb Intl 279, 281.

jurisdiction'.[118] In *Kill v Hollister*,[119] the court held that 'the agreement of the parties cannot oust' the Court.[120] They denied any other mechanism which restricted their authority in resolving disputes.[121] It was difficult at the time to imagine the current stand of arbitration in resolving transnational commercial disputes. However, now arbitration is used as the most frequent means of settling international disputes. The arguments against the appeal mechanism stated here can be addressed by introducing an efficient appeal mechanism. The law is evolving and a mechanism that was not acceptable in the past has become a norm in settling disputes. Any attempt or argument which prevents the development of international commercial arbitration would damage its credibility in the long term. Thus, the possibility to have an appeal mechanism in international commercial arbitration, which seems difficult to implement in most jurisdictions could be a norm in a near future. There are also some indications that attempts to establish an appeal within international commercial arbitration have gained momentum. For example, a growing number of international arbitration institutions provide the right to appeal from arbitral awards for their users. In addition, there are plans in some jurisdictions to implement an appeals process for international arbitration. For example, there is a consultation underway in Singapore regarding amendments to the International Arbitration Act that would allow appeals of errors of law on an 'opt-in' basis.[122]

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[118] VS Deshpande, 'How International Arbitration can always Prevail over Litigation' (1987) 4 J Intl Arb 9, 9.

[119] (1746) 95 ER 532.

[120] *Kill v Hollister* (1746) 95 ER 532, 532.

[121] Paul L Sayre, 'Development of Commercial Arbitration Law' (1928) 37 Yale LJ 595, 610.

[122] Carol Mulcahy, 'A Right of Appeal in International Arbitration: Second Bite of the Cherry: Sweet or Sour? BCLP international arbitration survey 2020' (Kluwer Arbitration Blog, 19 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/19/a-right-of-appeal-in-international-

The success of international commercial arbitration can be interpreted as a sign of satisfaction with the current system of review and justify reasons for the lack of appellate review in international commercial arbitration. However, the question that remains is if international commercial arbitration provides an efficient, fast and cheap appellate review mechanism, would parties still reject its implementation in their arbitration process? Arbitration is always compared with litigation and other alternative dispute resolution mechanisms and there is currently no other alternative which offers better service in the international sphere. Thus, parties simply overlook the drawbacks of the system as they do not want to refer to national courts or other mechanisms for resolving their disputes.

It can be argued that it is time to reconsider the system of review in international commercial arbitration. There is no reason to restrict the review mechanism of arbitration and reject the idea of introducing an appellate review mechanism. Arbitration is based on the will of parties and their requirements must be fulfilled. For example, some practitioners choose arbitration as it offers them an effective, fast and final process which is difficult to find in litigation. On the other hand, there are users who do not want to 'bet the farm on a single tribunal's decision'. [123] There should be an option of a different form of appeal for those with these concerns as arbitration is not only for a certain type of disputes or some practitioners whose main concern is finality. International commercial arbitration needs to establish an appellate mechanism in order to prevent a wrongful award as much as possible. It would be important to note that any reform should guarantee the efficiency, viability, and feasibility of international commercial

arbitration-second-bite-of-the-cherry-sweet-or-sour-bclp-international-arbitration-survey-2020/> accessed 23 March 2021.

[123] William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 Am Rev Intl Arb 531, 535.

arbitration. Establishing an appellate review should be conducted with extra care and attention to details and principles without any compromise to the nature of international commercial arbitration.

4.4 Conclusions

Fairness and finality are two important considerations in international commercial arbitration. However, these two principles are not treated equally. Legislators have put an emphasis on finality to limit national court involvement in arbitration and to provide a fast and efficient settlement mechanism. This is reflected in limited grounds for review of an arbitral award and the lack of a substantive review on the merits of the award.

Parties choose arbitration as they believe it is a fair dispute settlement mechanism. The current practice of review ensures procedural fairness such as impartiality of the arbitrators, equal opportunity for presenting a case. There is normally no room for seeking substantive fairness in international commercial arbitration with a few exceptions in a limited number of jurisdictions and some international arbitration institutions. Therefore, parties who believe their arbitral award is wrong due to misapplication of law or fact are usually obligated to comply with the wrongful decision.

Although there may be an assumption that by choosing expert and professional arbitrators, the possibility of mistakes is very low, arbitrators are still prone to mistakes. Disputes that are submitted to arbitration are now more complex and the stakes are higher. It would be unreasonable to oblige the parties to accept the arbitral award without any chance of recourse to an appeal mechanism. It is time to revisit the current practice of review of arbitration and

propose the possibility of establishing an appeal mechanism in international commercial arbitration in order to review the arbitration award on the merits.

Finality means that an arbitral award is binding and final and there is no chance to reopen the issue that has been settled by the tribunal. This is considered an advantage for arbitration. However, the empirical data demonstrate a decline in the emphasis on finality in international commercial arbitration by practitioners. Furthermore, arbitration is an autonomous system that is based on parties' agreements. Hence, it would be unreasonable to hinder their autonomy in deciding the scope of review in their arbitration proceedings. International commercial arbitration should provide the possibility of appeal for those parties who want to include such a possibility in their arbitral agreement. Any appeal mechanism in arbitration should be designed in a way that ensures finality as well as its independence from the judiciary. This is discussed in detail in the next chapters.

Four arguments have been made in support of expanding the scope of review in international commercial arbitration by introducing or extending the scope of appeal. First, there should be a possibility to appeal against an erroneous award in order to satisfy the requirement of justice. Second, arbitration is considered too risky by practitioners with a high stake. The possibility of appeal would enable them to manage the risk in settling their disputes by arbitration. Third, there is a growing competition by introducing international commercial courts which offers an appeal in their dispute settlement. Arbitration should provide similar opportunities in order to compete with the newly established courts. Fourth, introducing an appeal would help to develop the law. Any development in law would be beneficial for parties who choose arbitration as their dispute settlement mechanism although it may not be their immediate concern when they are taking part in arbitration.

Appeal in international commercial arbitration may be criticised due to potential delays to enforcement it may cause. However, it is argued that an award by an appellate body would be more credible, hence easier to enforce. The second argument against appeal in international commercial arbitration points to the fact that parties accept the risk of an erroneous decision in order to have a fast settlement mechanism. But, the stakes in global trade are high and an option for appeal should be provided for parties with such disputes. The third argument against appeal is that arbitration would become similar to trials with a complex procedure. However, international commercial arbitration is self-contained in nature and appeal should be introduced in an appropriate form for arbitration. Fourth, arbitrators are chosen based on their expertise in the dispute which reduces the chance of mistakes in their decision. Thus a limited review would ensure the integrity of international commercial arbitration. However, they are human beings and are prone to mistake.

The appeal mechanism in international commercial arbitration has to be developed as an independent mechanism. Developing an appeal mechanism and finding solutions to its flaws is not possible by just reforming the appeal mechanism in the judiciary. International commercial arbitration has a specific nature and is quite different from litigation. Its regulations and principle developed from the needs and practices of users. Any appeal mechanism must be established according to the necessities of practice and needs of practitioners and is not required to be similar to appellate review by national courts.

CHAPTER 5. HOW SHOULD REVIEW BE EXPANDED IN INTERNATIONAL COMMERCIAL ARBITRATION?

5.1 Introduction

It was concluded in the previous chapter that the extent of review in international commercial arbitration should be expanded to include appeal on the merits. The aim of this chapter is to identify the appropriate forum to conduct an extended review in form of an appeal in international commercial arbitration. A question that needs to be answered is whether the appeal mechanism should be modelled after the appeal within the judicial system or whether it requires its own mechanism to fulfil the objectives of arbitration. For this purpose, different options on how to implement an appeal in international commercial arbitration are examined. The first possibility is to introduce an internal review process within an arbitration institution. This approach is currently used by some international arbitral institutions. The second alternative examined is to expand national court jurisdictions to review arbitration awards on the merits. The third option is to create an international commercial arbitration court of appeal that can conduct the appellate review of arbitration awards.

Section 5.2 attempts to provide an answer to whether it would be appropriate to introduce an appeal procedure through arbitral institutions. The internal appeal used by some international arbitration institutions is examined in order to find out how review is implemented in their

proceedings. The pros and cons of the implementation of appeal through arbitral institutions are discussed to answer the question of this section.

In Section 5.3, the possibility of establishing an appeal mechanism by empowering national courts to conduct a review on the merits is examined. The current approaches of the courts towards an expanded review in a few jurisdictions are examined first to find out if parties are able to contractually extend the role of national courts and seek more extensive review. Then, the history and practice of English courts in reviewing an arbitral award on a question of law is examined. This informs the discussion on the appropriateness of the expanded review by national courts by highlighting how the role of the court progressively diminished in English law over time. The chapter concludes by considering the drawbacks of expanding review through national courts.

Establishing a new international arbitration appeal court is considered in Section 5.4. After reviewing the predominant existing proposals for introducing an international commercial arbitration court, arguments in favour of and against the proposed court are discussed.

The conclusions are provided in the last section.

5.2 Expanding review through international commercial arbitration institutions

Due to the limited possibility to appeal in international commercial arbitration, an increasing number of arbitration institutions provide an internal appeal mechanism for losing parties in their regulations, although this is not the practice of all international arbitration institutions. For example, the LCIA which is one of the world's leading international institutions for commercial

dispute resolution has not provided a possibility for appeal. Article 26.8 LCIA Arbitration Rules (2020) provides that:

> Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.

However, some commercial arbitration institutions changed their rules to offer an internal appeal. The International Institute for Conflict Prevention & Resolution (CPR) has offered an internal appeal mechanism since 1999.[1] The American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service (JAMS) based in the US also provide an internal appeal mechanism.[2] The European Court of Arbitration (CEA) included an appellate review in its arbitral procedure.[3] The Shenzhen Court of International Arbitration (SCIA) is a Chinese arbitration institute that provides optional appeal for their arbitration.[4] An appeal panel would be appointed by these institutions to conduct the review of arbitration awards. The appellate review offered by some of these institutions is optional. For example, CPR, JAMS and SCIA require parties to agree to appeal in their arbitration agreement if they want to use the benefit

[1] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1126.

[2] AAA Optional Appellate Arbitration Rules 2013, r A-1; JAMS Comprehensive Arbitration Rules & Procedures 2021, r 34.

[3] Arbitration Rules of the European Court of Arbitration 2021, art 28.

[4] SCIA Arbitration Rules 2019, art 68.

of an appellate review.[5] This is justified by party autonomy in order to provide the flexibility for parties to tailor the proceedings according to the necessities of their disputes and their needs.[6]

Some trade organisations such as the Federation of Oils, Seeds and Fats Associations (FOSFA) and the Grain and Feed Trade Association (GAFTA), which are based in London, also provide an arbitration service for settling disputes with an internal appeal option.[7]

In order to provide an overview of the internal appeal mechanism in international commercial arbitral institutions, appeal procedures in some of these institutions are examined briefly here. This provides the basis of our discussion to determine whether this is the best way to expand review in international commercial arbitration. The analysis demonstrates how arbitral institutions have integrated party autonomy into their appeal procedures. However, the differences in their rules and procedures reveal possible issues with the expansion of review through arbitration institutions.

5.2.1 The International Institute for Conflict Prevention & Resolution (CPR)

CPR is an independent non-profit organization based in the US which settles commercial disputes. It has provided an internal appeal mechanism since 1999 known as Appellate Arbitration Procedure. Parties who want to authorise an appeal to the CPR arbitration tribunal must include this in a clause in their agreement. One of the aims of CPR in introducing the

[5] CPR Appellate Arbitration Procedure 2015, r 1.1; JAMS Comprehensive Arbitration Rules & Procedures 2021, r 34; SCIA Arbitration Rules 2019, art 68.

[6] Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Intl Arb 185, 188.

[7] FOSFA Guide to Arbitrations and Appeals 2018; GAFTA Arbitration Rules 2018.

appeal tribunal is to address the concerns of practitioners who refused to resolve their dispute in international arbitration due to the lack of appellate review.[8] CPR in its General Commentary on its recent CPR Administered Arbitration Rules in 2013 stated that:

> Most users of arbitration find the finality of an arbitration award appealing. But some parties to major cases are concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has adopted the CPR Arbitration Appeal Procedure ("Appeal Procedure") which is set forth, together with a Commentary. The Procedure may be invoked whether or not the original arbitration was conducted under CPR Rules.[9]

CPR in its regulation also emphasises the importance of the principle of finality. Rule 9 of CPR Appeal Procedure provides that 'the parties and the Tribunal shall use their best efforts to avoid delay and to assure that the appeal will be concluded within six months of its commencement'. Therefore, the CPR appeal procedure allows appeal on limited grounds pursuant to rule 8.2, however, these grounds are 'beyond the statutory grounds under section 10 of the Federal Arbitration Act'. According to rule 8.2, an appeal can be sought on the following grounds:

> a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or b. That the Original Award is subject to

[8] CPR Appellate Arbitration Procedure 2015, Introduction.

[9] CPR Appellate Arbitration Procedure 2015, Introduction.

> one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.

Parties to CPR arbitration may specify in their agreement that, by filing an appeal the appellant waives his or her right to vacatur under section 10 of the Federal Arbitration Act.[10] However, CPR provides no guarantee that such a waiver will be upheld. An appeal shall be initiated within 30 days of the date on which the Original Award was presented to the parties unless the parties agree to a different timeframe.[11] Parties agree that by initiating appeal procedure under these rules, they will not bring a court action to confirm, enforce, vacate or modify an original award until the appeal process has been completed.[12] The appellate panel should conclude its review within six months of its commencement.[13]

The CPR appellate tribunal consists of three members who are former federal judges.[14] However, the parties can agree to constitute the panel with one member.[15] The appellate tribunal has the power to affirm, modify or set aside the original award.[16]

[10] CPR Appellate Arbitration Procedure 2015, r 2.4.

[11] CPR Appellate Arbitration Procedure 2015, r 2.1.

[12] CPR Appellate Arbitration Procedure 2015, r 2.4.

[13] CPR Appellate Arbitration Procedure 2015, r 9.

[14] CPR Appellate Arbitration Procedure 2015, r 4.

[15] CPR Appellate Arbitration Procedure 2015, r 4.1.

[16] CPR Appellate Arbitration Procedure 2015, r 2.4.

5.2.2 The American Arbitration Association (AAA)

The AAA was established in 1926 to encourage practitioners to select arbitration as a method to settle their disputes.[17] The AAA, in 2013, offered a comprehensive internal appeal procedure to review arbitration awards.[18] The AAA's appeal is optional and can only be brought if parties agree on it in their agreement. It requires a notice of appeal to be filed within 30 days after the final award.[19] The panel of appellate arbitrators is composed of three arbitrators unless the parties agree to have just one arbitrator.[20] The time limit for the panel to issue its award is three months.[21]

The grounds for appellate review in the AAA Optional Appellate Arbitration Rules are more inclusive than the grounds set out in the Federal Arbitration Act 1925. The AAA appeal mechanism reviews '(1) an error of law that is material and prejudicial; or (2) determinations of facts that are clearly erroneous'.[22] Under the Optional Appellate Arbitration Rules, the appeals process can be completed within three months.

According to article A-19 of the AAA Optional Appellate Arbitration Rules, the appellate panel may either approve the 'underlying award as its own', 'substitute its own award for the underlying award' or ask for additional information and inform the parties of its decision to extend the time in order to render an award. The appeal tribunal may not seek a new arbitration

[17] Anthony Connerty, *A Manual of International Dispute Resolution* (Commonwealth Secretariat 2006) 246.

[18] AAA Optional Appellate Arbitration Rules 2013.

[19] AAA Optional Appellate Arbitration Rules 2013, r A-3(a)

[20] AAA Optional Appellate Arbitration Rules 2013, r A-5(c).

[21] AAA Optional Appellate Arbitration Rules 2013.

[22] AAA Optional Appellate Arbitration Rules 2013, r A-10.

hearing or send the case back to the first instance arbitral tribunal for corrections or further review. The award of the arbitral tribunal should be in writing and should 'include a concise summary of the decision and an explanation for the decision'.[23] Once the appeal process is concluded and the decision of the appeal tribunal has been served to the parties, the decision will be considered the final award for purposes of judicial enforcement proceedings.[24]

5.2.3 The Judicial Arbitration and Mediation Service (JAMS)

The JAMS provides alternative dispute resolution such as arbitration and mediation internationally. The JAMS also offers an appeal in its arbitration procedures. It is argued in its introduction to Optional Arbitration Appeal Procedure that 'perhaps one of the biggest myths about arbitration is there is no avenue to appeal'.[25] It also stated that 'incorporation of an appellate process can lessen the risks and provide some peace of mind'.[26]

According to rule 34 of the JAMS Comprehensive Arbitration Rules & Procedures, 'the Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure'.[27] The JAMS provides 14 days for a party to file an appeal in writing to the case manager and to the opposing party. The ground for appeal according to JAMS Optional Arbitration Appeal Procedure is similar to the grounds for review by the federal court. Appeal Panels in JAMS arbitration 'apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision'.[28] The Panel cannot send the case to the original

[23] AAA Optional Appellate Arbitration Rules 2013, r A-19(c).

[24] AAA Optional Appellate Arbitration Rules 2013, r A-20.

[25] JAMS Optional Arbitration Appeal Procedures 2003.

[26] JAMS Optional Arbitration Appeal Procedures 2003.

[27] JAMS Comprehensive Arbitration Rules & Procedures 2021, r 34.

[28] JAMS Optional Arbitration Appeal Procedure, r d.

Arbitrator(s), it may refer to the previous document or re-examine the evidence or request new evidence. The award should be rendered after twenty-one days of receiving all evidence, records and briefs.[29] The decision should be explanatory unless the parties agree otherwise.[30]

5.2.4 The European Court of Arbitration (CEA)

The European Court of Arbitration which is a branch of the European Centre of Arbitration and Mediation is another arbitral institution, established in 1959, and provides international and national arbitration. The Arbitration Rules of the European Court of Arbitration were amended in 1997 to incorporate intra-arbitration appellate procedures. It was based on the argument that there is no reason why arbitration should not provide the same protections as litigation does.[31] The court provides appellate provisions in its Arbitration Rules 2021. Article 28(1) provides that:

> Subject to any contrary provision of applicable mandatory law, and unless expressly excluded by agreement of the parties, the Award is subject to the right of appeal to an Appellate Arbitral Tribunal by way of rehearing. If a party challenges the award before a state court to avoid time limitation, the challenge will be promptly followed by an application to that court to stay it until the appellate arbitral proceedings are decided.[32]

[29] JAMS Optional Arbitration Appeal Procedure, r d.

[30] JAMS Optional Arbitration Appeal Procedure, r d.

[31] Mauro Rubino-Sammartano and Shahla Ali, 'Will the Winds of Change on Internal Appellate Proceedings in Arbitration Reach Asia?–Part 1' (2015) 17 Asian Dis Rev 72, 73.

[32] Arbitration Rules of the European Court of Arbitration 2021, art 28.1.

The appellate arbitral proceedings allow a full review of the dispute by way of rehearing which includes examining the admissibility, the facts, and the merits.[33] According to article 28.2, if a party intends to bring an appeal against an award made under the court rules, he or she must do so within the mandatory deadline of 40 days from the date of service of the award. Furthermore, an appeal will not be admissible unless it is accompanied by the deposit of the principal sum, plus interest and costs as may be awarded against it by the award under appeal.[34]

All members of the Appellate Arbitral Tribunal consisting of three arbitrators will be appointed by the Court.[35] The location would also be selected by the Court.[36] Parties are not involved in these selections. [37] According to article 28.7, appeals should be concluded within six months if no new evidence is required, otherwise, it may be extended to nine months.

The Secretariat of the European Court of Arbitration responded to arguments against intra-arbitration appellate proceedings.[38] The lack of certainty regarding the standard of the appeal tribunal, the length and costs of such a process and parties' desire for a single-step process are the most common arguments against intra-arbitration appeal. The Secretariat addressed the latter by asserting that a swift resolution of the disputes is normally the desire of all parties, and the award is undoubtedly acceptable for the winner of the case. However, the loser always desires a review of the award. Moreover, under most state court procedures, the loser is given

[33] Arbitration Rules of the European Court of Arbitration 2021, art 28.4.

[34] Arbitration Rules of the European Court of Arbitration 2021, art 28.3.

[35] Arbitration Rules of the European Court of Arbitration 2021, art 28.5

[36] Arbitration Rules of the European Court of Arbitration 2021, art 28.5

[37] Arbitration Rules of the European Court of Arbitration 2021, art 28.5

[38] Secretariat, 'European Court of Arbitration's Appellate Arbitral Proceedings' (CEA, 7 February 2018) <https://cour-europe-arbitrage.org/publication/european-court-arbitrations-appellate-arbitral-proceedings> accessed 13 April 2021.

the right to review the judgment. The parties generally select arbitration instead of litigation because they are looking for a different and more efficient mechanism. The arbitration process is no different from court proceedings in terms of mistake in a decision, arbitrators equally could make mistakes like national courts judges. Therefore, the lack of appeal is a drawback for arbitration.

The Secretariat responded to the argument regarding the delay due to the appellate procedure by asserting that:

> Since under the CEA's Arbitration Rules the first proceedings must (and in general do) last nine months (which only in very special circumstances may be extended for six months once or twice), if one adds to that the six months available for intra-arbitral appeal, its total is one year and three months, which is shorter than the duration of many other arbitral proceedings, which are frequently over two years, and on occasion, even reaching 10 years.[39]

Regarding the cost, the Secretariat argued that the CEA has offered a reasonable rate for the arbitrator's fees as well as administrative charges for the appeal process. For disputes of the same value, the CEA arbitration process costs are comparable to a typical commercial arbitration cost.[40]

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[39] Secretariat, 'European Court of Arbitration's Appellate Arbitral Proceedings' (CEA, 7 February 2018) <https://cour-europe-arbitrage.org/publication/european-court-arbitrations-appellate-arbitral-proceedings> accessed 13 April 2021.

[40] Secretariat, 'European Court of Arbitration's Appellate Arbitral Proceedings' (CEA, 7 February 2018) <https://cour-europe-arbitrage.org/publication/european-court-arbitrations-appellate-arbitral-proceedings> accessed 13 April 2021.

The Secretariat argued in favour of the higher standard of arbitrators in appellate proceedings due to the fact that in the first instance only one arbitrator decided the case whereas in appellate proceedings three arbitrators make the review.

5.2.5 Shenzhen Court of International Arbitration (SCIA)

The Shenzhen Court of International Arbitration (SCIA) is an arbitral institution in China that was established in 1983 and offers an internal appellate mechanism. The appeal is optional and parties may challenge an arbitral award on a point of law or fact.[41] Article 68 SCIA Arbitration Rules provides that 'unless prohibited by the laws of the place of arbitration, where the parties have agreed on submitting to the SCIA for appellate arbitration in respect of the award rendered by the arbitral tribunal according to Chapter VIII herein, their agreement shall prevail'. An appellant must request an appeal within fifteen days of receiving the original award.[42] The appellant should provide 'the arbitration agreement on appellate arbitration between the appellant(s) and the appellee', ' the element(s) of the Original Award that are being appealed', 'the application for appeal'; and 'the facts and grounds on which the request for appeal is based'.[43]

The appellate panel consists of three arbitrators and one of them would be the president of the panel. All arbitrators for the appellate arbitral tribunal would be selected from the Panel of

[41] Cameron David Hassall, Matthew Brown and Tiger Lin, 'Appellate Review in International Commercial Arbitration' in Neil Kaplan, Michael Pryles and Chiann Bao (eds), *International Arbitration: When East Meets West. Liber Amicorum Michael Moser* (Kluwer Law International 2020) 104.

[42] SCIA Guidelines for the Optional Appellate Arbitration Procedure 2019, art 3(1).

[43] SCIA Guidelines for the Optional Appellate Arbitration Procedure 2019, art 4.

Arbitrators of Shenzhen Court of International Arbitration by the SCIA's President.[44] The appellate arbitral tribunal may either affirm or modify the Original Award. Awards rendered by the appellate arbitral tribunal shall be final and binding on the parties.[45]

5.2.6 The Grain and Feed Trade Association (GAFTA)

The Grain and Feed Trade Association (GAFTA) is an international trade association based in London which 'promotes international trade in agricultural commodities'. The GAFTA offers arbitration services according to their Arbitration rules and provides an internal appeal mechanism.[46] Parties can bring an appeal within thirty days after an award has been rendered before a board of appeal.[47] The boards shall be chosen and constituted in accordance with the GAFTA Arbitration Rules. If the tribunal award is rendered by three arbitrators, the board of appeal shall consist of five members.[48] The board of appeal will consist of three members if an arbitrator's award is made at the first level by one arbitrator.[49]

An appeal will be in the form of a new hearing of the dispute.[50] A board of appeal via a majority of the panel members has the authority to confirm, vary, amend or set aside the arbitral award of the tribunal.[51] According to rule 12.7, the award 'shall be signed by the chairman of the board of appeal, and, when so signed, shall be deemed to be the award of the board of appeal, and

[44] SCIA Guidelines for the Optional Appellate Arbitration Procedure 2019, art 5.

[45] SCIA Guidelines for the Optional Appellate Arbitration Procedure 2019, art 7.

[46] GAFTA Arbitration Rules No. 125, r 10.1.

[47] GAFTA Arbitration Rules No. 125, r 10.1(a).

[48] GAFTA Arbitration Rules No. 125, r 11.1.

[49] GAFTA Arbitration Rules No. 125, r 11.

[50] GAFTA Arbitration Rules No. 125, r 12.5.

[51] GAFTA Arbitration Rules No. 125, r 12.5.

shall be final, conclusive and binding'. The GAFTA by providing an internal appeal mechanism provides a safety mechanism that ensures both accuracy and finality in their arbitral awards.

5.2.7 The Federation of Oils, Seeds and Fats Associations (FOSFA)

The Federation of Oils, Seeds and Fats Associations (FOSFA) is the trade association for the oil, seeds and fats industry. The FOSFA was formed by a 'merger of four other associations, the oldest dating back to 1863, each of which concerned itself with a specific part or parts of the seed, oil and fat business'.[52] The FOSFA offers an ad-hoc arbitration mechanism for settling disputes.

The FOSFA's Rules of Arbitration and Appeal provides an exclusive guideline about the arbitration process and grounds and procedure of appeal. Parties who choose the FOSFA dispute settlement mechanism have the right to bring an appeal to the Federation[53] provided the following criteria are met. According to rule 7(a) fees and expenses should be paid within forty-two days of the award and the Federation must receive a notice of appeal no later than 12.00 noon on the twenty-eighth consecutive day following the date on which the award is despatched. A copy of the notice should be sent to the other party.[54]

Appeals are heard by the members of the Board of Appeal which consists of five members assigned by the Federation. They have the same rights and duties as arbitrators and they are bound to be fair to both parties and to follow the 'rules of natural justice.[55] In its arbitration and appeal guide, it is stated that 'An appeal generally arises out of a first instance Arbitration

[52] Brian Chapman, 'FOSFA International Arbitration' (1986) 2 Arb Intl 323, 323.

[53] FOSFA Rules of Arbitration and Appeal 2018, r 6.

[54] FOSFA Rules of Arbitration and Appeal 2018, r 7(a)

[55] FOSFA Rules of Arbitration and Appeal 2018, r 8(a).

Award and in that context entails a complete rehearing of a dispute. Neither the parties nor their representatives can assume that evidence or information produced at the arbitration is available to the Board'.[56]

The appellant should provide their outline of the reasons for the appeal to the other party and to the Federation, within 21 days of the lodging of the appeal.[57] A reasoned award would be issued by the arbitral panel and will be signed by the Chairman of the Board of Appeal on behalf of the Board and countersigned by the Secretary to the Board of Appeal. The award must contain the findings of facts and reasons for the Board's decisions. This award is final and binding.[58]

5.2.8 Is intra-arbitration appeal the solution?

A number of institutions provided appeal for their users which demonstrates that the need for appeal in international commercial arbitration has already been felt. Appeals offered by these institutions are usually non-mandatory. For most of these institutions such as the AAA, the JAMS and the SCIA, the parties may opt-in to appeal in their arbitration. The CEA requires a parties' agreement to opt-out of appeal in their arbitral procedures. Such optional appeals would uphold party autonomy which is one of the cornerstones of arbitration. This provides an opportunity for parties to balance finality and fairness according to their needs.

A major benefit of expanding review through arbitral institutions is that it would maintain the independence of international commercial arbitration from the judiciary. It would reduce

[56] FOSFA, Guide to Arbitrations and Appeals (April 2021).

[57] FOSFA Rules of Arbitration and Appeal 2018, r 7(f).

[58] FOSFA Rules of Arbitration and Appeal 2018, r 9(b).

excessive bureaucracy compared to court proceedings. This also allows arbitration institutions to tailor their review proceedings in order to address the parties requirements which is not possible in the court proceedings. The panel members are usually arbitrators who may have expertise in a particular dispute. Examining these arbitral institutions' appeal rules shows that there is a clear desire to make an appeal a relatively straightforward affair. They usually have expedited appeal procedures. For example, parties should file an application for appeal within fifteen days of issuing an award at the SCIA and fourteen days at the JAMS. The other institutions examined here have a time limit of about one month to file an appeal application. The appellate panels usually have a short time frame to issue their awards which can be as low as twenty-one days for the JAMS. The AAA should issue its appellate award within three months and it can be up to nine months for the CEA. Unnecessary delays and complications would be avoided in institutional appeal proceedings.

Arbitration institutions have established a solid record of administrating arbitration proceedings on a national and international scale. Therefore, institutions may better be acquainted with the requirement of international arbitration. They could provide an efficient, flexible and fast track appeal procedure that could address the necessity of international commercial arbitration. This would address the needs of users in accessing an efficient and reliable appeal procedure. Furthermore, the appellate panels are selected from experienced arbitrators (or as in the case of the CPR from retired federal judges) and usually consist of more members than the original arbitral tribunal. An award would be made by the majority of the panel members which would reduce the risk of an error compared to a decision made by a single arbitrator. Thus, appellate awards rendered by these institutions would be of a higher quality.

It is undeniable that there are some benefits in introducing appeal through arbitration institutions. Arbitration institutions proliferate rapidly around the world[59] as a result of the growing popularity of international commercial arbitration for settling commercial disputes. Introducing an appeal through arbitration institutions may provide a wide range of choices for parties. However, the rules and regulations of international arbitral institutions vary from one institution to another. For example, institutions that are considered here have different appellate proceedings. The GAFTA, the FOSFA and the CEA conduct their appeal by way of rehearing while the AAA would not accept any new evidence. This may increase inconsistencies and uncertainty in the practice of appeal conducted by these institutions. There is no harmonised system and each association has its own rules and procedure that is different from the others.

If the power of national courts to review an arbitral award was delegated to the arbitral institutions, it might increase the risk of unfair awards. There would be no regulatory body to oversee the institutional appeal procedure. Therefore, the review offered by these institutes may suffer from low standards and may have negative impacts on the development of arbitration.

Expanding review by arbitration institutions would satisfy the need of those parties who seek an appeal of an arbitral award while it can maintain party autonomy by allowing parties to tailor their proceedings and opt in to appeal. However, there is still a need for a supervisory body that can ensure the consistency of arbitration proceedings and the requirement of due process. Furthermore, there is a need for some level of harmonisation in the review process to ensure the enforcement of arbitral awards. The expansion of review by arbitral institutions is a

[59] Emilia Onyema, 'Effective Utilisation of Arbitrators and Arbitration Institutions in Africa by Appointors' (4th Arbitration and ADR in Africa Workshop: Empowering Africa in the 21st Century through Arbitration & ADR, Cairo Egypt, 29-31 July 2008) 3.

welcomed development but it is not the solution that is offered by this thesis as discussed in the following sections.

5.3 Expanding review through national courts

National courts may be considered as the appropriate forum to hear an appeal against an arbitration award. This is the view supported by the seat theory as discussed in Chapter 3. The first question that needs to be answered here is whether it is possible to contractually expand the role of national courts to review an arbitral award on the merits. The practices of a few jurisdictions are examined here briefly to answer this question. The evolution of English law in reviewing arbitral awards is examined to demonstrate how the Court's power to review arbitral awards has reduced over time although the Court can still review an arbitral award on a question of law. This would lead us to answer the central question of this section of whether empowering the courts to review arbitral awards on the merits by reforming national legal systems would promote the efficiency and reliability of international commercial arbitration or would damage its objectives as an independent dispute settlement mechanism.

5.3.1 Contractual expansion of the scope of review

As discussed in Section 2.6, the scope of review by national courts is limited by arbitration statutes. National courts are usually reluctant to hear appeals against arbitral awards.[60] For example, in *Canada Inc v Toronto (City)*,[61] the Ontario Court of Appeal was reluctant to be involved in the appeal process against an international commercial arbitration award and

[60] William Laurence Craig, William W Park and Jan Paulsson, *Craig, Park and Paulsson on International Chamber of Commerce Arbitration* (3rd edn, OUP 2000) 473.

[61] [2017] OJ No 3045.

believed its involvement would frustrate the efficiency and finality of international commercial arbitration.

It is suggested by some scholars that the scope of review may be extended by the parties' agreement.[62] In the United States, there were contradictory stands by the courts regarding such agreements[63] which were finally settled by the Supreme Court.[64] In *Hall Street Associates LLC v Mattel Inc*[65] disputes arose between Mattel, which manufactures toys, and its landlord, Hall Street Associates, regarding a property lease. The property was used by Mattel in Oregon to manufacture toys. Due to contamination of water in the property, Mattel requested that the lease be terminated. Initially, the matter was brought to a bench trial in the United States District Court for the District of Oregon. The Court rendered judgment in favour of Mattel and permitted termination of the lease contract by Mattel.

Arbitration was not determined by the parties to settle their dispute. However, at a later stage, they agreed to settle their compensation issue by arbitration under the US Federal Arbitration Act (FAA). The arbitration agreement included a provision that the Court had the power to

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[62] Hans Smit, 'Contractual Modification of the Scope of Judicial Review of Arbitral Awards' (1997) 8 Am Rev Intl Arb 147; Tom Cullinan, 'Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements' (1998) 51 Vand L Rev 395; Margaret Moses, 'Can Parties Tell Courts What to Do-Expanded Judicial Review of Arbitral Awards' (2004) 52 U Kan L Rev 429; Boris Prastalo, 'Expanded Judicial Review in International Commercial Arbitration: Which Jurisdictions Offer the Optimal Approach from the Private Parties' Perspective?' [2019] ELTE LJ 159.

[63] *Gateway Technologies, Inc v MCI Telecommunications Corp*, 64 F.3d 993, 997 (5th Cir 1995); The Court of Appeal for the Fifth Circuit provides that 'However, the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award'.; *Kyocera Corp v Prudential-Bache Trade Services,* 341 F.3d 987 (9th Cir 2003).

[64] Timothy Tyler and Archis A Parasharami, 'Finality over Choice: *Hall Street Associates, LLC v Mattel, Inc* (US Supreme Court)' (2008) 25 J Intl Arb 613, 613.

[65] 552 US 576 (2008).

annul, modify or correct an award under the agreement if the arbitrator's conclusions of law were erroneous. Hence, the agreement extended the judicial intervention of the Court. The arbitration award was rendered in favour of Mattel and rejected the compensation claim. Hall brought an appeal on a question of law to the District Court. The District Court allowed review of the arbitration award for legal error. The review was determined by the parties' agreement. The District Court rejected the arbitrator's conclusion, vacated the award and sent it to the arbitrator for reconsideration. This time, the arbitrator changed his decision and rendered an award in the favour of Hall for declaratory relief and damages. Both parties then sought modification but the District Court confirmed the decision of the arbitrator in favour of Hall.

Mattel brought a challenge to the Ninth Circuit Court about the provision of the arbitration agreement which provided the expansion of judicial review beyond the exhaustive provisions set out in the Federal Arbitration Act. Mattel argued that that extending the scope of review is not permissible under the Federal Arbitration Act. They cited *Kyocera Corp v Prudential-Bache Trade Servs*[66] in which the Court refused to recognise the expansion of the judicial review of the arbitration award by agreement. The Ninth Circuit Court confirmed the Mattel argument and again sent the case to the District Court for reconsideration.

The District Court for the second time confirmed the arbitrator's award in favour of Hall Street. The Ninth Circuit Court reversed the decision again, finding that the original award, favouring Mattel, must be upheld. The Court rejected the argument that judicial review can be extended far beyond sections 10 and 11 of the Federal Arbitration Act.

[66] 341 F3d 987 (9th Cir 2003).

The matter came before the Supreme Court which granted certiorari to clarify whether the grounds for review of an arbitral award provided by sections 10 and 11 of the Federal Arbitration Act are exclusive. The Court provided that 'Under the terms of [section] 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in [sections] 10 and 11. Section 10 lists grounds for vacating an award, while [section] 11 names those for modifying or correcting one'.[67] According to the Supreme Court words 'must' and 'unless' in section 9 indicated that provisions of sections 10 and 11 are exclusive and could not be modified or vacated by contract.[68] The Supreme Court in this decision clarified its position. Although the general policy in the United States is that arbitration agreements should stand 'on equal footing with all other contracts',[69] the Court did not follow this directive in this instance and did not allow parties to contractually expand the grounds for vacatur or modification of arbitral awards.[70] The parties cannot use a contract to overrule statuary provisions.

Despite this ruling, some states have chosen to allow contractual expansion of review. For example, New Jersey statutes recognise an extension of review by contract. Section 2A:23B-4c of the New Jersey Arbitration Act provides that, 'nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record'.

[67] *Hall Street Associates, LLC v Mattel, Inc*, 552 U.S. 576, 128 S Ct 1396, 1402 (2008).

[68] *Hall Street Associates, LLC v Mattel, Inc*, 552 U.S. 576, 128 S Ct 1396, 1402 (2008).

[69] *Hall Street Associates, LLC v Mattel, Inc*, 552 U.S. 576, 128 S Ct 1396, 1402 (2008).

[70] Sarah Staley, '*Hall Street Associates, LLC v Mattel, Inc*' (2009) 24 Ohio St J on Disp Resol 381, 383.

France is another jurisdiction that would not enforce an agreement to expand the scope of review of arbitration awards beyond the statutory grounds set out in article 1520 of the French Code of Civil Procedure.[71] The grounds set out in article 1520 are exhaustive.[72]

In England, the right of appeal on a question of law is recognised by the English Arbitration Act 1996. However, there is no possibility of appeal against an arbitral award on a question of fact.[73] Also, parties cannot contractually empower the court to hear an appeal on a point of fact arising out of an award.

The position of the English court regarding expanding the extent of review by contract is reflected in the decision of the court in *Guangzhou Dockyards Company Ltd v E N E Aegiali I.*[74] In this case, the claimant had entered into a contract for the conversion of a carrier ship dockyard in the port of Guangzhou, China. The contract was governed by English law. The parties chose the London Maritime Arbitrators Association (LMAA) to settle their disputes. According to article 22 of their contract:

> The Parties agree that either Party may appeal to the English High Court on any issue arising out of any award. The Parties agree that any final unappealable judgment of the

[71] Boris Prastalo, 'Expanded Judicial Review in International Commercial Arbitration: Which Jurisdictions Offer the Optimal Approach from the Private Parties' Perspective?' [2019] ELTE LJ 159, 166.

[72] Laurence Franc, 'Contractual Modification of Judicial Review of Arbitral Awards: The French Position' (1999) 10 Am Rev Intl Arb 215, 218.

[73] *Geden Operations Ltd v Dry Bulk Handy Holdings Inc* [2014] EWHC 885 (Comm), [2014] 2 All ER Comm 196, [29].

[74] [2010] EWHC 2826 (Comm), [2011] 2 All ER Comm 595.

> English High Court ... shall be referred back to the arbitrators and the arbitrators shall issue a final unappealable award in the form of the said judgment.[75]

A dispute arose between the parties and an arbitration award was rendered in favour of the defendant (ENE Aegiali I). The claimant dockyard brought two appeals on a question of fact and on a question of law under section 69 of the 1996 Act. The defendant argued that the claimant could not seek the court's jurisdiction for an appeal on a question of fact as the power to hear an appeal from the arbitral award is only permitted by the Act on a question of law. Parties could not by contract extend the court's jurisdiction to hear an appeal on a question of fact. The claimant argued that the parties to an arbitration agreement can decide whether they want to bring an appeal on a question of fact. It was argued that an appeal on a question of fact is not prohibited by the Arbitration Act 1996 and is within the court's inherent jurisdiction. Furthermore, such appeal is not within the mandatory provision of section 4 of the Act, thus parties can agree to have an appeal on a question of fact.

The Courts dismissed the claimant's arguments on the ground that section 69 of the Arbitration Act 1996 is applicable only to an appeal on a question of law. Blair J asserted that:

> In my view, the opening words of the section ('Unless otherwise agreed by the parties …') have to do with agreement between the parties in the context of an appeal on a question of law. The words cannot be construed as expanding the jurisdiction of the court to include an appeal to the court on a question of fact on the basis that the

[75] [2010] EWHC 2826 (Comm), [2011] 2 All ER Comm 595, [4].

> parties have agreed to such an appeal, and so far as I am aware, such a suggestion has not been made before in the case law or literature.[76]

The court also rejected the argument to hear an appeal on a question of fact based on court inherent jurisdiction. Blair J stated that:

> [Section] 1(b), stating the principle of party autonomy, is concerned with the conduct of the arbitration. This view has the support of the DAC Report at paragraph 21, which says as to the second principle that "it should in the first instance be for the parties to decide how their arbitration should be conducted". Section 1(b) is (as Mr Eder QC put it) not concerned with the role of the court, nor the interface between the court and the arbitration. Section 1(c) is the relevant provision in that regard. Any appeal to the court would (I think) be an "intervention" in the arbitration, and neither the particular structure nor the terms of article 22 of the ship conversion contract seem to me to invalidate this analysis.[77]

In this case, the judge concluded that party autonomy may not allow expansion of the scope of review contractually. The extent of party autonomy is defined by section 1(b) of the Arbitration Act 1996 where there is no provision to extend the scope of the review of an arbitral award.

Contractually expanding the judicial review is not generally permissible and enforceable.[78] This limitation would be regarded as an obstacle for the parties' contractual freedom which is one of the important features of international commercial arbitration. Arbitration is a creature of

[76] [2010] EWHC 2826 (Comm), [2011] 2 All ER Comm 595, [17].

[77] [2010] EWHC 2826 (Comm), [2011] 2 All ER Comm 595, [19].

[78] Hans Smit, 'Contractual Modifications of the Arbitral Process' (2008) 113 Penn St L Rev 995, 999.

contract[79] and the principle of party autonomy plays a substantial role in shaping arbitration. This feature enables the parties to tailor arbitration to their particular needs and is one of the reasons for the popularity of arbitration. It can be argued that allowing parties to decide about the extent of review in their arbitration proceedings is in line with their contractual freedom. This practice would also provide opportunities for parties who have a concern about lack of substantive review to enter an agreement with other parties to extend the scope of review in their arbitration proceedings.

However, contractual expansion of review may not be favoured by national courts that would be forced to deviate from their usual procedures upon the parties' request. Parties may seek a different review process and expecting national courts to honour each particular agreement would increase complexity, unpredictability and inconsistency in reviews of arbitration awards. Furthermore, the scope of review by national courts is determined by statutes which normally cannot be altered by the parties' agreement unless the statutes provide such possibility.

5.3.2 Empowering national courts to review an arbitral award on the merits

From the above discussion, it is clear that the contractual expansion of the scope of review is not possible in most jurisdictions. However, it may be argued that national courts should be empowered to review an arbitral award on the merits. It is important to mention that there are a few jurisdictions that recognise the right of appeal on a question of law for arbitral awards.[80] England, which is one of the important global hubs for international commercial arbitration,

[79] Keith Joseph Fernandez, 'Be Quick-but Don't Hurry: Competing Purposes of the Federal Arbitration Act and *Hall Street Associates v. Mattel*' (2009) 70 La L Rev 387, 391.

[80] [1 June 2011] LN 38 of 2011 (Hong Kong Arbitration Ordinance), Cap 609, sch 2, s 6(5)(1); English Arbitration Act 1996, s 69; New Zealand Arbitration Act 1996, sch 1, cl 5.

recognises the right to appeal on a question of law pursuant to section 69 of the Arbitration Act 1996. The practice and the history of appeal against an arbitral award in England are examined here to answer the question of whether national courts are the appropriate forum to hear appeals against arbitral awards.

Traditionally, English courts have had a tendency to supervise arbitration.[81] Moreover, in the eighteenth and nineteenth centuries, some judges had a hostile attitude toward arbitration.[82] Although the Court's attitude changed over time,[83] the suspicion of the courts towards arbitration continued and clearly was reflected in the English Arbitration Act 1950. Section 21 of the 1950 Act introduced a special case procedure that enables parties to seek the court ruling on a question of law at any time in their arbitration process. The second method of judicial review was an error of law on the face of the record.

These two practices were at the centre of criticisms as they facilitated the court's involvement in the arbitration process and damaged the reputation and attractiveness of England as the seat of international arbitration.[84] They also caused a delay in the arbitration process and were used as dilatory tactics by parties to an arbitration agreement. Kerr LJ in his judgment in *Granvias Oceanicas Armadora SA v Jibsen Trading Co*[85] emphasised the problem by asserting that:

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[81] Roger Holmes and Michael O'Reilly, 'Appeals from Arbitral Awards: Should Section 69 Be Repealed?' (2003) 69 J Intl Arb Med Disp Mang 1, 2; Michael Needham, 'Appeal on a point of law arising out of an award' (1999) 65 J Intl Arb Med Disp Mang 205, 206.

[82] *Kill v Hollister* (1746) 95 ER 532; Michael Needham, 'Appeal on a point of law arising out of an award' (1999) 65 J Intl Arb Med Disp Mang 205, 210.

[83] *Scott v Avery* (1856) 10 ER 1121.

[84] Reuben Clark and Dieter G Lange, 'Recent Changes in English Arbitration Practice Widen Opportunities For More Effective International Arbitrations' (1980) 35 Bus Law 1621, 1621.

[85] [1977] 2 Lloyd's Rep 344.

> There are nowadays many complaints that our special case procedure in commercial arbitration is being abused. Special cases used to be the exception, but they are becoming the rule and increasingly frequent as a means of delaying the speedy resolution of commercial disputes for which arbitrations are designed.[86]

Furthermore, it was not possible to exclude the special case procedure by an arbitration agreement as it was against public policy. Thus, the necessity of the reform was recognised and resulted in the Arbitration Act 1979.[87] Under the terms of the Arbitration Act 1979, the practice of 'special case' procedure and the 'error on the face of the award' were removed from English arbitration law and replaced by a new appeal procedure.[88]

The Arbitration Act 1979 brought a substantial improvement over the broad judicial intervention in reviewing arbitration awards by English courts.[89] Section 1(2) of the Arbitration Act 1979 established a limited right of appeal on a question of law to the High Court. However, the Act did not still satisfy some commentators and they argued that 'while the front door was now bolted to the dangers of the special case, the English courts would find a new means to break the back door'.[90] The involvement of national courts in arbitration was in the centre of criticism during reading the Arbitration Bill in 1996, Lord Wilberforce asserted that:

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[86] *Granvias Oceanicas Armadora SA v Jibsen Trading Co* [1977] 2 Lloyd's Rep 344, 349.

[87] Robert M Merkin and Louis Flannery, *Arbitration Law* (LLP 2004) 898.

[88] Hacking, 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 14 Int'l L 95, 99.

[89] Thomas E Carbonneau, 'Judicial Approbation in Building the Civilization of Arbitration' (2009) 113 Penn St L Rev 1343, 1351.

[90] Taner Dedezade, 'Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law' (2006) 9 Intl Arb L Rev 56, 57.

> I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law - yes, its substantive law. I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts.[91]

The Arbitration Act 1996 adopted almost the same procedures for an appeal on a point of law as the previous act with few modifications. Section 69 of the Arbitration Act 1996 provides that 'unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings'.

During the consultation on the draft Bill which led to the enactment of the English Arbitration Act 1996 different views were reflected regarding the question of whether the right to appeal on a point of law should be abolished. Lord Saville, who was Chairman of the Departmental Advisory Committee, argued that:

> Another feature of our existing law which has caused disquiet abroad and which many regard as detracting from arbitrating here is the ability to seek leave to appeal to the Court from the substantive award of the arbitral tribunal. What is said is that to allow

[91] HL Deb 18 January 1996, vol 568, col 778.

> an appeal of this kind is to frustrate the agreement of the parties to resolve their disputes by arbitration, since the result of a successful appeal is to substitute a court resolution for an arbitral resolution.[92]

The Departmental Advisory Committee (DAC) rejected the arguments regarding the abolition of the right of appeal on a question of law. The committee stated that:

> We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate.[93]

Finally, drafters of the Arbitration Act 1996 agreed that the possibility of an appeal on a point of law should remain in the Arbitration Act 1996. An appeal under section 69 can only be brought with the agreement of the parties or with the permission of the court.[94] One of the important features of section 69 of the Arbitration Act 1996 is its freedom to contract out the option of an appeal to the court. The Act allows the parties to choose the appeal option according to the necessities of their disputes. If there is no agreement between parties on the issue of appeal, the court will decide to grant leave to appeal upon an application for that based on the statutory provisions set out in section 69(3). Thus, parties are encouraged to expressly indicate if they want to appeal to the court.

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[92] Mark Saville, 'The Bernstein Lecture Number 1, 1996: the Arbitration Act 1996 and its effect on international arbitration in England' (1997) 63 J Intl Arb Med Disp Mang 104, 108.

[93] 'The 1996 DAC Report on the English Arbitration Bill: The Last Part' (2014) 15 Arb Intl 413, 414.

[94] Arbitration Act 1996, s 69(2).

The scope of rights of appeal from an arbitration award is restricted substantially by the Act. The Departmental Advisory Committee in their report stated that 'We have attempted to express in this clause the limits put on the right to appeal by the House of Lords in … *The Nema*.'[95] Lord Saville argued that when the English Arbitration Bill was being debated in early 1996, the drafters decided to permit a limited right of appeal on a point of law in order to impose restrictions on the court involvement in the arbitration process.[96] This was a concern of practitioners who believed that the English courts retained wide discretion to interfere in the arbitration process. Lord Saville believed that parties 'have expressly agreed to use arbitration as their method of dispute resolution. By doing so they have agreed to accept the decision of their chosen tribunal instead of that of the court. What the English court would have decided is irrelevant'.[97]

Section 69(3) outlines a high threshold for granting leave to appeal.[98] Appeal on a question of law may be considered by the court providing that 'the determination of the question will substantially affect the rights of one or more of the parties', 'the question is one which the tribunal was asked to determine', 'on the basis of the findings of fact in the award the decision of the tribunal on the question is obviously wrong, or the question is one of general public

[95] 'The 1996 DAC Report on the English Arbitration Bill: The Last Part' (2014) 15 Arb Intl 413, 415, citing *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.

[96] Saville LJ, 'Reforms will threaten London's place as a world arbitration centre' *The Times* (London, 28 April 2016) 56.

[97] Saville LJ, 'Reforms will threaten London's place as a world arbitration centre' *The Times* (London, 28 April 2016) 56.

[98] Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley-Blackwell 2014) 335.

importance and the decision of the tribunal is at least open to serious doubt' or 'it is just and proper in all the circumstances for the court to determine the question'.[99]

The report provided by the Commercial Court Users' Group in 2020 provides the number of applications that were made to the English court to challenge arbitration awards under section 69.[100] The number of applications to the English Court for challenging arbitral awards was 88 in 2017, 53 in 2018 and 34 in 2019. Only about 30% of applications were granted leave to appeal.[101] In 2018-19, three out of fifty one applications were successful.[102] The small number of successful applications under section 69 of the Arbitration Act 1996 demonstrates the difficulty of bringing an appeal to the Court on a question of law[103] and may be the reason for the decline in the number of applications in recent years. It is argued that 'relatively few grants of leave are made, and very few appeals succeed. In almost every case the arbitrator's award is in truth final'.[104]

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[99] Arbitration Act 1996, s 69(3)(d).

[100] Commercial Court User Group, 'Commercial Court User Group: Meeting Report' (25 November 2020) <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf> accessed 09 April 2021.

[101] Commercial Court User Group, 'Commercial Court User Group: Meeting Report' (25 November 2020) <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf> accessed 09 April 2021.

[102] Commercial Court User Group, 'Commercial Court User Group: Meeting Report' (25 November 2020) <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf> accessed 09 April 2021.

[103] Taner Dedezade, 'Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law' (2006) 9 Intl Arb L Rev 56, 56.

[104] Michael Needham, 'Appeal on a point of law arising out of an award' (1999) 65 J Intl Arb Med Disp Mang 205, 210.

The evolution of review of an arbitral award by the English courts shows that national courts are not suitable bodies to conduct a substantive review of arbitral awards. There are three main arguments against an appeal by national courts. Firstly, increasing a court's involvement in reviewing international commercial arbitration awards may cause 'formalisation and judicialisation'[105] of international commercial arbitration. The judicialisation of international arbitration is a growing concern.[106] This practice may encourage parties to find other alternatives for settling their dispute.[107] Furthermore, it would lead to procedural complexity and would make arbitration a sophisticated mechanism to settle international commercial disputes. In such cases, arbitration would become 'a mere stepping-stone to litigation'.[108]

Secondly, the independence and integrity of international commercial arbitration can be frustrated by empowering courts to hear an appeal on the merits. Review by national courts would bind arbitration to national legal systems and would prevent arbitration from setting its rules and procedures in reviewing an arbitral award. A consequence of the limited review of an international commercial arbitration award is to preserve arbitration independence from the judiciary. When parties select arbitration to settle their dispute, they explicitly agree to comply with the decision of the tribunal and not by the decision of a national court which they have

[105] Leon Trakman and Hugh Montgomery, 'The 'Judicialization'of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30 LJIL 405, 405.

[106] Thomas J Stipanowich, 'Arbitration: The New Litigation' [2010] U Ill L Rev 1, 6, 7; Leon Trakman and Hugh Montgomery, 'The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30 LJIL 405, 405.

[107] Michael McIlwrath, 'Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices' (2008) 74 J Intl Arb Med Disp Mang 424.

[108] Tom Cullinan, 'Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements' (1998) 51 Vand L Rev 395, 397.

voluntarily excluded.[109] Expanding the scope of review through national courts would increase the involvement of the judiciary in arbitration which would be a drawback in the development of international commercial arbitration. In introducing a substantive review, it is important to preserve and promote the independence of arbitration.

Thirdly, recourse to national courts would be costly and time-consuming. It would cause a substantial delay in reaching a final decision. The delay caused by such arrangements would enable parties to use appeal as a dilatory tactic which was the case in England before the enactment of the Arbitration Act 1996 as discussed above.

In addition to the above arguments, the pros and cons of the review of an arbitral award by national courts were examined in Chapter 3. An alternative suggested there was delocalisation of arbitral awards and a new international appellate court to review arbitral awards were introduced. The new court is examined in the next section as an alternative forum to conduct an extended review of arbitral awards.

5.4 The International Commercial Arbitral Court of Appeal

The implementation of an appeal mechanism is a challenging task. Even leading commentators who point out the benefits of appeal in international commercial arbitration have struggled to suggest a suitable structure and a forum in order to implement an appeal process. Two appeal mechanisms that are suggested were discussed earlier in this chapter. Another possibility is the creation of an international arbitration court of appeal with an international unified regulation

[109] Stephen L Hayford, 'Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards' (1995) 30 Ga L Rev 731, 831.

that empowers it to review arbitral awards on the merits. This section argues that establishing a court, which is named here as the International Commercial Arbitral Court of Appeal (ICACA), is the best way to introduce an appeal mechanism in international commercial arbitration. The question is whether establishing such an appellate court serves as a suitable alternative to national courts and would minimise their involvement in the arbitration process. Another question is whether an international appellate court would promote and enhance the harmonisation and efficiency of the appeal process in international commercial arbitration.

5.4.1 Existing proposals for an international commercial arbitral appeal court

The idea of an international forum for review of an international commercial arbitration award is not new.[110] A small number of scholars have considered the introduction of such a forum and their views are reflected in this chapter to support the discussion.

[110] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 ICLQ 551; Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9; Mauro Rubino-Sammartano, 'An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings' (1989) 6 J Intl Arb 181; Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109; Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 116; Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145; Jan Hendrik Dalhuisen, 'The Case for an International Commercial Court' (7 May 2014, last revised 8 Jan 2015) available at SSRN <https://dx.doi.org/10.2139/ssrn.2433513> accessed 10 February 2020.

The creation of an international arbitral court has been discussed by some commentators such as Schmitthoff,[111] Smit,[112] Rubino-Sammartano,[113] Holtzman,[114] Schwebel,[115] Yu[116] and Dalhuisen,[117] and. This section aims to review the most prominent proposals regarding the creation of an international commercial arbitral court. The purpose of the review is to demonstrate the differences between previous proposals and the proposal of this research.

Schmitthoff proposes the creation of an international court of commercial arbitration. He highlights that confidentiality and the absence of published arbitral awards have resulted in a lack of unification and harmonisation of law. He argues that a feasible solution to the problem would be the creation of an international court of commercial arbitration as an appeal tribunal to hear appeals from arbitral awards. He argues that:

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[111]. Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 ICLQ 551.

[112] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9.

[113] Mauro Rubino-Sammartano, 'An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings' (1989) 6 J Intl Arb 181.

[114] Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds) *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109.

[115] Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' , in Martin Hunter, Arthur Marriot and VV Veeder (eds) *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 116.

[116] Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145.

[117] Jan Hendrik Dalhuisen, 'The Case for an International Commercial Court' (7 May 2014, last revised 8 Jan 2015) available at SSRN <https://dx.doi.org/10.2139/ssrn.2433513> accessed 10 February 2020.

> Since arbitration proceedings are normally private and awards are usually not published, divergencies in the interpretation of standard contracts do not become widely known. This situation is not, however, satisfactory. The most satisfactory solution would be the establishment of an international court of commercial arbitration as an appeal tribunal from all types of international commercial arbitration tribunals.[118]

Hans Smit argues that an increase in the number of arbitration institutions around the world might cause inconsistency as these institutions have different rules and procedures.[119] Thus, he proposes to create a single international institution that would regulate and unify the procedure and rules of arbitration institutions. He states that this institution 'would offer all possible advantages of institutional arbitration anywhere in the world. Not only would such an institution greatly simplify the task of international businessmen and their lawyers, but it is only through such an institution that the advantages of international arbitration can be maximized'.[120] He supported the creation of a review process by this international institution which would be optional for parties. Furthermore, the case law of such an institution would possess more authority compared to individual institutions.[121]

Rubino-Sammartano is amongst commentators who argue in favour of the creation of an international arbitral appellate court. He wrote that:

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[118] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 ICLQ 551, 576.

[119] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9, 29.

[120] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9, 33.

[121] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9, 34.

> The solution I propose is to institutionalize the appellate instance by entrusting the appointment and supervision of appellate proceedings to a new body, an International Arbitral Court of Appeal. Each party to these proceedings would be entitled to appoint an arbitrator and the International Court would then appoint the Chairman. The appeal panel would be under the control of this new body, which would also administer the appeal arbitration proceedings.[122]

According to Rubino-Sammartano, an international arbitral court of appeal would replace national courts in reviewing any possible challenge to an arbitral award.[123]

Howard Holtzman[124] states that 'a valuable task for the 21st century would be to create a new international court that would take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards'.[125]

Stephen Schwebel has also advocated the creation and operation of an international court of arbitral awards. He once observed that:

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[122] Mauro Rubino-Sammartano, 'An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings' (1989) 6 J Intl Arb 181, 185.

[123] Mauro Rubino-Sammartano, 'An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings' (1989) 6 J Intl Arb 181, 185.

[124] Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds) *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109.

[125] Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109.

> [A]s things now stand, there is no international court with an effective capacity or jurisdiction whose process can be directly activated by the private party which seeks the recognition or enforcement of foreign arbitral awards. The need is there and no existing international court can meet it. So, the case for creating such a new international court of Arbitral Awards is … sound.[126]

Yu proposes transferring states' supervisory power over arbitration to a new supernational body.[127] She supported the separation of arbitration and national court systems and delegating the jurisdiction over arbitration to the new supernational body. She argues that in order to address the shortcomings associated with a total delocalised arbitration there should be:

> [A]n ideal arbitral framework which corresponds with the fast development of arbitration and the existing level of judicial intervention, States must be prepared to give away the supervisory powers over arbitration to a well-designed supranational body while allowing the parties to submit their commercial disputes to a private judge, that is an arbitrator.[128]

Dalhuisen is also amongst the commentators who have supported the creation of an international commercial court. He rejected the possibility of an appeal in 'substance of the

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[126] Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 116.

[127] Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145, 156.

[128] Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145, 155.

decision'[129] but he offered the creation of an international court to substitute the current review process at the enforcement court and also the court of the seat.[130]

Although commentators have proposed the creation of an international arbitral court, there is no detailed explanation in the literature of how such a court can be implemented in practice. The detailed analysis of the case for an international court is discussed in the next chapter.

5.4.2 The case for the International Commercial Arbitral Court of Appeal

The previous chapter examined arguments in favour of and against the right to appeal against an international arbitral award. Here, we examine the arguments in favour of and against the International Commercial Arbitral Court of Appeal in order to fully evaluate the benefits of its establishment. First, seven arguments in favour of the creation of the new court are examined which is followed by nine arguments against it.

First, the creation of an international arbitration appellate court would make arbitration independent of the judiciary in hearing challenges against an arbitral award and fulfil the parties' choice to avoid litigation. The current practice of post-award review relies on national courts to review awards. Such reviews are not internationalised and may undermine fairness due to their limited scope. By choosing arbitration, parties try to avoid a national jurisdiction that may serve in favour of a party with the same nationality. International commercial arbitration is praised for its independence from national jurisdictions. Although national courts are inevitably

[129] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 ICLQ 551, 567.

[130] Jan Hendrik Dalhuisen, 'The Case for an International Commercial Court' (7 May 2014, last revised 8 Jan 2015) available at SSRN, 12 <https://dx.doi.org/10.2139/ssrn.2433513> accessed 10 February 2020.

involved in the arbitration process and arbitration needs support from national courts for its effectiveness, the 'principle of judicial non-interference'[131] which reduces national courts' involvement in the arbitration process is adopted by national and international instruments.[132] The limited reviews and exclusion of an appeal on the merits in different national jurisdictions and international legal instruments is a clear sign of these trends.

Introducing a specialised international court to conduct appeals can enhance the independence of international commercial arbitration from national legal systems by providing an appeal option outside any national jurisdictions. This would be appealing to parties who choose arbitration as an independent mechanism from national jurisdictions. Furthermore, it would not be necessary to limit avenues for appeals in order to reduce the national court's involvement in the arbitration process. The new International Commercial Arbitral Court of Appeal would have the authority to review arbitral awards on the merits.

Secondly, the introduction of the court would maintain the popularity of arbitration in settling international commercial disputes. As discussed in Chapter 4, a growing number of countries are establishing international commercial courts which provide appeal. This would be attractive to those parties who want to have an appeal in their arbitration proceedings. It may be argued that by the availability of these courts, there is no need to establish the ICACA, as parties who seek an appeal in their dispute settlement mechanism could refer to these courts for settling their disputes. Although these international commercial courts are established to deal with international commercial disputes, they are incorporated within the national judicial system and

[131] Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) 30 U Pa J Intl L 999.

[132] Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process' (2009) 24 Am U Intl L Rev 489, 490-491.

based on national procedural frameworks which are more complex compared with arbitration. Furthermore, arbitration provides confidentiality which does not exist in national courts. Introducing the ICACA would safeguard the leading role of arbitration in settling international commercial disputes and would satisfy the wish of those parties who want an appeal option in their dispute settlement mechanism.

Third, the proposed appellate court could provide a fast appeal mechanism compared to national courts proceedings. National court proceedings are normally a long process due to the number of claims which are made to a national court. For example, in England and Wales, appeals from arbitration awards need to be made in the Commercial Court which is already very busy and is handling many cases. In 2019-2020, 860 claim forms were issued in the Commercial Court which resulted in a total of 1013 hearings.[133] It seems that the Commercial Court needs to handle a significant number of complex cases efficiently and effectively. Arbitration claims, which includes amongst other issues appeal against arbitral awards, only cover about 25% of the English Commercial Court's caseload.[134] Although the number of appeals and review of international arbitral awards is limited, the overall caseload in the Commercial Court would prevent speedy proceedings. Introducing the ICACA would provide a fast and efficient appeal mechanism as the main and the sole function of the court would be to hear appeals from international commercial awards. This is discussed in more detail in Section 6.5 of this thesis.

[133] Judiciary of England and Wales, 'The Commercial Court Report 2019-2020' 20, (2021) 22 <https://www.judiciary.uk/wp-content/uploads/2021/05/6.7302_Commercial-Courts-Annual-Report_Final_WEB.pdf> accessed 21 June 2021.

[134] Judiciary of England and Wales, 'The Commercial Court Report 2019-2020' (2021) 11 <https://www.judiciary.uk/wp-content/uploads/2021/05/6.7302_Commercial-Courts-Annual-Report_Final_WEB.pdf> accessed 21 June 2021.

Fourth, the introduction of the ICACA would enhance the enforceability of arbitral awards by preventing unnecessary challenges against arbitral awards at the enforcement court.[135] There is a possibility that vexatious and strategic appeals can be pursued to resist enforcement of an arbitral award. However, it would be unlikely for the losing party to be successful at the enforcement stage since the award would have been already scrutinised by the proposed appellate court. Although the losing party may file a strategic appeal to the ICACA, the time frame of the proposed court would be shorter than national courts which would reduce the risk of dilatory tactics. Furthermore, the losing party may find it unreasonable to bear extra costs and expense to try its chance in an enforcement court knowing that the enforcement court would likely consider the outcome of the ruling of the proposed appellate court. It is argued in Chapter 6 that a new convention is required in order to establish the new court. The Convention may include provisions that would preclude parties in the enforcement proceedings from relying on those grounds that are within the jurisdiction of the international arbitration appeal court and the enforcement court may refuse enforcement of an arbitration award only on the public policy and arbitrability bases. Thus, the enforceability of arbitration awards would be enhanced.

Fifth, the proposed court would sufficiently satisfy justice[136] and fairness by providing an opportunity to appeal from an incorrect award. This new forum to hear an appeal would be empowered to review an award on procedural and jurisdictional irregularities as well as to hear an appeal on both a question of law and a question of fact. The scope and conditions of such appeals are discussed in the next chapter. The court would provide an opportunity to have a full

[135] Erin Gleason, 'International Arbitral Appeals: What are so Afraid of?' (2007)7 Pepp Disp Resol LJ 269, 293.

[136] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arb Intl 79, 83.

review process which is not currently available and is also problematic to introduce in international arbitration via national legal systems as discussed in the previous section.

Sixth, the creation of the new court would address the concerns about developing international commercial arbitration law and increase certainty in this regard. This new court would help to establish arbitral case law and would create precedent suitable for international commercial arbitration which is discussed in Section 6.3.2. It would help to develop the law and would increase certainty and stability[137] which will promote arbitration in the long term as a successful dispute settlement mechanism. It is argued that 'the credibility of the entire dispute resolution system depends on consistency because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose'.[138]

It may be argued that harmonisation is not a required feature in the context of international commercial arbitration. It would be difficult to persuade practitioners to adopt a procedure in order to develop the law. Parties to arbitration 'have little incentive to provide for an appeal process and pay the appeals tribunal to engage in lawmaking'.[139] The parties' intention is to meet their business needs and they choose arbitration as a private means to settle their disputes with minimum costs. Any additional costs that may arise to develop the system can be

[137] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Intl Rev L & Econ 519, 520.

[138] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 378.

[139] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1997) 51 SMU L Rev 469, 470.

unacceptable to them and it is not possible to oblige parties to deal with complications involved in national jurisdictions which they prefer to skip.

However, harmonisation is an important aspect of international trade, as otherwise it would not operate smoothly.[140] Furthermore, it is argued that 'any system of law requires a minimum of certainty, and any dispute settlement system a minimum of foreseeability'.[141] A question that can be raised is why the same is not applicable to international commercial arbitration. The success of the New York Convention and the UNCITRAL Model Law is clear evidence that a harmonised dispute settlement mechanism is required in international commercial arbitration. Currently, eighty five states adopted the Model Law and changed their legislation based on it.[142] Furthermore, the New York Convention on the recognition and enforcement of foreign arbitral awards also has been ratified by 168 countries around the world.[143] The Convention has established a harmonised enforcement mechanism for enforcing arbitral awards around the world. The availability of these international instruments has created great stability which helps to eliminate the differences[144] and barriers by offering harmonised law for the practice of international commercial arbitration.

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[140] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 Can Bus LJ 63, 67.

[141] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5.

[142] UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 15 December 2019.

[143] 'Contracting States' (New York Arbitration Convention) <http://www.newyorkconvention.org/countries> accedes 1 July 2020

[144] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 Can Bus LJ 63, 64.

The trend of harmonisation also has been reflected in the rules of important arbitration institutions, such as the AAA, the ICC and the LCIA, which have almost similar provisions.[145] The trace of harmonisation is clear in all the aforementioned developments. Establishing the ICACA would help to promote this development most efficiently. The court would be an expert in international commercial arbitration disputes which would produce reliable case law. Lord Denning argued that 'If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both'.[146]

Seventh, the introduction of the court would promote party autonomy by allowing parties to choose the appropriate degree of review according to their needs. International commercial arbitration has long been hailed for its procedural flexibility. However, as discussed in Chapter 2, the current practice of review of arbitral awards is very limited. Furthermore, there is no or only a very limited possibility to contractually expand the scope of review in international commercial arbitration which is discussed in Section 5.3. The introduction of the court provides the possibility for parties to structure the scope of review in their arbitration in a way that they deem best suited to their requirements. This is discussed in detail in Section 6.3.1.

Nine arguments may be raised against the establishment of the proposed appeal court. Although these arguments are not compelling, in order to make exhaustive and convincing arguments regarding the establishment of the court these arguments should be addressed.

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[145] Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' (2002) 3 Melb J Intl L 400, 410.

[146] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 359, citing *Packer v Packer* [1954] P 15, 22.

The first is the delay that may occur in the arbitration process. Establishing the new court would add an additional layer which would make the arbitral award open to challenges, and can prolong the process which would be deemed final otherwise. An appeal application to the ICACA entails suspension of the enforcement to allow the court to hear the appeal and render an award. It may be argued that the ICACA proceedings may cause a delay which is not favourable in international commercial arbitration, hence what the reason is to establish the court and cause delays in the arbitration process.

As discussed in Chapter 4, there is a need to expand the scope of review in international commercial arbitration. Although arbitration with a right to appeal may take longer than arbitration without such a right, parties who opted to use this non-mandatory mechanism may accept the delay in their proceedings to have a chance to challenge the award and ensure fairness of the proceedings. The ICACA would provide an expedited service compared to national courts for which illustrative examples are provided in Section 6.5. Therefore, the establishment of the ICACA is the best way to provide access to appeal in international commercial arbitration.

The second concern is that the creation of an international appellate court would damage the flexibility of international arbitration which is one of its main features. The flexibility of the system provides parties with opportunities to tailor the arbitration process that best suits their needs.[147] For example, they may prefer to have an expedited arbitration process in order to have final awards without unnecessary delay or expenses. Parties should have an opportunity to preclude the appeal from the international arbitral court of appeal in their agreement. This practice would be similar to the practice which is currently recognised by the English

[147] Moses Oruaze Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60 IJLMA 114, 115.

Arbitration Act 1996. Section 69(2)(a) of the Arbitration Act provides that an appeal shall not be brought unless 'with the agreement of all the other parties to the proceedings' or by 'the leave of the court'. The proposed appeal process is not mandatory and needs to be agreed by contract if parties want to preclude it from their arbitration. Party autonomy should not be overlooked by the drafter of the new provisions or the Convention for the creation of an international appellate court. The proposed scheme should clearly put an emphasis on parties' freedom to seek an appeal from this international appellate court. This is discussed in Section 6.3.

Third, the cost of bringing an appeal into the international commercial arbitral appeal court may be a matter of concern. The court fees to hear an appeal may be substantial due to the international nature of the court and logistical issues of international travel. The hearing fees should be increased by reference to the value and the complexity of disputes and detailed proposals are discussed in Section 6.7. Stakes are normally high in international commercial disputes. For example, the average value of dispute registered with ICC in 2019 was $52 million.[148] The fees would not prevent parties to appeal if they feel an award is wrong. However, the court's fee might force parties to think twice when they want to apply to an appeal as they may lose money if they seek an unnecessary and unreasonable appeal from an arbitration award.

Fourth, the implementation of this court would be a difficult task as countries would not recognise it easily. For some of them, the recognition of this court would be considered a loss of sovereignty. Countries may not wish to give up their sovereignty in favour of establishing an international arbitral appellate court. A question that may be asked is why countries would

[148] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) 15 <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

accept delegation of their national court's jurisdiction for reviewing international commercial arbitration awards to an international arbitral appellate court.

It is undeniable that globalisation has affected state sovereignty power. Facilitating international trade is very important to most countries and countries are taking steps to promote global trade[149] by introducing international commercial courts. The Netherlands, China, and Singapore are recent examples.[150] Globalisation also moves further beyond trade, it has affected the 'practice of law and the development of legal systems'.[151] Therefore, an appeal to national courts would be considered as a barrier to true international trade as disputes would be dealt with in states rather than through an international mechanism. The introduction of the International Commercial Arbitral Appeal Court serves this purpose and states would likely agree to it in order to promote international trades as some states have already provided an option to exclude themselves from the post-award review process. For example, the Swiss International Arbitration Law provides the possibility for parties to waive their right to challenge an award in the Swiss court.[152] The trend to waive a judicial review was followed by other countries like Belgium,[153] France[154] and Sweden.[155] It seems that exclusion of the national

[149] Julian Ku and John Yoo, 'Globalization and Sovereignty' (2013) 31 Berkeley J Intl L 210, 212.

[150] See s 4.3 of this thesis.

[151] Sundaresh Menon, 'Patron's Address' (Chartered Institute of Arbitrators London Centenary Conference, London, 2 July 2015).

[152] Federal Act on Private International Law (PILA) (Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG) AS 1988, 1776 ff) (CH), art 192(1).

[153] Code Judiciaire (BE), art 1718.

[154] Code de Procédure Civile (FR), arts 1504.

[155] Skiljeförfarande (SFS 1999:116) (SE), s 51(1).

court of the seat of arbitration from intervention in arbitration awards would be acceptable to states when it can promote international arbitration.

The ratification of the New York Convention by most of the countries around the world demonstrates that countries would accept some loss of sovereignty in order to advance the requirements of global trade. In order to involve governments internationally, states indirectly would involve in the court process by introducing judges to the international arbitral court of appeal which is discussed in the next section.

Fifth, states may resist the proposal for an international appeal court due to loss of revenue from hearing appeals against international arbitral awards in their courts. However, it seems that the revenue is not high enough for states to resist such a proposal. For example, by looking at the number of cases referred to the English courts, it can be noted that only 28 claims were made in 2019-2020 under section 68 of the Arbitration Act.[156] The number of claims that are made under section 69 of the Act was 34 in the same period where few have been granted leave to appeal.[157] Since the number of cases is very limited, legislators may agree to exclude national courts from the appeal process of an international commercial arbitral award in favour of an international arbitral appellate court.

Sixth, establishing the ICACA would undermine the principle of party autonomy which is one of the basic principles in international commercial arbitration. It would impose a mandatory

[156] Judiciary of England and Wales, 'The Commercial Court Report 2019-2020' (2021) 14 <https://www.judiciary.uk/wp-content/uploads/2021/05/6.7302_Commercial-Courts-Annual-Report_Final_WEB.pdf> accessed 21 June 2021.

[157] Judiciary of England and Wales, 'The Commercial Court Report 2019-2020' (2021) 12 <https://www.judiciary.uk/wp-content/uploads/2021/05/6.7302_Commercial-Courts-Annual-Report_Final_WEB.pdf> accessed 21 June 2021.

appeal procedure for practitioners without considering their dispute and their situations. One of the attractions of arbitration is its autonomy and the possibility for parties to adopt the process and its extent according to their needs.

Introducing an international forum for appeal in arbitration would not undermine party autonomy as seeking an appeal from arbitration awards is not mandatory and parties could exclude a right of appeal from their arbitration agreement. Parties would have a chance to choose whether to have an appeal option in their arbitration agreement or waive their right to any appeal. It is argued that 'the logical consequence of party autonomy is that they should be allowed to have recourse if that is what they have agreed'.[158]

Seventh, the creation of the ICACA and the isolation of international commercial arbitration from the judiciary would promote the privatisation of justice. It is argued that this trend may bring 'a lack of clarity in the important area of private law, undermine the rule of law' and make access to justice more difficult.[159] However, privatisation would limit access to justice only to those parties who cannot afford it. This would not undermine access to justice in international commercial arbitration as usually the parties to an international trade agreement have resources to pursue a private dispute settlement mechanism and the cost would not be a barrier to them. Genn[160] gathered statistical data regarding the use of civil justice in settling disputes. The number of cases commenced in QBD in England in 1990 was 400,000. There was a significant decline in the number of cases submitted to the court and it dropped sharply to around 25,000

[158] Fraser P Davidson, 'The new Arbitration Act - a model law?' [1997] JBL 101, 125.

[159] Hazel Genn, 'Why the Privatisation of Civil Justice Is a Rule of Law Issue' (36th FA Mann Lecture, Lincoln's Inn, London, 19 November 2012) 3.

[160] Hazel Genn, 'Why the Privatisation of Civil Justice Is a Rule of Law Issue' (36th FA Mann Lecture, Lincoln's Inn, London, 19 November 2012) 3.

in 2010. In comparison, the number of cases referred to LCIA has increased from 81 in 2,000 to 215 in 2008 and 440 in 2020.[161] It is clear that the demand for trial in civil court has fallen over the years and parties prefer to settle their disputes by private dispute settlement mechanisms due to the pressure, complexity and bureaucratic character[162] of the court system.[163] Furthermore, there is significant growth in the number of arbitration institutions around the world[164] which indicates the trend towards the privatisation of justice.

Eighth, there are currently several institutions that offer an internal appeal of an international commercial arbitration award, hence, there is no requirement for the International Commercial Arbitral Court of Appeal. However, the ICACA would provide a consistent appeal procedure which would apply uniformly independent of any arbitral institutional rules. Each of these institutions tailors its appeal procedures in a different way. For example, LCIA provides no possibility to appeal from arbitral awards.[165] On the other hand, the CPR[166] and the AAA[167] provide a comprehensive appeal process of both factual and legal errors. It is clear that there is no standard appellate review process and differences could become cumbersome due to growth in the number of international commercial institutions. Hans Smit argues that by growing the

[161] LCIA, 'LCIA 2020 Annual Casework Report' (LCIA, 17 May 2021) <https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx> accessed 22 June 2021.

[162] Owen M Fiss, 'The Bureaucratization of the Judiciary' (1983) 92 Yale LJ 1442, 1422.

[163] Vijaya Kumar Rajah, 'W(h)ither Adversarial Commercial Dispute Resolution?' (2017) 33 Arb Intl 17, 18.

[164] Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55 Intl Org 919, 920.

[165] LCIA Arbitration Rules 2020.

[166] CPR Appellate Arbitration Procedure 2015.

[167] AAA Optional Appellate Arbitration Rules 2013

number of international arbitration institutions around the world, there would be differences in laws and practices of these institutions. He argues that variations of rules and practice of these institutions may cause problems for their practitioners.[168] The creation of an international arbitration appellate court would address the above issue and would provide a consistent review process for international commercial arbitration.

Ninth, it may be argued that the creation of the proposed court may undermine appeal offered by arbitral institutions and force practitioners to appeal through the ICACA. However, having an appeal through the proposed court is not mandatory and there would be an option for parties to either opt-out of any appeal process, use an institutional appeal process or appeal through the proposed court. This would not prevent arbitration institutions from introducing an internal appeal mechanism in their arbitration process. If parties want to proceed in the framework of the institution they would be completely free to do so.

A question that could be asked is, given that the idea of establishing an arbitral appeal court has been around for a while, why it has not already been established. The last century has witnessed a growth in cross-border trade[169] and, due to the high stakes and the complexity of international transactions, there is a growing change in the landscape of resolving disputes arising from these transactions.[170] Recognising and enforcing flawed awards may not be the preferred option

[168] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9, 29.

[169] Esteban Ortiz-Ospina, Diana Beltekian and Max Roser, 'Trade and Globalization' (Our World in Data, October 2018) <https://ourworldindata.org/trade-and-globalization> accessed 3 July 2020.

[170] Anibal Sabater, 'Practicing International Arbitration: A New Landscape' (2008) 17 ILSA Quart 16, 17.

anymore for those practitioners.[171] The biggest indicators of this trend are reforms in regulations of some international commercial institutions which now provide an internal appellate body to hear appeals.[172] As the need for the establishment of the international commercial arbitration appellate court was not immediate, such a forum has not developed yet but the current trend would highlight the needs. This thesis seeks to contribute to the establishment of such a court in the near future by offering suggestions on how the court could be set up and how it could function.

5.5 Conclusions

Different forums are proposed for expanding review in international commercial arbitration. It is argued that due to the lack of an appellate review in international commercial arbitration, some international institutions have introduced an internal appeal mechanism in their arbitration rules. The rules of some institutes such as the FOSFA, the GAFTA, the CPR, and the AAA are examined briefly in this chapter. Appeal offered by these institutes is generally optional, requiring parties' agreement either to have recourse to appeal or to exclude it from their arbitral proceedings.

Such recourse to appeal would strengthen and support party autonomy in international commercial arbitration. It also satisfies the needs of parties with a concern over the lack of appeal in international commercial arbitration. Furthermore, it promotes international

[171] Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality' (2013) 30 J Intl Arb 531, 531.

[172] Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality' (2013) 30 J Intl Arb 531, 534.

commercial arbitration independence from the judiciary and enables institutions to adopt flexible rules and regulations to administrate their appeal procedures. This would result in a faster and more efficient procedure compared to litigation.

However, there are some drawbacks and concerns that need to be addressed. Firstly, each arbitration institution has its own rules and procedures. This would create significant inconsistency in international commercial arbitration appellate review. Moreover, there is no regulatory authority overseeing their appeal procedures, which could result in low-quality awards that could negatively harm the development and reputation of international commercial arbitration.

Another way to implement an appellate review in international commercial arbitration is empowering national courts to conduct an appellate review. Currently, the scope of review by national courts in most jurisdictions is limited to procedural irregularities and jurisdictional challenges. Furthermore, it is not generally possible to expand the scope of review by agreement between the parties. It is argued that allowing the expansion of the scope of review by parties agreement is in accordance to parties' autonomy and would enable parties to tailor their arbitration procedure according to their needs. However, such an approach would not be favoured by national courts as they have to deviate from their usual procedure upon parties request. This may lead to inconsistency, increased complexity and unpredictability in the review of arbitral awards due to the variation in parties agreements and needs.

The court may be empowered to review an arbitral award on the merits. Currently, an appeal on a question of law may be brought against an arbitral award to English courts pursuant to section 69 of the Arbitration Act 1996. Traditionally, the court in England had a greater power to scrutinise an arbitral award. However, the practice was criticised due to undermining

arbitration independence and also the delays caused by such interference. This resulted in amending the Arbitration Act in 1979 and 1996 to limit the scope of review by the courts. The introduction of appeal through national courts would result in judicialisation of arbitration and would undermine the independence and integrity of international commercial arbitration. It would make arbitration more costly and may cause substantial delay.

It is suggested that the best forum to conduct a review on the merits of an arbitral award is the new International Commercial Arbitral Court of Appeal. The establishment of such a court is advocated by some commentators who argued that it would replace the national courts in reviewing arbitral awards and would make international commercial arbitration more consistent and unified.

The introduction of the court would make arbitration independent of the judiciary. It would address the concern of practitioners who are worried about the lack of appeal. Its appeal mechanism would be expedited compared to the national legal system. The enforcement of arbitral awards would be enhanced by introducing a court that ensures the correctness of awards. It would provide an opportunity to review an arbitral award fully and would provide precedent in international commercial arbitration.

Some drawbacks may be associated with the court but it is shown in this chapter that those arguments against the court are not compelling. The appeal process offered by the court may cause delay but it is argued that the court would have an expedited service which would be faster than appeal by national courts. Furthermore, parties that agreed to the appeal would accept the delay to ensure the correctness of their awards. It may be argued that the court would damage the flexibility of the arbitration. However, since the appeal process offered by the court is not mandatory, parties could decide about the level of scrutiny they are looking for. The cost

is another concern however the stakes are high in international commercial arbitration and a reasonable cost based on the complexity and value in the dispute would not prevent parties from recourse to the court.

It is argued that states may not accept the court due to their concern over the loss of sovereignty, however, states already made a compromise by accepting the New York Convention in order to promote international commerce. The introduction of the court is to promote international commercial arbitration which would facilitate international trade and would be welcomed by the governments. There may be some resistance to the establishment of the court because of the loss of revenue in national courts. However, a very limited number of the appeal of an arbitral award are brought before the national courts and the introduction of the court would have a very limited effect on national courts' revenue. Arbitration is a private dispute settlement and parties to international commercial agreements would not struggle with the ICACA fees. The appeal procedure of the court is by agreement and parties are not prevented from using the internal appeal procedure offered by arbitral institutes. The establishment of the court is examined in the next chapter.

CHAPTER 6. ESTABLISHING AN INTERNATIONAL COMMERCIAL ARBITRAL COURT OF APPEAL

6.1 Introduction

It is argued in this thesis that an appeal mechanism should be introduced in international commercial arbitration. It is also suggested that the best forum to conduct such an appellate review is the International Commercial Arbitral Court of Appeal (ICACA). Although as discussed in the previous chapter the idea of creating an international court to review arbitral awards is not new, the existing literature on an international commercial arbitral appeal court is superficial and no detailed proposal has yet been offered on the implementation of such a court. This study seeks to fill the gap in the current literature of how such an international court can be established by providing a comprehensive analysis of its implementation requirements, structure, function, location and finance.

In Section 6.2, I offer a detailed explanation of my suggestion on how the proposed court may be implemented before discussing the proposed functioning of the court in Section 6.3. Next, I discuss my proposals on the structure and the procedure of the court in Sections 6.4 and 6.5 respectively before explaining the reasons for my proposed location of the court. Finally, my suggestions on how the court may be financed are discussed in Section 6.7. The chapter closes with conclusions.

6.2 The implementation

The first step for introducing an international arbitral appeal court is drafting a new convention or amending relevant existing conventions. International commercial arbitration relies on the New York Convention and the Model Law. The discussion that follows first considers the possibility of introducing the ICACA by amending international instruments before considering the option of a new convention.

6.2.1 Amending the existing instruments

United Nations Commission on International Trade Law ratified the New York Convention on the recognition and enforcement of the arbitral awards in 1958. The Convention set out provisions for recognition and enforcement of the arbitral awards outside the country in which enforcement is sought. The Convention ensures practitioners that awards are recognised and enforced in the same way as national awards.[1] It is clear that the main focus of the New York Convention is to build an 'effective legislative framework'[2] for facilitating the enforcement of the arbitral award. The Convention does not deal with the review of an arbitration award and there is no possibility to discuss appeal and establishment of the ICACA within the Convention.

The difficulty in amending the New York Convention was mentioned by Gaillard who argued that 'the issues raised by a potential revision of the New York Convention are much more intricate and likely to be highly controversial than one would expect at first sight. Against that

[1] Troy L Harris, 'The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes' (2007) 24 J Intl Arb 9, 9.

[2] Katia Fach Gómez and Ana M López Rodríguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) xlvii.

background, the inescapable conclusion is that it is urgent to do nothing'.[3] Van den Berg previously supported the amendment of the New York Convention and proposed solutions to mitigate its shortcomings.[4] However, he changed his stand later and supported the introduction of a new convention instead of an amendment of the New York Convention in order to address its shortcomings.[5] Furthermore, an amendment to the Convention requires member states' consensus which could be difficult to achieve.[6] The idea of establishing the ICACA would eliminate national courts' role in reviewing arbitral awards. If the introduction of the court was pursued via amendments to the New York Convention, the required changes may face the resistance of some member states who opposed such changes in the New York Convention and it would be difficult to achieve an agreement between 168 member states in practice.

The UNCITRAL Model Law is another international instrument that plays a significant role[7] in the harmonisation of law and practice of international commercial arbitration by providing a

[3] Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' in Albert van den berg (ed), *50 Years of the New York Convention: ICC International Arbitration Conference* (Kluwer Law International 2008) 696.

[4] Julie Bédard, 'A New New York Convention? Interview with Albert Jan van den Berg' (Mealey's Executive Summary, October 2008) 7 <http://www.hvdb.com/wp-content/uploads/2008-AJvdB-A-New-New-York-Convention.pdf> accessed 12 July 2020.

[5] Albert van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note' in Albert van den Berg (ed), *50 Years of the New York Convention: ICC International Arbitration Conference* (Kluwer Law International 2008) 649.

[6] Carolyn B Lamm, 'Comments on the Proposal to Amend the New York Convention' in Albert van den Berg (ed), *50 Years of the New York Convention: ICC International Arbitration Conference* (Kluwer Law International 2008) 697.

[7] Howard M Holtzmann and others, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) V.

'statutory framework' [8] for arbitration proceedings. The UNCITRAL Model Law contributes to the development and harmonisation of international commercial law in different countries[9] by assisting countries to reform their laws by using it as a model for modernising their arbitration legislation. Introducing the establishment of the ICACA within the UNCITRAL Model Law statutory framework would be difficult. UNCITRAL Model Law permits countries to make changes in its provisions when incorporating the Model Law into their arbitration laws.[10] The provisions regarding the structure and the process of the proposed court cannot be changed and the member states could not have a possibility to modify them as it would make the implementation of the court impossible. Thus, the Model Law framework which provides flexibility in its adoption cannot be used and a new convention is required.

6.2.2 Introducing a new convention

The ICACA as a new international forum needs a detailed convention that covers all issues including provisions about court structure and its functions. The new Convention would be considered as a legislative instrument that provides a comprehensive legal framework for appeal of international arbitral awards around the world. It would facilitate review of arbitral awards and hear an appeal on the merits. The ICACA would end the inconsistent review process in different jurisdictions.

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[8] Howard M Holtzmann and others, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) V.

[9] Hsu Locknie, 'The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore' [1994] Sing JLS 387, 391.

[10] Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28 J Intl Arb 445, 451.

The title of the new Convention would be "International Commercial Arbitral Appeal." The Convention should be divided into two parts; the first part would deal with legal provisions about the appeal and the second part would provide provisions about the court and its structure. The United Nations Commission on International Trade Law (UNCITRAL), would be the appropriate body to draft the new Convention. One of the mandates of the UNCITRAL is:

> [P]reparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field.[11]

The UNCITRAL is comprised of a commission, the intergovernmental working groups and the secretariat.[12] The commission functions via an annual plenary session.[13] The commission considers draft texts which are prepared and submitted by the working groups. It also considers

[11] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 33 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

[12] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 5 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

[13] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 5 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

projects' progress reports of the working groups and determines possible future work and research agendas.[14]

The intergovernmental working groups comprise of all member states of UNCITRAL. Different groups such as international and regional organisations (both intergovernmental and non-governmental) can be invited to attend working groups sessions and contribute to the work of the working groups.[15] The working groups normally hold one or two annual meetings and report their work progress to the commission. The secretariat assists and supports the commission and its working groups.[16]

A first draft of the New York Convention was proposed by the International Chamber of Commerce (ICC) in 1953 and presented to the United Nation Economic and Social Council (ECOSOC).[17] An ad hoc committee was established by the Council to consider and produce the draft Convention at a time which predates the formation of UNCITRAL. The draft Convention

[14] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 5, 6 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

[15] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 7 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

[16] UNCITRAL, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (United Nations 2013) 7 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> accessed 28 June 2021.

[17] UN, 'Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' (United Nations Publications 1999) 3.

on the Recognition and Enforcement of Foreign Arbitral Awards was submitted to a three-week International Conference at the United Nations for adoption.[18]

The preparation of the new Convention is an important task and needs to be examined and analysed thoroughly by UNCITRAL. A working group would be authorised by the Commission to undertake works on different sections of the new Convention. For example, currently, the Working Group III of the UNCITRAL is considering reforms on investor-state dispute settlement including the possibility of introducing an appeal mechanism.[19] Arbitral institutions and individual experts from all over the world should be invited to the working group for extensive consultation and drafting the new Convention on establishing the ICACA. This practice would be important as it would assure the member countries that their concerns would be considered and the new Convention would not frustrate the main principles of their public policy. The final draft should be adopted by a United Nation Diplomatic Conference.

Although the ICACA would be established by drafting the new Convention, the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention of 1958 would still play a significant role in relation to the new Court. There are provisions in the New York Convention that may be contradictory to the new Convention. For example, currently, article V(1)(e) of the New York Convention provides that:

[18] UN, 'Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' (United Nations Publications 1999) 3.

[19] UNGA, 'Possible reform of investor-State dispute settlement (ISDS)' United Nations Commission on International Trade Law, Working Group III (Vienna, 27 November-1 December 2017) (18 September 2017) UN Doc A/CN.9/WG.III/WP.142, 8-9.

> [R]ecognition and enforcement of the award can be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:
> … (e) The award has not yet become binding on the parties, or 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.

In this article, the recognition and enforcement of an arbitral award can be refused if the arbitral award was set aside or suspended by a national court of the place where the arbitration award was made. However, such a role would be delegated to the ICACA and the court of the seat may not review an arbitral award anymore. Hence, it is necessary to refer to such articles in the new Convention and exclude them for the member states who are parties to the new Convention.

The UNCITRAL Model Law should also be revised in order to provide new provisions and guidelines regarding appeals from arbitral awards by new international arbitral appellate courts. For example, article 6 of the Model Law provides that 'The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]' Article 34 currently deals with the application for setting aside an arbitral award. Hence, the above text should be modified in order to remove an option by states to refer appeal cases to any court other than the proposed international appellate court. Article 34 of the Model Law should also be extended to include provisions for bringing an appeal on the merits to the newly established court.

The support of countries is crucial in establishing the ICACA. Countries must accept delegation of the power to hear an appeal from arbitral tribunals to the new international arbitral court.

Some countries may resist such changes as they may consider it undermining their power to protect their public policies. However, it would take time to persuade countries to sign up to ICACA as an alternative forum to national courts in hearing an appeal from the international commercial arbitration award and 'arbitration could achieve what for centuries has been its impossible dream'.[20] Holtzman defended the argument to create an international arbitral court by asserting that, 'many of the developments in international arbitration that seem ordinary today would have been thought to be impossible dreams 100 years ago'.[21]

The countries who decide to recognise the establishment of this court should emphasise that the court would be the sole court for the international commercial arbitral awards and their rulings should be recognised fully by states. Awards rendered by the court would be binding and it would not be possible to scrutinise awards in national courts.

6.3 The function

The question which is examined here is what would be the functions of the ICACA. Its main function would be to hear appeals from international commercial arbitral awards. The Court would be the authority to hear appeals from international commercial arbitral tribunals. It would also establish precedent which would increase the certainty in international commercial arbitration and would contribute to the development of law.

[20] Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (3rd ed, Juris 2014) 1345.

[21] Holtzmann, Howard M. 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriott, VV Veeder (ed), *The Internationalisation of International Arbitration, the LCIA Centenary Conference* (Martinus Nijhoff 1995) 109.

6.3.1 The scope of appeal in the ICACA

As national courts would no longer review arbitral awards, the ICACA would be the ultimate available authority for parties to challenge the validity of arbitration awards. Although national courts would not have any role in reviewing arbitration awards, the enforcement of international commercial arbitration awards would still be in the jurisdiction of national courts.

A question that needs to be answered is what type of review should be conducted by this new court. Should the court review an arbitral award on procedural irregularities and jurisdictional challenges and hear an appeal on both questions of law and questions of fact? For example, WTO appellate review is limited to appeals on points of law. The panel cannot 're-examine existing evidence or re-examine new issues'.[22] The appellate panel can uphold, modify, or reverse the award.[23] The European Court of Arbitration (CEA) allows parties to seek an appeal from an arbitral award pursuant to its arbitration rules. According to article 28.4 'appellate arbitral proceedings allow a full review of the dispute by way of rehearing, including dealing in particular with admissibility, the facts and the merits'.[24] The American Arbitration Association (AAA) allows parties to appeal on 'an error of law that is material and prejudicial or determinations of fact that are clearly erroneous'.[25] The Grain and Feed Trade Association (GAFTA) also provides an opportunity for dissatisfied parties to appeal an arbitration award on

[22] 'Settling Disputes: A Unique Contribution' (World Trade Organization) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 9 July 2020.

[23] 'Settling Disputes: A Unique Contribution' (World Trade Organization) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 9 July 2020.

[24] Arbitration Rules of The European Court Of Arbitration 2021, art 28.4.

[25] AAA Optional Appellate Arbitration Rules 2013, r A-10.

a question of law or fact. According to GAFTA's Rules and Regulations, the appeal is *de novo* and parties can provide the appeal panel with new facts and submit new evidence.[26]

As discussed in Chapter 4, the scope of review in international commercial arbitration should be expanded to include an appeal on the merits. The parties' will should be respected in setting the scope of appeal in the ICACA and the court rules should be flexible enough to respect party autonomy in setting the scope of review for their dispute. The ICACA would provide a comprehensive appeal process within arbitration. Currently, arbitral awards in most countries will be set aside by national courts on limited statutory grounds for procedural or jurisdictional errors and arbitral awards normally are not reviewed on the merits of the award for errors of fact or law.[27]

Dissatisfied parties may overturn arbitration awards by applying to the ICACA for the annulment of an arbitral award on procedural and jurisdictional grounds. This would be allowed by default in the ICACA and parties to an arbitration agreement could bring a challenge for annulling an arbitral award without the inclusion of the right of application in their agreement. Furthermore, under the proposed scheme parties would not be permitted to exclude such a right by agreement. This is to satisfy the minimum requirement of due process that is set by the New York Convention and the UNCITRAL Model Law to serve 'as the shield of fundamental procedural rights'.[28]

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[26] Jacques Covo, 'Commodities, Arbitrations and Equitable Considerations' (1993) 9 Arb Intl 57, 60.

[27] Currently, few jurisdictions allow substantive reviews which goes to the merits of arbitral awards arbitral. For example, the English Arbitration Act provides appeal opportunity on questions of law. However, this appeal can only be brought by agreement of the parties to the arbitral proceedings or by permission of the court.

[28] Lucy Ferguson Reed, 'Ab(use) of due process: sword vs shield' (2017) 33 Arb Intl 361, 366.

The court would also hear an appeal on a question of law. There is no need to include this in their agreement similar to the previous case. However, if parties want to exclude it in their proceedings, they must opt-out in their agreement. If an appeal on a question of fact is requested by the parties, the court has to honour the parties' will. As discussed earlier, an appeal on a question of fact would only be considered if parties agree to in order to prevent lengthy proceedings and prevent excessive caseload.

The practice of the new international appellate court should capture the best elements of national appeal systems both from common law and civil law systems in order to provide an effective and efficient appeal mechanism with international features. The right to appeal in some common law systems such as England is not de novo.[29] It means that awards are not entirely reviewed by the appellate court.[30] For example, in general, an appeal in England involves reviewing a judgment on a point of law rather than on a point of fact.[31] In civil law countries, the court may fully review the case both on a question of fact and on a question of law.[32] For example, in France, the Court of Appeal may hear an appeal on a question of fact or a question of law.[33] In this type of appeal, new evidence may also be considered by the court for more clarity in fact-finding of the arbitration tribunal.[34]

[29] Martin Shapiro, 'Appeal' (1980) 14 L & Soc'y Rev 629, 648.

[30] Martin Shapiro, 'Appeal' (1980) 14 L & Soc'y Rev 629, 636.

[31] Alisdair Gillespie and Siobhan Weare, *The English Legal System* (7th ed, OUP 2019) 646.

[32] Nina Nichols Pugh, 'The Structure and Role of Courts of Appeal in Civil Law Systems' (1975) 35 La L Rev 1163, 1165; Steven Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24 JLS 379, 419.

[33] Code de procédure civile (FR), art 561.

[34] Nina Nichols Pugh, 'The Structure and Role of Courts of Appeal in Civil Law Systems' (1975) 35 La L Rev 1163, 1165.

It is clear that the right to appeal is restricted in the common law system in comparison to the right of appeal in civil law countries. Now, the question is which practice should be adopted by the ICACA. As party autonomy plays an important role in the arbitration process, parties should have the opportunity to choose the type of appeal they are looking for in their contracts. They should have an opportunity to challenge an arbitral award on a question of fact or a question of law. For example, the court could consider a de novo review of the case if it is agreed by parties at any stage before starting the appeal process. According to this research proposal, the ICACA could correct the legal errors and would not necessarily hear an appeal from the arbitral award on a question of fact unless it was sought by the parties. The ICACA would have the power to reverse, change or revise arbitral awards.

It may be argued that if parties are provided with the opportunity to appeal on a question of facts this may prolong the arbitration process and may cause uncertainty. However, as discussed before, appeal on a question of fact would be possible only upon request of the parties to a dispute and arbitration is a system based on the wills of the parties. If they choose to have an appeal based on a question of facts this should be granted to them.

A question is whether the ICACA should introduce limits and thresholds to bring cases to the international arbitral appeal court. Such thresholds can be used to reduce the court caseload, hence providing an expedited appeal process for those who can submit their case. One of the thresholds that can be implemented is the monetary threshold to bring appeals to the ICACA. For example, according to article 330 of the Iran Civil Procedure Code, an appeal can be brought in financial disputes if the amount of claim is above 3 million Rials. In England, the Civil Procedure Rules Practice Direction 7A(2.1) provides that ‘proceedings (whether for damages or for a specified sum) may not be started in the High Court unless the value of the

claim is more than £100,000'. It is important to note that cases with a lower value can still be heard at a lower court. This ensures the right to recourse to justice for all while it controls the caseload of the High Court.

In some courts and arbitral tribunals leave to appeal should be granted in order to bring an appeal against a judgment. For example, section 69 of the Arbitration Act 1996 requires parties without an agreement on appeal to seek the court's permission to appeal an arbitral award.[35] Article 28.3 of the CEA arbitration rules provides that 'the appeal will be admissible only if it is accompanied, unless otherwise directed by the Court by order made with reasons and based on exceptional circumstances, by the deposit by the appellant with the Competent International Registrar of the principal sum, and such interest and costs as may have been awarded against it by the award under appeal'.

Such measures can be used to control the caseload of the ICACA if required. However, the purpose of the court is to provide an opportunity to appeal against a wrong award in international commercial arbitration. The new Court is proposed to satisfy the will of parties who are concerned with the lack of appeal in international commercial arbitration. The measures should only be applied if there is no other means to control the caseload.

6.3.2 Interaction of the proposed court with the current internal appeal mechanisms of arbitral institutions

This thesis recognises that a growing number of arbitral institutions are introducing internal appeal mechanisms in their arbitration proceedings. Examples of such institutions include the GAFTA and FOSFA arbitrations. Both have already been discussed more fully above in

[35] Arbitration Act 1996, s 69.

Chapter 5.[36] The proposal of this thesis for the ICACA does not require these arbitral institutions to change, abolish or modify their internal appeal mechanisms. Currently, the appeal mechanisms offered by arbitral institutions work alongside the review provided by the court of the seat. Under the system proposed by this thesis, the power of the court of the seat to review arbitral awards would simply be transferred to the ICACA, hence a similar arrangement of institutional appeal could still be effective.

Where arbitral institutions make provision for their own appeal mechanisms for their users, should arbitrating parties still be able to apply directly to the ICACA for review? The answer is that if the arbitration rule of the particular institution requires parties to waive their right to appeal to the ICACA,[37] the Court would not be able to accept the appeal. However, the Court will still accept an application to annul an arbitral award on procedural and jurisdictional grounds as this type of review is mandatory and cannot be excluded. The ultimate aim is to introduce the ICACA as a competent forum for hearing challenges to all arbitral awards in order to promote harmonisation and minimize inconsistencies, and it is expected that the Court would play a more substantial role by gaining recognition and acceptance amongst practitioners through time.

[36] See discussion in Section 5.2.

[37] For example, Article 26.8 LCIA Arbitration Rules (2020) provides that 'Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law'.

6.3.3 Precedent

Another important function of the court is to harmonise and develop the law in international commercial arbitration as much as possible. The Court would have the authority to establish persuasive precedents in international commercial law. Traditionally, the legitimacy of international commercial arbitration is justified by emphasising the two important elements of party autonomy and the arbitration agreement.[38] However, transparency and establishing precedent would foster the legitimacy of international arbitration.[39] A question that needs to be answered here is whether establishing the ICACA would develop precedent in international commercial arbitration. Does precedent have a place in international commercial arbitration? What types of precedents would be created by the court? Would opinions produced by the court have a precedential force?

Precedent in the national legal system is described as the 'starting-point of judges' reasoning'.[40] Landes and Posner praise a court system for its efficiency in settling disputes and producing rules and a system of precedents.[41] However, they argue that private dispute resolution mechanisms, although they facilitate efficient dispute resolution and would satisfy justice, are

[38] Diego P Fernández Arroyo, 'The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration' in Hans-W Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing Ltd 2016) 357.

[39] Diego P Fernández Arroyo, 'The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration' in Hans-W Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing Ltd 2016) 357.

[40] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5, 5.

[41] William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235, 236.

inefficient in creating rules of law.[42] Awards rendered by a court provide precious information regarding the 'likely outcome of similar disputes in the future'.[43] MacCormick argued that precedent contributes to 'the idea of an impartial legal system that does the same justice to everyone, regardless of who are the parties to a case and who is judging it'.[44] MacCormick argued that a 'reason for sticking to precedents is economy of effort—judges and lawyers should not have to keep on going over the same ground'.[45] It prevents unnecessary pressure on judicial systems to deal with similar cases. It also enables national courts to cope with their workload.

The lack of precedent in international commercial arbitration may be a matter of concern. For example, in England, Lord Thomas in his speech mentioned his desire to consider 'rebalancing the relationship between the court and arbitration'.[46] He proposed reform of section 69 of the Arbitration Act 1996 to permit more rights of appeal on points of law. He argued that currently, the strict test[47] for permission to appeal under section 69 has led to a reduction in the number of applications for appeal to the courts. The current practice restricts the development of the common law. Farrow argued that:

> Without public scrutiny – through open court processes, the publication of precedents and the application of case law to the facts to be adjudicated – there is a real danger that parties, particularly those with power, will increasingly use this privatizing system in

[42] William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235, 238.
[43] William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235, 236.
[44] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 143.
[45] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 143.
[46] Lord Thomas CJ, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', (The Bailii Lecture 2016, 9 March 2016).
[47] *Pioneer Shipping Ltd v BTP Tioxide Ltd (Nema)* [1982] AC 724, 743.

order to circumvent public policies, accountability and notions of basic procedural fairness.[48]

The role and importance of precedent are not the same for all types of international arbitration proceedings. Precedent is recognised in both investment and sports arbitration. However, the lack of appeal in investment arbitration has undermined the role of precedent. Transparency and the existence of precedent in investment arbitration are important due to the involvement of states and the public interest in this type of arbitration.[49] Concerns over inconsistency in arbitral decisions and lack of predictability in investment arbitration are among issues which have been raised in current discussions at Working Group III of UNCITRAL regarding possible reforms in investor disputes settlement.[50] It is argued that coherence and consistency could 'support the rule of law and enhance confidence in the stability of the investment environment'.[51]

Precedent is also crucial in sports arbitration, as justice should be applied equally for all athletes and their performance on the playing field should be measured by universal sports standards.[52]

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[48] Trevor C W Farrow, 'Privatizing our Public Civil Justice System' (2006) 9 News & Views on Civ Just Ref 16, 16.

[49] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 376.

[50] UNGA, 'Possible reform of investor-State dispute settlement (ISDS)' United Nations Commission on International Trade Law, Working Group III (Vienna, 27 November-1 December 2017) (18 September 2017) UN Doc A/CN.9/WG.III/WP.142.

[51] UNGA, 'Possible reform of investor-State dispute settlement (ISDS)' United Nations Commission on International Trade Law, Working Group III (Vienna, 27 November-1 December 2017) (18 September 2017) UN Doc A/CN.9/WG.III/WP.142, 7.

[52] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 376.

They must receive fair and equitable treatment in similar situations, and it is not appropriate for tribunals to apply different legal justifications for similar facts.[53]

There are some differences between international commercial arbitration and investment or sports arbitration in the context of precedent. Every year many arbitral awards are rendered by international commercial arbitral tribunals. Due to the lack of empirical evidence as a result of a shortage in the number of published awards, it is very difficult to determine whether precedent has a place in international commercial arbitration.[54] Kaufmann-Kohler has researched the extent of arbitrators' reliance on past awards.[55] He mentioned:

> I asked one of my research assistants to survey awards in order to answer these two questions. Several hundred awards later, he returned with a long, detailed memorandum that concluded that arbitrators do what they want with past cases and that there is no clear practice in this field.[56]

He concluded that precedent is less important in international commercial arbitration as disputes are mostly 'fact and contract-driven'.[57] Arbitrators are responsible for resolving disputes between parties and they have no duty to produce norms. It is argued that:

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[53] Matthew J Mitten, 'The Court of Arbitration for Sport and Its Global Jurisprudence: International Legal Pluralism in a World without National Boundaries' (2014) 30 Ohio St J on Disp Resol 1, 16.

[54] Ank Santens and Romain Zamour, 'Dreaded Dearth of Precedent in the Wake of International Arbitration-Could the Cause Also Bring the Cure?' (2015) 7 Arb LR 73, 75.

[55] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357.

[56] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 362.

[57] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 376.

> [U]ltimately, the Arbitral Tribunal has not been entrusted, by the parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.[58]

It is argued that international commercial arbitral tribunals are normally created for settling a specific dispute between specific parties according to a contract between them. [59] Arbitrators consider their principles concerning the resolution of a dispute. An arbitrator will 'do justice as he sees it, applying his own sense of law and equity to the facts as he finds them'.[60] However, arbitrators may find themselves influenced by the decision of other tribunals on similar matters.[61] Furthermore, they are still bound to follow international norms derived from their practice and precedent can help them to ensure consistency in their ruling.

Four reasons are mentioned for the lack of support for generating precedent in international commercial arbitration here and it is shown how the introduction of ICACA would address these issues and would help the development of precedent.

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[58] Patrick M Norton, 'The Role of Precedent in the Development of International Investment Law' (2018) 33 ICSID Rev 280, 289, citing *Romak SA v The Republic of Uzbekistan* (PCA Case No 2007-07/AA280) 171.

[59] James T Peter, 'Med-Arb in International Arbitration' (1997) 8 Am Rev Intl Arb 83, 91, citing *Silverman v Benmor Coats Inc*, 61 NY.2d 299, 308 (Ct App 1983).

[60] James T Peter, 'Med-Arb in International Arbitration' (1997) 8 Am Rev Intl Arb 83, 91.

[61] Stacie I Strong, 'Research in International Commercial Arbitration: Special Skills, Special Sources' (2009) 20 Am Rev Intl Arb 119, 142.

The first reason is that a system of hierarchy is required for establishing precedent. There is no hierarchy in the current practice of international commercial arbitration and tribunals are acting completely independent from other tribunals.[62] Arbitrators and tribunals are under no obligation to follow the decision of arbitrators and tribunals at the same level. It is also unclear how many disputes are settled by arbitration around the world.[63] It would be difficult to persuade all arbitrators and arbitral institutions to follow previous decisions which would be large in number and were rendered by other tribunals who would be deemed of the same importance.

The lack of hierarchy may be problematic in generating precedents by arbitrators due to possible inconsistencies between tribunals. There should be a higher rank court that could set precedents. The introduction of ICACA would provide international commercial arbitration with a higher court. The ICACA would be the ultimate forum to produce precedent as it would be the superior court of international commercial arbitration.

The second reason is that traditionally there is an assumption that arbitration proceedings and awards are widely confidential in their nature and information regarding disputes and arbitration proceedings should not be disclosed.[64] Thus, the principle of precedent cannot be applied to international commercial arbitration. Arbitration proceedings are conducted normally 'firmly

[62] Diego Fernández Arroyo, 'Private Adjudication Without Precedent?' in Horatia Muir Watt and Diego Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 135.
[63] Stefan Pislevik, 'Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?' (2018) 34 Arb Intl 241, 253.
[64] Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22(2) J Intl Arb 127.

behind closed doors' and 'hidden from view'[65] and arbitration awards are mostly unpublished. This trend would hinder the establishment of precedent in the framework of international commercial arbitration. It cannot be ignored that for some practitioners confidentiality in international commercial arbitration is the main motivation to choose arbitration for resolving their disputes.[66] However, confidentiality is not protected in some national laws.[67] The international law association reported:

> Confidentiality is an important feature of international commercial arbitration … Many users of international commercial arbitration assume when choosing arbitration that arbitration is inherently confidential. This assumption is not warranted because many national laws and arbitral rules do not currently provide for confidentiality and those that do vary in their approach and scope (including the persons affected, the duration and the remedies).[68]

[65] William Rowley, 'London arbitration under attack'(IDRC 16 May 2016) <https://www.idrc.co.uk/media/26078/rowley_-_london_arbitration_under_attack.pdf> accessed 19 February 2019.

[66] Joyiyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration – An Introspection of the Public Interest Exception' (2006) 23 J Intl Arb 39, 39; Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[67] Filip de Ly, Mark Friedman and Luca Radicati Di Brozolo, 'International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Confidentiality in International Commercial Arbitration"' (2012) 28 Arb Intl 355, 357.

[68] International Law Association, 'Confidentiality in International Commercial Arbitration' (The Hague Conference, August 2010) 19.

For example, confidentiality was not addressed in the Arbitration Act 1996 and there is no express provision in the Act that protects confidentiality. In *Milsom v Ablyazov*,[69] Briggs J stated that 'arbitration confidentiality or privacy is not absolute. Its preservation in any particular situation, for example, an arbitration appeal, is only the starting point and maybe overridden where either the public interest or … the interests of justice required'. The English court imposes some 'implied obligation' for parties and prevents them from disclosing or using 'any documents prepared for and used in the arbitration'.[70] In France, there is no provision which covers the issue of confidentiality in international arbitration. If parties seek confidentiality in their arbitration proceedings, they can agree on it. However, According to article 1479 of the French Code of Civil Procedure, 'the arbitral tribunal's deliberations shall be confidential'.

Many international arbitral institutions, such as the London Court of International Arbitration (LCIA),[71] Singapore International Arbitration Centre (SIAC)[72] and Hong Kong International Arbitration Centre (HKIAC)[73], recognise the principle of confidentiality in their arbitration process and provide that arbitration proceedings are normally confidential unless the parties agree otherwise. However, ICC's approach is different and it provides that arbitration proceedings are not confidential unless parties agree on the confidentiality of the proceedings.

[69] [2011] EWHC 955 (Ch), [2011] All ER (D) 131 [30]

[70] *Dolling-Baker v Merrett* [1991] 2 All ER 890 [66].

[71] LCIA Arbitration Rules 2020, art 30 < https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx > accessed 5 May 2021.

[72] The Arbitration Rules of the Singapore International Arbitration Centre 2016, r <https://www.siac.org.sg/our-rules/rules/siac-rules-2016> accessed 8 July 2020

[73] HKIAC Administered Arbitration Rules 2018, art 45.

It leaves to parties to decide about the extent of confidentiality of their proceedings. [74] According to article 1.3 of the Arbitration Rules of the European Court of Arbitration, 'the proceedings and all what is said, written, produced and argued in the proceedings and the award are confidential for anyone involved in it. Notwithstanding the requirement of confidentiality, the Court is authorized by the parties to publish the substance of an award subject to preserving the anonymity of the parties'.[75]

Article 25(3) UNCITRAL Rules provides, 'an award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority'.

It is clear that confidentiality is neither an 'established legal principle'[76] nor inherent in the nature of international commercial arbitration and the necessity of its existence in international commercial is exaggerated by advocates. [77] There are no mandatory obligations for confidentiality in arbitration and some of the national laws are silent on this issue. Confidentiality and concern over privacy in international commercial arbitration resulted in a lack of published and reasoned awards. Moreover, precedent largely relies on publishing awards and the lack of publications in the current practice is the main hurdle in developing precedent in international commercial arbitration. Although there would be a mandate for the ICACA to

[74] ICC 2021 Arbitration Rules, art 22(3).

[75] Arbitration Rules of the European Court Of Arbitration 2021, 1.3

[76] Michael Pryles, 'Confidentiality' in Lawrence Walker Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris 2014) 415.

[77] Richard W Nalmark and Stephanie E Keer, 'International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People - A Forced-Rank Analysis' (2002) 30 Intl Bus Law 203, 207.

preserve the confidentiality of arbitral awards due to the will of those parties who choose arbitration to protect their trade secrets, the ICACA can still publish awards anonymously in redacted forms which contain little information about parties and their business. It should remove any information which would be considered confidential upon the request of parties. This approach has been adopted recently by the ICC. It stated that from 1st January 2019 the ICC awards may be published as publishing awards is an 'instrumental factor in facilitating the development of trade worldwide'. [78] The ICACA would retain some level of protection for parties who expressly want to keep their information private. There would also be the possibility of delaying the publication of an award at the request of parties which may be extended indefinitely.

The third reason is the lack of reasoned and explanatory awards. For arbitrators in international commercial arbitration, there is no mandate to provide an explanatory and extensive written award.[79]Arbitrators 'neither follow the law, nor contribute to it'[80] and they normally do not provide detailed explanatory awards which include legal analysis of results. Awards without explanation would have no value as precedent as the vast majority of cited precedent came from "published judicial opinions".[81] For example, AAA in its guide for Drafting Dispute Resolution Clauses provides no mandate for tribunals to render reasoned awards. It provides that:

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[78] ICC, 'Note to parties and arbitral tribunals on the conduct of the arbitration under the icc rules of arbitration' (ICC, 1 January 2019) para 43 < https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> accessed 6 November 2019.

[79] Edward Brunet, 'Arbitration and Constitutional Rights' (1992) 71 NC L Rev 81, 85.

[80] W Mark C Weidenmaier, 'Judging-Lite: How Arbitrators Use and Create Precedent' (2012) 90 NC L Rev 1091, 1092.

[81] W Mark C Weidenmaier, 'Judging-Lite: How Arbitrators Use and Create Precedent' (2012) 90 NC L Rev 1091, 1091.

> In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.[82]

ICACA awards are appeal awards and they would be explanatory. This would make them suitable to be used as precedents in international commercial arbitration.

The fourth reason is that there is no incentive for practitioners to become involved in a law-making process.[83] It is argued that 'why would litigants who engage the services of a rent-a-judge want to pay extra for a reasoned opinion enunciating a rule that benefits only future litigants? Future litigants, after all, would receive the benefits of the rule for free'.[84] However, the availability of precedent would be beneficial for parties as they would consider the chance of winning before deciding to arbitrate their disputes. It is argued that 'precedent is then an informational device which gives parties to arbitration and litigation cases a better basis upon which to evaluate the likelihood of various outcomes'.[85]

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[82] AAA, 'Drafting Dispute Resolution Clauses: A practical Guide' 32 <https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf> accessed 11 April 2020.

[83] W Mark C Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm & Mary L Rev 1895, 1903.

[84] David Luban, 'Settlements and the Erosion of the Public Realm' (1994) 83 Geo LJ 2619, 2622.

[85] Andrew Schotter, 'The Effects of Precedent on Arbitration' (1978) 22 J Conflict Resol 659, 660.

This practice may affect parties' decision to submit their disputes to arbitration.[86] It is argued that arbitrators may avoid 'clarifying the meaning of the law'[87] as this may reduce the number of disputes and would reduce the demand for arbitrators' services.[88] However, arbitrators need to protect their reputations[89] by providing reasons for their decisions. Precedent would legitimise the outcome of arbitration and parties in different disputes would be treated according to a similar 'normative criterion'[90]. Therefore, parties would have more incentive to accept the decision of the arbitrators and to honour the award easily.[91]

As it is clear international commercial arbitration in current practice is not well suited for developing a system of precedent. The ICACA would be the court dealing with establishing precedent in international commercial arbitration.

A question that would arise here is what types of precedent would be established by the court. In order to answer this question, it is important to look at the role of precedent in different judicial systems. The role of precedents is different in Common law and Civil law systems. Common law systems follow the doctrine of *stare decisis* which means that courts follow and are bound by previous decisions of courts of high authority when rendering a judgment in

[86] Andrew Schotter, 'The Effects of Precedent on Arbitration' (1978) 22 J Conflict Resol 659, 660.

[87] William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235, 238.

[88] Andrew Schotter, 'The Effects of Precedent on Arbitration' (1978) 22 J Conflict Resol 659, 660.

[89] Theodore Eisenberg and Geoffrey P Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56 DePaul L Rev 335, 336.

[90] W Mark C Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm & Mary L Rev 1895, 1900-1901.

[91] W Mark C Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm & Mary L Rev 1895, 1900-1902.

similar situations.[92] Precedent in common law is considered a primary source of law. Appellate courts can overturn the decision of the lower court if a precedent was not followed by a judge.[93]

However, in Civil law, courts do not adopt *stare decisis*, but they follow the doctrine of 'jurisprudence constante'.[94] It means that 'judges should only consider themselves bound to follow a consolidated trend of decisions. Judicial decisions do not become a source of law until they mature into a prevailing line of precedents'.[95] Precedent in the civil law system does not create law[96] and is considered a secondary legal source. According to the jurisprudence constante doctrine, 'The practice of the courts does not become a source of law until it is definitely fixed by the repetition of precedents which are in agreement on a single point'.[97]

Adopting the Common Law approach and following the doctrine of *stare decisis* in international commercial arbitration would not be appropriate. Arbitrators and tribunals would not necessarily be bound and constrained by the decisions of the court, unlike judges in the

[92] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5, 6.

[93] Georgios I Zekos, 'Precedent and Stare Decisis by Arbitrations and Courts in Globalization' (2009) 10 JWIT 475, 483.

[94] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Intl Rev L & Econ 519, 519.

[95] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Intl Rev L & Econ 519, 520.

[96] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5, 6.

[97] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Intl Rev L & Econ 519, 522, citing Edouard Lambert and Max J Wasserman, 'The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law' (1929) 39 Yale LJ 1, 15.

judicial system who are bound by the decisions of superior courts.[98] Arbitrators should think independently in order to render their judgment by considering the specific circumstances of each dispute. It is argued that international commercial arbitration 'would not necessarily seem to be conducive to precedent building. Thus, what is needed is rather a system which will not blindly bind but rather takes greater focus on the norm being propagated within'.[99]

The Civil Law approach regarding the doctrine of precedent is more appropriate for international commercial arbitration. There is no obligation to follow previous decisions. The arbitrator may indeed find themselves inspired by a prior award.[100] This practice would provide inspiration and guidance for settling disputes in similar cases without binding them to take the same approach. Precedent would also provide some level of certainty in procedural rules. However, past decisions would be taken into account 'when there is a sufficient level of consistency in case law'.[101] This would enhance the efficiency of the system.

The ICACA would establish a reliable precedent system that would persuade arbitrators in determining their cases and would help arbitrators to make strong arguments. Such practice would foster consistency in international commercial arbitration and would address the long-lasting concern of the lack of harmonisation in international commercial arbitration.

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[98] W Mark C Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm & Mary L Rev 1895, 1900.

[99] Stefan Pislevik, 'Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?' (2018) 34 Arb Intl 241, 255.

[100] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23 Arb Intl 357, 358.

[101] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Intl Rev L & Econ 519, 519.

6.4 The structure

In this section, the question about the structure of an international commercial arbitral appeal court is examined. The new court would be the authority to hear challenges brought by parties on the validity of international commercial arbitration awards. The newly established ICACA would also provide an efficient system for hearing appeals from arbitral awards. The court would be governed by its own rules and procedures for hearing appeals.

The proposed international commercial arbitration court of appeal would consist of a main court with a possibility of delegating its power to regional branches in the future depending on the workload. In the future, if the court workload increases beyond the capacity of the court it is proposed to establish regional branches of the court in some members states to hear an appeal from arbitral awards on behalf of the ICACA. For example, a branch of the international arbitral appeal court in the Middle East may be established in Iran and would be the ICACA Tehran branch. This would also make the court accessible to the practitioners in member states. For example, the Permanent Court of Arbitration (PCA) which is an intergovernmental organisation and settles disputes between member states, state entities, intergovernmental organisations, and private parties is located at The Hague in the Netherlands.[102] However, the court establishes a legal framework under which the majority of the court hearings are held outside The Hague.[103] The court's 'host country agreements' allow proceedings to take place in similar conditions to

[102] PCA Arbitration Rules 2012**,** art 1.

[103] PCA, 'Host Country Agreements' <https://pca-cpa.org/en/relations/host-country-agreements/> accessed 7 July 2020.

those in The Hague and parties benefit from the same advantages, flexibility and efficiency that have been provided by the Permanent Court of Arbitration at its headquarters.[104]

The ICACA would be composed of a permanent panel of judges whose candidates would be proposed by the member states to the new Convention. The panel should be comprised of a limited number of members. For example, the European Court of Arbitration is managed by an Executive Committee composed of five members which are selected from the Council of the European Centre of Arbitration.[105] It is important to emphasise that the permanent panel members should represent the interests of different states equally and it should be inclusive. This may be achieved by allocating members of the panel to different geographical entities proportionally. The permanent panel would be selected by the member states of each geographical entity from candidates proposed by those states. This practice would be very important as it would prevent powerful countries from enjoying more benefits than developing countries by influencing the process of the international arbitral appeal court. The permanent panel would adopt court rules and regulations. It has a duty to amend and update the regulations over time and address the recent trends in international commercial arbitration. Furthermore, it would have the authority to decide any administrative issue that may arise from the operation of the court. It would also decide about the court's finances and budget.

For example, the finances and administration of the Court of Arbitration for Sport (CAS) which settles sports-related disputes are managed by the International Council of Arbitration for Sport (ICAS) which is composed of twenty members.[106] The main functions of ICAS are to adopt and

[104] PCA, 'Host Country Agreements' <https://pca-cpa.org/en/relations/host-country-agreements/> accessed 7 July 2020.

[105] Arbitration Rules of the European Court of Arbitration 2021, Preamble, para 4.

[106] Code of Sports related Arbitration 2020, s 5.

amend the code, appoint and approve arbitrators on the CAS arbitrators list, hear challenges and removal of arbitrators, is responsible for the CAS finances, and appoints the CAS Secretary General, etc.[107]

A committee of the ICC executive board governs the ICC International Court of Arbitration which is named the ICC Governing Body for Dispute Resolution Services (GB-DRS). The committee consists of sixteen members. The four ex officio members of the committee are the president and secretary-general of the International Court of Arbitration; and the chair and secretary-general of ICC.[108] The other twelve members of the committee are appointed for two years who may be reselected once. The committee is responsible for 'preparation of business plans and policy proposals'[109] such as finances and recruitment policies. It is also responsible for 'oversight of the implementation of any proposals of strategic importance' such as preparation and implementation of new rules.[110]

The ICACA panel would select a president who would act as their representative. The president of the court would oversee the overall operation and administration of the Court. The appellate court would need a secretariat for the function and day-to-day administration of the court. The secretariat should consist of a secretary and a few assistant secretaries and staff based on the workload. For example, the ICSID secretariat consists of 70 staff including a Secretary-General,

[107] Code of Sports related Arbitration 2020, s 6.

[108] ICC, 'Governing Body for Dispute Resolution Services' <https://iccwbo.org/about-us/governance/the-icc-governing-body-for-dispute-resolution-services/> accessed 7 July 2020.

[109] ICC, 'Governing Body for Dispute Resolution Services' <https://iccwbo.org/about-us/governance/the-icc-governing-body-for-dispute-resolution-services/> accessed 7 July 2020.

[110] ICC, 'Governing Body for Dispute Resolution Services' <https://iccwbo.org/about-us/governance/the-icc-governing-body-for-dispute-resolution-services/> accessed 7 July 2020.

one or more Deputy Secretaries-General and staff for the daily operation of ICSID.[111] The ICACA secretariat would provide administrative support and would be involved in all aspects of its process including the finance of the court. One of the secretariat's functions is to act as registrar which includes receiving and registering appeal applications. It is also responsible for supervising panels and parties regarding the implementation of a procedural rule. It has the duty to set up panels and organise hearings. The organisation chart is shown in Figure 1.

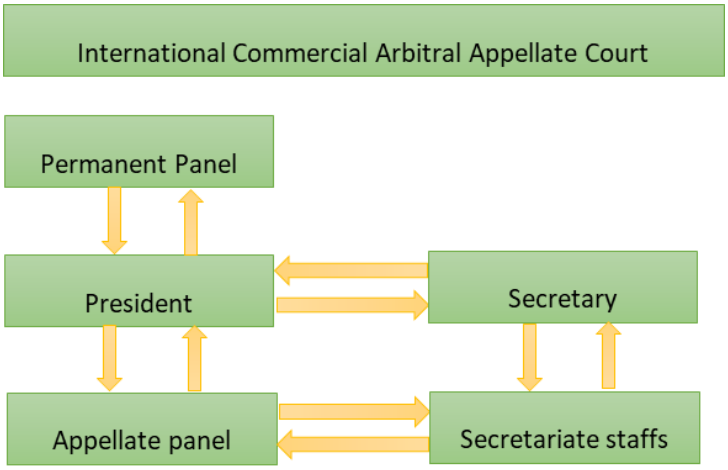


FIGURE 1. THE ORGANISATIONAL CHART OF THE INTERNATIONAL COMMERCIAL ARBITRAL COURT OF APPEAL. ARROWS INDICATE THE FLOW OF INFORMATION.

The secretariat of the proposed court would also oversee the court judgments by reviewing the conduct of appellate bodies. It would review randomly selected case reports and ensure the principle of due procedure and impartiality of the judges. This is similar to the approach adopted by the ICC International Court of Arbitration. The ICC court is not directly involved in settling disputes[112] but administers the resolution of disputes through arbitral tribunals. It also

[111] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) (adopted 18 March1965) 575 UNTS 159 (the ICSID Convention), art 11.

[112] ICC, 'ICC International Court of Arbitration' <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> acceesed 04 July 2020.

supervises the arbitration process in order to ensure the arbitration process is conducted efficiently. The court scrutinises and approves all arbitration awards rendered according to the rules to promote the quality and enforceability of awards.[113]

When an appeal request is submitted to the court, the secretariat would choose and suggest a minimum of three judges to form the appellate panel to the president for approval. Examining different arbitral institutions which offer an appeal mechanism or internal review indicates that they normally select three judges for each panel although there are some exceptions. For example, the European Court of Arbitration offers appeal by way of rehearing on questions of law and fact. According to article 28.5 of its rules, 'the Court will appoint all the members of the Appellate Arbitral Tribunal consisting of three arbitrators, without the parties being involved in the least in such appointments and will fix the place of arbitration'.[114] In investment arbitration, although there is no appeal from tribunals awards in ICISD arbitration, an ad hoc committee which consist of three arbitrators are selected by the Chairman of ICSID's Administrative Council to review investment arbitral awards.[115] However, some institutions form tribunals with more than three members, for example, according to rule 8 of FOSFA Rules of Arbitration and Appeal, a board of appeal should consist of five members.

The secretariat also informs the parties about the composition of the panel to avoid any conflict of interest. These appellate panel judges are the nominees of the member states. The seat of

[113] ICC, 'ICC International Court of Arbitration' <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> acceesed 04 July 2020.

[114] Arbitration Rules of the European Court of Arbitration 2021, art 28.5.

[115] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) (adopted 18 March1965) 575 UNTS 159 (the ICSID Convention), art 52(3).

arbitration and the place of enforcement are considered in the selection process of the panel. This is due to the vital role of the seat in the arbitration process as discussed in chapter 2. The presence of a panel member from the place of enforcement may reduce the risk of rejection of the award by the enforcement court based on the public policy. The secretary needs to ensure that judges are impartial and there is no conflict of interests. The appellate panel that will be nominated for each case would be dissolved once it has accomplished its purpose. Their daily presence in the location of the court would not be necessary considering financial and time limitations. These judges should be experts in law and arbitration.

6.5 The time frame and virtual hearings

It is difficult to predict the length of the appeal process in the new court before it has been established, however, the length of the appeal process in similar institutions can be used in order to estimate the appeal process length in an international appellate arbitration court. The procedure for appeal should be faster than a court proceeding. Arbitration was conceived, among other things, as a relatively speedy and low-cost method of dispute resolution.

Appeals are concluded in a different time frame in the UK depending on the workload, complexity and urgency of the case. For example, in England, an application for leave to appeal from the court must be made within 28 days of the making of an arbitral award.[116] Moreover, this application for appeal must be served on the respondent within one month from the date of issue.[117] The respondent will have 14 days to confirm they have received the claim. A respondent who opposes the application for permission to appeal must file and serve a

[116] Arbitration Act 1996, s 70(3).

[117] CPR R.62.4(2).

respondent's notice[118] within 21 days after the date on which the respondent was required to acknowledge service.[119] It is clear that approximately three months is needed to satisfy these prerequisites before the court can consider an application for leave. A recent court decision in *Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd*[120] regarding an application for leave to appeal under section 69 of the Arbitration Act 1996 took almost eight months.

In *Priminds Shipping (HK) Co Ltd v Noble Chartering Inc, Motor Vessel Tai Prize,*[121] the claimant voyage charterer brought a challenge on questions of laws under s.69 of the Arbitration Act 1996. The arbitration was commenced by the issue of an arbitration claim on the 29th of January 2019. The defendant responded to the claim by a respondent's notice dated 19 March 2019. The court considered an application for leave to appeal and granted a leave to appeal on the 18th of June 2019.[122] It is clear that an appeal via national courts is a slow process and would undermine the speed of the arbitration process.

The current practice of international courts and tribunals around the world indicates that these fora provide tight timetables for conducting appeals expeditiously and efficiently compared to court proceedings. For example, the World Trade Organization dispute settlement mechanism, which is one of the successful and effective dispute settlement mechanisms in the world for settling trade disputes between states, provides a short period for conducting appeals. The WTO appellate body was established by the Dispute Settlement Body in February 1995 to hear

[118] CPR PD 62 paras 12.6.

[119] CPR PD 62 paras 12.7.

[120] [2019] EWHC 704 (Ch).

[121] [2020] EWHC 127 (Comm), [2020] 2 Lloyd's Rep 333.

[122] *Priminds Shipping (HK) Co Ltd v Noble Chartering Inc Motor Vessel Tai Prize* [2020] EWHC 127 (Comm).

appeals from WTO panel reports.[123] According to the WTO rules, appeal proceedings should not exceed 60 days from the date a party formally notifies its intention to appeal. This time may be extended to 90 days.[124]

The American Arbitration Association appeal process takes about three months. It provides that 'the appellate rules anticipate an appellate process that can be completed in about three months while giving both sides adequate time to submit appellate briefs. The rules permit review of errors of law that are material and prejudicial and determinations of fact that are clearly erroneous'.[125]

The European Court of Arbitration in article 28.7 of the Arbitration Rules of the European Court of Arbitration provides that 'an Appellate Arbitral Tribunal shall make its award within six months, if there is no evidentiary stage, and otherwise within nine months of its receipt of the file by rehearing the case and deciding it on its merits. This time-limit may be extended as provided for in article 23'.[126]

The rules and procedure of the ICACA should be set in a way which would provide a fast and efficient appeal mechanism. A three-month time frame to conclude an appeal procedure seems to be reasonable, which may be extended based on the complexity of the case. Furthermore, technological advances can be incorporated to reduce the time scale of proceedings, for example,

[123] Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 art 17 <http://docsonline.wto.org>.

[124] Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 art 17(5) <http://docsonline.wto.org>.

[125] AAA Optional Appellate Arbitration Rules 2013.

[126] Arbitration Rules of The European Court of Arbitration 2021, art, 28(7).

electronic communication means can be used for serving the court notice to parties with a short time frame and allowing the court hearing via video calls.

As a result of technological advances, businesses and people interact in entirely new ways.[127] Digitalisation has already had significant impacts on daily life, for example, online applications and emails are common features. However, dispute settlement mechanisms often struggle in implementing new technologies quickly.[128] One of the areas that has not developed properly is virtual and remote hearings,[129] although the possibility of virtual hearings has been recognised by some tribunals, for example, article 19.2 of the LCIA Arbitration Rules 2020 provides that hearings can 'take place by video or telephone conference or in-person (or a combination of all three)'. The ICC Arbitration Rules 2021 address the use of virtual hearings for the case management conference. According to article 24(4), 'case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication'. The ICC also provides a similar possibility for expedited and emergency arbitration. According to article 4(2) of the Emergency Arbitration Rules 2021, 'Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication'. The SIAC implicitly recognises the possibility of virtual hearings in

[127] Maud Piers and Christian Aschauer, 'Arbitration Unplugged?' in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018) 1.
[128] Kevin Ongenae and Maud Piers, 'Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework'(2021) 30 J Intel Arb 27, 27; see also, Patricia Louise Shaughnessy, 'Initiating and Administering Arbitration Remotely' in Scherer Bassiri and Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 36.
[129] Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption' (2020) 22 Asian Disp Rev 173, 177.

its arbitration proceedings. Article 19.1 of the Arbitration Rules 2019 of the SIAC provides that 'the Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute'. Article 23(1) of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017 also provides that 'the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties'. According to article 17(c)(ii) of UNCITRAL Notes on Organizing Arbitral Proceedings 2016, 'hearings can be held in-person or remotely via technological means'.

Until the COVID-19 pandemic, most of the hearings were face to face and video conferences and virtual hearing rooms were rarely used by practitioners.[130] A survey, published in 2018, was conducted among members of CEPANI and VIAC arbitral institutes to determine whether arbitration practitioners use online tools or electronic services.[131] Participants in this survey came from different age groups and jurisdictions. There were 103 respondents including counsels, arbitrators and secretaries of the tribunals. According to the survey 40 per cent of participants never used video conferences to examine witnesses. Even amongst the majority of

[130] Mark Baker, Arbitrators' corner: Doing justice in the face of a global pandemic' (2020) (14) Intl Arb Rep 4 <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report---issue-14.pdf?la=en-mc&revision=> accessed 24 June 2021.

[131] Maud Piers and Christian Aschauer, 'Survey on the Present Use of ICT in International Arbitration' in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018) 15.

videoconferencing users (56 per cent of participants), its use was limited to less than 25 per cent of the cases where witnesses were beyond travel distance.[132]

However, COVID-19 caused disruption and created challenges for many businesses including litigation and arbitration. The pandemic has also affected the practice of courts and dispute settlement mechanisms and has a significant impact on the administration of justice. More than half of the courts and tribunals in England and Wales were suspended according to HMCT announcement on 27 March 2020.[133] It is evident that the justice system struggled to overcome this challenge immediately and find the best way to administer justice in this period. However, the experience of this period inevitably would open a new chapter for legal services and hassle-free virtual hearings and remote working procedures would be developed further.

Currently, some institutions provide virtual hearings and electronic communication services. For example, HKIAC provides a comprehensive range of integrated virtual hearing services for its arbitration proceedings. It provides an IP-based Video conferencing system which can support eighty different locations. It also provides an audio-conferencing option that can connect more than eighty countries and support up to thirty lines. It also provides services for electronic presentations of evidence.[134]

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[132] Maud Piers and Christian Aschauer, 'Survey on the Present Use of ICT in International Arbitration' in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018) 19.

[133] Justice Committee, *Coronavirus (COVID-19): The impact on courts* (2019–21, HC 519) 6.

[134] HKIAC, 'Virtual Hearings at HKIAC: Services and Success Stories' (HKIAC, 6 May 2020) <https://www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories> accessed 12 July 2020.

Virtual hearings should be encouraged in the procedure of the ICACA as it would help the court to hear and finalise cases efficiently and expediently and would prevent delay as well as extra costs. There are some issues that need to be taken into account when deciding about virtual hearings. For example, the unfamiliarity of the user with a prescribed online platform, lack of proper internet connection and difficulty in cross-examination of witnesses conducted via video conference. In order to tackle these problems, the court could provide some virtual hearing rooms in member states of the Convention. The venue may be used via a shared platform and such services may become common in the near future.

6.6 The location

Candidates for the location of the court are examined in this section. The location plays an important role in the success of the court. If the location is not appealing to the parties they may not use its services and this may hinder its success. The court should be established in one of the hubs for international commercial arbitration. The appeal mechanism offered by the court is not mandatory, hence its location should be appealing to practitioners in order for them to use its services. There are also other factors that need to be taken into account in selecting the location such as accessibility, infrastructure, business environment, economy, liveability, environment, etc. Such measures are commonly used to form cumulative indices that allow direct comparison of cities appeal to businesses and individuals.

In this section, the Queen Mary's international arbitration survey[135] findings are used to find out the most popular seats for arbitration. The locations of a few predominant international

[135] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018)

arbitral institutions are also reviewed. This is followed by a review of three indices that are used to rank these hubs attractiveness to businesses.[136] Although these indices provide an objective measure to compare these cities, they are mainly focused on the attractiveness of cities to the businesses and financial sector. Few metrics including the number of international direct flight and air passengers, availability of skilled human resources and political risk are deemed important and are investigated separately.

The most popular seats for arbitration according to Queen Mary's 2018 International Arbitration Survey[137] are London, Paris, Singapore, Hong Kong, Geneva, New York, and Stockholm. This is not an exhaustive list and 140 distinct seats were selected by respondents to the survey as the most preferred seats.[138] The response of practitioners around the world via 922 questioners responses and 142 interviews are used to draw the conclusions of the survey

<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[136] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020; AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) < http://bit.ly/2019-Global-Cities > accessed 6 December 2020; CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) <https://www.longfinance.net/publications/long-finance-reports/global-financial-centres-index-29/> accessed 28 June 2021.

[137] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[138] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

which demonstrates the reach of the survey and its credibility.[139] General reputation and recognition of a seat, users' perception of its formal legal infrastructure, the neutrality and impartiality of its legal system, its national arbitration law and its track record in enforcement are respectively the most determinant factors in users' choice of the seat. Although some of these factors, e.g. national arbitration law and track record in enforcement, have no direct impact on the ICACA, these are measures of attitude and flexibility of national legal systems towards arbitration which are also important for the function of the court as well. This can ensure that if any support of the national legal system is required for the function of the court in the future, it would be provided.

The preferred seat can differ from region to region. Although London and Paris are the most popular seats consistently in all regions, the ranking differs when only the respondents from a particular region are considered.[140] For example, Sao Paulo is the fourth popular seat for arbitrators from Latin America.[141] Singapore could also be a good candidate for establishing the ICACA. Singapore is considered as a 'safe seat' in the Asia region and also 'the seat of the

[139] Stavros Brekoulakis and Adrian Hodiș 'Arbitral Seats – An Empirical Overview' (Kluwer Arbitration Blog, 17 May 2018) <http://arbitrationblog.kluwerarbitration.com/2018/05/17/tbc/?doing_wp_cron=1590952906.5779469013214111328125 > accessed 14 April 2020.

[140] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[141] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

future'[142] due to its 'supportive national laws, well-developed infrastructure and its strong position as a financial and commercial centre'.[143] The popularity of the seats in term of percentage is shown in Figure 2 for six regions including Europe, Asia-Pacific, Latin America, North America, Africa and the Middle East.

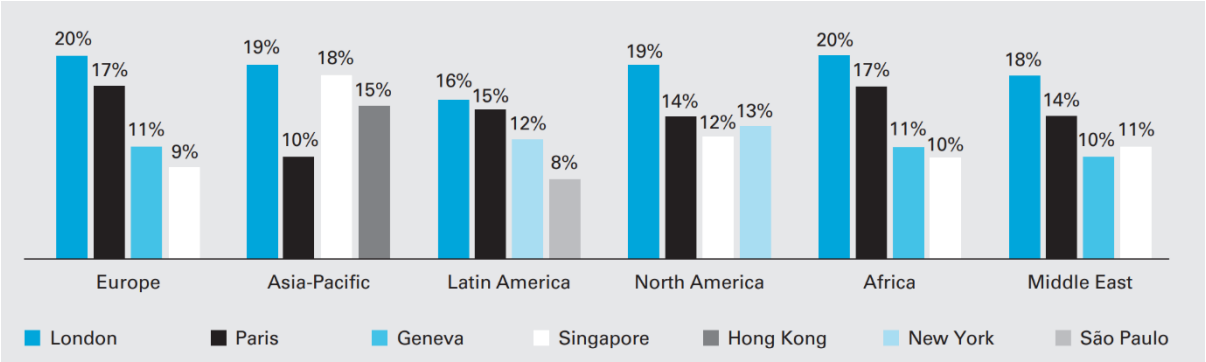


FIGURE 2: TOP FOUR POPULAR SEATS BY REGION[144]

London, Paris, Geneva and New York are also among the most popular seats in Europe and North America[145] and they could be considered as a place for establishing international

[142] IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitrations: Regional Perspectives' (IBA August 2015) 24 <https://cvdvn.files.wordpress.com/2018/10/int-arbitration-report-2015.pdf> 8 December 2020.

[143] IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitrations: Regional Perspectives' (IBA August 2015) 24 <https://cvdvn.files.wordpress.com/2018/10/int-arbitration-report-2015.pdf> 8 December 2020.

[144] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 10 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[145] IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitrations: Regional Perspectives' (IBA August 2015) 24 <https://cvdvn.files.wordpress.com/2018/10/int-arbitration-report-2015.pdf> 8 December 2020.

commercial arbitral appeal court. According to the Queen Mary University survey, Paris is the second most preferred seat.[146] Although French arbitration law provides significant flexibility and supports to arbitration practitioners[147] Paris is still behind London in terms of its popularity as the seat of arbitration.

Geneva is also considered a popular city for establishing the ICACA. Geneva as a neutral city has been host to many important international organisations like the United Nations, the World Trade Organisation and the Court of Arbitration for Sport. New York which is a major financial hub is less popular for arbitration and only 22% of practitioners included it in their preferred seat list.[148]

The number of cases that are arbitrated in these hubs as the place of arbitration can also be used as a measure of popularity. Comprehensive statistics are not readily available as the number of ad hoc arbitrations in each city is not known but ICC provides statistics of its dispute resolutions annually.[149] According to its 2019 report, London is the most popular place of arbitration with 17.1% of its all cases.[150] The second most popular place is Paris with 15.9% followed by

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[146] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[147] Code de procédure civile (FR), arts 1442-1527.

[148] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[149] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

[150] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) 28 <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

Geneva and Singapore both with 8.0% and 4.8% of all cases.[151] New York, Zurich, Madrid, Hong Kong, Sao Paulo, Doha and Dubai are the other ten most frequently selected cities.[152] Although the most popular cities occupy the top six places, cities like Sao Paulo, Doha and Dubai are also popular places for arbitration and can be considered as potential locations for the court.

The Queen Mary Survey also lists the most preferred international arbitration institutions based on the respondents choice. The location of the headquarter of these institutions can also be used as an indicator for the attraction of major hubs to the international arbitration community. The caseload of each institute is also provided here for comparison purposes. The most popular is the International Chamber of Commerce (ICC)[153] with a headquarter in Paris. The caseload of ICC was 869 in 2019[154] but in only 135 cases Paris was the place of arbitration. The LCIA with a headquarter in London was in second place with a total number of cases of 346 in 2019.[155] The third popular institute was the Singapore International Arbitration Centre (SIAC) with 479

[151] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) 28 <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

[152] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) 28 <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

[153] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[154] ICC, 'ICC Dispute Resolution 2019 Statistics' (ICC 2020) 4 <www.iccwbo.org/dr-stat2019> accessed 7 December 2020.

[155] LCIA, 'Annual Casework Report' (LCIA, 19 May 2020) 5 <https://www.lcia.org/News/annual-casework-report-2019-the-lcia-records-its-highest-numbe.aspx> accessed 7 December 2020.

cases in 2019.[156] SIAC is based in Singapore. Stockholm Chamber of Commerce (SCC) was the fourth popular institute with 175 registered cases in 2019. [157] The last institute on the list is Hong Kong International Arbitration Centre (HKIAC) with 308 cases in 2019.[158] The list is not comprehensive but demonstrates the attractiveness of these cities for international arbitration.

The Mori Memorial Foundation which is comprised of two institutes for urban development and urban strategies in Japan analyses and ranks the major cities around the world since 2008 annually. The index they developed is called the Global Power City Index (GPCI) and measures cities attraction to people, businesses and enterprises. The index uses measures of the economy, research and development, cultural interaction, liveability, environment and accessibility.[159] Overall seventy metrics are used to form the GPCI. In order to assess the economy of cities, thirteen metrics such as GDP per capita, GDP growth rate, wage level, availability of skilled human resources are used.[160] The number of researchers, world's top universities in each city, R&D expenditure, start-up environment, etc. are used to come up with an index for the research

[156] SIAC 'Where The World Arbitration: Annul Report' (SIAC Annual Report 2019, 30 June 2020) 14 <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20(30%20June%202020).pdf> accessed 7 December 2020.

[157] SCC, 'Statistics 2019' (SSC 2019) < https://sccinstitute.com/statistics/> accessed 7 December 2020.

[158] HKIAC, 'Annual Report' (2019 Reflections, 2020) 9 <https://www.hkiac.org/sites/default/files/annual_report/annual%20report%203463-7390-6190%20v.4.pdf> accessed 7 December 2020.

[159] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[160] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 2 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

and development of cities.[161] Sixteen measures including but not limited to the number of international conferences, the number of theatres, museums and stadiums, the number of foreign residents and visitors are considered to assess the cultural interaction in cities.[162] The unemployment rate, total working hours, price levels, the number of murders, social freedom and equality and nine other metrics are used to assess the liveability.[163] Commitment to climate action, renewable energy rate, urban greenery, the comfort level of temperature are among nine measure that is used to assess the environment. Accessibility is measured via the number of direct international flights, the number of air passengers, travel times to airport, public transport use and six other statistics.[164]

London maintained its first position in the GPCI index for eight consecutive years. New York, Tokyo, Paris, Singapore and Amsterdam are in second to sixth place respectively. Hong Kong is in the ninth position.[165] London occupies the top of the table in the cultural interaction

[161] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 2 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[162] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 2 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[163] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 2 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[164] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 3 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[165] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 5 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

measure,[166] while New York tops in the economy and research and development followed by London in the second place.[167] The two top cities are not among the top for liveability[168] and environment[169] where Paris has the highest score for the former and Zurich for the latter. In accessibility, Paris is at the top of the table followed by London and New York closely.[170]

A similar ranking is provided by Kearney which is a management consulting company and the ranking is aimed at the financial sector.[171] Their index is based on twenty-seven metrics in five categories of business activity, human capital, information exchange, cultural experience and political engagement.[172] The metrics in each category are summarised in Table 1. Political

[166] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 14 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[167] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 12 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[168] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 15 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[169] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 16 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[170] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) 17 <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[171] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

[172] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

engagement is a category that is not considered in the GPCI.[173] Few metrics are considered in different categories in two indices, e.g. Air Freight is considered in the business activity section in the Kearney's index but it is in the accessibility category of the GPCI.[174] Top global service firms number, sea freight, number of international schools, access to TV news, news agency bureaus, Broadband subscribers, online presence, and sister cities in addition to those metrics that categorised under political engagement are not considered in GPCI although it has a more comprehensive list of metrics.[175] New York becomes the top city in Kearney's global index followed by London and Paris. Hong Kong is in fifth place followed by Singapore in sixth. Vienna ranked twenty-fifth in this index list.[176]

[173] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) 5 < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

[174] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

[175] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

[176] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) 13 < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

TABLE 1. METRICS USED BY KEARNEY IN THEIR CITIES COMPARISON INDEX.[177]

Business activity	Human capital	Information exchange	Cultural experience	Political engagement
Fortune 500	Foreign-born population	Access to TV news	Museums	Embassies and consulates
Top global services firms	Top universities	News agency bureaus	Visual and performing arts	Think tanks
Capital markets	Population with tertiary degrees	Broadband subscribers	Sporting events	International organizations
Air freight	International student population	Freedom of expression	International travelers	Political conferences
Sea freight	Number of international schools	Online presence	Culinary offerings	Local institutions with global reach
ICCA conferences			Sister cities	

Z/Yen is a commercial think-tank that also publishes comprehensive indices for comparison of major cities around the world. Its twenty-seventh edition of the Global Financial Centres Index (GFCI),[178] which is published in partnership with the China Development Institute (CDI), used 143 factors alongside its online questioners to rank 114 major financial centres.[179] They are grouping metrics into five categories of the business environment, human capital, infrastructure, financial sector development and reputations which are summarised in Figure 3. The index is focused on financial centres but it uses metrics which are important in the selection of the

[177] AT Kearney, 'A question of talent: how human capital will determine the next global leaders' (AT Kearney, 2019) 5 < http://bit.ly/2019-Global-Cities > accessed 6 December 2020.

[178] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

[179] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 3 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

location for the proposed court such as those categorised under human capital and infrastructure.[180]

New York is ranked the highest overall as the most attractive centre and it also ranked highest in human capital and infrastructure categories.[181] London followed New York as the second city in the overall ranking as well as in human capital and infrastructure.[182] The fifth overall ranking was occupied by Singapore which also ranked the same on infrastructure but ranked third on human capital. Hongkong was ranked fourth overall followed by Paris at the twenty-fifth position.[183]

[180] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 9 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

[181] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 2, 4 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

[182] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 2, 4, 10 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

[183] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 2, 4, 10 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

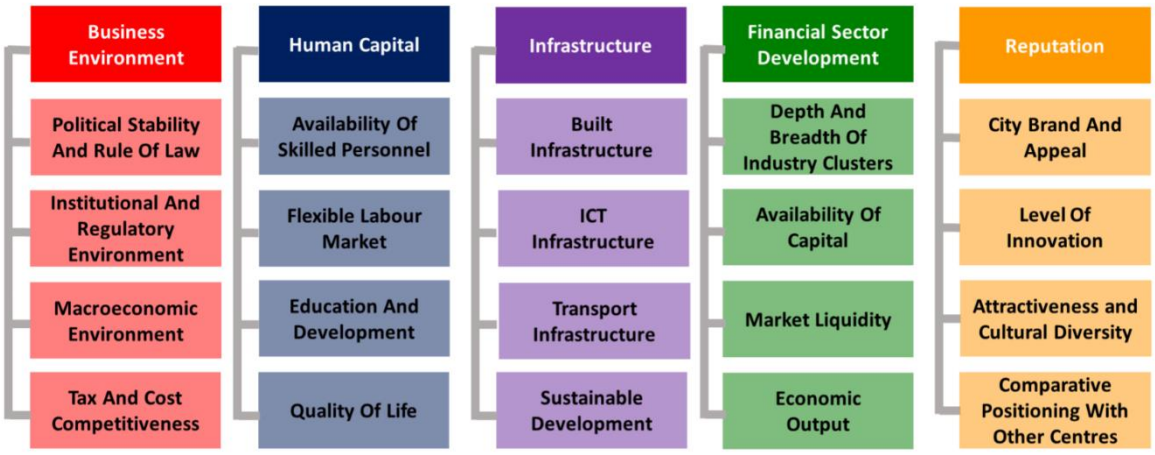


FIGURE 3. ASSESSMENT CATEGORIES THAT ARE USED IN THE GFCI INDEX.[184]

Another index that is published by Z/Yen is the Global Green Finance Index (GGFI) which has an emphasis on sustainable development in its assessment.[185] A similar methodology is used by Z/Yen for both indices. A hundred and forty metrics are used with the response to questioners in order to compile the seventh edition of GCFI. The categories that are used in this index are summarised in Figure 4. In their seventh edition, Amsterdam was first while London ranked third followed by Paris at eleventh place. Geneva is ranked 7th and Singapore is ranked 20th. Vienna did not score well and ranked 22nd, New York was at 31st and Hong Kong ranked 40th position.[186]

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[184] CDI and Z/Yen, 'The Global Financial Centres Index 29' (Long Finance & Global Financial Centres, March 2021) 9 <https://www.longfinance.net/media/documents/GFCI_29_Full_Report_2021.03.17_v1.1.pdf> accessed 28 June 2021.

[185] CDI and Z/Yen, 'The Global Green Finance Index 7' (Long Finance & Global Financial Centres, April 2021) <https://www.longfinance.net/media/documents/GGFI_7_Report_2021.04.29_v1.1.pdf> accessed 28 June 2021.

[186] CDI and Z/Yen, 'The Global Green Finance Index 7' (Long Finance & Global Financial Centres, April 2021) 6 <https://www.longfinance.net/media/documents/GGFI_7_Report_2021.04.29_v1.1.pdf> accessed 28 June 2021.

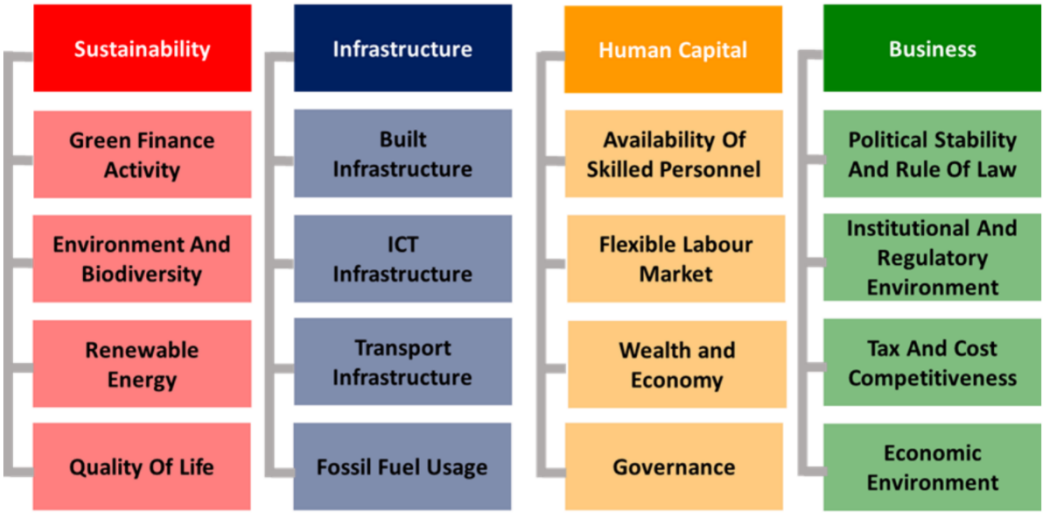


FIGURE 4: ASSESSMENT CATEGORIES THAT ARE USED IN THE GGFI INDEX.[187]

In the following, the rankings and scores provided by the GFCI are used to consider a few important metrics. A score of 100 is given to the highest-ranked city in each case with a score of 0 for the lowest-ranked city.[188] One of the main requirements for the location of the court is accessibility. Since the court acts in a global capacity, the number of direct international flights and the total number of passengers are two important metrics that can demonstrate how accessible the court location is. Metrics provided by the GFCI is used for this purpose here.[189] London is the most accessible location based on these two metrics that occupies the first place at both metrics' comparison chart. Paris follows London at the second place for the number of

[187] CDI and Z/Yen, 'The Global Green Finance Index 7' (Long Finance & Global Financial Centres, April 2021) 21 <https://www.longfinance.net/media/documents/GGFI_7_Report_2021.04.29_v1.1.pdf> accessed 28 June 2021.

[188] The Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, The Mori Memorial Foundation 2019) <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

[189] Mori Memorial Foundation, 'Global Power City Index 2019' (Institute for Urban Strategies, Mori Memorial Foundation 2019) <http://mori-m-foundation.or.jp/pdf/GPCI2019_summary.pdf> accessed 6 December 2020.

direct international flights. However, its score is 78% of that of London which is a considerable gap. Singapore is ranked 12th followed by Hong Kong at 14th and New York at 19th places.[190] In terms of the number of air passengers, New York is ranked second which demonstrate that most of the flight to New York are within the US. Paris is ranked 5th, Hong Kong 14th and Singapore 18th. It is also worth mentioning that London and Paris are connected with a high-speed direct train and cities within Europe are accessible by high-speed rail travel. Rail travel provides a more sustainable mode of transport which is preferred over air travel considering the emission levels and its effect on global warming.[191]

The availability of skilled human resources is another important metric. According to the GFCI, the availability of skilled human resources is similar in New York and London. New York is ranked 6th with a score of 90.3 and London is ranked 7th with a score of 89.6. Singapore is in 10th place with a score of 86.1. Paris is ranked 26th and Hong Kong is ranked 40th.[192]

Singapore is considered as the city with the lowest political, economic and business risk. Hong Kong is ranked 3rd followed by New York with a score of 97.7. London is ranked 9th with a score of 95.1. Paris is ranked 19th with a score of 85.1.[193]

The number of murders is considered as a measure of safety and security here. Geneva has the lowest number of murders followed by Singapore at 4th place and a score of 99.4. Hong Kong

[190] Mori Memorial Foundation, *Global Power City Index 2019 Year book* (Institute for Urban Strategies, Mori Memorial Foundation 2019).

[191] Mori Memorial Foundation, *Global Power City Index 2019 Year book* (Institute for Urban Strategies, Mori Memorial Foundation 2019).

[192] Mori Memorial Foundation, *Global Power City Index 2019 Year book* (Institute for Urban Strategies, Mori Memorial Foundation 2019).

[193] Mori Memorial Foundation, *Global Power City Index 2019 Year book* (Institute for Urban Strategies, Mori Memorial Foundation 2019).

is ranked 9th with a score of 97.8, London is 17th with a score of 95.8, Paris is 24th with a score of 93.4 and New York is ranked 34th with a score of 88.2.

The proposal put forward by this research is that the seat and headquarter of the international arbitral appeal court should be in London. London is ranked highly by arbitration practitioners and also in different metrics that are used to compare cities. It is the most accessible city and the most popular city as the place of arbitration. It also benefits from highly experienced, independent skilled legal professionals who are experts in different sectors such as business, trade, banking and finance.[194] Furthermore, its geographical location is advantageous as it is possible to communicate with the eastern and western parts of the world on the same working day. Lastly, the UK benefits from a strong judiciary that is independent and incorruptible[195] and can ensure that the proposed court offers a fair dispute settlement mechanism.[196] It would also ensure businesses run their activities in a secure atmosphere.[197] It may be argued that Brexit would harm the reputation of London as an important hub for settling international commercial disputes, however, international commercial arbitration is based on international conventions and is not limited to the European Union.[198]

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[194] Court and Tribunal judiciary 'English Law, UK Courts and UK Legal Services after Brexit-The View beyond 2019' 2 <https://www.chba.org.uk/news/brexit-memo> accessed 28 June 2021.

[195] Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (HL 2006–07, 151).

[196] Lord Burnnet CJ, 'English Law on the World Stage', (London International Disputes Week, 8 May 2019) 2.

[197] Lord Burnnet CJ, 'English Law on the World Stage', (London International Disputes Week, 8 May 2019) 3.

[198] Practical Law Dispute Resolution, 'The impact of Brexit on dispute resolution clauses - survey report' (Practical Law, 23 July 2018) <https://uk.practicallaw.thomsonreuters.com/w-015-2475?transitionType=Default&contextData=(sc.Default)> accessed 6 December 2020.

6.7 The finances

It is necessary to identify sources of funding to establish and run the court. Costs can be divided into two general categories of pre-establishment costs and running costs. The former are expenses incurred during the process of creating the court such as infrastructure costs, equipment costs, etc. The running costs are expenses which are incurred due to the process of the court such as salaries, consumables, rents, etc. Here, it is argued that financial assistance from member states or external organisations would be necessary to cover the initial costs related to the establishment of the court which is discussed in Section 6.7.1.1. However, the court would be financially independent in due time and it would become self-sustained by generating income from its services which is argued in Section 6.7.1.2.

6.7.1.1 The establishment cost

The international commercial arbitral appeal court would be an international not-for-profit organisation that aims to promote fairness in international commercial arbitration. If an organisation aims to generate profit, the required establishment funds may be provided by the investor(s) or loans which would be paid back via the profit of the organisation. An investor may have reasons beyond financial profits to invest in an organisation, for example, a charitable organisation. There could also be political or economic indirect benefits that justify the establishment of such organisations. The ultimate goal of establishing the court is to promote international trade via improving fairness in international commercial arbitration dispute settlement. Furthermore, the court would substitute the court of the seat in reviewing arbitral awards, and states would delegate their power to the proposed court to promote international trade. States contribute to the judiciary budget to ensure access to justice for individuals. The same principle applies here. Therefore, states party to the new Convention who would be the

beneficiary from the promotion of international trade would provide the required funding for the establishment of the court.

Although the ICACA would serve the interests of private parties, it is an intergovernmental organisation and would be established by an international convention. Funding such organisations is a common practice. For example, the International Tribunal for the Law of the Sea (ITLOS) which is established by the United Nations Convention on the Law of the Sea (UNCLOS) is 'an independent judicial body'[199] to settle disputes arising from the Convention. The member states to the Convention provided the cost of its establishment. In the fourth meeting of states parties, it is decided that 'the budget of the Tribunal for the initial period is to be financed by all States that are parties to the Convention as at 1 August 1996'.[200] For example, 'As at 31 December 1997, 54 States Parties had made their contributions (in the full amount or above) to the initial budgetary period totalling $5,911,624'.[201] States parties still contribute to the finance of the tribunal to help the tribunal cover its costs.[202] Article 19 of the Statute of the Tribunal provides that 'The expenses of the Tribunal shall be borne by the States Parties and by the Authority on such terms and in such a manner as shall be decided at the meetings of States Parties'.[203] Furthermore, the Federal Republic of Germany, at the time,

[199] ITLOS, 'International Tribunal for the Law of the Sea' (ITLOS Press Office 2016) 3 <https://www.itlos.org/fileadmin/itlos/documents/brochure/1605-22023_Itlos_Selbstd_En.pdf> accessed 28 June 2021.

[200] ITLOS, 'Finances of the Tribunal' (1996-1997) 1 Intl Trib L Sea YB 115, 115.

[201] ITLOS, 'Finances of the Tribunal' (1996-1997) 1 Intl Trib L Sea YB 115, 115.

[202] ITLOS, 'Finances of the Tribunal' (1996-1997) 1 Intl Trib L Sea YB 115, 115.

[203] Statute of the International Tribunal for The Law of the Sea, art 19.

provided premises for the Tribunal, including a modern building and a nineteenth-century villa in order to host the organisation in its territory.[204]

6.7.1.2 The running costs

The finances of some predominant courts and arbitral organisations are examined here in order to develop the argument. Fees and funding resources of the International Centre for Settlement of Investment Disputes (ICSID), the Court of Arbitration for Sport (CAS), the London Court of International Arbitration (LCIA) and the ICC International Court of Arbitration are reviewed in order to develop a model for the finances of the proposed court.

International Centre for Settlement of Investment Disputes which is an international arbitration institution for settling international investors disputes is funded by the International Bank for Reconstruction and Development. The Executive Director of the bank decided to provide financial support[205] for the centre by providing the centre with office accommodation at the bank's headquarters and the basic overhead expenditure within 'reasonable limits'.[206] Currently, ICSID's administrative expenditures are covered by fee income and by the contribution of the bank pursuant to the Memorandum of Administrative Arrangements. The Memorandum of Administrative Arrangements was concluded between the centre and the Bank[207] which specify

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[204] ITLOS, 'International Tribunal for the Law of the Sea' (ITLOS Press Office 2016) <https://www.itlos.org/fileadmin/itlos/documents/brochure/1605-22023_Itlos_Selbstd_En.pdf> accessed 28 June 2021.

[205] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 2006, art 17.

[206] Antonio R Parra, *The History of ICSID* (OUP 2012) 101.

[207] ICISD, '2020 ICSID Annual Report' (ICISD, 21 September 2020) 49 <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> accessed 28 June 2021.

the extent of the support provided by the bank for the centre. The Bank grants 'the services of staff members and consultants'.[208] It also provides 'other administrative services and facilities such as travel, communication facilities, office accommodations, furniture, equipment, supplies and printing' without charge.[209] Stakes in investment disputes are very high which incurs high costs for resolving these disputes.[210] This helps the centre to cover its expenses. For example, ICISID revenues from arbitration/conciliation proceedings in 2020 was $52,015,745.[211] During the same period, in-kind contributions by the bank were $661,644, the investment income was $1,286,108 and the sales of publications provided $72,321. It can be noted that the main source of funding is ICISID fees.[212]

ICISID charges are including the lodging fee of $25,000 which is non-refundable and parties should pay when instituting proceedings. Parties should also pay fees and expenses of arbitrators, conciliators or committee members, and the centre's expenses and administrative

[208] ICISD, '2020 ICSID Annual Report' (ICISD, 21 September 2020) 52 <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> accessed 28 June 2021.

[209] ICISD, '2020 ICSID Annual Report' (ICISD, 21 September 2020) 52 <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> accessed 28 June 2021.

[210] UNGA, 'Possible reform of investor-State dispute settlement (ISDS)' United Nations Commission on International Trade Law, Working Group III (Vienna, 27 November-1 December 2017) (18 September 2017) UN Doc A/CN.9/WG.III/WP.142.

[211] ICISD, '2020 ICSID Annual Report' (ICISD, 21 September 2020) 47 <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> accessed 28 June 2021.

[212] ICISD, '2020 ICSID Annual Report' (ICISD, 21 September 2020) 51 <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> accessed 28 June 2021.

charges.[213] For example, parties should pay a fee of $3,000 per day for meetings or other work performed in connection with the proceedings ($375 per hour).[214] According to the Administrative and Financial Regulation 14 (3), ICSID fees are not calculated based on the amount in the dispute. The cost of proceeding depends on the complexity of the cases, duration and the number of pleadings and oral hearings.[215]

The Court of Arbitration for Sport (CAS) is established to settle sports-related disputes.[216] The court originally was funded by the International Olympic Committee (IOC). However, this relationship raised concerns over the lack of independence in the CAS proceedings due to its dependency on the IOC.[217] In order to address these concerns, the IOC proposed some reforms in the CAS structure.[218] One of the significant changes was the establishment of the International Council of Arbitration for Sports (ICAS) in 1994 pursuant to the Agreement concerning the constitution of the International Council of Arbitration for Sport, known as the Paris Agreement.[219] The ICAS is the governing body of the CAS which controls and manage its operation. ICAS is also responsible for 'the administration and financing of [the] CAS'.[220]

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[213] ICISD, 'Schedule of Fees' (ICISD, Effective 1 July 2020) <https://icsid.worldbank.org/services/content/schedule-fees> accessed 8 December 2020.

[214] ICISD, 'Schedule of Fees' (ICISD, Effective 1 July 2020) <https://icsid.worldbank.org/services/content/schedule-fees> accessed 8 December 2020.

[215] ICISD Administrative and Financial Regulations 2006, reg 14(3).

[216] Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, s 1.

[217] Matthew J Mitten, 'Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations' (2009) 10 Pepp Disp Resol LJ 51, 52.

[218] Darren Kane, 'Twenty Years On: An Evaluation of the Court of Arbitration for Sport' (2003) 4 Melb J Intl L 611, 618.

[219] Agreement Related To The Constitution of The International Council Of Arbitration For Sport, (adopted 22 June 1994).

[220] Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, s 2.

According to article 3 of the Paris agreement, three institutions contribute to the finance of the CAS including the International Olympic Committee, the International Olympic Summer Sports Federations and the International Olympic Winter Sports Federations.[221] Furthermore, the CAS charges parties for providing its services. The CAS normally does not charge parties high fees for submitting their disputes to the CAS. Its proceedings are far cheaper compare to other international arbitration.[222] This is to provide access to justice for all athletes even those with low incomes.[223]

Parties are charged for the tribunal and administrative fees based on the amount in dispute. For example, administrative cost for disputes from CHF1,000,001 to CHF2,500,000 is CHF9,750 + 0.30% of amount in excess of CHF1,000,000. The maximum administrative charge is CHF25,000 for disputes above CHF10,000,000. The courts also charge an arbitrator's fee based on the work and time each arbitrator devoted to the case. For example, the hourly rate for arbitrators is CHF300 for disputes up to CHF2,500,000 which increases gradually to an hourly rate of CHF500 for disputes above CHF15,000,000.[224]

Another institution that is considered here is the ICC International Court of Arbitration. It is one of the world's leading arbitral institutions for settling international commercial and

[221] Agreement Related To The Constitution of The International Council Of Arbitration For Sport, (adopted 22 June 1994).

[222] Louise Reilly, 'An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes' [2012] J Disp Resol 63, 72.

[223] Louise Reilly, 'An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes' [2012] J Disp Resol 63, 72.

[224] CAS, 'Schedule Of Arbitration Costs' (CAS, in force from 1 January 2017) <https://www.tas-cas.org/en/arbitration/arbitration-costs.html> accessed 17 July 2020.

business disputes.[225] According to the ICC Arbitration Rule, parties should pay a non-refundable filing fee of $5000 for commencing the proceedings. The administrative expense varies between $5000, for disputes up to $50,000, and $150,000, for disputes above $500,000,000 depending on amounts in disputes. Parties are also charged for arbitrators' fees which will be calculated based on the amount in dispute, the complexity of the dispute and the time spent on each case by arbitrators. Arbitrators' fee varies between a minimum of $2400 for disputes of up to $50,000 and a maximum of 0.04% of the dispute value for disputes above $500,000,000.[226]

A different model for fees is adopted by the London Court of International Arbitration. The LCIA has three different sources of revenues, administrative and tribunal fees which are paid by parties to administer an arbitration proceeding, membership fees and tickets to events and conferences.[227] The LCIA charge a fixed non-refundable arbitration registration fee of £1,950.[228] The secretariat of the LCIA in the administration of the arbitration charges an hourly fee of £280 per hour for registrar/deputy registrar, £250 per hour for counsel, £195 per hour for case administrators and £165 per hour for casework accounting functions.[229] The tribunal costs are based on 'the particular circumstances of the case, including its complexity and the special

[225] Queen Mary, University of London and White & Case LLP, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 07 December 2020.

[226] ICC Arbitration Rules 2021, app III: Arbitration costs and fees.

[227] LCIA, 'Frequently Asked Questions' <https://www.lcia.org/Frequently_Asked_Questions.aspx> accessed 17 July 2020.

[228] LCIA Scheduel of Costs 2020, r 1(ii).

[229] LCIA Scheduel of Costs 2020, r 1(ii).

qualification of the arbitrators'.[230] The maximum hourly rate of tribunals is £500 per hour. The registrar may increase the fee above the maximum rate in exceptional cases with agreements of all parties.[231]

It is clear that different institutions have adopted different revenue models to cover their costs. The CAS and the ICSID are two arbitration institutions that partly rely on the resources of their parent organisations. It is argued and demonstrated above that both organisations can adapt a self-sustain revenue model that makes them independent, however, their current financial policies either are set to provide justice for all athletes in the case of the CAS or are based on the fact that ICSID is part of the world bank group. The other two institutions that are examined above are self-sustained and are able to cover their costs successfully through the services they provide.

The ICACA provides a private appeal mechanism and it should cover its running costs and be self-sustained. The services of the court should neither be cheap which could be used as a tactic to prolonged arbitration process nor should be expensive that become unaffordable for the parties. The costs should be calculated based on the complexity and the value in dispute. An administrative fee may be charged to institute an appeal. The fee should cover the initial administrative costs for the case. The tribunal and the ongoing administrative costs would be charged on an hourly basis which would reflect the complexity of each case on the cost of an appeal. The hourly rate would be based on the value in the dispute similar to the institutions reviewed above. This would provide justice for less financially capable parties.

[230] LCIA Scheduel of Costs 2020, r 2(i).

[231] LCIA Scheduel of Costs 2020, r 2(i).

Although the finances of similar institutions reviewed here indicate that the court can cover its costs by fees, the financial sustainability of the court should be guaranteed by member states as an international organisation. This is especially important in the early years after the establishment of the court when the court has not gathered the necessary momentum to support its operation. However, a question may be raised that what would be the benefit of establishing this court for countries and why countries should subsidise it. ICACA would facilitate international trade by providing a better dispute settlement mechanism and this would contribute to global economic growth. The member states would ratify the new Convention if it is in their interest, hence supporting the Court and providing the fund would be an inherent part of its implementation.

6.8 Conclusions

It is important to establish an international arbitral appeal mechanism that would offer an efficient and cost-effective appeal process. The parties that seek review of an arbitral award should be able to do so through an efficient and cost-effective international forum. National courts have not provided such alternatives and relying on them can jeopardise the internationalised features of commercial arbitration.

The ICACA is introduced in the previous chapter as an international forum to review an arbitral award. It would provide consistency and integrity in international commercial arbitration and would promote the development of international commercial law. Commercial arbitration would retain its attractiveness and it will not lose the parties to other dispute settlement

mechanisms. The establishment of such a court is advocated by some commentators but its procedure and organisation are not developed fully which is introduced in this chapter.

The court would be established by drafting a new convention. It is argued that the amendment of the New York Convention is not feasible and it requires consensus of all member states. The new Convention would be drafted by UNCITRAL. The Convention would set out the legal provisions regarding the appeal, the court and its structure.

The ICACA would hear a challenge on the validity of an arbitral award on a mandatory basis and this cannot be excluded by parties agreement. This is to satisfy the requirement of due process. The court would also hear an appeal on a question of law. Parties should explicitly exclude such a right of appeal by their agreement if they wish so, similar to the practice of the English Arbitration Law. There would also be a possibility to hear an appeal on a question of fact which requires an explicit agreement of parties. The court practice would allow the establishment of precedent and would help to harmonise and develop the law.

The ICACA would comprise of a permanent panel, a president, secretariats and appellate panels. The permanent panel would be the governing body of the court and its members would be selected by member states. The permanent panel would select a president who would oversee the overall operation and administration of the court. The secretariat would comprise of a secretary and a number of assistant secretaries and staff. They are responsible for the day to day administration of the court. The appeal would be conducted by the appellate panel which would be selected by the secretariat. The panel would comprise of three members chosen from proposed judges by member states. An appeal should be conducted within three months which can be extended based on the complexity of the case.

The proposed location of the court would be London as one of the main hubs for international arbitration. It is also one of the most accessible cities in the world with rail links to Europe. London also possesses a developed infrastructure with access to a pool of experts.

The initial establishment funding of the court would be provided by the member states. The court would be independent and self-sustaining in its operation and would provide its running costs via fees. The cost of appeal would be based on the complexity and value in dispute and would be charged on an hourly basis.

CHAPTER 7. CONCLUSIONS

Most international commercial arbitration awards are voluntarily respected.[1] However, a party may conclude that the award rendered against them is unfair or wrong and seek ways to challenge the award. Yet, grounds on which a party may challenge an award are usually limited to procedural irregularities and jurisdictional challenges.[2] The central research questions of this thesis are whether the scope of review should be expanded to include a review on the merits (appeal) in international commercial arbitration and what is the best forum to conduct such a review of an international commercial arbitral award. In answering these questions, the research has made several contributions. The significance of the contributions is explained here following roughly the outline of the thesis. The contributions are on the issues of the scope of review in international commercial arbitration, the role of national courts in reviewing arbitral awards, the necessity to expand the review of an arbitral award, the best forum to review an arbitral award and the establishment of the new International Commercial Arbitral Court of Appeal.

[1] Queen Mary, University of London and PWC, 'International Arbitration: Corporate attitudes and practices' (2008) 2 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf> accessed 22 May 2021.

[2] See ss 2.6 and 2.7.

7.1 The scope of review in international commercial arbitration

Generally, a review of an award or a decision may be divided into two types, a judicial review and appeal. Although both engage in reviewing decisions, the standards of review and grounds of review are different. Furthermore, the outcomes of the two review processes are different. In judicial review the court scrutinises a decision to determine whether the decision was lawful, a fair procedure was followed and decision makers acted according to the law. The scope of judicial review is limited and normally is not extended to the merits of a decision. The court in judicial review would not consider the correctness of a decision and will not substitute its decision but the court may annul the decision. However, an appeal offers more substantive review for litigants which enable them to challenge the decision of a first instance court on the merits. Even though there is no universally accepted standard for the procedure and scope of appellate review, [3] appellate courts normally review final decisions for both procedural as well as legal or factual errors. The appellate court has the authority to vary a decision, substitute it, annul it or order a rehearing.

In Chapter 2 it is observed that the tendency to limit national courts intervention and the desire to have a final and binding award in international commercial arbitration has resulted in the adoption of a restricted form of judicial review of an arbitral award by the international instruments.[4] Most national laws follow the same trend and only allow a review of an arbitral award on the grounds of procedural irregularities and jurisdictional errors. There are a few jurisdictions that provide an opportunity of appeal on the merits, generally limited to legal

[3] Martin Shapiro, 'Appeal' (1980) 14 L & Soc'y Rev 629.

[4] New York Convention 1958, art V; UNCITRAL Model Law, art 34.

errors.[5] The outcome of a judicial review may be the annulment of an arbitral award and the court would not substitute its own decision to that of an arbitral tribunal.

7.2 The role of national courts in reviewing arbitral awards

The discussion in Chapter 3 shows that under current practice, the court of the seat is the competent court to review the validity of an arbitral award. The underlying theory that justifies the role of the seat is the seat theory. According to this theory, the validity and the legitimacy of arbitration are originated from the seat of arbitration.[6] The arbitrator's authority is delegated by the seat statute which enables them to settle disputes privately.[7] The seat theory has a profound effect on the review of an arbitral award. The law of the seat determines the rules governing arbitration and the grounds for annulment.

The New York Convention and the UNCITRAL Model Law have recognised the seat of arbitration as the appropriate court to review the validity of an arbitral award.[8] The seat theory is adopted by most national legal systems. For example, in England, the Court reviews an international arbitral award if the seat of arbitration is England or the Law chosen by parties is the English Law.[9]

The seat theory is criticised for limiting the parties autonomy by dictating the specific scope of review that is determined by the national law of the seat. Furthermore, parties choose to settle

[5] For example, English Arbitration Act 1996, s 69.

[6] William W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21, 24.

[7] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 JIDS 271.

[8] New York Convention, art V(1)(e); UNCITRAL Model Law 1985, art 6.

[9] English Arbitration Act 1996, s 2(1).

their dispute outside the national legal system by opting for arbitration rather than litigation. There is no reason to bind them to a national legal system that they voluntarily excluded. Moreover, there is no unified standard for review of arbitral awards by national jurisdictions. This would increase inconsistency in international commercial arbitration. The role of the seat of arbitration in the review of international commercial arbitral awards should be revisited in order to provide a truly international and fair arbitration.

A competing theory that offers an alternative to the seat is the delocalisation theory. This theory advocates party autonomy and argues that arbitration is not based on a state's internal laws but is derived from parties agreement and should not be connected to any legal system.[10]

A form of delocalisation theory advocates detaching arbitration from its seat completely.[11] This is known as the delocalisation of the arbitration process. It is argued that there is no link between arbitration and the law of the seat of arbitration. However, such an approach would undermine arbitration by removing the supervisory and assistive role of the court of the seat. The support of the court in different stages of arbitration is required, for example, enforcing an arbitration agreement and granting emergency relief. The supportive role of the court must be preserved in the current state of international commercial arbitration to maintain arbitration as a reliable dispute settlement mechanism.

Another version of the delocalisation theory is the delocalisation of arbitration award which means that an arbitration award is detached from the law of the place it is rendered.[12] As a result,

[10] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358, 363.

[11] W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 Tex Intl LJ 699, 715.

[12] Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291, 298.

the seat of arbitration has no power to review arbitral awards. Some advocates of the theory believe that the review of an arbitral award should be conducted at the enforcement court.[13] This is to remove the double control system by place of arbitration and by the enforcement court. However, this would undermine party autonomy in defining the scope of review as the national law of the place of enforcement would determine the scope. Furthermore, enforcement courts of different states may render different awards for similar matters, causing uncertainty in international commercial arbitration. Arbitrators may violate the principle of due process if the seat of arbitration does not provide adequate control. Additionally, the enforcement court is usually at the home state of the losing party where they have assets. This increases the chance of bias in favour of the losing party.

Alternatively, an international court may be formed to review arbitral awards. The new court is detached from national laws and national courts and serves the transnational nature of arbitration.

7.3 The necessity to expand the review of an arbitral award

This thesis examined the question whether the current scope of review available in the context of international commercial arbitration is satisfactory. It asked whether the very limited scope for review available in this context is fair to losing parties. Fairness and finality are two fundamental features of arbitration. However, these two principles are not treated equally in international commercial arbitration by national and international instruments and the emphasis has been put on finality. In order to observe finality, the scope of review is limited considerably

[13] Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 ICLQ 53, 57.

in international commercial arbitration and most national legal systems refuse an appellate review.

Fairness is an indispensable feature of any dispute settlement mechanism. Fairness may be classified as procedural and substantive fairness.[14] It is argued that satisfying the procedural fairness is deemed sufficient in the current practice of international commercial arbitration.[15] However, a truly fair proceeding needs to satisfy substantive fairness and provide an opportunity to correct errors of law or fact.

A final arbitration award means that the dispute has been resolved and cannot be reopened. It is believed that this is an advantage for arbitration. However, a decline in the importance of finality is evident. Moreover, hindering parties' autonomy in their arbitration proceedings is unreasonable. Those parties who wish to include the possibility of appeal in their arbitral agreement should be able to do so in international commercial arbitration. Any appeal procedure in arbitration should be implemented in a way that ensures finality as well as its independence from the judiciary.

In this thesis, four arguments are made in favour of extending the scope of review in international commercial arbitration. First, in order to satisfy the requirement of justice, there should be a possibility to correct an erroneous decision on a point of law or fact. Arbitrators are prone to mistakes and introducing appeal would protect parties and ensure the integrity of arbitration. Second, the cost of an error in high stake arbitration is too high and this may

[14] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen J Intl L 110, 124.

[15] Nana Japaridze, 'Fair Enough-Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 Hofstra L Rev 1415, 1430.

discourage practitioners to use arbitration for high stake disputes. The lack of possibility to correct erroneous decisions may damage the credibility of international commercial arbitration. Third, a growing number of states are introducing international commercial courts that provide the opportunity for a substantive review.[16] Arbitration should evolve to meet the current demand and practice in order to remain competitive. Fourth, the establishment of an appellate court may contribute to the development of law that would ultimately benefit the arbitral community.

The thesis also addressed the possible arguments against expanding the scope of review in international commercial arbitration. It is said that easy availability of review or appeal in the arbitral process may delay enforcement, however, an award by the appellate body would bear a higher degree of credibility and would be easier to enforce. It is also argued that parties to an arbitration agreement may accept the risk of an erroneous award. This may be acceptable for parties with relatively small stakes disputes, but it is unreasonable to expect parties with high stake disputes to accept such risks. Another argument against expanding the scope of review is that the appeal would make arbitration sophisticated and similar to litigation. The appeal procedure must be set to avoid unnecessary complications and be fit for the purpose.

The success of international commercial arbitration with its restricted review may be regarded as a valid reason to resist any reform. However, parties may overlook the issue of the limited review of an arbitral award and choose international arbitration as there is no other better alternative to arbitration. The appeal mechanism in international commercial arbitration should

[16] For example, NCC, ICCP and CICC.

be developed as an independent mechanism and parties' autonomy should be respected in order to for them to tailor the procedure according to their needs.

7.4 The best forum to review an arbitral award

Three forums are examined in this thesis to conduct a substantive review of an international commercial arbitral award: arbitration institutes; national courts; and an international arbitral court.

Several arbitral institutions currently offer internal appeal mechanisms for their users.[17] Appeals through these institutions are usually optional and require a party agreement. The practice maintains the independence of arbitration from national jurisdictions and also safeguards party autonomy. Arbitral institutions are able to tailor their proceedings to meet parties' requirements and avoid excessive bureaucracy compared to court proceedings. However, expanding review via arbitral institution may cause inconsistency and there is a risk of an unfair award due to the lack of a regulatory body to oversee such appeals. I believe intra-arbitration appeal should be maintained and supported but there is still a need to have an appellate court that would maintain consistency and oversight of international commercial arbitral awards.

Another option for expanding review in international commercial arbitration is to empower national courts to conduct reviews. However, such practice would promote the formalisation and judicialisation of international commercial arbitration. It would undermine the independence and integrity of arbitration and would bound parties to national courts that they

[17] For example, AAA, CPR, JAMS, GAFTA, FOSFA, SCIA and CEA.

have excluded by agreeing to arbitrate their disputes. It would also be costly and time-consuming due to the general caseload of national courts.

A third option which is promoted by this thesis is to establish a new International Arbitral Court of Appeal (ICACA). The idea of an international court of appeal is supported by a number of scholars who argued the benefits of such a court.[18] It is argued in this thesis that such a court would make arbitration independent of the judiciary in reviewing an arbitral award. It would also address the concern of those parties which are looking for a possibility of appeal in their dispute settlement mechanism and would maintain the popularity of arbitration. The proceedings of the court would be tailored to solely review international commercial arbitration which enables the court to provide an expedited and simplified appeal procedure compared to the national courts. It would enhance the enforceability of international arbitral awards as the awards will be open to scrutiny by an appellate forum. The ICACA would satisfy justice by providing a possibility to correct an erroneous award. It would help to create precedent for

[18] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 ICLQ 551; Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25 Colum J Transnatl L 9; Mauro Rubino-Sammartano, 'An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings' (1989) 6 J Intl Arb 181; Howard Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 109; Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Marriot and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martinus Nijhoff 1995) 116; Hong-Lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arb 145; Jan Hendrik Dalhuisen, 'The Case for an International Commercial Court' (7 May 2014, last revised 8 Jan 2015) available at SSRN <https://dx.doi.org/10.2139/ssrn.2433513> accessed 10 February 2020.

international commercial arbitration that would promote consistency and help to develop the law. Furthermore, the court would allow parties to tailor the scope of review according to their needs.

It is shown that in this thesis that the establishment of ICACA is the best option to introduce a substantive review in international commercial arbitration. Arguments against the court have been addressed in Chapter 5.

7.5 Detailed proposal on the establishment of the ICACA

This research is the first to provide detailed proposals on the establishment of a new international court of appeal to conduct an expanded review in international commercial arbitration. The research advocates for a new international convention to be adopted for this purpose. It argues that the proposed court cannot be introduced by an amendment of existing conventions. An amendment to the New York Convention requires consensus of all member states and there is a possibility that some states would oppose the elimination of the role of national courts in reviewing an arbitral award. A new convention can be introduced to recognise the court and its review process. States signatory to the new Convention would recognise review of an arbitral award by the ICACA and will not review an international commercial arbitral award in their national courts. They would still be a member of the New York Convention and would enforce awards that are issued according to its provisions. This would pave the way for all states to gradually join the new Convention if they do not join at its commencement.

The new Convention would provide a comprehensive legal framework for appeal and provisions about the court and its structure. UNCITRAL is suggested by this thesis as the

appropriate body to draft the new Convention. The UNCITRAL Model Law should also be modified to include provisions for an appeal to the ICACA.

The ICACA would be the only authority to review an arbitral award. The enforcement of arbitral awards would still be within the jurisdiction of national courts. The ICACA provisions should provide some degree of autonomy for parties to tailor the scope of review in their arbitration. It would hear a challenge on procedural irregularities and jurisdictional errors mandatorily to secure the minimum standard of due process. This is per the review scope currently recognised by the New York Convention and UNCTIRAL Model Law. However, it would go further and allow an appeal on a question of law for parties that have not opted out by agreement. The court would also allow an appeal on a question of fact if parties opt in.

Another important function of the court is establishing persuasive precedent. The ICACA is a higher rank court that would set precedent in international commercial arbitration. The Court would publish awards in a redacted form to respect arbitration confidentiality while providing records for precedent. I also suggested explanatory awards be issued by the ICACA as they are appeal awards and it would contribute to the development of precedent. The precedent established by the ICACA would be reliable and it would contribute to the consistency in international commercial arbitration.

The ICACA would consist of a main court with a possibility to delegate its power to the regional branches in the future if the workload increases. It would comprise a permanent panel of judges that would be suggested by the member states. The Panel would adopt court rules and regulations and would amend and update its regulation over time. It also has the power to decide any administrative issue that may arise from the operation of the court e.g. the court finance and budget. The Panel would select a president who would act as their representative who would

oversee the overall administration of the court. The court would also have a secretariat that would provide administrative support. Appellate panels would be formed normally of three judges proposed by the member states and providing there is no conflict of interest, a judge from the place of arbitration and the place of enforcement may be considered for the membership of the appellate panel.

The court time frame would be set to provide an expedited appeal procedure compared to the court proceedings. By comparing with similar institutions procedures, a three-month time frame is suggested for appeal which can be extended based on the complexity of the case. A virtual hearing would be incorporated into the Court proceedings in order to expedite the appeal process.

I have suggested London as the location of the court by comparing arbitration hubs around the world. Different indices are considered for this purpose and London appears in the top five in the majority of instances. For example, it is one of the most accessible cities around the world having numerous air links as well as train connections to Europe. Its geographical position allows communication with the east and the west on the same working day. It provides a secure atmosphere for business with an independent and strong judiciary. There is also a good pool of professionals available in London.

The member states will be responsible for the initial funding of the court's establishment. It will be independent and self-sustaining and will be able to provide its running costs through fees. A fee for an appeal will depend on the complexity and value of the dispute and will be based on an hourly rate.

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